

FILED

SID J. WHITE

APR 14 1989

CLERK, SUPREME COURT

By: Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,
vs.
FRANK DIAZ-SILVEIRA,
Respondent.

The Florida Bar File Nos.
87-24,174(11B) , 87-24,203(11B) ,
88-70,144(11B) , 88-70,238(11B) ,
88-70,312(11B) , 88-70,365(11B) ,
88-70,398(11B) , 88-70,443(11B) ,
88-70,529(11B) , 88-70,575(11B) ,
88-71,012(11B) ,

Supreme Court Case No. 72,653

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 Regulating The Florida Bar (article XI, Rule 11.06 of the Integration Rule of The Florida Bar), a Final Hearing was held at the office of the Florida Bar, on March 8, 1989. All of the pleadings, transcripts, notices, motions, order and exhibits are forwarded with this report and the foregoing constitutes the record of the case.

The following attorneys acted as counsel for the parties:

For The Florida Bar: Randi Klayman Lazarus
The Florida Bar
Suite 211, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131

For the Respondent: Douglas L. Williams, Esq.
1920 Miami Center
100 Chopin Plaza
Miami, Florida 33131-2305

II. FINDING OF FACTS: I find the following facts to be true and correct:

COUNT I

(The Florida Bar File No. 87-24,174(11B))

2. On or about February 20, 1987 the Respondent drafted check number 3042 in the amount of two dollars (\$2.00) payable to the Clerk of the Circuit and County Courts for Brevard County, Florida.

3. Said check was drawn on the Respondent's special trust account at Southeast Bank, N.A., account number 015-029945.

4. On or about March 13, 1987 the Clerk of the Circuit and County Courts of Brevard County sent a letter to The Florida Bar informing the Bar that said check had been dishonored.

5. This check was dishonored due to insufficient funds being in the above mentioned account when the check was presented to said Bank on or about March 6, 1987.

COUNT II

(The Florida Bar File No. 87-24,203(11B))

7. On or about April 2, 1987 the Respondent drafted check number 2241 in the amount of two hundred twenty six dollars (\$226.00) payable to the Clerk of the Court of Dade County.

8. Said check was drawn on the Respondent's Law Office account at Southeast Bank, N.A., account number 015-029226.

9. On or about May 22, 1987 the Clerk of the Court of Dade County sent a letter to The Florida Bar informing the Bar that said check had been dishonored.

10. This check was dishonored due to insufficient funds being in the above mentioned account when the check was presented to said Bank on or about May 5, 1987.

COUNT III

(The Florida Bar File No. 88-70,144(11B))

12. On or about June 26, 1987 the Respondent drafted check number 2563 in the amount of two hundred ninety four dollars and fifty cents (\$294.50) payable to the Clerk of the Court of Dade County.

13. On or about June 30, 1987 the Respondent drafted check number 2572 in the amount of five dollars (\$5.00) payable to the Clerk of the Court of Dade County.

14. These checks were drawn on the Respondent's Law Office account at Southeast Bank, N.A., account number 015-029226.

15. On or about July 23, 1987 the Clerk of the Court of Dade County sent a letter to The Florida Bar informing the Bar that said checks had been dishonored.

16. These checks were dishonored due to insufficient funds being in the above mentioned account when the checks were presented to said Bank on or about July 8, 1987 and July 9, 1987 respectively.

COUNT IV

(The Florida Bar File No. 88-70,238(11B))

18. On or about July 23, 1987 the Respondent drafted check number 2642 in the amount of eighteen dollars (\$18.00) payable to the Clerk of the Court of Dade County.

19. This check was drawn on the Respondent's Law Office account at Southeast Bank, N.A., account number 015-029226.

20. On or about August 20, 1987 the Clerk of the Court of Dade County sent a letter to The Florida Bar informing the Bar that said check had been dishonored.

21. This check was dishonored due to insufficient funds being in the above mentioned account when the check was presented to said Bank on or about August 3, 1987.

COUNT V

(The Florida Bar File No. 88-70,312(11B))

23. On or about August 11, 1987 the Respondent drafted check number 2697 in the amount of seventy eight dollars and fifty cents (\$78.50) payable to the Clerk of the Court of Dade County.

24. This check was drawn on the Respondent's Law Office account at Southeast Bank, N.A., account number 015-029226.

25. On or about September 4, 1987 the Clerk of the Court of (\$11.05) payable to the Clerk of the Court of Dade County.

45. On or about September 30, 1987 the Respondent drafted check number 2887 in the amount of forty one dollars and fifty cents (\$41.50) payable to the Clerk of the Court of Dade County.

46. These checks were drawn on the Respondent's Law Office Account at Southeast Bank, N.A., account number 015-029226.

47. On or about October 14, 1987 the Clerk of the Court of Dade County sent a letter to The Florida Bar informing the Bar that said checks had been dishonored.

48. These checks were dishonored due to insufficient funds being in the above mentioned account when the checks were presented to said Bank on or about October 5, 1987.

COUNT X

(The Florida Bar File No. 88-71,012(11B))

50. On or about January 11, 1988 the Respondent drafted check number 3133 in the amount of six dollars and fifty-five cents (\$6.55) payable to the Clerk of the Court of Dade County.

51. On or about January 14, 1988 the Respondent drafted check number 3136 in the amount of six dollars and (\$6.00) payable to the Clerk of the Court of Dade County.

52. On or about January 19, 1988 the Respondent drafted check number 3143 in the amount of two dollars and (\$2.00) payable to the Clerk of the Court of Dade County.

53. These checks were drawn on the Respondent's Law Office Account at Southeast Bank, N.A., account number 015-029226.

54. On or about February 18, 1988 the Clerk of the Court of Dade County sent a letter to The Florida Bar informing the Bar that said checks had been dishonored.

55. These checks were dishonored due to insufficient funds being in the above mentioned account when the checks were presented to said Bank.

COUNT XI

(The Florida Bar File No. 88-70,575(11B))

57. As a direct result of Counts I through X, The Florida Bar launched a complete audit of the Respondent's Law Office Account and trust accounts.

58. The bank accounts examined were the following:

a) "Diaz-Silveira & Associates, P.A. Law Office Trust Account", maintained at Southeast

Bank, N.A. Account No. 015-029234, for the period of January 1, 1987, to December 31, 1987.

b) "Diaz-Silveira & Associates, P.A. Law Office FNBC Trust Account", maintained at Southeast Bank, N.A., Account No. 015-029945, for the period of January 1, 1987 to December 31, 1987.

c) "Diaz-Silveira & Associates, P.A. Law Offices", maintained at Southeast Bank, N.A., Account No. 015-029226, for the period of January 1, 1987 to December 31, 1987.

59. The auditor's examination of Mr. Diaz-Silveira's Trust Account No. 015-029234 revealed that during the period examined ten (10) checks issued from the trust account were dishonored by the bank due to insufficient funds. In addition the trust account was overdrawn a total of twenty (20) times.

60. The auditor's examination of Mr. Diaz-Silveira's Trust Account No. 051-029945 revealed that during the period examined fifty (50) checks issued from the trust account were dishonored by the Bank due to insufficient funds. The trust account was overdrawn twenty-three (23) times.

61. The auditor's examination of Mr. Diaz-Silveira's Law Office Account No. 015-029226 revealed that during the period examined two hundred and forty-five (245) checks issued from the account were returned due to insufficient funds. The account was overdrawn one hundred and fifteen (115) times.

62. The Respondent consistently failed to preserve the integrity of entrusted funds, commingling same with personal and operating account monies. Client's funds were deposited in the operating account and used to satisfy what appears to be personal and business obligations. When additional client's funds were received Respondent would use those funds to pay obligations previously incurred.

63. The Respondent on at least two (2) occasions received client's funds, used those funds for unrelated matters, and when he finally paid his clients the check was dishonored due to insufficient funds.

64. During the month of December of 1987, Mr. Diaz-Silveira deposited a total of \$30,000.00 of personal funds in the trust account to cover shortages.

65. During 1987, Mr. Diaz-Silveira issued eleven (11) checks from his regular operating account to his trust accounts which were dishonored due to insufficient funds. In every instance Mr. Silveira's regular bank balance was not sufficient to cover the worthless checks and on five (5) occasions the account was overdrawn.

66. The worthless checks which Mr. Diaz-Silveira deposited into his trust account increased his balance for a few days, from the date of the deposit to the date they were dishonored, in an apparent attempt to cover outstanding checks issued from the trust account. This procedure is characterized in the financial circles as Check Kiting.

III. RECOMMENDATION AS TO GUILT:

Count I

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a) [a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct and additionally the Respondent has violated Rule 5-1.1 [money entrusted to an attorney for a specific purpose must be used for that specific purpose] of the Rules Regulating Trust Accounts.

Count II

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a) [a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

Count III

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a) [a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

Count IV

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a) [a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

Count V

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a)

[a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

Count VI

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a) [a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

Count VII

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a) [a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

Count VIII

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a) [a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

Count IX

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a) [a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

Count X

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a)

[a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct.

Count XI

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-8.4(a) [a lawyer shall not violate a disciplinary rule] and Rule 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] of the Rules of Professional Conduct and additionally the Respondent has violated Rule 5-1.1 [money entrusted to an attorney for a specific purpose must be used for that specific purpose] of the Rules Regulating Trust Accounts.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE IMPOSED:

Sitting as a Referee is an awesome responsibility. On the one hand, it is my task to determine the fate of an attorney's ability to practice law. On the other hand, it is also my task to evaluate whether the attorney deserves the privilege of continuing to practice law. Many factors must be considered.

The evidence presented by the Bar regarding the Respondent's mishandling of two trust accounts and an office operating account was unrefuted. In total, there were in excess of 300 checks returned for insufficient funds ~~from all~~ three accounts. The Bar's allegation that Respondent used client's funds was also amply proven. The defense that no client lost money is without merit. The act of using client's monies for any period of time, without their consent is inexcusable. The sanctity of the trust between lawyer and client is second to none. Breaching that trust casts a grey shadow on a profession that is suffering from public image problems. Moreover, cries of "no client lost money" is analagous to robbing a bank and later returning the money. The Florida Supreme Court in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980) addressed this matter:

The referee is aware that other referees have found that a 'lack of intent to deprive the client of his money' and 'personal hardship' justified relatively minor punishment. 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. The willful misappropriation of client funds should be the Bar's equivalent of a capital offense. There should be no excuses.

Breed, at 784

Respondent would have me believe he is either utterly disorganized and/or a sloppy and inept bookkeeper. Two factors force me to reject Respondent's proposition. First, the Bar auditor testified in detail to evidence of "check kiting". It is my perception that the act of issuing insufficient checks from one account to another to create a false balance for a brief period of time at the end of each month, over and over again, cannot be accepted as an unintentional act. Second, Respondent was given a public reprimand and placed on probation in 1985 for similar misconduct. It is hard to fathom why someone who in essence was given "one free bite" could be so utterly unaware. The Florida Supreme Court did violate Respondent's probation as a result of this activity. Moreover, the Bar brought out testimony during the cross-examination of the Respondent establishing that he was aware for some period of time that checks were bouncing. Notwithstanding this knowledge, Respondent persisted in allowing this practice to continue. Consequently, claims of lack of knowledge or intent cannot be justified.

I was very impressed with the testimony of several illustrious members of the community regarding Respondent's good character. I could not ignore their reactions, when asked whether their opinions would change if the Bar could prove the charges alleged. For the most part, they did testify to a change of opinion. Further, the various certificates and news articles

giving testimonial to Respondent's charitable and courageous acts are quite impressive. They cannot overwhelm, however, the gravity of the Respondent's misconduct. The Florida Supreme Court was confronted with a situation where misconduct occurred and the Respondent had been a public servant.

This respondent has an excellent record of public service both to his community and his profession. He has held numerous positions of responsibility in the Bar and in community life. This type of background does not excuse professional misconduct. However, it does tend to suggest that an individual so committed and so oriented professionally is not likely to do willful violence to the ethics of the profession. It further suggests that such an individual is amenable to minimal corrective measures in the event of an unintentional professional misprision.

The Florida Bar v. Goodrich,
212 So.2d 764,766 (Fla. 1968)

This Respondent would not fit within the above referenced parameters. His acts were intentional and as a result of having been given a chance once before, corrective measures would be futile.

I have had an opportunity to review various cases. The Florida Bar v. Schiller, ___ So.2d ___ (Fla. 1989); (Opinion filed February 2, 1989; 14 FLW 6) involved commingling clients funds, failing to promptly deliver trust funds, utilizing funds for purposes other than those for which entrusted, and failing to keep sufficient trust records, inter alia. The Florida Supreme Court suspended that Respondent for three years after noting the existence of certain mitigating circumstances. The Respondent had replaced all misappropriated monies, no client was damaged, remorse was exhibited and Respondent appeared to be a good candidate for rehabilitation. I find distinctions between the Schiller, supra case and this matter which leads me to the conclusion that disbarment is appropriate. First, Mr. Diaz-Silveira unquestionably engaged in the deliberate act of check kiting. Second, Respondent had prior discipline involving misconduct of a similar nature, which constitutes cause to

enhance discipline. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983). Finally, Mr. Diaz-Silveira would not be a good candidate for rehabilitation since four years ago he was disciplined for this type of conduct and is once again before this Referee.

In The Florida Bar v. Leopold, 379 So.2d 978 (Fla. 1981) Respondent's acts of misappropriating funds from clients' trust account for personal use and commingling private funds with trust account funds, when considered with prior misconduct warranted disbarment. The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981) provided that Harris' continuing and irresponsible pattern of conversion of clients' trust funds to his own use, his failure to account for client trust funds and failure to maintain trust records warranted disbarment.

The Florida's Standards for Imposing Sanctions have also been instructive. They provided the following:

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 improperly with client property and causes injury or potential injury to a client.

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

Based on the caselaw and considering all circumstances I am left with the unpleasant task of recommending that Mr. Diaz-Silveira be suspended from the practice of law in the State of Florida for a period of three years, nunc pro tunc from the date of suspension by the Florida Supreme Court.

V. RECOMMENDATION AS TO COSTS: I find the following costs to have been reasonably incurred by the Florida Bar:

Grievance Level:

Administrative Costs [Rule 3-7.5(k) (5)]	\$ 150.00
Grievance Committee Hearings transcript of April 18, 1988	535.25
transcript of May 13, 1988	188.90

Referee Level:

Administrative Costs [Rule 3-7.5(k) (5)]	150.00
Final Hearing transcript of March 8, 1989	1,126.65
Report of Referee Federal Expressed to Judge	17.00
Staff Auditor's Cost of Audit	1,998.39
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TOTAL	\$ 4,166.19 =====

Respectfully submitted this 11 day of April, 1989.


GEORGE A. SHAHOOD, Referee

Copies furnished to:
Randi Klayman Lazarus, Bar Counsel
Douglas Williams, Attorney for Respondent