IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No.: 72,698

THE FLORIDA BAR,

Complainant,

Florida Bar Case
No.: 87-26,833 (17C)

v.

WARNER B. MILLER, III,

Respondent.
_____/

ON PETITION FOR REVIEW

INITIAL BRIEF and APPENDIX OF RESPONDENT, WARNER B. MILLER, III

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INTRODUCTION

Respondent, **WARNER B. MILLER, III**, a member of the Florida Bar, files his Initial Brief and Appendix in support of the Referee's Report and in reply to the brief filed by **The Florida Bar.**

For the purpose of clarity and continuity, Respondent will use the same references and symbols as used by **The Florida Bar** with the following additions:

Respondent will be referred to by proper name whenever appropiate;

The symbol "App." followed by a page number, will refer to the Appendix attached to Respondent's Initial Brief;

POINTS ON APPEAL

I.

WHETHER THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION THAT RESPONDENT BE FOUND NOT GUILTY OF RULE 5-1.1 OF THE RULES REGULATING TRUST ACCOUNTS IS SUPPORTED BY THE RECORD?

II.

WHETHER THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION THAT RESPONDENT BE FOUND NOT GUILTY OF COUNT II OF THE COMPLAINT IS SUPPORTED BY THE RECORD?

III.

WHETHER THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS WARRANTED AND JUSTIFIED BASED ON THE EVIDENCE PRESENTED AND THE CONDUCT OF THE RESPONDENT?

REPLY TO STATEMENT OF THE CASE AND FACTS

A. Course of Proceedings and Disposition Before the Referee:

The Respondent, **WARNER B. MILLER,** accepts the procedural statements set forth in the Brief of **The Florida Bar** at pages 1 and 2.

B. Statement of the Facts:

The Florida Bar has set forth the factual matters it relies upon in support of the issues presented for review. **Respondent** does not contend that any of the references are inaccurate, however, **Respondent** would add the following facts as evidenced by the testimony presented to the Referee at the final hearing and which, **RESPONDENT** will argue, support the findings and recommendations in the Referee's Report (App.1-2).

1. **WARNER B. MILLER, III,** obtained his law degree from the University of Florida in 1980 (T.61; App.69). He has been in private practice, mostly as a sole practitioner in the field of personal injury law, since his graduation (T.62; App.70). Mr. **MILLER** has never had any prior disciplinary conviction. [1/]

2. These proceedings were initiated by a letter of complaint sent to **The Bar** on or about December, 1986, by Harvey ABRAMSON, a practicing attorney and member of The Florida Bar

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[1/] The Referee made the finding that Mr. **MILLER** had no prior disciplinary convictions (App. 3). However, there does not appear to be any prior disciplinary problem associated with Mr. **MILLER.**

(T.3,46; App.11,54). Thereafter, an audit of Mr. **MILLER'S** trust account was undertaken for the months March 1, 1986 through October 30, 1987 (T.22; App.30), and upon stipulation, a review of Mr. **MILLER'S** trust account was completed for the months November, 1987 through October, 1988 (T.29; App.37).

3. **The Bar**, in Count II of the Complaint (App.5-7) charged Mr. **MILLER** with violating Disciplinary Rule 1-102 (A) (4) of the Code of Professional Responsibility and Rule 4-8.4 of the Rules of Professional Conduct, by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The testimony and evidence presented to the Referee in support of these allegations consisted of the testimony of Mr. ABRAMSON (T.2-17; App.10-25) and the correspondence between Mr. ABRAMSON and Mr. **MILLER** (Exhibits 2,3; App.8).

Mr. ABRAMSON had a client, Ms. ILLES, who had two claims. . .one for uninsured motorists benefits and another against K-Mart for a "slip and fall" (T.6-7; App.14-15). Mr. ABRAMSON had a 40% contingent fee arrangement with Ms. ILLES (T.12; App.20) although he estimated approximately 62 hours were expended in legal work on the claims at a rate of $150.00 per hour (T.6; App.14). [2]/ Eventually, Ms. ILLES sought other legal representation (T.6; App.14) and came to Mr. **MILLER**. Mr. ABRAMSON would not forward the files to the office of Mr. **MILLER** until the costs were reimbursed to him and THE letter of June 18,

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[2]/ It should be noted that these "62 hours" were not performed by Mr. ABRAMSON, but were performed by a third lawyer to whom Mr. ABRAMSON referred the files (T.46; App.54).

1985 was prepared (T.46-47; App.54-55). [3]/

THE LETTER (T.4; Ex.2; App.8), which is the basis for **The Bar's** allegations that Mr. **MILLER** misrepresented matters to Harvey ABRAMSON warranting suspension, is dated June 18, 1985, is written on the stationary of Mr. **MILLER**, and states, in part, that:

> This is to confirm our agreement wherein I promise to honor the attorney's lien you have acquired by virtue of the work done on both matters involving Mrs. Illes. Pursuant to case law and the disciplinary rules of conduct, your are to receive the reasonable value of your services performed to date upon the fulfillment of the contingency which your contract of employment with Mrs. Illes was based.
>
> It is further agreed, that if we cannot reach an agreement as to the reasonable value of your services upon the completion of the case, then we will submit the issue to the Judge sitting on the cases for a determination.

Mr. ABRAMSON testified that (1) he [ABRAMSON] received the costs on both files (T.6; App.14); (2) he [ABRAMSON] received the fee on the UM case (T.; App.16); [4]/ (3) he [ABRAMSON] received a letter from Mr. **MILLER** that the slip and fall case was settled; [5]/ (4) the dispute about the amount of fee

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[3]/ The fourth paragraph in the letter of June 18, 1985 (T.4; Ex. 2; App.8) states: "Upon receipt of these costs checks, please release Mrs. Illes' files to my representative."

[4]/ Mr. ABRAMSON was a bit chagrined that his 40% retainer with Ms. Illes was compromised by the 10% retainer **Mr. MILLER** had with Ms. Illes (T.8,12; App.16,20).

[5]/ **The Bar** has stated on page 8 of its brief that "By virtue of the agreement declared on the June 18, 1985 letter, between Respondent and Mr. Abramson, Respondent knew he needed to

owed had been scheduled at least twice before a circuit judge pursuant to the letter "agreement" of June 18, 1985 (T.9; App.17); (5) Mr. ABRAMSON was not the one who set either of the hearings (T.16; App.24); (6) at least one of the hearings was cancelled because Mr. ABRAMSON was to be out of town and he does not know if the trial court or someone caused the other hearing to be cancelled (T.16-17; App.24-25); (7) other than complaining to the Florida Bar, Mr. ABRAMSON did nothing else to determine the reasonable fee due to him or make any other attempt to collect a fee from Mr. **MILLER** (T.15; App.23).

4. Carlos RUGA is **The Bar** auditor assigned the task of auditing and reviewing **Mr. MILLER'S** trust account (T.19-20; App.27-28). Mr. RUGA testified that:

> The audit covers the transaction from the period of March 1st, 1986 through October 30, 1987.
>
> Now Mr. Miller's trust account didn't reflect any problems. Normally the funds were received and disbursed without any irregularities. The first irregularity that I found on the trust account occurred in March of 1987.

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notify Mr. Abramson that the Illes case had settled. However, Respondent failed to advise Mr. Abramson about the settlement because Respondent knew he could not honor said attorney's lien (T.47,50)." This statement is not only an incorrect assumption based on the testimony, but it is **contrary to the testimony of Mr. Abramson as well as Mr. MILLER.** Mr. ABRAMSON testified that "Ms. Illes called and said the case was settled and subsequently we did get a letter and check from Mr. Miller." (T.7; App.15) **Mr. MILLER** acknowledged that he had always, based on his prior accountant's advice, paid referral fees from his operating account and not his trust account, and thus, "...there were no funds left in trust to pay Mr. Abramson's fee."

> On this particular month, Your Honor, there was a check written in the account, check No. 322 in the amount of $10,000 and it was payable to Warner B. Miller and it had no reference whatsoever to client or matter...
>
> So this is the first sign of irregularity that I find on the trust account. (T.22-23; App.30-31) [underlining added]

The auditor had several meetings with **Mr. MILLER** and found him to be 100% cooperative, very candid at all times, and never tried to hide anything. . .he came forward with everything (T.33-34; App.41-42).

The trust "irregularity" pyramided from one trust check written to the Respondent for $10,000.00 [6]/ in March, 1987, mistakenly indicating earned fees (App.33-34,50; App.41-42,58).

The trust account audit does not reflect that the Respondent took or used trust account monies belonging to one client for the benefit of another. Respondent maintained a general trust account which included a "pool of clients" and the withdrawal of the $10,000.00 check in March, 1987, caused a monthly "negative balance" (T.40-41; App.48-49). Until the Respondent replaced those monies, which was accomplished in December of 1988, "there were insufficient funds in the account

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[6]/ **Mr. MILLER** explained that his mother, who lives in Virginia, is a bookkeeper. She had come into his office to reconcile his books, including his trust account. **Mr. MILLER** always retained earned fees and costs in his trust account. When his mother told him there was $10,000.00 of earned fees in his trust account and he should transfer those monies to his operating account, he did so without thinking there was any problem (T.50; App.58).

to satisfy liability on all the clients that he [Respondent] had at [that] time" (T.27; App.35). . .even though no client ever lost any monies (T.39; App.47).

Subsequent to the audit, a 12-month review of Respondent's trust account indicated that there were still some irregularities and **Mr. MILLER** was still not in substantial compliance with the proper trust accounting procedures (T.29-30; App.37-38). Since this was only a review and not an audit, there was no determination as to the cause of the insufficiency (T.31; App.39). Nonetheless, the trust account records and closing statements [7]/ corresponded to the explanation by **Mr. MILLER**. [8]/

As of the date of the hearing before the Referee, the auditor testified that "it is my opinion also that it appears that right now that they are [trust accounts], that everything is up to par and kosher" (T.39; App.47).

At all times during these proceedings, the Respondent accepted responsibility for his conduct and admitted his fault (T.52; App.60).

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[7]/ The auditor was given all closing statements reflecting all monies paid to clients and all disbursements on behalf of clients from the Respondent's trust account. These records were all properly maintained (T.36; App.44).

[8]/ **Mr. MILLER** explained that after his initial meeting with the auditor, and in his attempts to comply with the trust accounting regulations, he paid referring attorneys from his trust account. However, he withdrew the earned fee reflected on the closing statements and deposited those in his operating account. He then paid (on one occasion, which again caused a pyramiding effect) the referring attorney from his trust account (T.24,51; App.32,59).

SUMMARY OF THE ARGUMENT

The Florida Bar has challenged the Referee's (1) recommendation of discipline and (2) recommendation that the Respondent, **WARNER B.MILLER, III**, be found not guilty of Disciplinary Rule 1-102(A)(4) and Rules 5-1.1 and 4-8.4 (c) of the Rules of Professional Conduct.

A Referee's findings of fact are presumed correct. In the case at bar, the factual findings and corresponding recommendations of "not guilty" under review, have evidentiary support in the testimony and exhibits presented to the Referee and are not clearly erroneous.

The Referee's recommendation of a public reprimand is consistent with the factual findings in the Referee's Report, supported by the testimony of **The Florida Bar** auditor; and warranted by the conduct and attitude of the Respondent, **WARNER B. MILLER, III.**

ARGUMENT

ISSUE 1

THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND NOT GUILTY AS TO RULE 5-1.1 OF THE RULES REGULATING TRUST ACCOUNTS (COUNT I) IS SUPPORTED BY THE EVIDENCE.

The referee's finding and recommendations will be upheld unless clearly erroneous or without record support. The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). More importantly, it is the burden of **The Bar**, being the party seeking review, to demonstrate that a report of a referee is erroneous, unlawful, or unjustified. Rule 3-7.6 (c)(5), Rules Regulating the Florida Bar.

In the case, sub judice, the Referee's findings are neither inconsistent nor unjustified.

The only evidence presented to the Referee indicated that there were no trust violations, of any nature, prior to March, 1987, when, because of improper trust accounting procedures, **Mr. MILLER** wrote a check from his trust account to his operating account in the sum of $10,000.00 which he mistakenly believed was earned fees. All clients' records, such as closing statements and ledger cards, properly reflected each trust transaction. All monies were replaced by the Respondent with his personal funds, and Respondent's trust accounting procedures are now in accordance with **The Bar** rules and regulations. In fact, there was nothing presented to the Referee

which even remotely indicates that **Mr. MILLER** took funds from his trust account as earned fees before the funds had cleared the bank or before Respondent had "earned" his fees because of any financial needs or shortages in his personal and operating accounts.

Based on the evidence presented and the conclusions properly deduced therefrom, the Referee specifically found that "the Respondent did not, by the facts intentionally or knowingly convert client property but was in fact guilty of poor bookkeeping and lack of attention to his trust account records".

There being no evidence to support a finding that the Respondent used funds from his trust account contrary to the purpose for which they were intended, the Referee's recommendation that the Respondent be found not guilty of Rule 5-1.1 of the Rules Regulating Trust Accounts should be approved.

ISSUE II

THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND NOT GUILTY AS TO COUNT II IS SUPPORTED BY THE EVIDENCE.

No matter what standard of review is used, [9]/ the Referee's findings and recommendations that the Respondent, **WARNER B. MILLER, III**, not be found guilty of violating Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility and Rule 4-8.4 of the Rules of Professional Conduct are supported by the testimony, exhibits and other related Rules of Professional Conduct.

The argument put forth by **The Bar** to support its position that Mr. **MILLER** engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 4-8.4(c) of the Rules of Professional Conduct is based on an alleged "duty" Mr. **MILLER** owed to Harvey ABRAMSON.

First, assuming there does exist a duty between **Mr. MILLER** and Mr. ABRAMSON, the record evidence does not indicate that the duty was breached. Contrary to **The Bar's** unsupported assumptions in analyzing the testimony (see note 5, pages 3-4, supra), the Referee was presented with the following evidence:

(1) Mr. ABRAMSON received a letter from **Mr. MILLER** indicating that the second case with Ms. ILLES had been settled.

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[9]/ **The Bar** still has the burden to show that the Referee's recommendation that Respondent not be found guilty of Count II of the Complaint is erroneous, unlawful or unjustified. Rule 3-7.6 (c)(5), Rules Regulating the Florida Bar.

The testimony of Harvey ABRAMSON indicated that he knew of the settlement prior to the letter from the Respondent because Ms. ILLES had called him. . . not that he had to learn of the settlement from another source other than **Mr. MILLER** (T.7; App.15). There is nothing in the evidence to indicate when Respondent notified, in writing, Mr. ABRAMSON of the settlement, or what precipitated the letter. There is nothing in the record to indicate the time frame when Ms. ILLES told Mr. ABRAMSON that her case was settled, nor is there any evidence indicating that there was an unusual or unreasonable delay between the sending of the letter and the settlement of the claim.

(2) **Mr. MILLER** admitted that he did not have monies to "protect" the attorney's fee lien in his trust account because he had always paid referral fees from his operating account (T.47; App.55). . . and his failure to have sufficient monies in his trust account certainly was not the reason he "failed to advise Mr. ABRAMSON about the settlement". . .as argued by **The Bar** at page 8 of its brief.

The letter of June 18, 1985 (T.4; Ex.2; App.8) was fully complied with by **Mr. MILLER**. Respondent acknowledged that Mr. ABRAMSON was due fees on the two files assigned to Ms. ILLES. The fee for one of the files and the costs for both files were paid. There was a dispute as to the second fee. Respondent twice scheduled the dispute for hearing before a circuit judge as outlined in **THE LETTER**. It was Mr. ABRAMSON who caused a delay by having at least one of the two scheduled hearings cancelled and

in no other manner taking the initiative to reduce his lien to a "reasonable fee".

The Referee correctly recommended that the Respondent, **WARNER B. MILLER, III**, be found not guilty of violating Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility and Rule 4-8.4(c) of the Rules of Professional Conduct. Further support of the Referee's recommendation is found in Rule 5-1.1, Rules Regulating Trust Accounts, which states:

> ...Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent...

Decisions involving violations of Rule 4-8.4(c) of the Rules of Professional Conduct and Rule 1-102 (A)(4) of the Code of Professional Responsibility involve intentional conduct on the part of the respondent. See generally, The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983); The Florida Bar v. Dykes, 513 So.2d 1055 (Fla. 1987); The Florida Bar v. Ward, 472 So.2d 1159 (Fla. 1985). There is nothing in the evidence presented to the Referee to indicate that Respondent, **WARNER B. MILLER, III**, intentionally or fraudulently tried to withhold referral fees claimed by Harvey ABRAMSON. . .**Mr. MILLER**, however, only wanted to pay Mr. ABRAMSON a reasonable sum that represented the work reasonably performed by Mr. ABRAMSON. Lastly, there is nothing to indicate that the conduct of **Mr. MILLER** and his relationship with Mr. ABRAMSON

relative to Ms. ILLES, in anyway reflects adversely on the public's image of attorneys.

ISSUE III

THE DISCIPLINE RECOMMENDED BY THE REFEREE IS WARRANTED, JUSTIFIED, AND SUPPORTED BY THE RECORD AND THE CASE LAW

The testimony of the auditor for **The Bar** contradicts and belies the conclusions arrived at by **The Bar** in its argument for an increased punishment.

There is little dispute with the law as cited in **The Bar's** brief at pages 11-15. . .the disagreement is with the application of that law to the evidence presented against **WARNER B. MILLER, III.**

The findings of fact of the Referee are entitled to the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. The Florida Bar v. Hawkins, 444 So.2d 961 (Fla. 1984). The factual findings support the recommended punishment and the goals of discipline enunciated in The Florida Bar v. Pahules, 233 So.2d 1130 (Fla. 1970).

There were no "shortages in a trust account extending over two (2) years and amounting to over $24,000.00." Similarly, there was no audit [10]/ subsequent to these pending charges which reflected continued use of entrusted funds. [11]/

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[10]/ The Respondent, though his counsel, stipulated to a review of Respondent's trust account for dates subsequent to the Complaint being filed (T.20; App.28). This additional review was not a subsequent charge (T.21; App.29).

[11]/ **The Bar** points to Paragraph 8 of the Referee's Report to indicate a finding of fact which it claims is not supported by the evidence. The testimony presented on cross examination of the auditor indicated the following colloquy:

The Bar's argument that the misconduct alleged in the complaint against the Respondent constitutes cumulative misconduct which supports suspension as an appropiate discipline is without a basis in law or fact. Even if this Court should determine that Respondent is guilty of the allegations in Count II of the complaint, the theory "cumulative misconduct" relates to previous disciplinary history and cumulative misconduct of a similar nature. **Mr. MILLER** has no previous disciplinary history

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> A. [by the auditor, Carlos Ruga]: Your are talking about the Lund case.
>
> Q.[by Respondent's counsel]: Yes.
>
> A. Okay. There were $30,000 that was left in the account but satisfactory he had to satisfy $60,000.
>
> Q. And isn't it true that he ended up with, like if you figure it out, like a ten percent fee because he ended up paying the money --
>
> A. 9,000.
>
> Q. Which was really his fee because he felt obligated to the client not to have to go back to the client.
>
> A. He ended up with abut $9,000.
>
> Q. Out of a fee that should have been damn near close to $50,000?
>
> A. (No verbal response).
>
> Q. Yes?
>
> A. I don't know what the fee should have been. I know there was a substantial amount of recovery and he kept about $9,000. (T.38-39; App.46-47)

and the trust account violations are dissimilar to the alleagations of misconduct in Count II. The cases relied upon by **The Bar** do not justify the application of "cumulative misconduct" in order to increase the discipline. The Florida Bar v. Felder, 425 So.2d 528 (Fla. 1982); The Florida Bar v. Hunt, 441 So.2d 618 (Fla. 1983); The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983).

This Court recognizes that each attorney and his actions must be individually assessed in meteing out punishment. Noevertheless, the Referee must also consider prior discipline given to other attorneys in similar situations so that discipline of attorneys does not become capricious. The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979). **The Bar** has cited cases indicating that the recommended discipline of Respondent is too lenient and not in line with punishment suffered by other attorneys who were found guilty of similar misconduct. However, **The Bar's** interpretation of the seriousness of Respondent's misconduct does not correspond to the facts, evidence and exhibits presented at the hearing before the Referee.

Standard 4.11 provides that "disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." [underlining added] The Referee found no evidence that **Mr. MILLER** acted intentionally or knowingly. . .in fact, the Referee found the converse to be true.

In line with Standard 4.11, this Court approved public

reprimands in matters relating to trust account violations in The Florida Bar v. Padrino, 500 So.2d 525 (Fla. 1987); The Florida Bar v. Block, 500 So.2d 529 (Fla. 1987); and The Florida Bar v. Heston, 501 So.2d 597 (Fla. 1987).

CONCLUSION

Based on the reasons, citations and record references set forth in Respondent's Initial Brief, Respondent, **WARNER B. MILLER, III**, requests that this court enter its order approving the Report of the Referee without any modification, change or increase to the recommended discipline.

DATED: March 27, 1989.

Respectfully submitted,

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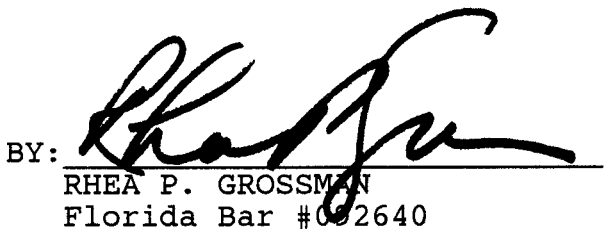

BY: _____
RHEA P. GROSSMAN
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Counsel for Respondent,
WARNER B. MILLER, III.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF RESPONDENT WITH ATTACHED APPENDIX was furnished this 27th day of March, 1989, by U.S. Mail, postage prepaid, to: Jacquelyn P. Needelman, Esq., Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Fl 33309; John T. Berry, Esq., Staff Counsel and John f. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl 32399-2300.

RHEA P. GROSSMAN