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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

WARNER B. MILLER, III,

Respondent.
_____/

Case No. 72,698

The Florida Bar Case No.
87-26,733 (17C)

INITIAL BRIEF OF THE FLORIDA BAR

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PREFACE

For purposes of this brief, The Florida Bar will be referred to as "The Florida Bar" and Warren B. Miller, III will be referred to as "Respondent".

The following symbols will be used in this brief:

T. - Transcript of the December 22, 1988 hearing held before the Referee.

Ex. - Exhibits introduced at the December 22, 1988 final hearing.

STATEMENT OF THE CASE AND FACTS

This is an attorney disciplinary proceeding.

The Florida Bar filed a two (2) Count Complaint against the Respondent on July 8, 1988. The Honorable Francis X. Knuck was appointed Referee in this cause. On July 28, 1988, The Florida Bar submitted its Request For Admissions.

On September 7, 1988, Respondent submitted his response to The Florida Bar's Request For Admissions and a Motion To Excuse Late Filing. On September 19, 1988, Respondent filed a further response to The Florida Bar's Request For Admissions.

On December 7, 1988, The Florida Bar filed its Request For Production Of Documents and a Notice that the cause was set for final hearing, to be held on December 22, 1988. On December 9, 1988, The Florida Bar submitted its Notice To Depose Respondent. On December 22, 1988, the final hearing in this cause was held.

On December 30, 1988, the Referee issued his Report of Referee with findings of guilt as to the majority of Count I of the Complaint and not guilty as to Count II. The Florida Bar filed its Petition for Review on February 10, 1989.

The Referee found the Respondent guilty as to Count I for violations of Florida Bar Integration Rule, Article XI, Rule 11.02(4)(b), Rules 5-1.1(b), 5-1.1(c), 5-1.1(e), 5-1.2 and 5-1.2(e) of the Rules Regulating Trust Accounts. The Referee found the Respondent not guilty of having violated Rule 5-1.1 of the Rules Regulating Trust Accounts [using funds for specific purposes for which they were entrusted]. Said recommendation is inconsistent with the Referee's

specific findings that the Respondent had shortages in his trust account, that his trust account was insufficient to cover all trust liabilities and that Respondent continued to use entrusted funds for purposes other than those for which said funds were entrusted (R.R., paragraphs 5 & 7, pages 1-2).

The Referee recommended that the Respondent receive a public reprimand and that he be required to retain a certified public accountant to file a certified accounting of Respondent's trust account with a representative of The Florida Bar on the first of every month for a period of one (1) year.

The record evidences Respondent's failure to maintain minimum trust accounting records in violation of the above mentioned Rules Regulating Trust Accounts, including Rule 5-1.1. (See Exs. 4, 5, 6 and testimony of Carlos J. Ruga, pages 18-42).

As to Count I, Respondent's misconduct concerns an audit and review conducted of his trust account transactions for the periods March 1, 1986 to October 30, 1987 and November 1, 1987 to October 30, 1988, respectively. Contrary to the Referee's finding with respect to Rule 5-1.1, the audit report and the record clearly indicated that Respondent used funds from his trust account for purposes other than that for which said funds were entrusted to him (See The Florida Bar Exs. 4, 5, 6 and testimony of Carlos J. Ruga, T-18-42). Specifically, Respondent wrote to himself, three (3) checks for $10,000.00, $16,500.00 and $1,500.00 (The Florida Bar's Ex. 5), without reference to client or matter, from his trust account to his operating account (T. 27, 31-32, 40).

The audit determined that Respondent failed to maintain required trust accounting records and failed to utilize proper record keeping procedures. During the period audited, Respondent's trust account had substantial shortages and was insufficient to cover his trust liabilities (The Florida Bar's Exhibit 4, T. 27).

During the period November 1, 1987 to October 30, 1988, an audit review was conducted of Respondent's trust transactions. Said review determined that three (3) checks were dishonored for non-sufficient funds during this period and that the Respondent continued to use entrusted funds for purposes other than those for which said funds were entrusted. Concerning the review period, Respondent was already on notice that The Florida Bar was investigating his trust account and continued to misuse same. (The Florida Bar's Ex. 6, T. 30, 40, 59-61, 64). Respondent even admitted on the record that he should not have misused client's funds entrusted to him (T. 52, 59-61, 64).

As to Count II, Respondent made misrepresentations to Harvey Abramson, Esquire, in a letter dated June 18, 1985 (The Florida Bar's Ex. 2), regarding promises to honor Mr. Abramson's attorney's lien for legal services performed by Mr. Abramson for Rosalia Illes, a former client of Mr. Abramson. (Exs. 1, 2, 3, T. 3-18).

SUMMARY OF ARGUMENT

I. THE REFEREE ERRED IN FINDING THE RESPONDENT NOT GUILTY IN COUNT I AS TO RULE 5-1.1 OF THE RULES REGULATING TRUST ACCOUNTS.

The Referee's findings of fact are inconsistent with the Referee finding the Respondent not guilty as to Rule 5-1.1. The Referee's findings of fact specifically find that the Respondent had shortages in his trust account, could not meet all his trust liabilities and that Respondent used funds for purposes other than those for which they were entrusted (See paragraphs 5 and 7 of the Referee's Findings of Fact, R.R., pages 1-2).

The controverted evidence and testimony further demonstrated that the Respondent violated Rule 5-1.1 (Ex. 4-6, T. 27, 30, 40).

II. THE REFEREE ERRED IN FINDING THE RESPONDENT NOT GUILTY ON COUNT II OF THE COMPLAINT.

The Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Disciplinary Rule 1-102(A)(4) and Rule 4-8.4(c) of the Rules of Professional Conduct. In a letter dated June 18, 1988, the Respondent promised to honor an attorney's lien to Mr. Harvey Abramson, Esquire. The Respondent failed to advise Mr. Abramson of the settlement of the case until after Mr. Abramson had learned of the settlement from the client. The Respondent failed to hold any monies in trust with which to honor the lien (Exs. 1, 2, 3, T. 47, 50).

In The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983), the Respondent was suspended for a period of sixty (60) days for misrepresentations he made to a judge. The misrepresentation made in this cause to Mr. Abramson, an officer of the court, is also serious and warrants suspension. An attorney must be able to rely on the word and integrity of another attorney as an officer of the court. See The Florida Bar v. Bennett, 176 So.2d 481, 482 (Fla. 1973).

III. THE DISCIPLINE TO BE IMPOSED IN THIS CAUSE SHOULD BE SUSPENSION FOR A PERIOD OF SIX (6) MONTHS.

The Respondent misappropriated clients' funds entrusted to him, admitted to the misappropriations and appeared to have no explanation for his misconduct. Additionally, Respondent failed to maintain minimum trust accounting records, failed to utilize proper record keeping procedures and his trust account revealed substantial shortages and irregularities which would preclude him from covering all trust liabilities (See Exs. 4, 5, 6, T. 18-42, 50-52).

The Supreme Court of Florida in The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980) held that conduct relating to "deficits in trust account extending over a two-year period and amounting at times to over $24,000.00 warrants suspension for six (6) months". The Respondent in this cause engaged in similar acts of misconduct.

Notwithstanding the Referee's recommendations as to Count II of this Complaint, a six (6) months suspension in this cause is appropriate.

The Respondent misused and continued to misuse his trust account funds knowing that The Florida Bar had conducted an audit of his trust account and that the instant charges were pending (T. 53, 59-61). Suspension is appropriate in this cause based upon Count I in and of itself.

Case law supports disbarment in cases involving misappropriation even if no harm occurs to clients. See, The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), The Florida Bar v. DeSerio, 529 So.2d 1117 (Fla. 1988), The Florida Bar v. Gillis, 527 So.2d 818 (Fla. 1988).

A public reprimand, as recommended by the Referee, should never be considered sufficient discipline in instances such as in this cause involving shortages in a trust account extending over two (2) years and accounting to over $24,000.00. See, The Florida Bar v. Welty, 382 So.2d at 1223 (citing The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979).

ARGUMENT

I. THE REFEREE ERRED IN FINDING THE RESPONDENT NOT GUILTY IN COUNT I AS TO RULE 5-1.1 OF THE RULES REGULATING TRUST ACCOUNTS.

The Referee specifically found that Respondent's trust account had shortages and were insufficient to cover all trust liabilities and that Respondent used funds for purposes other than that for which said funds were entrusted to him, and continued to misappropriate trust account funds knowing that the instant charges were pending (RR, paragraphs 5 & 7, pages 1-2). The Referee inconsistently recommended that Respondent be found not guilty of violating Rule 5-1.1 of the Rules Regulating Trust Accounts [using funds for specific purpose for which they were entrusted]. Additionally, the uncontroverted testimony and reports of Carlos Ruga, Branch Auditor for The Florida Bar, established that Respondent used funds for purposes other than the specific purpose for which they were entrusted (Exs. 4-6, T. 27, 30, 40).

Rule 5-1.1 provides in pertinent part as follows:

> Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose.

Accordingly, based upon the Referee's specific findings in paragraphs 5 and 7 of his findings of fact (pages 1-2, RR) and the uncontroverted evidence in this cause (Exs. 4-6, T. 27, 30, 40), the Referee erred in finding the Respondent not guilty of Rule 5-1.1 of the Rules Regulating Trust Accounts regarding Count I of the Complaint.

II. THE REFEREE ERRED IN FINDING THE RESPONDENT NOT GUILTY ON COUNT II OF THE COMPLAINT.

On June 18, 1985, the Respondent promised to honor the attorney's lien acquired by Harvey Abramson, Esquire, concerning fees for services performed by Mr. Abramson (The Florida Bar's Exhibit 2). Respondent's misrepresentations to Mr. Abramson in said letter and confirmed by the testimony adduced at trial warrant a determination of guilt on Count II of the Complaint.

The Respondent, as a professional, owed a duty to inform Mr. Abramson concerning a settlement obtained on behalf of Rosalia Illes, a former client of Mr. Abramson. By virtue of the agreement declared on the June 18, 1985 letter, between Respondent and Mr. Abramson, Respondent knew he needed to 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). The record and the evidence clearly indicated that Respondent was having serious irregularities with his trust account such as transfers of funds from said trust account into his operating account without reference to client or matter, disbursements without appropriate required reference, dishonored checks and having insufficient funds to cover his trust liabilities. (The Florida Bar's Exhibits 4-6, T. 27, 31-32, 40).

The Respondent himself admitted to "taking referral fees out of any disbursement that was made and placing those in [his own] operating account," (T. 47); "there were no funds left in trust to pay Mr. Abramson," (T. 47).

As professionals, lawyers have the duty to uphold the integrity of their profession "by acting .... to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing [and integrity]." The Florida Bar v. Bennett, 176 So.2d 481, 482 (Fla. 1973).

In The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983), the Respondent was suspended for a period of sixty (60) days for misrepresentation he made to a judge. The misrepresentation made by Respondent in this cause to Mr. Abramson is also serious and warrants suspension. An attorney must be able to rely on the word and integrity of another attorney as an officer of the Court.

Respondent not only made misrepresentations to Mr. Abramson, a compeer officer of the Court, but knowingly failed to advise Mr. Abramson about the said settlement until after Mr. Abramson learned of same from his former client (T. 7, 50). Clearly, the record and the evidence are at odds with the Referee's finding in paragraph 10 of his report. The matter involved is not a mere disagreement concerning the fees mentioned; that is beyond the scope of inquiry in this cause.

Respondent's misrepresentation to Mr. Abramson is serious. Respondent failed to hold any funds in trust to honor said lien and has not to date paid any sums to Mr. Abramson although the client's case was settled on June 2, 1986 (T. 46). Mr. Abramson testified "that he has not pushed the matter in court because he thought he could rely on an attorney's word," (T. 9, 15).

Respondent should be found guilty of having violated Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility and Rule

4-8.4(c) of the Rules of Professional Conduct [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation] regarding Count II of The Florida Bar's Complaint.

III. THE DISCIPLINE TO BE IMPOSED IN THIS CAUSE SHOULD BE SUSPENSION FOR A PERIOD OF SIX (6) MONTHS.

The Referee determined in Count I of the Complaint that Respondent was guilty of failing to maintain and keep proper trust records. The Referee further determined that Respondent's trust account had substantial shortages and was insufficient to cover all trust liabilities, and that Respondent used funds for purposes other than for which they were entrusted. Additionally, he found that the Respondent failed to maintain minimum trust account records in violation of Florida Bar Integration Rule, article XI, Rule 11.02(4)(b) and Rules 5-1.1(b), 5-1.1(c), 5-1.1(e) and 5-1.2(b), of the Rules Regulating Trust Accounts (See Report of Referee, pages 1-2).

The Supreme Court of Florida in The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), held that conduct relating to "deficits in trust account extending over a two-year period and amounting at times to over $24,000.00 warrants suspension for six (6) months." Id at 1223. Very similar acts of misconduct were perpetrated by the Respondent in this cause. The instant cause and the facts in Welty are similar in that in each case there were shortages and irregularities in the trust accounts held by both Respondents extending over a two-year period in amounts in excess of $24,000.00 and $28,000.00 respectively.

In The Florida Bar v. DeSerio, 529 So.2d 1117 (Fla. 1988), the Supreme Court of Florida held that failure to keep proper trust account records, improper commingling of funds in trust account, and improper withdrawal of funds from trust account warrant disbarment.

Count I of The Florida Bar's Complaint charged and the evidence presented established that the Respondent misappropriated clients' monies entrusted to him for his own purposes (The Florida Bar's Exs. 4-6, T. 27, 31-32, 40). The Respondent himself admitted to the misappropriations (T. 52, 60-61, 64) and appeared to have no explanation for his misconduct (T. 59-61).

The Florida Bar maintains that a six (6) months suspension is appropriate in and of itself just based upon Count I of this Complaint. Case law supports disbarment in cases involving misappropriation even if no harm occurs to clients.

In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), the Supreme Court gave notice that it would not be reluctant henceforth to disbar an attorney even though no client is injured in misappropriation cases and stated that "misuse of clients' funds is one of the most serious offenses a lawyer can commit." Id at 785.

In The Florida Bar v. Gillis, 527 So.2d 818 (Fla. 1988), the Respondent was disbarred for misappropriating $350.00 from his clients.

The instant Respondent's misappropriation totalled approximately $28,000.00 and the fact that the shortage was repaid after The Florida Bar commenced its investigation in the matter does not lessen the seriousness of the violation. (T. 25-27).

Public reprimand in this cause is inadequate because such sanction should be reserved for such instances as isolated instances of neglect. See, The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979). A public reprimand should never be considered sufficient discipline in instances

such as in this cause involving shortages in a trust account extending over two (2) years and amounting to over $24,000.00. See The Florida Bar v. Welty, 382 So.2d at 1223 (citing Larkin, supra).

Most importantly in this cause, after the Respondent knew that The Florida Bar had conducted an audit of his trust account and that the instant charges were pending, Respondent continued to misuse his trust account (T. 59-61), had shortages in his trust account (T. 26-27), had three (3) checks returned for non-sufficient funds (T. 30) and again used entrusted funds for a purpose other than that for which they were entrusted (T. 40, 59-61), (See Carlos Ruga's December 17, 1988 Report). The fact that Respondent continued to use client funds after this cause was pending shows a willful and wanton disregard for the proper handling of clients' monies and certainly warrants a suspension for a period of six (6) months.

With respect to paragraph 8 of the Referee's findings of fact, The Florida Bar's audit did not reflect that the Respondent had lost approximately $30,000.00 in fees because of his attempts to satisfy clients and referring attorneys; Mr. Abramson has not been paid yet. Furthermore, contrary to said paragraph 8, the audit did not reflect this fact. See testimony of Carlos Ruga (T. 38-39). The Respondent is the only one who testified on this point (T. 68-69). The audit does not reflect support for the Referee's findings in paragraph 8.

In addition, Respondent's misconduct involving misappropriation of clients' funds and his misrepresentations to Mr. Abramson constitute cumulative misconduct which is dealt with more severely than isolated instances of misconduct. See The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981) and The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983).

The two counts in this Complaint are cumulative to each other as well as each count contains more than one act of misconduct. The Board of Governors of The Florida Bar approved in November, 1986 Florida's Standards for Imposing Lawyer Sanctions. The applicable standards in this cause are as follows:

> Standard 4.12 provides: 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.

The Florida Bar submits that Standard 4.12 is applicable in this cause. The Referee's findings and the evidence presented in the record demonstrate facts that were knowingly committed or should have been known,

> Standard 7.2 provides: Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

Standard 7.2 is applicable concerning Respondent's failure to advise Mr. Abramson that a settlement of the case in question had been reached and Respondent's failure to hold any funds in trust to honor the agreement he had with Mr. Abramson who has not yet been paid.

The Florida Bar submits that the findings and facts in Count I are sufficient alone to warrant a suspension for a period of six (6) months. If this Court should reverse the Referee's findings of not guilty in Count II, same would be cumulative misconduct.

For all of the above stated reasons, The Florida Bar submits that the discipline in this cause should be suspension for a period of six (6) months, requiring proof of rehabilitation pursuant to Rules 3-5.1(e) and 3-7.9 of the Rules of Discipline.

CONCLUSION

The Florida Bar respectfully requests this Honorable Court to uphold the Referee's findings of fact as to Count I, and find that the Respondent violated Rule 5-1.1 as to Count I, reverse the Referee's findings of fact as to Count II and impose a discipline of suspension for a period of six (6) months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of The Florida Bar has been furnished to Lawrence P. Kuvin, Attorney for Respondent, 1424 South Andrews Avenue, Suite 200, Ft. Lauderdale, FL 33335, on this 10th day of March, 1989 by regular mail.

JACQUELYN P. NEEDELMAN