

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.
87-26,831 (170)

FILED

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REPLY BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND FACTS

Respondent, at page 5 of his brief, erroneously states, "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." In the report of Carlos Ruga, Branch Auditor for The Florida Bar, Exhibit 6, concerning his review of Respondent's trust transactions for the period November 1, 1987 to October 30, 1988, Mr. Ruga states in paragraph 2; "In effect Respondent was able to satisfy his obligation of \$12,720.00 by using other clients' funds, specifically the Reipricht funds". (See page 2, The Florida Bar's Exhibit 6, attached hereto as Appendix II).

Additionally in his audit report, The Florida Bar's Exhibit 4, dated December 31, 1987, at page 3, Mr. Ruga states:

Also, during the month of June Mr. Miller disbursed on behalf of his client Tabois the sum of \$5,000.00. The amount being held in escrow on behalf of this client was \$1,925.10, so the net result was that a total of \$3,074.90 (\$5,000.00 - \$1,925.10) was paid on behalf of a client with funds from some other client.

(See paragraph 1, page 3 of The Florida Bar Exhibit 4, attached hereto as Appendix I).

Moreover, at pages 40-41 of the transcript, Mr. Ruga testified in response to questions asked by counsel for Respondent that Respondent used funds from one client for other clients. (See T. 40-41).

In his brief at page 4-5, Respondent implies that the negative balance in his trust account was caused by one check issued in March, 1987 for \$10,000.00. However, the record is clear that the shortage in

Respondent's trust account reached \$28,295.68 and that Respondent issued more than one check to himself. (T. 19, 25-27, The Florida Bar's Exhibits 4 and 5). The shortage amount was originally \$37,064.90 and was reduced to \$28,295.68 after Mr. Ruga took into account earned fees of the Respondent. (T. 25-26).

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, the specific purpose doctrine (Ex. 4-6, T. 27, 30-32, 40-41).

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) of the Code of Professional Responsibility 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).

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.

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 Florida Bar agrees with the Respondent that a referee's finding and recommendations will be upheld unless clearly erroneous or without record support.

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, 32-41). Paragraphs 5 and 7 of the Referee's findings provide as follows:

During the period audited, Respondent's trust account had shortages and were insufficient to cover all trust liabilities.

By stipulation of the parties an audit review was conducted of Respondent's trust transactions during the period November 1, 1987 to October 30, 1988. Said review determined that three (3) checks were dishonored for non-sufficient funds during this period and that the Respondent continued

to have shortages in his trust account and continued to use entrusted funds for purposes other than those for which said funds were entrusted.

(See Report of Referee, pp. 1-2, paragraphs 5 and 7 of Findings of Fact).

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.

Respondent implies that the shortage in his trust account was caused by one check issued in March, 1987 for \$10,000.00. The record, however, is clear that the shortage in Respondent's trust account reached \$28,295.68 and that Respondent issued more than one check to himself. (T. 19, 25-27, The Florida Bar's Exhibit's 4 and 5). The shortage amount was originally \$37,064.90 and was reduced to \$28,295.68 after Mr. Ruga took into account earned fees of the Respondent (T. 25-26). Mr. Ruga testified that Respondent's trust account had insufficient funds in it to satisfy the liabilities on all the clients that he had (T. 27).

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, 32-41), 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.

The Florida Bar hereby adopts its arguments set forth in its initial brief in this cause.

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. (See The Florida Bar's Exhibits 4 and 6).

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.

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.


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, and the reasons stated in The Florida Bar Initial Brief, 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

For the above stated reasons and the reasons stated in The Florida Bar's initial brief, 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,



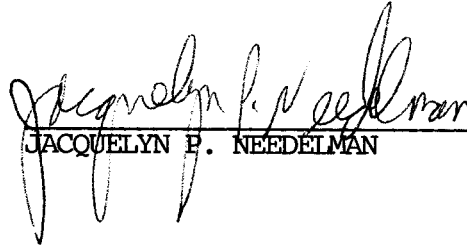
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of The Florida Bar has been furnished to Rhea P. Grossman, Counsel for Respondent, 2710 Douglas Road, Miami, FL 33133-2728, on this 6th day of April, 1989 by regular mail.



JACQUELYN P. NEEDELMAN