

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs.

WILLIAM A. BORJA,

Respondent.

Case No. 72,962  
TFB No. 86-16,453(06A)

**FILED**

SID J. WHITE

JUN 23 1989

THE FLORIDA BAR'S INITIAL BRIEF

CLERK, SUPREME COURT

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## SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The appellee, WILLIAM A BORJA, will be referred to as "the respondent". "TR" will denote the transcript of the Final Hearing, held on December 15, 1988. "RR" will denote the Report of Referee. "R" will denote the record in this cause.

STATEMENT OF THE FACTS AND OF THE CASE

In or about May, 1985, the respondent was the attorney and personal representative for the Estate of Frank Libertini. (TR, p.77, L.21-25 and p.78, L.1-15).

On or about May 6, 1985, the respondent issued trust account check #2750, made payable to the Internal Revenue Service (I.R.S.) in the amount of \$10,000.00, to cover the estate taxes on the Estate of Frank Libertini. (TR, p.18, L.1-10). At the time the respondent issued trust account check #2750, there were no funds belonging to the Estate of Frank Libertini in the respondent's trust account. There were, however, sufficient funds to pay the estate's taxes in an estate account. (TR, p.8, L.4-7). On June 10, 1985, the respondent deposited in his trust account, the sum of \$10,000.00 to replace the amount that he advanced to the I.R.S. on behalf of the Estate of Frank Libertini. (TR, p.55, L.1-3).

On June 17, 1987, July 21, 1987 and September 21, 1987, Pedro Pizarro, Branch Staff Auditor of The Florida Bar, conducted an audit of the respondent's trust accounts (from January 19, 1985 through June, 1987), due to the respondent's issuance of the \$10,000.00 check from the trust account, rather than the estate's account. (TR, p.17, L.17-19).

At the conclusion of the audit, Mr. Pizarro made a determination that the respondent was not in substantial compliance with the minimum requirements of the Rules Regulating Trust Accounts, based on the following four violations:

1. The respondent did not maintain and/or preserve for at least six (6) years all trust account records for 1985.

2. The respondent's funds (fees) were kept in his trust account and payments were made therefrom on behalf of certain clients in excess of funds received from such clients, if any.

3. On November 30, 1985, the respondent's trust account reflected a shortage of \$670.57. On December 31, 1985, the respondent's trust account reflected a shortage of \$8,709.00. The aforesaid shortages represent use of client's funds for purposes other than the specific purpose for which the funds were entrusted to the respondent.

4. From January, 1985 through June, 1987, there were negative balances in the respondent's trust account at the end of each month. (TR, p.21, L.18-25; and R, Bar Exhibit 1, p.5).

The respondent was informed of the aforementioned violations and was advised by Mr. Pizarro of what was required to be kept in the records, in order to be in substantial compliance with the minimum requirements of the Rules Regulating Trust Accounts. (TR, p.23, L.6-22).

During June, 1988, a follow-up audit of the respondent's trust account was conducted by Mr. Pizarro at the request of the grievance committee, to determine whether or not the respondent remedied his trust account irregularities. (TR, p.24, L.1-4). The follow-up audit commenced from the end of the first audit, June 31, 1987 through May, 1988. (TR, p.24, L.25).

At the conclusion of the follow-up audit in June, 1988, Mr. Pizarro found that the respondent was again not in substantial compliance with the minimum requirements adopted by The Florida Bar for trust accounts. (TR, p.25, L. 4-8). Although the records were improved, Mr. Pizarro found the following violations in regards to the respondent's trust account:

1. The respondent did not maintain monthly reconciliations and comparisons from July, 1987 through May 31, 1988.

2. The respondent continued to commingle his funds (fees) with client trust funds which resulted in an overage in his trust account as of May 31, 1988 in the amount of \$3,699.08.

3. There were client negative balances in the respondent's trust account as of May 31, 1988, most of which were the same negative balances that existed as of June 30, 1987. (TR, p.26, L.12-19; and R, Bar Exhibit 3).

On June 28, 1988, the Sixth Judicial Circuit Grievance

Committee "A" found probable cause for further disciplinary proceedings.

The Florida Bar filed a complaint against the respondent charging him with violating the following Rules Regulating The Florida Bar: Rule 5-1.2(b) (5) (Bylaws Section 11.02(4)(c)2.e., prior to January 1, 1987); Rule 5-1.2(b) (6) (Bylaws Section 11.02(4)(c)2.f., prior to January 1, 1987); Rule 5-1.2(c)1.b., (Bylaws Section 11.02(4)(c)3.a.(ii), prior to January 1, 1987); Rule 4-1.15(a) (Disciplinary Rule 9-102(A), prior to January 1, 1987); and Rule 5-1.1 (Integration Rule 11.02(4), prior to January 1, 1987). (R, Complaint, p.3,4).

The referee found the respondent may have been responsible for certain technical violations of the Rules that generally concern trust accounting. (RR, p.2). However, the referee then found the respondent not guilty of violating the aforementioned Trust Accounting Rules. (RR, p.3).

The Florida Bar Board of Governors reviewed the Report of the Referee and voted to seek review of the findings made by the referee.



## SUMMARY OF ARGUMENT

The referee in this cause found that the respondent was in substantial compliance with The Florida Bar's Trust Accounting Rules. This finding by the referee is clearly erroneous based on the expert testimony of The Florida Bar's auditor, Pedro Pizarro and based on recent case law.

At the Final Hearing in this cause, Mr. Pizarro testified that the respondent's trust accounts were not in substantial compliance with the Trust Accounting Rules in that the respondent failed to maintain his 1985 trust records for six (6) years, he commingled his funds with client funds, he had shortages in his trust account for two (2) months, and he failed to prepare monthly reconciliations and comparisons from the end of the initial audit in June, 1987 through May, 1988. (TR, p.21, L.8-25; and TR, p.26, L.5-19).

The referee in his report acknowledges that the respondent may have violated the general trust accounting rules, yet found the respondent not guilty of violating any disciplinary rule regarding the same. (RR, p.2).

In finding the respondent not guilty, the referee took into account the fact that no client was injured and that the respondent instituted procedures to guard against future violations. (RR, p.2). These factors considered by the referee are not sufficient to justify a finding of not guilty.

The evidence in this case is clear and convincing that the respondent's conduct was in violation of the Rules Regulating

Trust Accounts, and therefore, the respondent should be found guilty and appropriately disciplined.

In this Petition for Review, The Florida Bar respectfully requests that this Court reverse the referee's judgment of not guilty and order a public reprimand, two (2) years probation and assess costs against the respondent.

## ARGUMENT

ISSUE: WHETHER THE REFEREE'S ULTIMATE FINDING THAT THE RESPONDENT'S TRUST ACCOUNT WAS IN SUBSTANTIAL COMPLIANCE WITH THE TRUST ACCOUNTING RULES IS CLEARLY ERRONEOUS, BASED ON THE EXPERT TESTIMONY OF THE FLORIDA BAR'S AUDITOR AND RECENT CASE LAW

In the instant case, the referee found that the respondent's trust account was in substantial compliance with the trust accounting rules alleged to have been violated by The Florida Bar in its complaint.

In The Florida Bar v. Stalnaker, 485 So.2d. 815, 816 (Fla. 1986) this Court held that "a referee's findings of facts are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support". In addition, Rule 3-7.6(c) (5), Rules of Discipline, specifically states that, "Upon review, the burden shall be upon the party seeking review to demonstrate that a Report of Referee sought to be reviewed is erroneous, unlawful, or unjustified".

The Report of Referee in this case is erroneous. The facts of this case clearly support a finding of ethical misconduct which warrants discipline. On May 6, 1985, the respondent issued trust account check #2750 made payable to the Internal Revenue Service (I.R.S.) in the amount of ten thousand (\$10,000.00) dollars, to cover the estate taxes on the Estate of Frank Libertini. At the time the respondent issued trust account check #2750, there were no funds belonging to the Estate of Frank Libertini in the respondent's trust account. There were,

however, sufficient funds to pay the estate's taxes in an estate account (TR, p.18, L.1-10; TR, p.77, L.1-4; and TR, p.78, L.16-25).

Based on the aforementioned facts, an audit of the respondent's trust account was conducted by Pedro Pizarro, Branch Staff Auditor of The Florida Bar. (TR, p.17, L.15-19).

At the Final Hearing in this cause, held on December 15, 1988, Mr. Pizarro was the sole witness called by The Florida Bar. In addition, the referee declared Mr. Pizarro to be an expert in the field of attorney trust accounting procedures and audits. (TR, p.14, L.7-8). Mr. Pizarro testified at the Final Hearing to the following facts:

1. That he conducted two separate audits on the respondent's trust account. (TR, p.20, L.6-11). The first audit covered the period from January, 1985 through June 30, 1987. A follow-up audit covered the period from July, 1987 to May, 1988. (TR, p.20, L.6-11).

2. At the end of the initial audit, he reached the conclusion that the respondent's trust accounts were not in substantial compliance with the minimum requirements adopted by The Florida Bar for trust accounts based on the following: a) the respondent failed to preserve for six (6) years, trust account records for 1985 including ledger

cards, cash receipt and disbursement journals, and monthly reconciliations and comparisons; b) the respondent commingled his funds with clients' trust funds; and c) there were two (2) months in which there were shortages in the respondent's trust account. (R, Bar's Exhibit 1; and TR, p.21, L.8-25).

3. During the initial audit, he informed the respondent of what remedial procedures were necessary in order for the respondent's trust account procedures and records to be in substantial compliance with the Rules Regulating The Florida Bar. The respondent was specifically instructed as to the commingling of fees in the trust account, which should be withdrawn after they are earned. (TR, p.23, L.10-15). Also, the respondent was made aware of the need to make monthly comparisons and reconciliations of the trust account. (TR, p.23, L.16-22).

4. Approximately one (1) year after the initial audit, a follow-up audit of the respondent's trust account was conducted to determine whether the respondent had remedied his trust account irregularities. (TR, p.23, L.23-25; and TR, p.24, L.1-6).

5. At the end of the follow-up audit,

he reached the conclusion that the respondent's trust accounting procedures and records were not in substantial compliance with the minimum requirements adopted by The Florida Bar for trust accounts in the following respects: a) no monthly reconciliations and comparisons had been prepared from July, 1987 through May, 1988; b) there were still some negative balances in the trust account which represented money spent for clients from whom no money was put into the trust account; and c) the respondent continued to commingle his funds with client funds.

The referee, in his report, found that the respondent had diligently undertaken remedial measures concerning record keeping and accounting procedures. (RR, p.2). This finding by the referee is in direct conflict with the aforementioned testimony of The Florida Bar auditor, Pedro Pizarro.

The results of the follow-up audit which occurred approximately one (1) year after the initial audit clearly shows that the respondent did not diligently undertake remedial measures concerning his record keeping and accounting procedures. The respondent did not take remedial action in regard to his trust accounting procedures and records until approximately three (3) to four (4) months prior to the Final Hearing when he hired a certified public accountant to establish a trust accounting system for him.

The referee, in his report, also finds that the respondent "may have been responsible for certain technical violations of the rules that generally concern trust accounting". (RR, p.2). However, the referee finds the respondent not guilty of ethical misconduct. (RR, p.3). This finding by the referee is inconsistent with recent case law. In The Florida Bar v. Hosner, 513 So.2d 1057 (Fla. 1987), the referee found that Hosner was guilty of ethical misconduct for failing to follow proper trust accounting rules by commingling his funds with clients' funds, by having trust account shortages for three (3) months in 1983 and overages for five (5) months in 1983 and two (2) months in 1984, and for failing to periodically prepare trust accounting reconciliations. On review, this Court stated "Professional misconduct of the nature and severity shown in the present case - failure to follow trust accounting rules and intermingling personal funds with those held in trust - has been found to warrant a public reprimand in other cases". Hosner, at 1058.

As established through the testimony of The Florida Bar auditor, the respondent in the instant case also failed to prepare monthly reconciliations and comparisons, he commingled his funds with client funds and he had shortages in his trust account for two (2) months. However, unlike Hosner, the referee in this case found the respondent was in substantial compliance with the trust accounting rules. As in Hosner, the respondent should be found guilty of ethical misconduct and disciplined by a public reprimand, two (2) years probation requiring that quarterly audits be submitted to The Florida Bar, and he should be assessed costs.

Similarly, in The Florida Bar v. Padrino, 500 So. 2d. 525 (Fla. 1987), Padrino failed to keep trust records and to follow trust account procedures in accordance with the prescribed minimum requirements. In view of various mitigating circumstances, the fact that there was no misappropriation of client funds and the lack of prior disciplinary action, the referee recommended a public reprimand and two (2) years of probation with the condition that quarterly reports by a certified public accountant be submitted to The Florida Bar showing compliance with Rule 11.02(4)(c) of the Integration Rules of The Florida Bar.

This court adopted the recommended findings and discipline of the referee and also assessed against Padrino the costs of the proceeding. Id. at 526.

The Padrino case appears to be on point. Like the respondent in the instant case, Padrino failed to comply with trust accounting procedures. Also, there was no misappropriation of client's funds in Padrino, and similarly, no clients were injured by the respondent's violations of the rules. Clearly, based on Padrino, the referee erred when he found the respondent was in substantial compliance with the trust accounting rules. Therefore, the respondent, like Padrino, should be found guilty of ethical misconduct and given a public reprimand with two (2) years probation with the condition that quarterly reports by a certified public accountant be submitted to The Florida Bar showing compliance with the trust accounting rules and assessed the costs of The Florida Bar's proceedings.



CONCLUSION

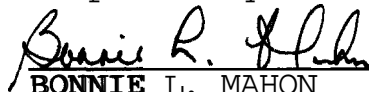
The referee found the respondent was in substantial compliance with the Trust Accounting Rules. However, according to the expert testimony of The Florida Bar Auditor at the Final Hearing in this cause, the respondent was not in substantial compliance with the Trust Accounting Rules in that the respondent failed to preserve trust records for six (6) years, he commingled his funds with client funds, he had shortages in his trust account and he failed to prepare reconciliations and comparisons for approximately one (1) year.

Recent case law involving facts similar to the instant case establish that the violations found by the Bar auditor to exist in this case warrants a finding of misconduct.

Clearly, based on the Bar Auditor's testimony and recent case law, the respondent is guilty of professional misconduct warranting discipline.

WHEREFORE, The Florida Bar respectfully requests that this Honorable Court find the respondent guilty of ethical misconduct and impose a public reprimand, two (2) years probation with the condition that quarterly reports by a certified public accountant be submitted to The Florida Bar showing compliance with the trust accounting rules and assess costs against the respondent.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished to, Harry M. Hobbs, attorney for respondent, at his record bar address of 725 E. Kennedy Blvd., Suite 100, Tampa, Florida 33602; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida 32399-2300, this 26th day of June, 1989.

  
\_\_\_\_\_  
BONNIE L. MAHON