IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

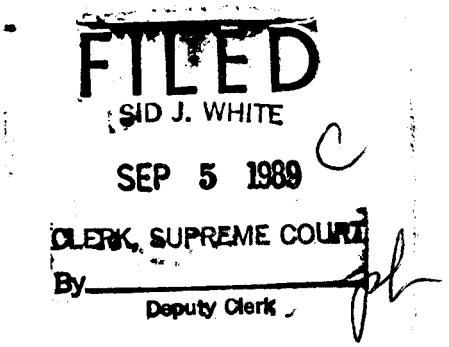
Complainant,

v.

ALBERT E. GUSTAFSON,

Respondent.

Case No. 73,406



Initial Brief of Complainant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The Florida Bar, Complainant, will be referred to as the "the Bar" or "The Florida Bar". Albert E. Gustafson, Respondent will be referred to as "Mr. Gustafson" or "Respondent". The symbol "TR." will be used to designate the transcript of the final hearing held on May 22, 1989. All emphasis have been added.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar served its complaint on December 6, 1988. A final hearing was conducted before the Honorable Arthur J. Franza, Referee on May 22, 1989. The Bar presented the testimony of Sam Young (TR. 14-80), George Blutstein, Esq., (TR. 81-124), Carlos Ruga, C.P.A. (TR. 125-140) and Detective Ralph Lopez (TR. 140-159). The Respondent was called as a Bar witness and testified only as to Count II of the Complaint. (TR. 161-166)

The Referee found Respondent guilty as to Count I and not guilty as to Count 11, and recommended that the Respondent be suspended for a period of three years and make restitution to Sam Young. The bar filed its Petition for Review on August 4, 1989 and is seeking disbarment.1

The Florida Bar would adopt the Referee's summary of facts contained in the Report of Referee as its statement of the facts. Those findings, together with disciplinary rule violation findings have been included below for the Court's convenience.

FINDINGS OF FACT:

1. That Respondent represented Alexander S. Martin (hereinafter referred to as "A. Martin") in various business matters.

2. That Respondent prepared a contract which was entered into by A. Martin and Sam Young (hereinafter referred to as "Young"), dated January 18, 1988.

1The Bar is not seeking review of the Referee's findings as to Count II.

3. That the aforementioned contract prepared by Respondent contained the following language in Article III b:

> "Albert E. Gustafson, Esquire shall act as the escrow agent for original contribution of funds as specified under Article I a, until such time as funds pursuant to Article II b, are disbursed amongst the herein contained parties."

and the following language in Article II c:

> "Subject to the terms and conditions specified in Article II a., if after a period of more than 14 days from the date that the restriction on said stock expires and said stock has not been sold in the market, assignee shall have the the right to demand return of said proceeds contributed for participation in the transaction, and shall thereafter relinquish all interest in proceeds realized from the transaction that may occur at a later time.

4. That the aforementioned contract provisions clearly provided that Young had up to fourteen days to withdraw from the Contract, and thereafter could withdraw if the stock had not been sold thereby relinquishing any right to future profits.

5. That Respondent, signed an agreement dated January 18, 1988 prepared by George Blutstein (hereinafter referred to as "Blutstein") attorney for Young stating that Respondent would hold the funds, specifically Sixteen thousand dollars ($16,000.00) in an escrow account for the parties.

6. That Respondent after signing this agreement executed between himself and Blutstein accepted a check from Young payable to Respondent, Albert E. Gustafson, Esquire Trust Account in the amount of Sixteen thousand dollars ($16,000.00) dated January 20, 1988 (Check number 243, Barnett Bank, North Miami Beach).

7. That Respondent did not have a trust account.

8. That on the same day Respondent received Young's check, Respondent accompanied by A. Martin cashed said check at Young's bank (Barnett Bank, 9190 Biscayne Boulevard, Miami Shore, Florida).

9. That Respondent obtained a cashier's check from Barnett Bank in the amount of Sixteen thousand ($16,000.00).

10. That Respondent after receipt of the cashier's check from Barnett Bank went to Glendale Federal Bank and signed the cashier's check over to Ms. Maria T. Buchhorst (hereinafter referred to as "Buchhorst") where it was deposited in her personal account.

11. That Respondent did not have signatory power on Buchhorst's account.

12. That Respondent's action of placing the funds within Buchhorst's account had the effect of relinquishing all control over Young's money since Respondent had no signatory power over Buchhorst's account.

13. That neither Young nor his attorney Blutstein, authorized Respondent to place Young's funds in Buchhorst's account.

14. That Respondent failed to return the funds to Young when requested by him on the same day they entered into the contract.

15. That Respondent advised Blutstein he would attempt to persuade A. Martin to return Young's money it Respondent was given a portion of the monies.

16. That Respondent did initiate a lawsuit against Young for slander and defamation regarding the substance of this matter. [Case No. 88-04911(4)]

17. That Young counterclaimed in the lawsuit alleging conversion.

18. That the Judge in the civil action ordered Respondent to place Young's monies in the Court Registry.

19. That Respondent did not place Young's monies in the Court Registry pursuant to Court order.

20. That a judgment in favor of Young has been entered in Case No. **88-04911(14)** for **$48,000.00,** in treble damages.

21. That on or about June **23, 1988,** Carlos **J.** Ruga, The Florida Bar Staff Auditor after serving subpoenas for Buchhorst's bank records on Glendale Federal Bank, completed an audit of the bank account of Buchhorst.

22. That the aforementioned audit covered all recorded transactions occurring between December 21, **1987** and May **3, 1988,** the period in which the account was opened until the date in which **it** was closed.

23. That the Buchhorst account does not constitute an attorney trust account.

24. That the audit revealed that on or about January **20, 1988** a deposit in the amount of Sixteen thousand dollars ($16,000.00) was recorded in Buchhorst's account, said $16,000.00 being Young's funds.

25. That at the time the funds were deposited the account balance was **$1,562.39.**

26. That after a period of five days the account balance was **$1,523.95,** having completely used Young's funds.

27. That by reason of the foregoing Respondent has violated Rule **4-1.15** (a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive), **4-3.4(c)** (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists), Rule **4-8.4**(c) (a lawyer shall not engage in conduct involving

dishonesty, fraud, deceit, or misrepresentation) Of the Rules Of Professional Conduct; Disciplinary Rules 5-1.2(b) (money entrusted to an attorney tor a specific purpose is held in trust and must be applied only to that purpose) of the Rules Regulating Trust Accounts.

This brief follows.

SUMMARY OF ARGUMENT

The Bar contends that the Referee erred when he recommended that Respondent be suspended for three years rather than disbarred. Respondent accepted monies as an escrow agent, and deluded the party, through misrepresentation into believing that said monies would be held in his attorney trust account. Respondent did not have a trust account. He signed his name on the investment check and allowed it to be deposited into his business partner's wife's personal account, over which he exercised no control. The monies were entirely used for unrelated purposes within five days. When the victim discovered the scam, he contacted various law enforcement agencies. The Respondent then sued the victim for slander and defamation. The victim counterclaimed for conversion and civil theft and was awarded $48,000 in treble damages.

The above Kafka-life scenario demands that Respondent should be stricken from the roll of attorneys.

POINT ON APPEAL

WHETHER DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS TEE APPROPRIATE SANCTION?

ARGUMENT

DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS THE APPROPRIATE SANCTION

It is well established that disbarment should be reserved for the most serious cases. The Florida Bar v. Pahules. 233 So.2d 130 (Fla. 1970). This Court has also stated that its principal concerns are to protect the public, to warn other members of the profession about the consequences of similar misconduct, to impose an appropriate punishment on the errant lawyer and to allow for and encourage reformation and rehabilitation. The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987). This case presents a most egregious set of circumstances, wherein an attorney participated in a scheme to defraud. Not only did this attorney participate in the scheme, he used his privilege to practice law in order to lull the victim and his attorney into a false sense of security.

Sam Young knew that any investment carried its normal risks. He believed that since he was represented by counsel and that since Alexander Martin was represented by counsel he was protected. Sam Young was to his own misfortune, very wrong. The contract entered into between Young and Martin, which was prepared by the Respondent, provided that Young's $16,000 would be held by Respondent as escrow agent. (See Contract attached as Exhibit B in Appendix)[2] In an abundance of caution, Young's

[2]The contract was introduced by The Florida Bar as its first exhibit. (TR. 21)

attorney insisted that Respondent sign a letter indicating that Young's funds would be held in escrow. (See letter attached as Exhibit C in Appendix)[3] Young's attorney was asked why he prepared the aforementioned letter. He stated:

> Just to make sure that there was no question as to what was going to happen.
>
> The contract clearly says that the funds were to be in escrow. I just wanted to make doubly sure that the funds would be held in escrow, so I prepared this escrow letter and he agreed to act as escrow agent.
>
> (TR. 83)

Consistent with their belief that the investment monies were shrouded with the protection of an attorney trust account, Young's check was issued to "Albert E. Gustavson [sic], Esq., Trust Account". (See Young's check attached as Exhibit D in Appendix)[4] Sam Young's testimony on direct examination in this regard is also enlightening.

> Q. Why did you make that check payable to Albert E. Gustafson, Trust Account?
>
> A. Well, I wasn't too sure of Mr. Martin's credibility and I figured that it would be a safer contract if the proceeds went into a trust account held in escrow, until such time as everything was finalized according to the way the contract was drawn up.
>
> Q. Why did you think it would be safer?

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[3]The January 18, 1988 was introduced by The Florida Bar as its second exhibit. (TR. 27)

[4]Young's check was introduced by The Florida Bar as its third exhibit. (TR.29)

A. I assumed that attorneys who have trust accounts and sign the contract -- by the way, Mr. Gustafson entered into a contract that Mr. Blutstein drew up, stating that he in fact would hold these monies in his trust account until such time as the contract was consummated properly and all monies disbursed, after which Mr. Gustafson then could dispose of the sixteen thousand dollars any way he wanted to.

(TR. 22-23)

The subsequent series of events is most frightening. Young's monies were deposited into the personal account of one "Maria T. Buchhorst". It is believed that Buchhorst is Alexander Martin's wife. (TR. 32) Respondent had absolutely no control over this account, evidenced by the fact that he was not a signatory on the account. (TR. 132) The Bar's auditor testified that by the end of the same day that Young's funds were deposited into the Buchhorst account nearly $8,000 of the $16,000 had been expended. (TR. 131) Within five days, all of the monies were used on matters completely unrelated to Young's investment. (TR. 131)[5] Young's attorney's comments in this regard are interesting.

Q. Did you ever heard the name Maria Buckhorst? [sic]

A. Not at that time. I heard about her later.

Q. Did you have any idea that your client's money, Mr. Young's money, was not going into an attorney's trust account?

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[5]The Audit revealed that the Respondent received a $200.00 payment from the Buchhorst account. (TR. 130)

[6]The question were propounded by The Florida Bar and answered by George Blutstein, attorney for Sam Young.

> A. No. In fact, I said to my client that it would seem that the only thing that could go wrong is if the attorney swung with the money.
>
> (TR. 83)[6]

Respondent's actions clearly constitute a violation of the "specific purpose doctrine". Money was entrusted to the Respondent for a specific purpose (to be held in his attorney trust account pursuant to a contract he prepared and later ratified) and was not used for that purpose. Respondant blatantly allowed others to convert Mr. Young's funds. In The Florida Bar v. Bond, 460 So.2d 375 (Fla. 1984), that attorney acted as an escrow agent and held funds belonging to his client's adversary in litigation. Bond converted the monies to his own use and was disbarred.

In the case sub judice, this Respondent added insult to injury by initiating a slander lawsuit against Sam Young. Young counterclaimed for conversion and civil theft and obtained a $48,000 judgment against the Respondent, and his cohort Martin. (TR. 84-86) At the onset of the litigation, the Respondent filed an application to place Young's money into the Court registry. The Court granted the request. Despite two orders compelling Respondent to place said money in the Court registry, such was **not** done. (TR. 86) Thereafter, Respondent abandoned his lawsuit.[7] Respondent's tumerity in suing Young was exceeded by his failure to pursue the suit.

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[6]The question were propounded by The Florida Bar and answered by George Blutstein, attorney for Sam Young.

[7]The entire Court file of the civil litigation was introduced as The Florida Bar's sixth exhibit. (TR. 87)

This Court in Pahules, supra and its progeny emphasize that whether an attorney could be rehabilitated should be considered when imposing disbarment. Mr. Gustafson consistently stated that he did no wrong. He accused Young, Blutstein and Detective Lopez of being part of some bigger than life conspiracy whose objective was to harm him. (TR. 5-6, 158-159) He did not recognize his actions of' deceiving Young and his attorney into believing the monies were safeyuarded in his trust account, when none existed, to be improper. Mr. Gustafson should not be permitted the privilege of practicing law.

> As members of this profession we realize that our standing is often measured in the layman's mind by the manner in which we discipline that small minority of our brethren who break the rules of fidelity and trust required by our calling.
>
> State of Florida, ex rel., The Florida Bar, v. Fishkind, 107 So.2d 131 (Fla. 1958)

The Referee found that Respondent's relative inexperience as an attorney constituted a mitigating factor. Respondent was fourty five years old at the time this incident occurred.[8] He testified that he has various academic degrees and that his studies emphasized securities and finance. (TR. 163, 166) Certainly, Respondent's life experiences and age must be considered. Moreover, this Court stated:

> The education which a lawyer receives in these days is such that by the time he is admitted to practice he should be thoroughly familiar with the Canons of Ethics. They should constitute his professional bible. He ought to be thorouyhly aware of the pitfalls involved in willful violations of the Canons.

[8] Respondent was admitted to The Florida Bar on November 25, 1985 and was born in 1943.

> There is no justification for relinquishing the requirements of integrity and ethical conduct merely because the offending lawyer is in the early years of his practice.
>
> State of Florida, ex rel., The Florida Bar v. Rhubottom, 132 So.2d 395 (Fla. 1961)

It has been held that where an attorney's ethical violation is particularly outrageous, the existence of mitigating factors will not be sufficient to outweigh disbarment as the appropriate sanction. The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986). This case falls within the foregoing principle.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee erroneously imposed a three year suspension, and would urge this court to disbar the Respondent.

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