IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHARLES J. CROWDER,

Respondent.

_____/

Supreme Court Case
No. 73,899

The Florida Bar
File No. 88-71,276(11H)

INITIAL BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, the complainant will be referred to as "Complainant" or "The Florida Bar". The Respondent, Charles J. Crowder, will be referred to as "Respondent" or "Mr. Crowder". Abbreviations utilized in this Brief are as follows: "(RR)" will refer to the Report of Referee, and "T" refers to the transcript of proceedings, dated September 14, 1989. For example, "T.30" will refer to page 30 of the transcript.

STATEMENT OF THE CASE

The Complaint and Request for Admissions were filed on March 23, 1989. On March 30, 1989, the Chief Justice appointed Leroy Moe, Circuit Judge, Seventeenth Judicial Circuit Court of Florida, as referee in this case. The final hearing was held on September 14, 1989 at the Broward County Courthouse and the Respondent waived venue. (T.7)

The Respondent did not reply to the complainant's Request for Admissions and the Referee deemed certain portions of the Request for Admissions as being admitted. (T.7 and 8).

The Report of Referee was filed on December 6, 1989. A copy of the report is shown as Appendix Exhibit 1. In said report, the Referee recommended that the Respondent be found guilty of all allegations in the complaint. (RR, par.III, Appendix Exhibit 1). In addition, the Referee recommended the following discipline:

Suspension from the practice of law for six months, with proof of rehabilitation being required before being reinstated. If Respondent should be reinstated after the six months suspension, he should be on probation for a period of two years from the date of the reinstatement. Also, it was recommended that the Respondent repay the Estate of Fritz Peterson the $6,000.00 fee that he received. (RR, par.III, Appendix Exhibit 1). In addition, the Referee recommended that the Respondent pay costs in the amount of $994.55. (RR, par.VI, Appendix Exhibit 1).

On January 13, 1990, the Respondent sent a check to the attorney for the estate, Ira Shapiro, in the amount of six thousand dollars, payable to the order of the Estate of Fritz Peterson. (Appendix Exhibit 2).

On February 1, 1990, The Florida Bar mailed a Petition for Review, which seeks to have reviewed the portion of the Report of Referee, as pertains to disciplinary measures to be applied. Specifically, The Florida Bar desires to have the Referee's recommendations for six months suspension changed to a three year suspension.

STATEMENT OF THE FACTS

Respondent was Personal Representative and attorney for an estate. The Court approved attorney fees for six thousand dollars ($6,000.00). However, Respondent wrote checks to himself for attorney fees, amounting to fifteen thousand dollars ($15,000.00), which is nine thousand dollars ($9,000.00) more than he was entitled to receive. Shortly after the grievance committee hearing, the Respondent refunded the nine thousand dollars ($9,000.00) to the estate. (Bar Composite Exhibit 1, T.18-25). The Respondent admitted that he wrote the estate checks amounting to $15,000.00 to himself. However, he testified that he didn't remember writing two of the checks, (the one for $4,000.00, and another for $5,000.00) although he admits that his signature is on the checks. (T. 9 and 10, T.35, Bar Composite Exhibit 1). From April, 1986 to October , 1988, Respondent did almost no work concerning the estate. The attorney who replaced the Respondent as attorney for the estate found a box filled with approximately sixty-five (65) checks and many stock certificates. The checks weren't endorsed and had not been deposited to the estate account. The dividend checks were dated from 1985 through 1988. (T.18, 25).

SUMMARY OF THE ARGUMENT

Despite the mitigating factors in this case (advanced age, refund of monies and attorney fees), the serious nature of the violations and the cumulative misconduct, warrants a three year suspension.

ARGUMENT

THE DISCIPLINE RECOMMENDED BY THE REFEREE IS INAPPROPRIATE, WHEN CONSIDERING THE SERIOUS NATURE OF THE VIOLATIONS AND THE CUMULATIVE MISCONDUCT.

The Referee recommended the following discipline be imposed in this case: Suspension from practicing law for a period of six months, with proof of rehabilitation being required before being reinstated; if respondent should be reinstated, he should be on probation for two years from the date of said reinstatement. In addition, that Respondent should repay the Estate of Fritz Peterson the $6,000.00 fee he received,[1] and payment of costs in the amount of $994.55. (RR, Appendix Exhibit 1).

The Florida Bar respectfully submits that the portion of the Referee's recommendation that states Respondent should be suspended for six months, should be changed to a suspension of three years, as the offenses committed by Respondent are too serious for the recommended discipline.

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[1] Respondent has complied with this portion of the Referee's recommendation. See appendix Exhibit 2.

While the Referee's findings of fact are presumed to be correct, it is a well established point of law in Florida that the Florida Supreme Court is not bound by the Referee's recommendation of the discipline to be imposed. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978), The Florida Bar v. Mueller, 351 So.2d 960 (Fla. 1977). In fact, the Florida Supreme Court exercises a broad scope of review in evaluating a referee's recommendation of discipline. The Florida Bar v. Patarni, 548 So.2d 1110 (Fla. 1989).

The evidence clearly and convincingly[2] shows that the Respondent issued the following checks to himself, "for attorney fees," from the estate of Fritz Peterson: (See Bar Composite Exhibit 1).

October 7, 1988	$4,000.00
April 16, 1987	3,000.00
April 21, 1987	3,000.00
November 13, 1987	5,000.00

The Court authorized Respondent a partial award of fees on June 16, 1987, in the amount of $6,000.00. However, prior to this date, the Respondent had already withdrawn $10,000.00 without proper authority.

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[2] The Referee found the evidence not only clear and convincing, but beyond a reasonable doubt. (T.47).

Although the Respondent admits that his signature appears on all of the checks (T.9,10,35 and Bar Composite Exhibit 1), he testified that he did not remember writing the check for $4,000.00 or the check for $5,000.00. (T.35)

A review of the checks (Bar Composite Exhibit 1), shows that this was not one isolated incident, but there were four separate acts concerning illegal withdrawal of funds from the estate account.

While the $9,000.00 in excess of the authorized fee was returned to the estate, this wasn't done until on or about February 23, 1989, which was after the grievance committee hearing of February 7, 1989. (Request for Admissions, Count I, par. K, See T.8).

A review of the cases concerning defalcation of client funds indicates that this Court considers such acts as being extremely serious. In The Florida Bar v. Tunsil, 503 So.2d 1230,1231 (Fla. 1986), this Court stated, "[i]n the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list." In the case of The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989), this court disbarred Mr. Golub because of the unauthorized removal of substantial sums from an estate, notwithstanding evidence of alcoholism. In the Golub case, supra, this Court stated:

> Although we may consider such factors as alcoholism and cooperation in mitigation, we must also determine the extent and weight of such mitigating circumstances when balanced against the seriousness of the misconduct.

While there are mitigating factors in the case at hand, ie., respondent cooperated by refunding the $9,000.00 and the fee of $6,000.00, we must determine the extent and weight of such circumstances when balanced against the seriousness of Mr. Crowder's misconduct.

In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), this Court stated that misuse of client's funds is one of the most serious offenses a lawyer can commit. It went on to admonish:

> ... henceforth, we will not be reluctant to disbar an attorney for this type of offense even though no client is injured.

In The Florida Bar v. Rhodes, 355 So.2d 774 (Fla. 1978), Mr. Rhodes was disbarred because of his improper withdrawal of funds from an estate, despite his prior good record.

In The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981), Mr. Harris was disbarred because of a continuous and irresponsible pattern of conversion of client trust funds for approximately one year. In the case at hand, Mr. Crowder, for a period of more than one year, converted funds to his own use, on four separate occasions, to wit:

October 7, 1986	$4,000.00
April 16, 1987	3,000.00
April 21, 1987	3,000.00
November 13, 1987	5,000.00

(see Bar Composite Exhibit 1)

Rule 4.11 of Florida's Standards for Imposing Lawyer Sanctions states:

> Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

The Florida Bar submits that the Respondent did intentionally and knowingly convert $9,000.00 from the Estate to his own use. In fact, the Referee found the Respondent guilty, "beyond a reasonable doubt." (T.47).

In The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), the Supreme Court announced, "This Court deals more severely with cumulative misconduct than with isolated misconduct." In the case at hand, there was cumulative misconduct. Each time the Respondent improperly withdrew funds from the estate, it was a separate act of misconduct. In addition, the Respondent was given two private reprimands, to wit; March 2, 1978 and December 1, 1978. (Bar Exhibit 2).

In addition to the four separate acts of defalcation of client funds, this case shows that the Respondent failed to act with diligence and competence, and failed to properly communicate with his client. (RR, Appendix Exhibit 1). Accordingly, all of the foregoing violations establish cumulative misconduct.

When considering the extremely serious nature of the offenses, and the cumulative misconduct involved in this case, it becomes clear that the six month suspension recommended by the Referee is too lenient.

It is The Florida Bar's position that a disbarment would not be inappropriate in this case. However, in view of the mitigating matters presented by the Respondent, the Bar is not seeking disbarment. Nevertheless, it does believe that a three year suspension is an appropriate discipline for the Respondent.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court to affirm the Referee's findings of fact and recommendations of guilt, but to reject the Referee's recommendation of six months suspension.

Accordingly, The Florida Bar requests that the following discipline be imposed in this case:

Suspension for three years with proof of rehabilitation being required before being reinstated.

That Respondent return to the Estate of Fritz Peterson, $6,000.00 in fees the Respondent had received (this has already been accomplished - see Appendix Exhibit 2).

That costs in the amount of $994.55 be charged to the Respondent, for which sum let execution issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 8, 1990, the original and seven copies of the above and foregoing Initial Brief of The Florida Bar were sent by Regular U.S. Mail to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that true and correct copies were mailed by Regular U.S. Mail to Charles J. Crowder, Respondent, 14011 Southwest 97th Avenue, Miami, Florida 33176-6827 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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