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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 73,905
[TFB Case No. 88-30,503
(18A)]

v.

THOMAS E. ROGERS,

Respondent.

COMPLAINANT'S REPLY BRIEF AND ANSWER BRIEF ON CROSS-APPEAL

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SYMBOLS AND REFERENCES

The Complainant, The Florida Bar, shall be referred to as the Bar.

The transcript of the final hearing held on December 18, 1989, shall be referred to as TI.

The transcript of the final hearing held on December 19, 1989, shall be referred to as TII.

The transcript of the final hearing held on December 20, 1989, shall be referred to as TIII.

Bar exhibits shall be referred to as B-Ex.

Respondent's exhibits shall be referred to as R-Ex.

The Report of Referee dated April 27, 1990, shall be referred to as RR.

SUMMARY OF THE ARGUMENT

The Florida Bar reiterates that it supports the referee's findings of fact and recommendations as to guilt, but rather contests the referee's recommended discipline as erroneous and unjustified.

In his answer brief and initial brief on cross-appeal, the respondent asked this court to substitute its opinion as the credibility of the witnesses for that of the referee. The Bar submits that it is well settled in Bar proceedings that the referee acts as the finder of fact for this Court and is in the best position to weigh the credibility of the witnesses and evidence. Although it appears the report of referee may contain small errors with respect to the amount of the management fee taken by the respondent and on the amount of rent he paid while living in townhouse unit #8, the Bar submits these are not material to the charges. It is not how much he took or paid, but the fact that he entered into a business transaction where his interests conflicted with those of parties who expected him to protect their interests. In fact, had the respondent's accounting been adequate, then there would be no question as to how much he credited himself for management fees or paid as rent on townhouse unit #8. Furthermore, it is interesting to note that while the respondent dedicates much of his argument to attacking the evidence with respect to the Sun Bay Condominium

transactions, he fails to address the more serious charge of utilizing Mr. Gorman's money in the RMG Partnership to make the down-payment on the Moorings condominium for what became his personal residence and "repaying" the funds only through a bookkeeping entry.

The evidence is clear and convincing that the respondent failed to disclose his conflicting interests, provided accountings that were inadequate and served only to obscure the true nature of his contributions to the RMG Partnership, and utilized partnership cash to buy his personal residence without reimbursing the partners. Clearly the respondent's gross misconduct in creating situations wherein he exploited his business partners warrants nothing less than a sixty or ninety day period of suspension.

ARGUMENT

POINT ONE: THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

It has long been the law that a referee's findings of fact are presumed correct and will be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990). Rule of Discipline 3-7.6(k)(1) of the Rules Regulating The Florida Bar, as amended, states that a referee's findings of fact shall enjoy the same presumption of correctness as a judgment of the trier of fact in a civil proceeding. This is the same language as in the previous Integration Rule and the Court applied the same standard. See e.g. The Florida Bar v. Stillman 401 So.2d 1306 (Fla. 1981).

In his brief, the respondent seeks to appeal the referee's findings of fact. He has the burden of demonstrating that the report of referee is erroneous, unlawful, or unjustified. See Rule of Discipline 3-7.7(c)(5) of the Rules Regulating The Florida Bar, as amended. The respondent has failed to meet this burden. Instead, he seeks to have this Court substitute its opinion as to the credibility of the witnesses for that of the referee. Most currently in The Florida v. Scott, 15 FLW 448 (Fla. 1990), this Court stated that it "cannot reweigh the evidence or substitute its judgment for that of the trier of fact."

In The Florida Bar v. Bajoczki, 558 So.2d 1022 (Fla. 1990), the record contained conflicting testimony from the accused attorney and the complaining witnesses. The referee determined that the complaining witnesses' version of the facts was truthful and rejected the accused attorney's version. The Court specifically stated that it could only conclude that there was substantial competent evidence supporting the referee's findings because the complaining witnesses supplied it in their testimony. Accordingly, the court was bound by the referee's findings.

In The Florida Bar v. Stalnaker, 485 So.2d 815, 816 (Fla. 1986), this Court reiterated its long standing position that a referee's findings of fact are presumed to be correct and will be upheld unless clearly erroneous or lacking in evidentiary support. The evidence presented to the referee boiled down to a credibility contest between the accused attorney and the complaining witness. After listening to and observing both of them, the referee, as this Court's finder of fact, resolved the conflicts in the evidence and this Court declined to disturb his findings.

In his brief, the respondent contends that the credibility of the Bar's three main witnesses was lacking. Father Mitzi testified that he believed the term "cash or its equivalent" meant that the respondent would make his contribution in the form of a cashier's check or money order in place of currency. (RR 3

and TI pp. 41-42). The Father further testified that he never read the RMG Partnership Agreement. (TI pp. 39-40). It is wholly consistent for a client to trust his attorney and not "fly-speck" a document prepared by that attorney.

With respect to Mr. Gorman's affidavit entered as R-Ex. VV, it was executed on June 11, 1985, after the conflicts arose over the Sun Bay and Moorings transactions. Furthermore, the affidavit related to an entirely different property transaction which is not at issue here. Most likely the respondent prepared this affidavit for Mr. Gorman's signature because by June of 1985 he had realized that he needed to exercise more caution in engaging in business transactions with clients.

As for Mr. Files' credibility, the respondent is mistaken in his assertion that Mr. Files had a vested interest in the outcome of the Bar's case because he was representing Father Mitzi and Mr. Gorman in a civil case against the respondent. Mr. Files had no more interest in the outcome of these proceedings than any other attorney representing a client. The Bar proceedings would not necessary affect the outcome of the civil case because the issues may be different. The Bar is concerned solely with ethical misconduct and not malpractice or other actionable civil wrongs.

In his brief, the respondent states that Bar Counsel admitted during his closing argument that the testimony and

exhibits were confusing. (TIII p. 46). The respondent's conclusion that this resulted from discrepancies between testimony and evidence is not correct. The real confusion arose from the respondent's failure to provide his partners with complete accountings. In fact, had the accountings been adequate, the respondent's misconduct probably would have been discovered sooner. On the other hand, had the Sun Bay and Moorings investments proved profitable, the respondent's improper actions with respect to the rules governing business transactions with clients might never have come to light.

The respondent also argues that the referee's findings are not supported by clear and convincing evidence with respect to his actions in connection with the Sun Bay transactions. The Bar disagrees. The respondent also fails to make any mention of the Moorings transaction, which could lead one to conclude he apparently believes the evidence supports the referee's findings in that transaction.

The Bar submits that the referee's findings are clearly and convincingly supported by the evidence. Only two of the referee's findings of fact appear to be inaccurate and neither are material to the charges at hand.

It appears from a review of the record that the respondent is correct in his contention that the referee made an error in

computing the amount of the management fee the respondent credited himself with. The $3,965.00 amount listed in the Report of Referee at paragraph nine, page three, appears to be associated with monthly condominium association assessments and not management fees. The respondent estimated his management fees for both Sun Bay units to be approximately $2,438.00. (TII p. 143).

It also appears from the record that an error might have been made with respect to the amount of rent the respondent paid on Sun Bay townhouse unit #8. According to the testimony of the certified public accountant, Michael Morgan, the respondent may have made only two $900.00 rental payments while living in the townhouse. For the most part, the rent payments were made by paying expenses of the RMG Partnership or making the mortgage payments in lieu of paying rent. (TII pp. 167-168).

Although the respondent asserts on page twenty-seven of his answer brief that he has written documentation disclosing the fact that he might not contribute cash to the RMG Partnership, the Bar could not locate such a document other than the agreement itself nor did the respondent produce one. Had he done so, no doubt it would have substantially altered these proceedings.

The Bar submits the evidence clearly and convincingly supports the referee's findings of fact. As the fact finder, he must be relied on to determine the credibility of the witnesses.

POINT TWO: THE REFEREE'S FINDINGS OF GUILT WERE PROPER.

Integration Rule 11.02(4) stated, in pertinent part, that "[m]oney 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. Money and other property of clients coming into the hands of an attorney are not subject to counter-claim or set off for attorney fees, and a refusal to account for and deliver over such property and money upon demand shall be deemed a conversion." This Rule is applicable to the instant case because the respondent was acting as both attorney for the partnerships and as a partner in RMG. Furthermore, the language of Rule 11.02(4) does not require a client for it to be in full force and effect although both Father Mitzi and Mr. Gorman should be considered as clients because they were the alter-egos of the RMG Partnership for which the respondent performed legal services. The respondent provided accountings to his clients but they were not sufficiently adequate to comply with the Rule.

Disciplinary Rules 5-101(A) and 5-104(A) also applied to the respondent's case. Rule 5-101(A) provided "[e]xcept with the consent of his client after full disclosure a lawyer shall not accept employment is the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." Rule 5-104(A) stated that "[a] lawyer shall not enter into a business transaction with a client if they have differing interest therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."

It is not always necessary for the traditional attorney-client relationship to exist in order for the Rules Regulating The Florida Bar or the former Code of Professional Responsibility to apply. See The Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984), and the cases cited therein, for the holding that there need not be an attorney-client relationship for the Rules to apply to business transactions involving non-lawyers.

In The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973), an attorney was suspended for one year for engaging in misconduct associated with business transactions involving non-clients. It was found that the attorney had a mixed interest of being both a participant and lawyer in the business transaction. The attorney had become involved in a joint venture to purchase a piece of

commercial real estate. He handled the details on behalf of the group as trustee. After the property was purchased, a dispute arose and the other partners sued the attorney for fraudulent misrepresentation and breach of fiduciary duties. Because he was an attorney, the referee found that this most likely caused the other investors to place greater confidence in him than they might have otherwise. See also The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982), for a discussion of the conflicting duties associated with engaging in business transactions involving clients.

The respondent's argument that the referee's findings of guilt were improper is totally without merit. Attorneys must be cautious in their business dealing with non-clients as well as with clients, especially where the potential for overreaching or self-dealing exists.

POINT THREE: A SUSPENSION FOR A DEFINITE PERIOD OF SIXTY OR NINETY DAYS RATHER THAN A PUBLIC REPRIMAND IS THE APPROPRIATE DISCIPLINE IN THIS CASE GIVEN THE NATURE OF THE RESPONDENT'S MISCONDUCT.

The Bar stands on its argument put forth in its initial brief.

The respondent, acting in his capacity as an attorney, placed himself in a position where his personal interests

conflicted with those of his client/partners. The respondent drew up the partnership agreements but failed to adequately disclose his conflicting interests. He had a financial interest in RMG with respect to fees for managerial services and is entitled to one-sixth of the appreciation of the property if it sold for a profit. He made himself a full-fledged partner in RMG. The referee found that neither Father Mitzi nor Mr. Gorman fully understood the ramifications of the respondent's conflicting interests in these business ventures.

Not only did the respondent fail to fully advise his client/partners of their differing interests and advise them to seek the advice of independent counsel, he also failed to provide adequate accountings that reflected his failure to contribute cash to RMG. Had the respondent's accountings been adequate, the analysis formed by Campos and Stratis (B-Ex. 25) would have been unnecessary. It was not so much improper for the respondent to elect to contribute services in lieu of cash as it was for him to obscure this fact from Father Mitzi and Mr. Gorman. They relied on the respondent's advice and trusted him to protect their interests rather than his own.

The most disturbing allegation in this case is the respondent's use of partnership funds to purchase a condominium which he ultimately assumed as his personal residence. It was the respondent who proposed purchasing the Moorings unit and he

who later recommended that Father Mitzi and Mr. Gorman pull out of the investment. Partnership money which came from Mr. Gorman was used as the down payment. None of this cash was returned to Mr. Gorman after he followed the respondent's advice and elected not to invest, but only after the respondent and his wife had signed certain papers toward the purchase by themselves. The respondent did nothing more than adjust bookkeeping entries despite a demand from Mr. Gorman that he return the funds in cash. This is very close to actual misuse of Mr. Gorman's money. It is a serious offense which calls for at least a sixty or ninety day period of suspension.

The instant situation might never have come to light had the ventures succeeded. Father Mitzi and Mr. Gorman would never have known that the respondent misled them with respect to contributing services in lieu of cash because the "accountings" provided by the respondent failed to reflect this aspect. Members of the Bar must be made aware of the hazards associated with creating such situations where the potential for over-reaching and self-dealing to a client's detriment exists. See The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982).

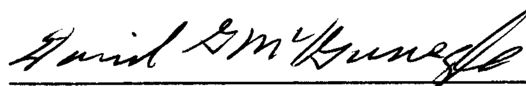
The respondent is both an attorney and a licensed certified public accountant yet he either could not or would not provide Father Mitzi and Mr. Gorman with adequate accountings of his activities in the business ventures. The "accountings" he

provided served only to obscure his role. He failed to advise them to seek the advice of independent counsel prior to entering into the partnerships wherein he had conflicting interests. His contributions to RMG were in kind or cover expenses and included rental payments. He then delivered the final blow by using Mr. Gorman's cash to make the down payment on what later became the respondent's personal residence. All Mr. Gorman received in return was a bookkeeping entry showing a paper transfer of credit. This is an aggravated situation of an attorney not only involving himself in business transactions with clients, but also knowingly taking advantage of the situation he has created to the detriment of those clients. If the respondent was able to do this with two relatively sophisticated and experienced investors, it is sobering, indeed, to consider what he could have done to an inexperienced and naive person. The respondent's misconduct clearly warrants either a sixty or ninety day suspension rather than the public reprimand recommended by the referee.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will approve the referee's findings of fact and recommendations as to guilt, but reject the recommended public reprimand as erroneous and unjustified and instead impose a suspension for a definite period of sixty or ninety days and order payment of costs in this proceeding currently totaling $4,792.90.

Respectfully submitted,



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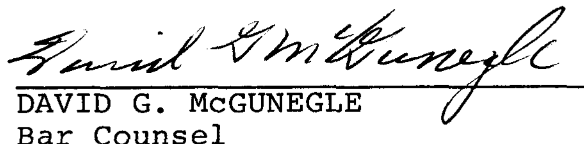
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Complainant's Reply Brief and Answer Brief on Cross-Appeal have been sent by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the Reply Brief has been furnished by certified mail, return receipt requested number P 630 486 181, to John A. Weiss, counsel for the respondent, at Post Office Box 1167, Tallahassee, Florida, 32301-1167; a copy of the foregoing has been furnished to Thomas R. Rogers, respondent, Sweetwater Square, 900 Fox Valley Drive, Suite 200, Longwood, Florida, 32779-2552; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 18th day of October, 1990.



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