IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SYDNEY ADLER,

Respondent.

_____/

CASE NO. ~~71-830~~ 75-670

TFB NO. 88-10,198(20A)

THE FLORIDA BAR'S INITIAL BRIEF

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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, Sydney Adler, will be referred to as the "Respondent". "TR" will denote the Transcript of the final hearing on September 14, 1990. "RR" will refer to the Report of Referee.

STATEMENT OF THE FACTS AND OF THE CASE

During a trust account audit regarding another matter, The Florida Bar discovered that there had, at one time, been shortages and deficits in Respondent's trust account.

In April, 1978, Respondent represented Richard and Sarah Anuszkiewicz in a real estate transaction between the Anuszkiewicz, buyers, and Terry and Lucille Lemley, sellers. (TR, p. 64, L. 8-22). On or about April 20, 1978, Mr. and Mrs. Anuszkiewicz entrusted Respondent with a $22,500.00 earnest money deposit on property they were seeking to purchase from the Lemleys. (TR, p. 65, L. 13-15). On April 20, 1978, the Anuszkiewicz trust funds were deposited into Respondent's trust account. (TR, p. 21, L. 7-12). The Respondent was to hold the Anuszkiewicz's deposit until authorized to disburse it, which it was anticipated would occur at the closing of the real estate transaction. Respondent was at no time authorized to use the trust funds for any purpose other than as part of the purchase price of the property. (TR, p. 42, L. 21-25; p. 43, L. 1-3). Following the deposit, the trust account had a balance of $23,033.10. However, on that same day, the following checks were drawn on the trust account: $6,000.00 to Sydney Adler; $5,000.00 to Park Management, Inc; and $2,000.00 to Palm Lake Estates. Also, a ten thousand dollar check dated April 24, 1978, and drawn on the trust account, was made to the order of Sydney Adler. All of the above mentioned checks were paid on or before April 25,

1978. (See Composite Exhibit 2). On the ledger card reflecting these disbursements, it was indicated that these disbursements were loans. (TR, p. 21, L. 10-21). Respondent had a financial interest in both Park Management, Inc. and Palm Lakes Estates. (TR, p. 85, L. 1-5). The checks were signed by Don Klinger, Respondent's now deceased bookkeeper, and endorsed "for deposit only" by someone other than Respondent. (TR, p. 86. to p. 89, L. 7).

Activity in the trust account prior to the time of closing the Anuszkiewicz real estate transaction led to shortages of up to $46,466.90 on June 23, 1978. (TR, p. 22, L. 5-25; p. 23 to 24). When the closing occurred on August 1, 1978, the net cash to seller was $62,480.62. (TR, p. 25, L. 12-23; Exhibit 4). Nevertheless, the balance in the trust account from August 1, 1978 to August 8, 1978 was insufficient to cover the net to seller - approximately $28,000 short (TR, p. 25, L. 21-22; TR, p. 26, L. 1-5), even though on August 1, 1978, $40,510.62 (of a $42,283.12 deposit) had been allocated on the ledger cards to the Anuszkiewicz trust deposit. (TR, p. 23, L. 18-25). The Anuszkiewicz trust deposit would have been sufficient to cover the net to seller if their $22,500.00 initial deposit and the $40,510.62 had been retained in the trust account. However, after August 1, 1978, when a check for $7,500.00 had been issued to Respondent, only $35,802.10 was left in the account. (TR, p. 24, L. 1-4).

A check dated August 8, 1978, signed by Respondent's now

deceased bookkeeper, for $62,480.62 payable to the order of the Lemleys, sellers, was drawn on Respondent's trust account. That check was paid August 16, 1978. (Composite exhibit 2). If cashed on August 8, 1978, the check to the Lemleys would have left an overdraft of about $28,300.00, but on August 9, 1978, there was a deposit of $25,100 attributed on the ledger card to Respondent as the source, leaving a potential overdraft of $3,811.65. On August 10, an additional $3,900.00 of Respondent's funds were deposited, which eliminated the remaining shortage. (TR, p. 24, L. 14-25; TR, p. 26. L. 2-5).

Respondent testified that his bookkeeper, Don Klinger, had signature rights on all accounts, and all bills and receipts came to Mr. Klinger, who moved monies to "make everything work". He also testified that Mr. Klinger wrote checks on Respondent's personal account. (TR, p. 74, L. 6-21). Respondent stated that he relied on Mr. Klinger to not commingle trust funds, and did not check on him. (TR, p. 6 to 15). He further testified that with respect to when the closing was to take place in the Anuszkiewicz matter, and regarding the need to replace the "loaned" Anuszkiewicz funds before closing, he did not give any directions to Mr. Klinger. (TR, p. 80, L. 1-22). He also testified that he never knew the Anuszkiewicz funds or any other funds were used for unintended purposes until he saw the records in conjunction with the investigation of the Bar grievance. (TR, p. 80, L. 23-25; TR, p. 81, L. 1-2). He further noted that he did not monitor his trust account on any periodic basis, and

never looked at the bank statement, (TR, p. 81, L. 20-25), but alleged he had explained to Mr. Klinger that trust funds must be used only for the purposes intended. (TR, p. 81, L. 7-10).

In addition to the above, in several additional respects the Respondent's trust accounts were not in substantial compliance with the minimum requirements for trust accounts: the Referee found that the Respondent commingled his business funds with his trust funds, in violation of Disciplinary Rule 9-102(A), Code of Professional Responsibility (RR, p. 3); used client trust funds for purposes other than the specific purpose for which they were entrusted, in violation of Rule 11.02(4), Florida Bar Integration Rules (RR, p. 3-4); failed to maintain, preserve and/or produce bank statements for a trust account existing between March 1983 through January, 1984, in violation of Section 11.02(4)(c)2g, Bylaws to The Florida Bar Integration Rules (RR, p.4); failed to maintain, preserve and/or produce original cancelled trust checks, client ledger cards, and monthly reconciliations for a trust account existing between March, 1983 through January, 1984, in violation of Sections 11.02(4)(c)2c and 11.02(4)(c)2f,and 11.02(4)(c)3a (i) and (ii), Bylaws to The Florida Bar Integration Rules (RR, p. 4-5); and failed to produce evidence that he had authorized the banks in which he maintained trust accounts to notify The Florida Bar if a trust check were returned due to insufficient funds, which was in violation of Section 11.02(4)(c) 3d, Bylaws to The Florida Bar Integration Rules (RR, p. 5).

In determining discipline, the Referee found the following

factors to be mitigating: full and free disclosure to the disciplinary board, a cooperative attitude toward the proceedings, and an absence of a selfish or dishonest motive. (RR, p. 5). As aggravating factors, he noted Respondent's substantial experience in the law (Respondent was admitted in 1950), the multiple offenses, and Respondent's prior disciplinary history. (RR, p. 6). He observed that had the facts of the instant case been known at the time of the prior discipline action, the sanction in that case would undoubtedly been harsher. (RR, p. 6). Respondent's previous discipline was ordered in 1987.

In The Florida Bar v. Adler, 505 So.2d 1334 (Fla. 1987), Respondent was found guilty of violating Disciplinary Rule 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), and Integration Rule 11.02(3)(a) (commission of an act contrary to honesty, justice or good morals). In 1976, Respondent invested over $4,000 in a joint venture, and prepared the Joint Venture Agreement and other documents for the group of investors. With Respondent's knowledge, the Joint Venture Agreement and a nonrecourse note were backdated to take advantage of a tax deduction for investors which was no longer in effect when the backdated documents were actually executed. At the time of the misconduct, Respondent was an able tax practitioner, well versed in I.R.S. regulations. Respondent was charged with willfully delivering and disclosing a document known to be fraudulent as to a material fact. He pled

guilty, and was sentenced to three years probation and fined ten thousand dollars. (Exhibit 5). The Court stated that the fact that Respondent's misconduct did not injure his client should not be considered in mitigation where a fraud is being perpetuated upon the government. (Exhibit 5).

In the instant case, the Referee recommended that Respondent be suspended for a period of eighteen months, and that he pay the costs of this action. The Board of Governors reviewed this matter, and voted to seek a three (3) year suspension.

SUMMARY OF THE ARGUMENT

The Respondent delegated total responsibility for operation of his clients' trust account to his bookkeeper, now deceased, but failed to take any steps to supervise or monitor the bookkeeper in this operation. During this period of time, clients' trust funds were disbursed to Respondent and to business entities in which Respondent had a financial interest.

A suspension of three (3) years is more appropriate for this misconduct in light of Respondent's prior suspension for conduct involving fraud. The Referee's recommended discipline of an eighteen (18) month suspension would diminish the public's confidence in The Bar's ability to police its own, and would send a message to attorneys that they may escape full responsibility for handling clients' funds by choosing to ignore this responsibility.

ARGUMENT

ISSUE: WHETHER AN EIGHTEEN (18) MONTH SUSPENSION IS A SUFFICIENT DISCIPLINARY SANCTION FOR AN ATTORNEY WITH PRIOR DISCIPLINE FOR CONDUCT INVOLVING FRAUD, WHOSE CLIENTS' TRUST FUNDS ARE USED FOR PURPOSES OTHER THAN THOSE INTENDED.

There is no dispute that clients' funds entrusted to Respondent were used for purposes other than that for which they were intended. These funds were entrusted to Respondent in connection with a real estate closing between his clients, Richard and Sarah Anuszkiewicz, and the sellers, Terry and Lucille Lemley. (TR, p. 64, l. 8-22). In connection with this closing, funds in the amount of $22,500.00 were entrusted to Respondent on or about April 20, 1978. (TR, p. 65, l. 13-15). An additional $40,510.62 was apparently entrusted to Respondent on August 1, 1978. (TR, p. 23, l. 18-25).

These funds were disbursed in varying amounts for purposes totally unrelated to the Anuszkiewicz real estate transaction. The same day that the initial deposit of Anuszkiewicz trust funds was made into the Respondent's trust account, April 20, 1978, checks were drawn on that account as follows:

1. $6,000.00 to Sydney Adler;
2. $5,000.00 to Park Management, Inc.; and
3. $2,000.00 to Palm Lake Estates. (TR, p. 21, L. 7-12).

On April 24, 1978, four (4) days later, a second check in the amount of $10,000.00 was drawn on Respondent's trust account to the order of Sydney Adler. Respondent's own records

characterized these disbursements as "loans."

At the Final Hearing in this matter, Respondent testified that a former bookkeeper by the name of Don Klinger, now deceased, had signed these checks. (TR, p. 86-89). Respondent admitted at the Final Hearing that he had a financial interest both in Park Management, Inc. and in Palm Lakes Estates, and that he had derived financial benefit from the transfer of the funds. (TR, p. 85, L. 2-18).

At the time the Anuszkiewicz closing took place on August 1, 1978, the balance in Respondent's trust account was approximately $28,000.00 short of the $62,480.62 that should have been in Respondent's trust account for the Anuszkiewicz closing. (TR, p. 25, L. 21-22; TR, p. 26, L. 1-5).

A disbursement made on August 1, 1978, in the form of a check for $7,500.00 payable to Respondent, created an additional shortage in the trust account. (TR, p. 24, L. 1-4). On August 9 and August 10, 1978, deposits were made into Respondent's trust account. The deposits covered the shortages. (TR, p. 24, L. 14-25; TR, p. 26, L. 2-5). Respondent testified at the Final Hearing that he had no knowledge at the time the transactions took place that the Anuszkiewicz funds or any other client funds were being used for unintended purposes. (TR, p. 80, L. 23-25; TR, p. 81. L. 1-2). According to Respondent's testimony, his now deceased bookkeeper had signature rights on all accounts, including the trust account and Respondent's personal accounts, and that the bookkeeper received all bills and receipts and

assumed responsibility for the transfer of funds between various accounts. (TR, p. 74, L. 3-21).

Despite this alleged delegation of complete responsibility to his bookkeeper, Respondent indicates that he took no steps to monitor his trust account on a periodic basis. (TR, p. 80, L. 21-25).

Evidence presented at the Final Hearing, including Respondent's own testimony, establishes, by clear and convincing evidence, that clients' funds entrusted to Respondent were misapplied for the benefit of Respondent and for business entities in which Respondent had a financial interest. In The Florida Bar v. Miller, 548 So.2d 219 (Fla. 1989), this Court suspended an attorney for ninety (90) days for using trust funds for purposes for which they were not intended. As noted in Miller:

> "Rule 5-1.1 states unequivocally: '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.' Rule 5-1.1, Rules Regulating The Florida Bar."

Miller, like Respondent, had failed to utilize proper record keeping procedures, had shortages in his trust account, and had used entrusted funds for purposes other than those for which said funds were entrusted. Id. at 220. Rejecting the Referee's recommendation of a public reprimand, this Court specifically noted that Miller "had no prior discipline, no dishonest intent and apparently no knowledge of the problems in his trust

account." Miller at 220-221. Respondent, like Miller, asserted he had no knowledge of the problems in his trust account. Unlike Miller, however, Respondent has a history of serious disciplinary violations . As further noted in the Miller opinion, the fact that there were no losses to clients resulting from the trust deficits was fortuitous for both the attorney and his clients.

In The Florida Bar v. Whigham, 525 So.2d 873, 874 (Fla. 1988), this Court found gross negligence in the management of the attorney's trust account, but no willful misappropriation of funds. Rejecting The Bar's recommendation of disbarment, this Court nevertheless suspended Whigham for three (3) years, noting the following:

> "It is significant that no evidence exists to suggest that any of Whigham's clients suffered any financial injury because of the mismanagement. No client has demanded money or complained of a loss or shortage of money, and, in fact, three of Whigham's clients testified before the referee that the respondent had represented their interests satisfactorily."

Whigham at 874.

Like Whigham, Respondent's clients suffered no financial injury because of his mismanagement, did not complain of any loss or shortage, and one of Respondent's clients, Ms. Anuszkiewicz, testified at the final hearing that she was not angry or dismayed with Respondent over the misuse of her funds. (TR, p. 66, L. 8-13. Respondent shares another similarity with Whigham in that they both had been previously disciplined. Whigham's previous discipline was for conduct not as serious in nature as

Respondent's previous discipline. Whigham had been publicly reprimanded for negligently commingling trust funds with personal funds, for having overdrafts, trust account shortages and incomplete records. Id. at 874. Respondent and Whigham also shared as mitigating factors their cooperation with The Florida Bar.

This Court, in 1987, ordered Respondent suspended for a period of ninety (90) days for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation for his participation in the fraudulent backdating of documents relating to a joint venture.

Participation in activities involving fraud is indicative of an individual who fails to possess the requisite moral character for attorneys. This previous breach of ethics by Respondent serves as a warning to the public and to this Court. In the past, Respondent fell seriously short of the standards expected of an officer of the court. Respondent's misconduct in the instant case reveals additional proof of deficits in his character.

Respondent's previous discipline is of a much more serious nature that Whigham's previous discipline. In rendering discipline, this Court frequently notes previous disciplinary history as a reason for enhancing discipline in a later case. The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980) and The Florida Bar v. Bern, 425 So.2d 526 (Fla 1982) (Rehearing denied 1983). In The Florida Bar v. Golden, 561 So.2d 1146, 1147

(Fla. 1990), this Court, citing The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981), noted that cumulative misconduct can be found when misconduct occurs near in time to the other offenses, regardless of when discipline is imposed.

The Florida Standards for Imposing Lawyer Sanctions, Section 9.22(a), lists prior discipline offenses as a factor that may justify an increase in the degree of discipline to be imposed. Further, absent aggravating or mitigating factors, suspension is appropriate when a lawyer knows or should know he is dealing improperly with client property and causes injury or potential injury to a client. Section 4.12, Florida Standards. Respondent clearly should have known that his clients' trust funds were being improperly handled. Fortunately, no clients suffered injury as a result of the improper handling of trust funds.

Respondent has alleged that, in the instant case, he delegated full and total responsibility for clients' trust funds to a bookkeeper. He also claimed that he took no steps to monitor or supervise the safekeeping of these funds. He should not now be allowed to avoid the full consequences by claiming a lack of knowledge. When a lawyer agrees to hold in his trust account funds belonging to clients, he should not be allowed to authorize a nonlawyer to manage those funds unless he personally ensures that clients' funds are properly safeguarded and that trust account records are kept in compliance with the Rules Regulating Trust Accounts.

Respondent's gross negligence in the handling of his trust

account resulted in the use of clients' funds for the benefit of Respondent and his business entities. Respondent should not now be allowed to escape full responsibility based on a claim of ignorance. A failure to appropriately discipline Respondent for his conduct in this case would undermine the public's confidence in the legal profession and in the ability of the profession to appropriately sanction its own members. An eighteen (18) month suspension is simply not sufficient for Respondent's misconduct in this case, especially in light of Respondent's troubling disciplinary history.

In The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), this Court set forth three (3) purposes which should be kept in mind in administering a disciplinary sanction. One (1) of these purposes is to deter others who might be prone or tempted to become involved in like violations. A failure to appropriately discipline Respondent sends a message to other attorneys that they may escape full responsibility for misuse of clients' funds by simply averting their eyes.

CONCLUSION

An eighteen (18) month suspension is not a sufficient disciplinary sanction for an attorney with prior discipline for conduct involving fraud, whose clients' trust funds are used for purposes other than that for which they were entrusted. A three (3) year suspension is more appropriate. It would serve as notice to the public that an attorney who engages in misconduct that endangers clients' funds, and who has a history of serious misconduct involving fraud, will receive stern treatment. A three (3) year suspension would also serve as a warning to other attorneys who might be tempted to engage in such conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished by U.S. Regular Mail to Theodore Klein, Counsel for the Respondent, at 100 S.E. Second Street, 36th floor, Miami, Florida 33131; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida 32399-2300, this 8th day of January, 1991.

SUSAN V. BLOEMENDAAL