IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SYDNEY ADLER,

Respondent.

CASE NO. 75,670

TFB NO. 88-11,003(12C)

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COMPLAINANT'S REPLY BRIEF AND ANSWER TO RESPONDENT'S CROSS-APPEAL

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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. "RC" will denote the Response to Complaint. "RA" will denote Respondent's Answer Brief and Cross-Appeal. "RR" will denote the Report of Referee.

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STATEMENT OF THE FACTS

In his Answer Brief and Cross Appeal, Respondent's description of his misconduct which previously resulted in a ninety day suspension is incomplete. Respondent stated that this Court previously suspended him for his acquiescence to the backdating of documents (RA p.20; RA p.7). This suggestion is presented, among other places, in the Argument and the Statement of Facts: "In 1987, this Court suspended Mr. Adler from the practice of law for a period of ninety (90) days because two documents he had prepared were backdated with his knowledge." (RA p.5; RA p.16). Actually, the misconduct was far more serious than these statements suggest. In fact, his misconduct included his preparation of a Joint Venture Agreement and nonrecourse notes for a joint venture in which he invested. These documents were backdated with his knowledge in an attempt to try to take advantage of a tax deduction provision which had ceased to apply to new investors. Respondent then claimed a deduction on his tax return based on the fraudulent date of execution. He pled guilty to willfully delivering and disclosing a document known to be fraudulent as to a material fact and was sentenced to three (3) years probation and fined ten thousand dollars ($10,000). The Florida Bar v. Adler, 505 So.2d 1334, 1335 (Fla.1987).

In his Answer Brief and Cross Appeal, Respondent notes that there was a "book" shortage rather than an actual bank overdraft in the instant case. (RA, p.4). Records presented by Respondent to The Florida Bar demonstrated that checks on Respondent's client trust account were drawn to pay on his personal debts.

Based on the dates his records indicate these checks were issued, there were insufficient funds in the trust account to meet all obligations to clients, i.e. shortages. Respondent prepared and presented a computer printout of his account to The Florida Bar, and gave the appearance of being forthright. However, Respondent then suggested at the referee level that there was no proof the checks were "issued," that perhaps they were held in the office and therefore there were no shortages. This argument apparently was not persuasive. After hearing the testimony and argument, the Referee found Respondent guilty of using client trust funds for purposes other than the specific purpose for which the funds were entrusted to him. (RR, p.4).

ARGUMENT

The Respondent claims it is readily apparent from the Referee's report that he sought to punish Mr. Adler anew for a prior violation as if it were a present act of fraud coupled with trust account violations. (RA, p.20). Respondent labeled this an "improper after-the-fact mind reading impulse" by the Referee, and says the Referee appears to be imposing a sanction as if the initial fraud had not been punished. (RA, p.20). The Respondent complains that the Referee's discipline is a de novo discipline for the prior offense. Id.

The Referee does note that the events in the instant case occurred prior to those causing the previous disciplinary action. He writes "had the instant facts been known or prosecuted prior to that action, however, the punishment would have undoubtedly been harsher." However, there is no indication he then improperly enhanced his current recommendation in total disregard for previously imposed discipline. It is certainly not improper for the Referee, in recommending discipline, to consider a prior disciplinary record regardless of whether the underlying rule violations occurred before or after the misconduct in the instant proceeding. Further, the Referee is not required to judge the severity of that past misconduct based solely on the discipline imposed. He may consider the nature of the past offense together with the conduct in the current case, and from that composite picture make a judgement about what discipline is currently warranted. The Rules specifically provide that prior disciplinary offenses and multiple offenses may justify an increase in the

discipline to be imposed.

Respondent suggests that the Referee's application of Standard 4.12, Standard for Imposing Lawyer Sanctions, was improper. (RA, p.9-12). To support his argument he cites The Florida Bar v. Hosner, 513 So.2d 1058 (Fla. 1987), in which a public reprimand was given to an attorney who had trust account shortages for three months and overages for seven (7) months. Hosner had engaged in commingling, and had no misappropriation of trust funds. This Court found 4.12 was not the appropriate Rule to use in setting discipline in Hosner because: "The evidence showed and the Referee found negligence and potential client injury. Id. (emphasis supplied).

In the instant case the Referee considered Rule 4.12 and found it applicable. Rule 4.12 states: "Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Rule 4.12 differs from 4.13 in that the former reads "knows or should know", and the latter "negligent". The Referee must determine which of the two (2) rules is applicable given the facts of the case. The Respondent had been an attorney for approximately twenty eight (28) years when the trust account violations occurred. He was admitted to The Florida Bar in 1950. RR. p.6. The Anuszkiewicz transaction occurred in 1978. TR, p.19, L.17-25. He was a businessman, as well as an experienced attorney. Clearly he "knew or should have known" what occurred in his client trust account. The inability to disprove his claim that he turned over responsibility for the

trust account to his now deceased bookkeeper and then merely failed to supervise him does not alter the fact that Respondent "knew or should have known" client trust funds were used for Respondent's business affairs. The application of Standard 4.12 is not inappropriate under the facts of this case.

Respondent lists several cases in support of his argument that the appropriate discipline is a reprimand, suggesting the conduct therein is similar to or more severe than his own. However, there are significant differences between the facts of most cases cited and the instant case. In The Florida Bar v. Borja, 554 So.2d 514 (Fla.1990), Borja received a public reprimand after his trust accounts were found on two (2) occasions to have technical violations of trust accounting regulations. He was commingling and had some negative balances. The Court specifically noted Mr. Borja had no prior discipline and there was no harm to clients. Borja testified he had delegated responsibility to his secretary. Unlike Borja, Respondent has a previous disicpline for misconduct as an attorney. Likewise, there is no prior discipline reported in the following cases cited by Respondent: The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986), (also no misuse of client funds); The Florida Bar v. Suprina, 468 So.2d 98 (Fla.1985), (also no deficits or overdrafts); The Florida Bar v. Armas, 518 So.2d 919 (Fla. 1988) (also no misuse of client trust funds); The Florida Bar v. Hero, 513 So.2d 1053 (Fla. 1987) (also no misuse of client funds); The Florida Bar v. Lumley, 517 So.2d 13 (Fla. 1987) (no wrongful intent, but knowingly used entrusted funds); The Florida

Bar v. Heston, 501 So.2d 597 (Fla. 1987) ($7,305.18 shortage due to poor record keeping and supervision, no indication the money was applied to Heston's business matters); The Florida Bar v. Reese, 247 So.2d 718 (Fla. 1971) (approximately $497.00 of client money commingled in his personal account applied to his personal IRS obligation, without intent to deprive the client of the funds).

In The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986), as noted by Respondent, Mitchell did receive a public reprimand for a second trust account violation based on poor record keeping and co-mingling. The Court opinion does not indicate any use of client funds for unauthorized purpose, nor a prior conviction for fraud as in Respondent's case.

A few corrections in Respondent's description of cases cited by The Florida Bar are warranted. For example, in referring to The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980), Respondent indicates that Greenspahn refused to return funds to a client until after a grievance committee hearing on the matter. The Court opinion, however, notes that the Referee found that Greenspahn did return the funds, but part was returned after the grievance committee hearing. Further, the opinion indicates that the misconduct occurred during a period when Greenspahn had difficulties with the Internal Revenue Service, which apparently were the very same problems which led to the prior discipline of a public reprimand. The Florida Bar v. Greenspahn, 386 So.2d 523, 524 (Fla. 1980). Even though the same underlying problems led to both Bar cases against Greenspahn, the Court took the

prior misconduct into account in imposing a suspension. Id.

Respondent points out that the Court in The Florida Bar v. Bern, 425 So.2d 526, 528 (Fla. 1983) noted "cumulative misconduct of a similar nature should warrant even more severe discipline than might dissimilar conduct." (RA p.26). It is suggested that in the instant case there are not numerous violations of a similar nature. (RA, p.26). The facts show the violations have significant similarities. Both the instant case and Respondent's past discipline action involve Respondent's business dealings. And in both he acknowledges responsibility only for passive acts (acquiescing and failure to supervise - ie, looking the other way), even while gaining or attempting to gain economic advantage for actions he attributes to others.

One of Respondent's themes is that he has shown rehabilitation. Respondent notes as evidence of interim rehabilitation that he voluntarily turned over documents which he knew would implicate him. These are not, it is said, the acts of a deceitful or dishonest person. (RA, p.13). However, the records "voluntarily given" had been subpoenaed. Had Respondent not "voluntarily" turned them over, the Bar could have reconstructed them from Bank records at great expense to the Respondent. This cooperation was wise, but too much is being made of its significance. Further, to put Respondent's claim of lack of deceitfulness in a proper perspective, this Court should consider Respondent's argument to the Referee that the Bar made no showing that he had trust account funds from March 1983 through January 1984. Therefore, he argued, there was no

requirement for trust accounting records. (RR, p.2). In spite of Respondent's argument, the Referee found that contrary to Respondent's assertions, the exhibits demonstrated that there were deposits and disbursements of trust funds during the period in question. (RR, p.3). Respondent's conduct is not as devoid of deceitfulness and dishonesty as he would have the Court believe. Perhaps Respondent "already learned from prior experience" (RA, p.22), but not in any positive sense.

In the midst of citing many cases allegedly supporting a discipline less than that proposed by the Referee, Respondent notes that each case comes down to its unique facts, and discipline in any given case is taylored to the specifics of the attorney and the circumstances. (RA, p.16). This is a well settled principle of law with which the Bar agrees. Respondent's overall conduct plus his past history of discipline warrant a suspension.

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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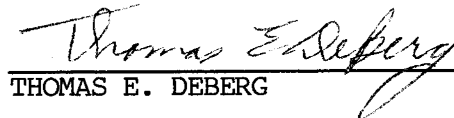
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Complainant's Reply Brief and Answer to Respondent's Cross-Appeal has been furnished by U.S. Regular Mail to Theodore Klein, Counsel for Respondent, at 100 Southeast 2nd Street, Miami, FL 33131; and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 13 day of March, 1991.



THOMAS E. DEBERG