047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

HOWARD NEU,

Respondent.

_____/

Supreme Court Case
No. 76,158

COMPLAINANT'S REPLY BRIEF TO RESPONDENT'S ANSWER BRIEF AND COMPLAINANT'S ANSWER BRIEF TO INITIAL BRIEF OF CROSS/COMPLAINANT

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Complainant reiterates the information stated in the Statement of the Case and Statement of The Facts in the Initial Brief of The Florida Bar. In addition, it accepts the Statement of the Case as recited in Respondent's Answer Brief.

SUMMARY OF THE ARGUMENT

It is not necessary to prove that the respondent had the intention of depriving his ward of funds permanently in order to prove that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation or conduct that adversely reflects on his fitness to practice law.

A suspension of three years is an appropriate discipline for an attorney who misuses the funds of clients or a ward. Although the funds were returned, with interest, prior to the shortages being discovered, a suspension for three years is appropriate. Respondent submitted a Consent Judgment. The Florida Bar rejected the Consent Judgment and directed Bar Counsel to seek disbarment. Although the referee recommended a form of discipline considerably less than disbarment, it was proper for the referee to tax costs against the respondent.

ARGUMENT

I

THE REFEREE ERRED WHEN HE FOUND NO EVIDENCE THAT NEU ENGAGED IN CONDUCT THAT INVOLVES DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION, BECAUSE HE HAD NO INTENT TO DEPRIVE HIS CLIENTS PERMANENTLY OF THEIR FUNDS.

This Court has the authority to disapprove findings of the referee which are errors of law. The Florida Bar v. Saxon, 379 So.2d 1281, 1283 (Fla. 1980). In the case at hand, the referee made an error of law when he found respondent not guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation because there was no intent to permanently deprive clients of their funds.

The respondent, in his brief, on page 7, states, "The Bar seeks to reinterpret the facts that Mr. Neu had intent to deprive his clients permanently of their funds."

The Bar submits that even if the respondent intended to deprive his clients of their funds temporarily to pay his own income taxes, this act is in violation of DR 1-102(A)(4), which proscribes conduct involving dishonesty, fraud, deceit or misrepresentation. It does not matter whether he returned the funds. The violation occurred when the respondent improperly used these funds.

The evidence is clear and convincing that the respondent misappropriated funds belonging to the ward for his own use. In paragraph 4(c), Page 2 of the Stipulation (Appendix Ex. A to Initial Brief of The Florida Bar), it states,

> On January 7, 1987, while serving as guardian of McKinney's property, Mr. Neu wrote a check on the guardianship account for $5,648.28, payable to the Internal Revenue Service. That check was written for Mr. Neu's own use, rather than for the benefit of his ward.

Although the $5,648.28, plus $50.00 in interest, was returned to the guardianship account by March 1, 1987, the funds were, nevertheless, obtained by Mr. Neu by means of dishonesty, fraud, deceit or misrepresentation. The fact that the funds were returned is a matter in mitigation, but is not a defense to violating DR 1-102(A)(4) or DR 1-102(A)(6).

In The Florida Bar v. McShirley, Supreme Court of Fla., Case No. 74,086, Jan. 10, 1991 (16 FLW S83) this Court found McShirley guilty of dishonesty, fraud, deceit or misrepresentation and conduct that adversely reflects on his fitness to practice law, despite the fact that McShirley did not intend to permanently deprive his clients of their funds. Like Mr. Neu, Mr. McShirley returned the funds before the losses were discovered.

Mr. Neu clearly and convincingly misappropriated funds which were to be used for the benefit of a brain-damaged child.

II

THE CUMMULATIVE VIOLATIONS AND THE SERIOUS NATURE OF THE OFFENSES WARRANT A THREE YEAR SUSPENSION.

Although the referee recommended a 90 day suspension (page 7 of Report of Referee), the respondent contends that a public reprimand is appropriate in this case (page 27 of Answer Brief of Respondent - Initial Brief of Cross Complainant).

The Florida Bar reiterates its argument as shown in the Initial Brief of The Florida Bar and emphasizes that this case has numerous aggravating factors. The respondent was entrusted with safeguarding the funds of a brain-damaged child and he betrayed that trust by misappropriating thousands of dollars.

There was not one isolated incident, but Mr. Neu improperly withdrew funds on several occasions, as indicated on pages 10-11 of The Initial Brief of The Florida Bar. Moreover, the respondent submitted false accountings to the court, in order to cover up the defalcation of funds. See Exhibits 2,3, & 4, and Transcript of October 3, 1990, beginning on page 71, line 19 to page 74, line 9. The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981) authorizes uncharged misconduct for the purpose of considering an appropriate discipline.

While Mr. Neu has no prior disciplinary history, the numerous unethical acts committed by Mr. Neu, as described in the record and in the Bar's Initial Brief, constitute cummulative misconduct - which authorizes the imposition of discipline more severe than for isolated misconduct. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979). The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1983) and The Florida Bar v. Lord, 443 So.2d 983, 986 (Fla. 1983).

In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), this Court stated, "... misuse of client's funds is one of the most serious offenses." In addition, this Court stated that it will not be reluctant to disbar an attorney for this type of offense, even though no client is injured.

In the McShirley case, supra, this Court suspended McShirley for three years for defalcation of client funds, even though the funds were returned before the losses were discovered. Accordingly, the Bar contends that a three year suspension is appropriate in this case.

III

THE REFEREE'S RECOMMENDATION CONCERNING COSTS SHOULD BE APPROVED

The referee recommended that the following costs were reasonably incurred by The Florida Bar and that said costs should be taxed to the respondent:

1. Administrative costs (Pursuant to Rule 3-7.6(K)(L)(5)	$ 500.00
2. Court Reporter costs	996.46
3. Cost of audit	2,009.00
4. Travel expenses of Bar Counsel	54.49
TOTAL COSTS (See page 15 of Report of Referee)	**$ 3,559.95**

The respondent contends that The Florida Bar should bear its own costs of these proceedings (pages 28-31 of Answer Brief of Respondent, Initial Brief of Cross/Complainant). It is the respondent's position that because the Bar rejected his Consent Judgment and requested disbarment, the Bar should pay its own costs. He argues that if the Consent Judgment had been accepted there would be no reason to incur expenses for the trial by referee. Also, it is obvious that the recommended discipline was considerably less than disbarment. Therefore, the respondent contends that the costs were brought about by the Bar's unreasonable position. In the case at hand, the respondent

agreed to the facts mentioned in the Complaint. However, he contends he did not plead guilty to violations of specific rules. However, please note that the Stipulation, Appendix Exhibit A to the Initial Brief of The Florida Bar, states, on page 8, as follows:

ISSUE TO BE TRIED

> There are no material facts in dispute. The only issue to be tried by the referee, pursuant to Rule 3-7.5 of The Rules Regulating The Florida Bar is the discipline to be imposed on Mr. Neu for the actions noted above.

Considering the foregoing and the finding of guilty by the referee, it is obvious that the respondent was guilty of the allegations in the complaint. Even if this Court should approve the referee's recommendations of not guilty of some of the violations, most of the facts as alleged in the Complaint were not contested. Moreover, it is possible that this Court will find the respondent guilty of all of the specific violations shown in the Complaint.

In The Florida Bar v. Lehrman, 485 So.2d 1276,1278 (Fla. 1986), this Court stated, "... We adhere to the general rule that an attorney found guilty of the charges brought by the Bar will have the costs assessed against him."

Accordingly, since all or almost all of the allegations in the Complaint were not contested, the referee did not abuse his discretion in recommending that the costs be taxed to the respondent. Moreover, it was not unreasonable of The Florida Bar to seek disbarment, considering the serious nature of the allegations that were made against the respondent.

CONCLUSION

WHEREFORE, The Florida Bar respectfully submits that a lawyer who misappropriates funds of a ward or client is guilty of dishonesty, fraud, deceit or misrepresentation, and conduct that adversely reflects on his fitness to practice law, even though there was no intent to deprive the ward or client of his funds permanently. Although the respondent returned the funds, with interest, prior to the loss being discovered, he should nevertheless be found guilty of violating DR 1-102(A)(4) and DR 1-102(A)(6)of the Code of Professional Responsibility. Also, a three year suspension is appropriate in this case. See The Florida Bar v. McShirley, Case no. 74,086, Jan. 10, 1991 (16 FLW S83). Since the referee recommended that the respondent be found guilty of almost all of the facts alleged in the complaint (except for violations of certain disciplinary rules), the referee's recommendations concerning costs should be approved. Also, even though the referee recommended less discipline than that set forth in the Consent Judgment, the respondent should, nevertheless, be responsible for costs. The Florida Bar's recommendations are set forth on page 18 of the Initial Brief of The Florida Bar.

Respectfully submitted,

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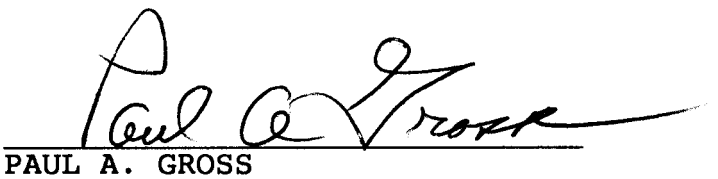
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 11, 1991, the original and seven copies of the foregoing Complainant's Reply Brief to Respondent's Answer Brief and Complainant's Answer Brief to Initial Brief of Cross/Complainant were mailed by Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed by U.S. Certified Mail, Return Receipt Requested No. P 110 986 648, to Howard Neu, Respondent, 12955 Biscayne Blvd., North Miami, Florida 33181, and a copy was mailed by regular mail to John A. Boggs, Director, Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300. NOTE: Arthur J. England, who was Counsel for Respondent at the trial by referee, informed Bar Counsel that he is not representing the respondent in his appeal. Therefore, he was not provided a copy of this brief.



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