047 w/app 11-18

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

HANS C. FEIGE,

Respondent-Appellant.

Supreme Court Case
No. 76,408

The Florida Bar File
No. 89-51,445 (17B)

ANSWER BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Hans C. Feige, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the Report of Referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. The symbol "PTS" will be used to designate the parties' Joint Pretrial Stipulation.

STATEMENT OF CASE AND FACTS

The Respondent's version of the facts and case is incomplete and argumentative. Therefore, The Florida Bar feels constrained to set forth its version of the same below.

The Bar initiated its investigation of the Respondent on August 10, 1988. Probable cause was found by Grievance Committee 17"B" on June 26, 1990. The Bar filed its Complaint on July 30, 1990. On January 31, 1991, the Referee entered an order on The Florida Bar's Renewed Motion to Compel and for Sanctions, which directed the Respondent to produce certain requested discovery by a certain date and time or have his pleadings struck and a default entered against him. The Respondent did not give discovery in the required time frame and therefore his pleadings were struck and a default was entered against him. However, this matter proceeded to final hearing on discipline based upon certain stipulated facts. The final hearing was held on April 19, 1991. The Referee's findings are set forth below.

COUNT I

On November 10, 1975 Michael Gale ("Gale") entered into a property settlement agreement with Debra Whalen ("Whalen"), formerly known as Debra Gale. (RR 2) Said agreement called for the payment by Gale to Whalen, of permanent periodic alimony in the amount of two hundred dollars ($200.00) per month. (RR 2) The alimony was terminable upon death or remarriage. (RR 2) This agreement to pay alimony was incorporated into the final divorce decree and was never modified by court order or agreement of the parties to the divorce. (RR 2)

Pursuant to the parties' agreement, the aforementioned alimony was paid to Whalen's attorney for later disbursement to her. (RR 3) Feige did not represent Whalen during the initial stages of her divorce, but he was retained on or about November 16, 1981, which was after the divorce was finalized. (RR 3) He handled a custody problem, as well as several other matters for Whalen. (RR 4) Some time after November 16, 1981, Gale started sending his alimony checks to Feige. (RR 3 and 4)

On December 24, 1983, Whalen was remarried. (RR 3) In fact, Feige, a notary public, performed the marriage ceremony. (RR 3) The Respondent did not advise Gale of Whalen's remarriage and continued to accept alimony payments. (RR 3 and 4)

Between January 1984 and September of 1985, Feige received four thousand two hundred dollars ($4,200.00) from Gale and pursuant to his agreement with Whalen, he kept the same as attorney's fees which had accrued due to Feige's representation of Whalen on other matters. (RR 4)

The Referee found that Feige, by continuing to accept Gale's checks, not only assisted Whalen in perpetrating a fraud upon Gale, but he also engaged in conduct which amounts to theft of monies by fraud. (RR 6)

COUNT II

Gale discovers Feige and Whalen's fraud in November of 1985 and sued them both concerning the foregoing matters. (RR 5) Feige, a material witness to the events in question and a party defendant, represented himself and Whalen in this lawsuit. (RR 5) Whalen

consented to this inherent conflict of interest, but the Referee found that this type of conflict could not have been consented to. (RR 6 and 7)

The Referee found the Respondent guilty of the following:

AS TO COUNT I

Article XI, Rules 11.02(2) [Violation of the Code of Professional Responsibility is cause for discipline.], and 11.02(3)(a) [The commission by a lawyer of any act contrary to honesty, justice or good morals is cause for discipline.] of the Integration Rules of The Florida Bar; Disciplinary Rules 1-102(A)(1) [A lawyer shall not violate a disciplinary rule.], 1-102(A)(4) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.], 1-102(A)(5) [A lawyer shall not engage in conduct that is prejudicial to the administration of justice.], 1-102(A)(6) [A lawyer shall not engage in conduct that adversely reflects on his fitness to practice law.], 7-102(A)(7) [A lawyer shall not counsel or assist his client in conduct that the lawyer knows to be fraudulent.], and 7-102(B)(1) [A lawyer who receives information that his client has perpetrated a fraud, shall call upon his client to rectify the same and if the client refuses he shall reveal the fraud to the affected person.] of the Code of Professional Responsibility.

AS TO COUNT II

Article XI, Rules 11.02(2) [Violation of the Code of Professional Responsibility is cause for discipline.], and 11.02(3)(a) [The commission by a lawyer of any act contrary to honesty, justice or good morals is cause for discipline.] of the Integration Rules of The Florida

Bar; Disciplinary Rules 1-102(A)(1) [A lawyer shall not violate a disciplinary rule.], 1-102(A)(5) [A lawyer shall not engage in conduct that is prejudicial to the administration of justice.], 1-102(A)(6) [A lawyer shall not engage in conduct that adversely reflects on his fitness to practice law.], 5-101(A) [Except with client consent, a lawyer shall not accept employment if his professional judgment will be affected by his own financial or personal interest.], and 5-101(B) [A lawyer shall not accept employment when he is a witness to the pending litigation.] of the Code of Professional Responsibility; Rules 3-4.2 [Violation of the Rules of Professional Responsibility is cause for discipline.], and 3-4.3 [Commission by a lawyer of any act contrary to honesty and justice may be cause for discipline.] of the Rules of Discipline; Rules 4-1.7(b) [A lawyer shall not represent a client when the lawyer's exercise of professional judgment may be limited by the lawyer's own interests.], and 4-8.4(a) [A lawyer shall not violated the Rules of Professional Responsibility.] of the Rules of Professional Conduct.

The Respondent filed a timely Petition for Review. He disputes the aforementioned findings of guilt and in particular, the findings of guilt as to Disciplinary Rules 5-101(A), 5-101(B), and 7-102(A)(7) and 7-102(B)(1) of the Code of Professional Responsibility.

SUMMARY OF ARGUMENT

The Respondent's actions in continuing to accept Gale's alimony checks were fraudulent and amount to the theft of over four thousand dollars ($4,000.00) by fraud. The Respondent contends that he should be found not guilty of both the theft by fraud charge, as well as the conflict of interest charge. His initial brief fails to show that the Referee's findings are clearly erroneous or lacking in evidentiary support.

The Respondent's major argument is that public policy concerns dictate that he be found not guilty, as he contends he had no obligation to inform Gale of the ongoing fraud that the Respondent participated in and financially benefited from. The Respondent would have this Court believe that it was his obligation to his client that prevented the disclosure of the Respondent's fraudulent actions in continuing to accept the alimony checks from Gale. While the Bar recognizes that attorneys have certain fiduciary obligations to their clients, these client obligations are superseded by an attorney's obligation to the courts and to our system of justice and in particular an attorney's obligation not to engage in criminal or fraudulent conduct. The Respondent, in this instance, has failed to meet the high standards of our profession and he ought to be disciplined therefore. The Referee's recommended sanction of a two year suspension from the practice of law is consistent with the precepts of lawyer discipline and ought to be adopted by this Court.

ARGUMENT

POINT I

THE RECORD CONTAINS SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT THE REFEREE'S RECOMMENDATION OF GUILT.

The Respondent has challenged the Referee's findings of guilt. It is well settled that a referee's findings are presumed to be correct and that the Supreme Court "cannot re-weigh the evidence or substitute its judgement for that of the trier of fact." The Florida Bar v. Scott, 566 So.2d 765, 767 (Fla. 1990), The Florida Bar v. Colclough, 561 So.2d 1147, 1150 (Fla. 1990). Furthermore, the Referee's findings will be upheld unless found to be "clearly erroneous or lacking in evidentiary support." Id. The party seeking review has the burden to demonstrate that the Referee's Report is erroneous, unlawful or unjustified. Scott at 767. In the case at hand, the Respondent has failed to demonstrate that the Referee's findings were clearly erroneous or lacking in evidentiary support.

A) **The Theft**

The Respondent's actions in continuing to accept Gale's checks were fraudulent and amounted to theft of money by fraud. (RR 6) The Respondent believes otherwise and would have this Court find that he has not violated Disciplinary Rules 7-102(A)(7) and 7-102(B)(1),

Code of Professional Responsibility.[1] Presumably, the Respondent is not challenging the other rule violations that are set forth in the Report of Referee in regards to Count I of the Bar's Complaint.[2]

Disciplinary Rule 7-102(A)(7) states, in pertinent part, that a lawyer, while representing a client, shall not "assist his client in conduct that the lawyer knows to be illegal or fraudulent." While Disciplinary Rule 7-102(B)(1) mandates that

> "A lawyer who receives information clearly establishing that his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal."

The Respondent launches two attacks on the Referee's findings of guilt as to these two rules. First, he contends that there is inadequate evidentiary support for these findings. Secondarily, he argues that he had conflicting ethical concerns which prevented him from informing Gale of the ongoing fraud.

1) Rule Violations

This case proceeded to final hearing based upon a joint pretrial stipulation.[3] The stipulation set forth 25 paragraphs of stipulated

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[1]The activity complained of occurred before January 1, 1987 and therefore all references will be to the Code of Professional Responsibility rather than the Rules of Professional Conduct.

[2]Of particular interest is the finding of guilt as to Disciplinary Rule 1-102(A)(4) which states that "a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

[3]The Joint Pretrial Stipulation is attached hereto as an appendix.

facts. The stipulation also included four documents[4] which the parties thought relevant to the matters at hand. Lastly, the stipulation included six separate, but interrelated, contested issues for resolution by the Referee. In essence, these six issues required the Referee to resolve an issue of law based upon the documents submitted and the parties' stipulated facts. The Respondent contends that there was no testimony adduced at trial and therefore he must be found not guilty. While it is true there was no sworn testimony at the final hearing, the Referee gave the Respondent ample opportunity to explain his side of the story, inclusive of accepting facts outside the parties' Joint Pretrial Stipulation.

The Referee's finding of guilt as to Disciplinary Rule 7-102(A)(7) [Assisting a client in fraudulent conduct] is predicated upon the following salient facts:

1) Gale's obligation to pay alimony to Whalen ceased upon remarriage. PTS page 1, para 3;

2) Whalen remarried. PTS page 2, paras 10 and 11;

3) At Whalen's instruction and request, the Respondent did not notify Gale of the remarriage. PTS page 2, para 12;

4) Gale did not learn of the remarriage and continued to make alimony payments to Whalen in care of the Respondent. PTS page 3, paras 5 through 17;

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[4]These documents are the Gale's Property Settlement Agreement, The Final Judgement on Supplemental Petitions for Modification, Melvyn Frumkes, Esquire's April 3, 1981 letter and Barry Roderman, Esquire's March 25, 1981 letter. The same are attached hereto in the appendix.

5) The Respondent followed Whalen's directions as to the disbursement of the alimony payments. PTS page 3, para 18;

6) The Respondent kept $4,200.00 from the Gale alimony payments as satisfaction of legal fees due and owing from Whalen. PTS page 3, para 18.

The Referee correctly concluded from the above agreed upon facts, the documents attached to the Pretrial Statement and the Respondent's explanations that the Respondent followed Whalen's directions on the continued acceptance and disbursement of Gale's alimony payments, notwithstanding Whalen's remarriage. The Referee then concluded that the foregoing violated Disciplinary Rule 7-102(A)(7).

The Referee's findings of guilt as to Disciplinary Rule 7-102(B)(1) [Disclosing fraud to third party.] is predicated upon the facts referenced above. Of particular interest is the following exchange between the Referee and the Respondent.

> Referee: Did you have a cutoff period at which time you would stop accepting the two hundred dollars a month or would you have accepted the two hundred dollars a month so long as he continued to send it?
>
> Mr. Feige: For so long as he continued to send it . . . (TT p. 49 l. 23 to p. 50 l. 4)

The Respondent sees nothing wrong with his conduct and expressed his opinion that he would have continued to accept Gale's alimony payments.

At trial and on appeal, the Respondent has contended that there should be a $50.00 a month offset based upon the following passage from the final judgement on supplemental petitions for modification:

> 3. If the wife resumes psychiatric or psychological therapy on a regular basis with a competent and well trained psychiatrist or psychologist, it shall then be the obligation of the husband, as additional alimony to the wife, to pay up to $50.00 per month upon proper showing that such expense has been incurred to help pay the costs of such therapy, with the exception that there will be exempt therefrom any charges that are available by way of medical insurance." (Emphasis added)

The Respondent contends that he is entitled to an offset based upon this passage in the final judgement on supplemental petitions for modification[5] and further contends that if this $50.00 monthly payments had continued to accrue after the remarriage, a zero balance would have been reached by April of 1987. The Referee disagreed with this proposition as no "proper showing" had been made by Whalen to entitle her to said $50.00 payment.[6] As there was no "proper showing", we never have to decide if the $50.00 payment would survive the remarriage or if the Respondent's assertion that he would have kept accepting Gale's $200.00 alimony checks indefinitely (TT p. 50, l. 3 and 4) and presumably even after his alleged offset had been reduced to a

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[5]The Respondent's Initial Brief at page 6 states that the Bar agrees that Whalen was entitled to the $50.00 a month in question. This is incorrect. All one needs do is examine the trial transcript at pages ten through fifteen to see that the Bar asserted that Whalen did not make a "proper showing" and was thus not entitled to the payments in question. The Referee agreed with the Bar's position. (RR p. 6 para. 4)

[6]This decision is based upon the pleading in question, the letters attached to the Pretrial Stipulation and paragraphs 23 and 24 of the Pretrial Stipulation which state that there were no pleadings in the divorce case directed to this matter and only two letters, the second of which refutes the need for the payment in question.

zero balance would be unethical. What is clear, however, is that the Respondent never intended to tell Gale of the ongoing fraud in violation of Disciplinary Rule 7-102(B)(1).

2) Other Ethical Concerns

The Respondent contends that certain other ethical concerns prevented him from disclosing Whalen's remarriage to Gale. His first argument in this area is that the attorney client privilege[7] prevented him from disclosing this fact to Gale. The Respondent alleges that if he disclosed the remarriage, he would be violating a client confidence or secret. The Respondent's argument is predicated upon the fact that Whalen's remarriage was a client secret. This is an incorrect assertion. A marriage is a public event. It is recorded in the public records and usually noted in the local papers. It is therefore impossible that Whalen's remarriage could be considered a "secret", for it was not.[8] In reality the only person Whalen wanted to keep this secret from was Gale. Why? Because to reveal the remarriage would stop Gale's monthly payments. Why did the Respondent not want to reveal the remarriage? Because Gale's checks would stop coming and he would have had to look to other sources to pay his legal fees.

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[7]The Respondent refers the Court to Rule 4-1.6, Rules of Professional Responsibility, but Disciplinary Rule 4-101 of the Code of Professional Conduct is the Rule in effect at the time of the events in question. Although the language of both rules is different, the precepts set forth in both rules are the same - A lawyer may not reveal the confidences or secrets of a client except in certain enumerated circumstances.

[8]The Respondent argues that Whalen told Gale of the remarriage. If so, how can this be an attorney client secret?

The Respondent argues that public policy dictates that he be allowed to rely on his client's representation that she had sent Gale a wedding invitation. First of all, mailing is not receipt, but more importantly, the Respondent contended that Whalen was an emotionally disturbed woman who needed psychiatric help as a result of her very bitter divorce. The Respondent states that he should be able to rely on this disturbed client notwithstanding the fact that this was a bitter divorce when the parties fought over everything. Did the Respondent not find it strange that Gale would gift $200.00 a month to his despised ex-spouse Whalen? The Bar thinks not. The Respondent knew or should have known that Gale did not know of the remarriage and if he had doubts, he should have, at the least, stopped accepting Gale's checks.

The Respondent also contends that he had a good faith argument to keep the money in question. He bases this argument on the fact that Whalen was entitled to $50.00 a month for psychiatric treatment. As is explained above, the Referee disagreed. Assuming arguendo that he did have such a good faith argument, what did he do to support or enforce this argument? He did nothing. He remained mute to the ongoing fraud and continued to accept the fruits of the fraud, Gale's alimony payments. The Referee found this conduct to amount to theft[9] by trick or fraud and he ought to be severely disciplined therefore.

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[9]The Respondent's Brief at page 8 states that "Even the Referee at the hearing stated that he did not believe that Respondent was guilty of theft." There is nothing in the record to support the Respondent's claim and the Respondent in his Reply Brief will be unable to support his position by reference to the trial transcript.

B) **The Conflict of Interest**

The Respondent claims that the Referee erred in finding him guilty of a conflict of interest, wherein he was a material witness, a named defendant, and a lawyer for Whalen, in Gale's lawsuit against the Respondent and Whalen. In particular, he urges that he should be found not guilty of Disciplinary Rules 5-101(A) and 5-101(B) of the Code of Professional Conduct.[10]

Disciplinary Rule 5-101(A) states

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if 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.

The Respondent asserts that he had client consent and therefore he could not have violated this Rule. The Referee disagreed, and the Bar concurs with the Referee, that this has an inherent conflict of interest that could not be consented to. The Respondent in this lawsuit was being sued for fraud and money damages. So was his client. The Respondent's own reputation and money were at stake in this lawsuit and the fear is that Whalen's own reputation and money were also on the line for her actions in reliance of the Respondent's legal advice. The potential for abuse was great and therefore the Respondent ought not to have represented Whalen in this lawsuit.

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[10] Presumably, the Respondent does not contest the Referee's other findings of guilt as to the rule violation regarding Count II of the Bar's Complaint.

There was also a second reason why the Respondent had a conflict of interest precluding this representation. He was a material witness in the matter sued upon. Disciplinary Rule 5-101(B) states that a lawyer may not be an advocate and a witness at the same time except in certain very limited and enumerated circumstances. In Hubbard v. Hubbard, 233 So.2d 150, 152-154 (Fla. 4th D.C.A. 1970), the Court stated that:

> If from the very outset, the lawyer knows or can reasonably anticipate that his testimony will be essential to the prosecution of his client's case, he should decline the representation altogether.

The Respondent chose to represent Whalen notwithstanding his anticipated need to testify. In any event, the combination of his own interests being at stake and his need to materially testify lead to the inescapable conclusion that this is a case where he had a severe conflict of interest.

POINT II

THE REFEREE'S RECOMMENDED SANCTION OF A TWO YEAR SUSPENSION IS CONSISTENT WITH THE PRECEPTS OF LAWYER DISCIPLINE.

The Respondent in his brief asserts that he is not guilty of the matters set forth in the Report of Referee. Other than making reference to The Florida Bar v. Ward, 472 So.2d 1159 (Fla. 1985) and The Florida Bar v. McCaghren, 171 So.2d 371 (Fla. 1965), the Respondent makes no other argument as to the appropriate level of discipline.

The Florida Supreme Court has held that:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). See also The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970); The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979).

On a prior occasion the Supreme Court of Florida has noted that: "[t]he single most important concern of this Court is defining and regulating the practice of law for the protection of the public from incompetent, unethical, and irresponsible representation." The Florida Bar v. Dancu, 490 So.2d 40, 41 (Fla. 1986). Thus, the Supreme Court

of Florida has recognized the fact that, of the three purposes for lawyer discipline, the most important purpose is the protection of the public. Id.

The Court in Dancu explains that:

> The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hand of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence.

Id at 41-42.

Theft of funds by an attorney is one of the most serious breaches of the Rules of Professional Conduct that an attorney can commit. The Florida Bar v. Schiller, 537 So.2d 992, 993 (Fla. 1989); The Florida Bar v. Tunsil, 503 So.2d 1230, 1231 (Fla. 1986). The Supreme Court of Florida has noted that "[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." Id.

Rule 4-1.15(b) of the Rules of Professional Conduct does not differentiate between the failure to remit funds to clients or third parties. Therefore, in the Bar's view stealing from a third party, such as Mr. Gale, is just as serious as stealing directly form a client. In short theft of anyone's money or other property is not acceptable conduct by an attorney and the same should be dealt with harshly.

In The Florida Bar v. Breed, 378 So.2d 783, 784 (Fla. 1979), the Supreme Court cited with approval a Report of Referee which state that "[t]he willful misappropriation of client funds should be the Bar's equivalent of a capital offense. There should be no excuses." The

major underlying reason why this should constitute a "capital offense" is that an attorney's theft of funds entrusted to him evidences a total disregard of his fiduciary duties. Tunsil at 1231.

It is important to note that the Supreme Court of Florida has on more than one occasion warned that this Court would "not be reluctant to disbar an attorney for this type of offense, even though no client is injured." Breed at 785; Tunsil at 1231. In fact, the Supreme Court of Florida has plainly stated that "upon a finding of . . . misappropriation, there is a presumption that disbarment is the appropriate punishment." Schiller at 993.

Fraudulent conduct by an attorney also warrants stern discipline. See The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990) [Disbarment for forging client's name on a will and submitting same for probate.]; The Florida Bar v. Fischer, 549 So.2d 1368 (Fla. 1989) [91-day suspension for having a secretary leave a message with the highway patrol so the trooper would not show up for a civil infraction trial.], and The Florida Bar v. Shupack, 523 So.2d 1139 (Fla. 1988) [91-day suspension for fraudulently recording a purchaser's mortgage as a second mortgage.]. In a case strikingly similar to this case, an attorney was disbarred for falsely endorsing savings bonds and redeeming the same for his own benefit. The Florida Bar v. Rubin, 257 So.2d 5 (Fla. 1972).

The Respondent urges that The Florida Bar v. McCaghren, 171 So.2d 371 (Fla. 1965) has bearing on the discipline that should be imposed in this case. The court in McCaghren, after finding that Respondent not guilty of fraudulent activity regarding the securing and

use of "black mail" photographs in a divorce proceeding noted that:

> After hearing arguments, carefully considering the briefs and thoroughly studying the record, we are convinced that the respondent was not actually guilty of corruption or active professional misconduct. We are equally certain, however, that he did not live up to the high standards which have always obtained for the members of the ancient and honorable profession which we should and do cherish so dearly. He remained silent at several stages of the divorce proceedings in the face of red flags which bore indicia of his client's improper conduct. The respondent should have made inquiry of his client concerning the suspicious circumstances before carrying the divorce suit to its final conclusion.

Id at 372.

The Respondent in McCaghren received a 30-day suspension. McCaghren is distinguishable to the case at Bar, as there was no finding of fraudulent conduct by McCaghren, and in the case sub judice there is such a finding.

Discipline is also warranted when an attorney represents a client in a suit where both are sued jointly and a potential conflict exists. The Florida Bar v. Ward, 472 So.2d 1159, 1162-63 (Fla. 1985). In Ward, an attorney and client were sued jointly and the client insisted that the attorney represent him. Id. at 1161. The referee found that a conflict of interest existed which would not be condoned despite the client's approval. Id. at 1162. The referee relied, in part, upon the fact that the attorney might be called as a witness in the trial. Id. The Florida Supreme Court upheld these findings of fact and imposed a thirty (30) day suspension. Id.

The case at hand is similar to Ward. In the case at hand, as in Ward, the attorney and client were sued jointly. The attorney continued to represent the client, despite an obvious conflict. There

was a real potential that the attorney would be called as a witness in the case. In Ward, a thirty (30) day suspension was imposed. Therefore, the Respondent's conflict of interest standing alone warrants a thirty (30) day suspension.

The Standards for Imposing Lawyer Sanctions set forth ten factors that may be considered as aggravation of an ethical defalcation. Florida Standards for Imposing Lawyer Sanctions, Rule 9.22. Of these ten factors, all but one is present in the instant action.

The first applicable aggravating factor is prior disciplinary offenses. Florida Standards for Imposing Lawyer Sanctions, Rule 9.22(a). The Respondent in this case was publicly reprimanded for neglect in 1990 and was also privately reprimanded for charging an excessive fee in 1989. This prior discipline may be used to enhance whatever discipline this Court may impose. The Florida Bar v. Shupack, 523 So.2d 1139 (Fla. 1988).

Rule 9.22(b) of the Standards states that a "dishonest or selfish motive" may be considered as aggravation. The Respondent, in the case at hand, clearly had a dishonest and selfish motive in that he fraudulently induced Gale, by his silence, into paying to the Respondent funds in excess of four thousand dollars ($4,000.00).

A pattern of misconduct, or multiple offenses, may also be taken into account as aggravation. Rules 9.22(c) and 9.22(d), Florida Standards for Imposing Lawyer Sanctions. The Respondent, from December 1983 until September of 1985, continued to accept Gale's alimony payments and in turn converted the same to his own use.

The Respondent's failure to give discovery is at least some

evidence of a bad faith obstruction of the disciplinary process. Rule 9.22(c), Florida Standards for Imposing Lawyer Sanctions. The same should be considered as aggravation.

Rule 9.22(g) of the Florida Standards for Imposing Lawyer Sanctions explains that an attorney's refusal to acknowledge the wrongful nature of his conduct is an aggravating factor. The Respondent refuses to acknowledge that he stole funds belonging to Gale and that he did so fraudulently. He also seems to think that since no client has complained about missing monies, he should be absolved any wrongdoing. However, the Supreme Court has noted on at least one occasion that disbarment is appropriate for theft of client funds "regardless of injury or potential injury" to the client. The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989).

Another factor to be analyzed is the vulnerability of the victim. Rule 9.22(h), Florida Standards for Imposing Lawyer Sanctions. Gale was in California and basically unable to learn of the remarriage.

The Florida Standards for Imposing Lawyer Sanctions also state that an attorney's substantial experience in the practice of law at the time of his ethical defalcation may be considered as aggravation. Florida Standards for Imposing Lawyer Sanctions, Rule 9.22(i). The Respondent was admitted to The Florida Bar in 1972. Therefore, when the Respondent committed the acts complained of in 1983 through 1985, he had been a member of The Florida Bar for at least 13 years.

The last aggravating factor from the Florida Standards for Imposing Lawyer Sanctions is set forth in Rule 9.22(j) wherein indifference to making restitution in a theft case can be considered as

aggravation. In the case at hand the Respondent was compelled, through litigation, to return monies to Gale.

The totality of these aggravating factors, the lack of any real mitigation and the seriousness of the Respondent's unethical acts more than warrants the two year suspension recommended by the Referee.

POINT III

THE REFEREE'S USE OF THE FLORIDA BAR'S PROPOSED REPORT OF REFEREE IS NOT REVERSIBLE ERROR.

The Respondent contends that it is reversible error for a referee to accept a proposed report of referee from a party in a Bar disciplinary matter. In particular he argues that the Referee's acceptance and later use of a proposed Report of Referee drafted by Bar Counsel evidences a mere "rubber stamping" of the Bar's allegations. The Respondent cites no case law or other authority to support this proposition.

It is respectfully contended that it is the norm in Bar disciplinary matters to provide a proposed report of referee to the referee upon the conclusion of the final hearing and, in fact, it is the norm for most litigants in other proceedings to submit proposed orders to the judge at the conclusion or during the hearing in question. In any event, the Respondent was offered an opportunity to submit his own proposed report of referee. (TT 95) However, the Respondent chose not to submit a proposed report of referee. The Respondent therefore had the same opportunity as the Bar and in no way was prejudiced by the Referee's acceptance of the Bar's proposed Report.

CONCLUSION

The Respondent has failed to demonstrate that the Referee's findings are clearly erroneous or lacking in evidentiary support. Therefore, the Referee's findings must be upheld. Additionally, the Respondent has failed to establish that a two year suspension is unwarranted on the facts of this case.

WHEREFORE, The Florida Bar requests this Court to uphold the Referee's findings and approve the Referee's recommended discipline of a two year suspension and the award of costs against the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of The Florida Bar has been furnished to Hans C. Feige, Respondent, at 1620 S. Federal Highway, Suite 204, Pompano Beach, FL 33062, by regular mail on this 24th day of October, 1991.

KEVIN P. TYNAN