

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

FILED  
SID J. WHITE  
JUN 7 1991  
CLERK, SUPREME COURT

THE FLORIDA BAR,  
Complainant,

Supreme Court Case  
No. 76,408

v.

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

HANS C. FEIGE,  
Respondent.

By \_\_\_\_\_  
Chief Deputy Clerk

REPORT OF REFEREE

I. Summary of proceedings:

The undersigned was appointed to preside in the above disciplinary action by order of the Supreme Court of Florida dated August 6, 1990. The pleadings and all other papers filed with the undersigned, which are forwarded to the Court with the Report, constitute the entire record in this case.

During the course of these proceedings, the Respondent appeared pro se and The Florida Bar was represented by Kevin P. Tynan, Bar Counsel.

On January 31, 1991 I entered an order on The Florida Bar's Renewed Motion to Compel and for Sanctions which directed the Respondent to produce all of the documents requested by The Florida Bar's First Request for Production and in accordance with my previous order, dated of January 31, 1991, which the Respondent failed to comply with. My January 31, 1991 order gave the Respondent until 5 p.m. on February 4, 1991 to produce the requested discovery or have his responsive pleadings struck and also have a default entered against him. The Respondent

failed to fully comply with my January 31, 1991 order and, therefore, his responsive pleadings were struck and a default entered against him. A final hearing was held on April 19, 1991. However, the parties entered into a joint pretrial stipulation whereby both parties stipulated to the facts of this case.

II. Findings of facts as to the misconduct of which the Respondent is charged:

Based upon the parties' joint pretrial stipulation, I find the facts of this case to be as follows:

AS TO COUNT I

1. The Respondent, Hans C. Feige, is, and all time hereinafter mentioned was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. On November 25, 1975, Michael Gale ("Gale") entered into a Property Settlement Agreement with Debra Whalen ("Whalen") formerly known as Debra Gale.

3. Pursuant to the terms and conditions of the Property Settlement Agreement Gale was to pay Whalen permanent periodic alimony until such time as Whalen died or remarried. This agreement to pay permanent periodic alimony was never modified by court order or agreement of the parties to the divorce, except as provided for by the January 28, 1981 order mentioned in paragraph nineteen (19) below.

4. Gale and Whalen were divorced on November 26, 1975.

5. The terms and conditions of said Property Settlement Agreement were incorporated into the Final Judgment of said divorce styled Gale v. Gale, Case number 75-7976.

6. Pursuant to an oral agreement, Gale was to pay the alimony mentioned above to Whalen's attorney in trust for Whalen.

7. The Respondent did not represent Whalen during her initial divorce proceedings.

8. On or about November 16, 1981, Whalen retained the Respondent concerning a visitation dispute with Gale.

9. Sometime after November 16, 1981, Gale started sending the aforementioned alimony checks to the Respondent in trust for Whalen.

10. On December 24, 1983, Whalen was remarried.

11. The Respondent, a Notary public, performed the marriage ceremony for the Whalens.

12. The Respondent did not advise Gale of Whalen's remarriage upon instruction of Whalen.

13. Whalen, if called to testify, will state that:

(A) She informed the Respondent that she had notified Gale of her remarriage by sending an invitation to her wedding by U.S. mail to Gale and his son;

(B) Whalen upon learning that Gale had married Whalen's best friend had severe physiological difficulties and sought treatment for the same.

14. Whalen's father, if called to testify, will state that he told the Respondent that Whalen had informed Gale of the remarriage.

15. Gale, if called to testify, will state that:

(A) He was not informed of Whalen's remarriage;

(B) He did not discover that Whalen had remarried until at least November of 1985;

(C) He would not have continued to make alimony payments had

he known of the remarriage.

16. Subsequent to January 1984, Gale continued to make monthly permanent periodic alimony payments in the amount of Two Hundred Dollars (\$200.00) to the Respondent in trust for Whalen.

17. The Respondent, between January of 1984 and September of 1985, received the sum of Four Thousand Two Hundred Dollars (\$4,200.00) from Gale.

18. The Respondent pursuant to his agreement with Whalen kept Four Thousand Two Hundred Dollars (\$4,200.00) as an attorney's fee, which had accrued due to Feige's representation of Whalen on matters unrelated to the alimony payments, but related to the divorce action or to criminal case related thereto.

19. On January 28, 1981, a Final Judgment on Supplemental Petitions for Modification was entered by the court. Paragraph three (3) of the Final Judgement states:

"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."

20. Gale never paid the aforesaid additional Fifty Dollars (\$50.00) a month alimony.

21. Assuming said Fifty Dollars (\$50.00) of additional alimony were due and owing since January 28, 1981 and that the same had accrued interest at the legal rate, as of January 1, 1984, the balance due would be approximately Two Thousand Ninety-nine Dollars (\$2,099.00).

22. Assuming the Respondent could use the permanent periodic

alimony as an offset for the unpaid, yet accrued Fifty Dollar (\$50.00) payments, in September 1985 when Gale paid his last permanent periodic alimony, the balance due and owing Gale was approximately Nine Hundred Forty-eight Dollars (\$948.00). If the Fifty Dollar (\$50.00) monthly payments had continued to accrue, a zero balance would have been reached by April of 1987.

23. The court file contains no pleadings concerning a demand, by Whalen, for this aforesaid Fifty Dollars (\$50.00) of additional alimony.

24. The only correspondence directed between counsel, for Gale and Whalen, that mentions the additional Fifty Dollars (\$50.00) of alimony was attached as Exhibits "C" and "D" to the parties' Joint Stipulation.

25. At all times material the Respondent knew or should have known of the terms and conditions of the Property Settlement Agreement and subsequent court orders related thereto.

#### AS TO COUNT II

1. All fact stipulated in Count I above.

2. On or about December 16, 1985, Gale filed a lawsuit styled Gale v. Feige et al., case number 85-30638 CM, against the Respondent and Whalen concerning the matters referenced above.

3. The Respondent represent Whalen in said lawsuit.

4. The Respondent was a witness to the events that formed the basis of this lawsuit, but any testimony from the Respondent would have duplicated the testimony of Whalen and/or her father.

5. The aforementioned lawsuit was settled in 1989 for approximately Thirty-four Thousand Dollars (\$34,000.00) of which there remains a balance of Five Thousand Seven Hundred Thirty Dollars and Sixty-nine Cents (\$5,730.69) and was concluded by the entry of a Consent

Final Judgment on or about December 14, 1989.

6. Pursuant to said Consent Final Judgment, the Respondent and the Respondent's law firm, Feige and Cramer, P.A., were obligated to pay Gale the sum of Five Thousand Seven Hundred Thirty Dollars and Sixty-nine Cents (\$5,730.69).

7. Whalen and her father, if called to testify, would state that Whalen was aware of the Respondent's conflict of interest and consented to the Respondent's representation notwithstanding said conflict and after having consulted with her father.

While the parties stipulated to the majority of the facts of this case, there were several issues for my determination. I find as follows on the same:

AS TO COUNT I

1. The Respondent had an obligation to either inform Gale of Whalen's remarriage or cease accepting Gale's alimony checks.

2. In my opinion, the Respondent 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.

3. The Respondent's actions in continuing to accept Gale's checks were fraudulent.

4. The Respondent was not entitled to offset the additional Fifty Dollars (\$50.00) of alimony, as the terms of the Final Judgment on Supplemental Petitions for Modification required Whalen to make a "proper showing" she had incurred the requisite Fifty Dollars (\$50.00) of psychiatric treatment and no such showing was made. In any event said Final Judgment did not require a Fifty Dollar (\$50.00) payment for each month, but specifically said that it was "up to \$50.00 per month."

AS TO COUNT II

1. The Respondent's representation of Whalen, in the lawsuit in question, was unethical in that he had a serious conflict of interest between his interest and that of his client.

2. This is the type of conflict which cannot be consented to by a client.

III. Recommendation as to whether or not Respondent should be found guilty:

I find the Respondent guilty of the following rule violations:

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 Rule 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 dishonest, 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 Rule 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.], 3-4.3 [Commission by a lawyer of any act contrary to honesty and justice may be cause for discipline.], and 3-4.3 [The 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 violate the Rules of Professional Responsibility.] of the Rules of Professional Conduct.

IV. Recommendation as to the disciplinary measure to be applied:

The Respondent's actions in this case are egregious. By his silence, the Respondent defrauded Four Thousand Four Hundred Dollars



(\$4,400.00) from Michael Gale. The Respondent financially benefited from his fraudulent act. In fact all but Two Hundred Dollars (\$200.00) of the Four Thousand Four Hundred Dollars (\$4,400.00) went directly into his pocket or that of his law firm. The Respondent's actions amount to a theft by trick.

The Supreme Court of Florida has repeatedly held that theft by an attorney is one of the most serious breaches of the Rules of Professional Responsibility that an attorney can commit. The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989). In fact, the Supreme Court has plainly stated that "upon a finding of . . . misappropriation, there is a presumption that disbarment is the appropriate punishment." Id. The Schiller disbarment presumption applies in the case sub judice. The fact that the true owner, of the funds in question, was not a client, but a third party, is a distinction without merit.

An attorney who engages in fraudulent conduct should be dealt with no less harshly. The Florida Bar v. Rubin, 257 So.2d 5 (Fla. 1972). Rubin is strikingly similar to the case at hand, as Rubin falsely endorsed savings bonds and then redeemed the same for his own benefit. In the matter before me, the Respondent fraudulently kept receiving alimony checks and then converted the same to his own use.

The Schiller disbarment presumption may be rebutted by certain mitigating factors. Schiller at 992. I have reviewed Standard 9.32 of the Florida Standards for Imposing Lawyer Sanctions which sets forth the factors that may be considered as mitigation. I do not feel any of the same are applicable in the case at hand. On the contrary I find the following aggravating factors to be present here:

- 1) Prior disciplinary offenses (Explained below)

- 2) Dishonest or selfish motive (He took the money for attorney fees.)
- 3) A pattern of misconduct (He took a series of checks over the course of a year.)
- 4) Bad faith obstruction of the disciplinary process (Failing to respond to discovery requests and court orders related thereto.)
- 5) Refusal to acknowledge wrongful nature of conduct
- 6) Vulnerability of victim (Mr. Gale was in California and unable, at first, to know his ex-wife had remarried.)
- 7) Substantial experience in the practice of law (Admitted to the Bar in 1972.)
- 8) Indifference to making restitution (He had to be sued to return Mr. Gale's money.)

A comment should also be made as to Count II of the Bar's Complaint. The conflict of interest documented above, standing alone, would warrant a 30-day suspension. The Florida Bar v. Ward, 472 So.2d 1159 (Fla. 1985).

The Respondent seeks protection under Canon 7 (Representing a Client Zealously, Within the Bounds of the Law). The Referee rejects this suggestion as being totally without merit.

Based upon the absence of mitigation, the dearth of aggravating factors and the seriousness of these charges, I find that the Respondent should be suspended from the practice of law for a period of two (2) years.

V. Personal History:

The Respondent is 44 years of age and was admitted to The Florida Bar in 1972.

VI. Statement as to past discipline:

The Respondent was privately reprimanded in 1989 for charging a clearly excessive fee to a client. The Respondent was also publicly reprimanded in 1990 for neglect of a legal matter.

VII. Statement of costs of the proceeding:

The costs of these proceedings were as follows:

(A) <u>Administrative Costs</u> [Rule 3-7.6(k)]		\$500.00
(B) <u>Court Reporter Costs</u>		
1) Hearing - Motion to Unseal File - 1/31/89	\$45.00	
2) Appearance Fee - 11/27/90	40.00	
3) Appearance Fee - 12/10/90	40.00	
4) Hearing - Motion to Compel - 1/3/91	40.00	
5) Hearing - Renewed Motion to Compel - 1/31/91	58.22	
6) Hearing - 4/19/91	67.53	
6) Final Hearing (to be determined)		
		<hr/>
SUBTOTAL		290.75
(C) <u>Audit and Investigative Costs</u>		
1) Coutre - Locate and interview witnesses, review court files, etc. - 7.7 hours	\$124.25	
2) Coutre - Mileage	20.25	
3) Widlansky - Audit	84.15	
		<hr/>
SUBTOTAL		228.65
<b>TOTAL COSTS DUE THE FLORIDA BAR</b>		<b>\$1,019.40</b>

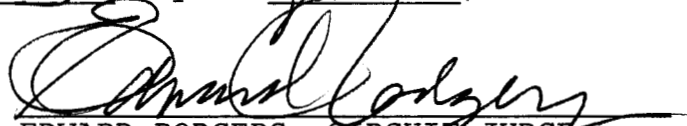
I recommend that such costs be taxed against the Respondent.

Rendered this 3 day of June, 1991 at Palm Beach  
County, Florida.

  
EDWARD RODGERS, REFEREE

Certificate of Service

I hereby certify that a copy of the above report of referee has been served on Kevin P. Tynan, Bar Counsel, The Florida Bar, at 5900 N. Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309, and to respondent, Hans C. Feige, at First Union Bank Building, 1620 S. Federal Highway, Suite 204, Pompano Beach, Florida 33062, by United States Mail, this 3 day of June, 1991.

  
EDWARD RODGERS, CIRCUIT JUDGE