047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SHALLE STEPHEN FINE,

Respondent.

_____/

Supreme Court Case
No. 76,584

On Petition For Review

ANSWER BRIEF OF COMPLAINANT

PAUL A. GROSS
Bar Counsel
TFB #032115
The Florida Bar
Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, the Complainant, will be referred to as either "The Florida Bar" or "the Bar".

SHALLE STEPHEN FINE, the Respondent, will be referred to as "Respondent" or "Mr. Fine".

Abbreviations in this brief are as follows:

"RR" will denote the report of referee, which the referee identified as "Findings of Facts and Recommendations of Referee".

"T-6/7/91-Page___" denotes the transcript of Proceedings taken on June 7, 1991 and the page number of the transcript.

Depo. refers to Deposition of Bruce M. Stone, which was taken on May 10, 1991.

STATEMENT OF FACTS

On January 23, 1987 the Respondent received a check payable to the order of the Estate of Anthony Mosca in the amount of $9,386.13. On the same day, he transferred the check into a bank check from Barnett Bank payable to himself. He then deposited the bank check into his trust account. On the same day, he issued a check from his trust account in the amount of $7,250, payable to himself. With this check, he obtained a cashier's check for the same amount, payable to himself. He then deposited this check into his operating account. (RR 3). On January 29, 1987, Respondent issued a trust account check to himself in the amount of $1,200. On the same day he deposited it into his operating account. (RR 3). The withdrawal of the $7,250 and $1,200 from the trust account reduced the net balance of Respondent's trust account to $1,257.08. (RR 4).

During April or May, 1988, the conservator of the estate asked Respondent about the $9,386.18, which he had received on January 23, 1987. The respondent told the conservator the funds were in an interest bearing account, (Joint Pre-Trial Stipulation, Paragraph 14).

On or about May 13, 1988, Respondent deposited $10,116.53 into his personal account at Shearson/Lehman Brothers. In return for the $10,116.53, he received a check for the same amount, from Shearson/Lehman Brothers, payable to Shalle Stephen Fine, Trustee. He then delivered that check to the conservator.

SUMMARY OF ARGUMENT

Although the Respondent was a personal representative of an estate, he was required to comply with the Rules Regulating Trust Accounts, as he did not open an estate account and he deposited the estate funds into his trust account. When he removed the estate funds from his trust account and placed them in his operating account, he violated Rule **5-1.1** of the Rules Regulating Trust Accounts.

When the Respondent removed estate funds from his trust account and placed said funds into his operating account, he commingled funds in violation of Rule **4-1.15** (a), Rules of Professional Conduct. The Respondent contends that he was permitted to commingle funds, as he was acting as a personal representative and not as an attorney. The Bar submits that even a personal representative is not permitted to commingle estate funds with his own funds. Moreover, Rule **4-1.15** (a) prohibits **a** lawyer from commingling his own funds with funds of a client or a third person. The estate funds were the funds of **a** "third person".

ARGUMENT

I

WHEN AN ATTORNEY, WHILE ACTING AS A PERSONAL REPRESENTATIVE DEPOSITS ESTATE FUNDS INTO HIS TRUST ACCOUNT, HE MUST COMPLY WITH THE RULES REGULATING TRUST ACCOUNTS, CONCERNING THOSE FUNDS.

Although Rule **5-1.2** exempts estate accounts fromthe Rules Regulating Trust Accounts, it is the Bar's view that the Rules Regulating Trust Accounts were applicable to this case, for the following reasons:

1. On or about January 23, 1987, Shalle *s*. Fine received a check for $9,386.13, payable to the Estate of Anthony Mosca. On the same date, he transferred the check into a bank check for the same amount payable to himself, and deposited it into his trust account. (paragraph 5 and 6 of Joint Pre-Trial Stipulation and **T-6/7/91**, pages 23 and **24)**.

2. Instead of opening an Estate account, the respondent deposited the estate funds into his trust account. Therefore, since there was no estate account, the trust account was used for the estate funds.

In view of the above, The Rules Regulating Trust Accounts were applicable to this matter. Therefore, when the Petitioner removed funds which belonged to the estate from his trust account **and** used those funds for his own purposes, he violated Rule 5-1.1, Rules Regulating Trust Accounts. (RR, pages 6 and 7).

Rule 5-1.1 states in part:

> 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.

When Mr. Fine removed estate funds from his trust account and exchanged those funds for checks which were put into his operating account, he failed to apply the estate funds for "specific purposes" as described in Rule 5-1.1, Rules Regulating Trust Accounts. (RR - pages 2-3).

ARGUMENT

II

RESPONDENT VIOLATED RULE 4-1.15(a) WHEN HE COMMINGLED HIS OWN FUNDS WITH FUNDS BELONGING TO AN ESTATE.

On page 13 of Mr. Fine's Brief, he contends that Rule 4-1.15 (a), applies to funds received by a lawyer only in connection with a representation of a client. Mr. Fine says he was the Personal Representative of the estate, and not the lawyer representing the estate. Therefore, he states that he was not in violation of Rule 4-1.15 (a), Rules of Professional Conduct. Also, he would have us believe he was not required to segregate his own funds separate from the funds of the estate.

The Florida Bar submits that Rule 4-1.15(a) states "a lawyer shall hold in trust, separate from the lawyer's own property, funds and property of the clients or third persons that are in the lawyer's possession in connection with a representation. (Underscoring added for emphasis). The Florida Bar submits that Mr. Fine was not permitted to commingle his own funds with the funds of the "third party", which was the estate. This took place when Mr. Fine deposited funds belonging to the estate into his operating account. (RR pages 3,7). It is the Bar's opinion that it doesn't matter whether Mr. Fine was acting as a lawyer or as a personal representative. As a fiduciary, he had no authority to commingle estate funds with the funds in his operating account. Accordingly, the Referee did not commit an error when he found that the Respondent violated Rule 4-1.15(a). Moreover,

"lawyers are necessarily held to a higher standard of conduct in business dealings than are non-lawyers". The Florida Bar v. Bennett, 276 So.2nd 481 (Fla.1973) and The Florida Bar v. Hosner, 520 So.2nd 567 (Fla.1988). Mr. Fine was acting as a fiduciary, and he knew or should have known it was unlawful and improper to place estate funds into his operating account. (RR page 7).

Mr. Fine contends that a Personal Representative may commingle the estate funds with the funds in his operating account, provided he delivers the monies due, when requested. However, an expert witness, Bruce M. Stone of Holland & Knight, does not agree. Mr. Stone's qualifications are on pages 24-27 of his deposition. Mr. Stone stated:

> The deposit of estate funds into an account that is in the name of the personal representative or somebody other than the estate, which has in that account funds belonging to other persons such as the personal representative in his individual capacity or his law firm, constitutes an impermissible commingling of funds, and under some cases has been held to be a conversion of funds, but in any event it is a breach of fiduciary duty, (Deposition, page 5).

(The Deposition was received in evidence. T-6/7/91 pages 46 & 47).

Mr. Stone states that personal representatives in the State of Florida are required to keep estate funds in a separate segregated trust account. (Deposition, page 19, lines 14-20).

The expert witness further testified, as follows:

> However where the personal representative takes funds belong to an estate and deposits them into an account in which the personal representative has funds of his own, that is a breach of trust and is a breach of fiduciary duty, and even though he is able to return the funds with interest on demand, again that, the fact that he is able to do that goes to the issue of damages, whether the

beneficiary of the funds has or the beneficial owner of the funds has sustained monetary damages. (Deposition, page 23).

The Florida Bar submits that a reading of Bruce M. Stone's deposition, makes it clear that Mr. Fine's conduct as a personal representative, constituted a breach of his fiduciary responsibilities. Moreover, it is the Bar's position that Mr. Fine not only breached his duty as a personal representative, but he also breached his duties as a lawyer, in violation of Rules 4-1.15(a) and 4-8.4(c) of the Rules of Professional Conduct.

CONCLUSION

Based upon the information presented in this Answer Brief of the Complainant, the Initial Brief of the Complainant and the record, it is clear and convincing that the Respondent violated the Rules Regulating Trust Accounts and Rule **4-1.15** (a), Rules **of** Professional Conduct, even though the Respondent was acting **as** a personal representative for an estate rather than an attorney for the estate.

When considering the Bar's arguments in this Answer Brief, the Initial Brief of Complainant and the record, it is obvious that the Referee properly found the Respondent guilty of violating Rule **5-1.1**, Rules Regulating Trust Accounts, Rule 4-1.15 (a), Rules of Professional Conduct and Rule **3-4.3**, Rules of Discipline. Moreover, it is the Bar's view that the Referee's finding the Respondent not guilty of violating Rule **4-8.4 (c)** - (conduct involving dishonesty, fraud, deceit or misrepresentation) was clearly erroneous. Please see argument in Initial Brief of Complainant.

In addition to the foregoing, a suspension for three years is more appropriate than the ninety-day suspension recommended by the Referee.

WHEREFORE, THE FLORIDA BAR respectfully requests the following:

1. That this **Court** approve the Referee's findings that the Respondent violated the following:

Rule **5-1.1**, Rules Regulating Trust Accounts.

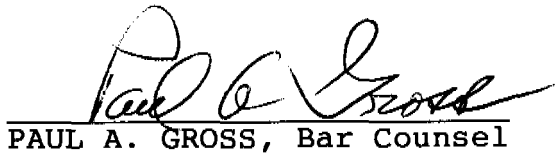
Rule 4-1.15(a) (Safe Keeping of Property) Rules of Professional Conduct.

Rule 3-4.3, Rules of Discipline.

In addition, it is requested that this Court disapprove of the Referee's findings that the Respondent was not guilty of violating Rule 4-8.4(c), Rules of Professional Conduct, (dishonesty, fraud, deceit or misrepresentation). It is also requested that this Court find that the Respondent violated Rule 4-8.4(c). Moreover, The Florida Bar requests that the referee's recommendation concerning discipline be changed to the following:

Suspension from practicing law for three years. Require Respondent to pass the ethics portion of The Florida Bar examination prior to being readmitted. Payment of costs in the amount of $1,841.83. (See attached affidavit concerning costs, Appendix-Exhibit B to Initial Brief of Complainant).

Respectfully submitted,



PAUL A. GROSS, Bar Counsel
TFB #032115
The Florida Bar
Rivergate Plaza, Suite M-100
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 3, 1992 the original and seven copies of the foregoing Answer Brief of the Complainant was mailed via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927 and that true and correct copies were mailed to the following:

SHALLE S. FINE, Respondent
2701 South Bayshore Drive
Suite 602
Miami, Florida 33133

JOHN A. BOGES, Director
Lawyer Regulation
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

PAUL A. GROSS, Bar Counsel
TFB #032115
The Florida Bar
Rivergate Plaza, Suite M-100
444 Brickell Avenue
Miami, Florida 33131
Tel: (305) 377-4445