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OCT 7 1991

CLERK, SUPREME COURT.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

V.

SHALLE STEPHEN FINE,

Respondent.

Supreme Court Case
No. 76,584
The Florida Bar File
No. 89-70,413(11I)

By _____
Chief Deputy Clerk

FINDINGS OF FACTS AND RECOMMENDATIONS OF REFEREE

HISTORY AND FACTS

The Florida Bar filed a complaint against SHALLE STEVEN FINE, pursuant to Chapter 3, Rules Regulating the Florida Bar. Specifically, The Florida Bar, in its original complaint, charged Respondent with violating rule 4-1.15(a) [a lawyer shall hold a client's property in trust separate from his own funds] and Rule 4-8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation]. Upon completion of all testimony, the Referee granted The Florida Bar's motion to amend the pleadings to include allegations of violation of Rules 3-4.3 [misconduct and minor misconduct] and Rule 5-1.1 [general rules regulating trust accounts].

A joint pre-trial stipulation was filed with your Referee establishing certain matters as a result of Respondent's answer to the complaint and to Complainant's request for admissions. The joint pre-trial stipulation provides:

1. Respondent was admitted to practice law in Florida on or about May 20, 1956 and has been, and is, at all material

times, a member of The Florida Bar subject to the jurisdiction of the Disciplinary Rules of the Florida Supreme Court.

2. Anthony Mosca, a resident of Dade County, Florida, died approximately 10 years prior to the filing of the complaint herein against Respondent. The son of Anthony Mosca, one Jerry Mosca, an attorney and the sole heir of Anthony Mosca, was appointed personal representative of Anthony Mosca's estate. Anthony Mosca's estate was administered and closed prior to the death of Jerry Mosca.

3. Jerry Mosca died intestate leaving a widow and two children as the sole beneficiaries of his estate.

4. On October 23, 1981, through and including August 31, 1988, Respondent served as the personal representative for the estate of Jerry Mosca. Respondent performed these services without fee or other compensation.

5. In 1986, Respondent was contacted by Mr. D. Schroeder, an individual whose business was finding lost assets. Based upon the information furnished by Mr. Schroeder, Respondent caused the estate of Anthony Mosca to be reopened in order to recover an asset located by Mr. Schroeder.

6. On or about January 23, 1987, Respondent received a check drawn upon the Barnett Bank of Tallahassee, Florida, from Mr. Schroeder in the amount of \$9,386.13. This check was made payable to the Estate of Anthony Mosca. Respondent admits receipt of the aforesaid check and the authenticity thereof.

7. On or about January 23, Respondent obtained from the Barnett Bank a bank check payable to himself and deposited

said check into his trust account at United National Bank of Miami. The photographic reproductions of the aforesaid official bank check and deposit slip relevant thereto offered by Complainant as exhibits are of such poor quality as to not justify their inclusion herein. Respondent, it is to be noted, admits the accuracy of the allegation.

8. On January 23, 1987, Respondent issued check no. 218 payable to "UNBM" (United National Bank of Miami) in the amount of \$7,250 from his trust account located in said institution. Respondent admits the authenticity of this allegation.

9. Respondent admits he, on or about January 23, 1987, obtained from United National Bank of Miami a cashier's check in the amount of \$7,250, the payee of which was Respondent.

10. On or about January 23, 1987, Respondent deposited the above described cashier's check into his operating account at Commercial Bank and Trust Company. Although the exhibit offered by Complainant on this particular transaction is of such poor quality as to be almost indecipherable, Respondent acknowledges the transaction and admits the allegation.

11. On January 29, 1987, Respondent issued his trust account check No. 220, drawn upon the United National Bank of Miami, in the amount of \$1,200; the payee of said check was himself. This check was deposited into the operating account of Respondent, located at Commercial Bank and Trust Company. In spite of the poor quality of the exhibits offered by the Complainant, Respondent acknowledges the occurrence of the

transactions and the accuracy of the allegations.

12. The combined effect of the withdrawal of the \$7,250 and the \$1,200, each of which sums were deposited into Respondent's operating account, was to reduced the net balance of Respondent's trust account to the sum of \$1,257.08 as of February 1, 1987. Respondent acknowledges the accuracy of this conclusion.

13. By order of Honorable Moie Tendrich, entered on or about April 5, 1988, attorney Warren H. Salomon, a member of the Florida Bar, was appointed conservator **for** the estate of Jerry Mosca. Respondent remained as personal representative **for** the estate of Jerry Mosca.

14. At all times material hereto, Warren H. Salomon had acted as the attorney for the estate of Jerry Mosca while Respondent served as the personal representative thereof.

15. Prior to the receipt by Respondent of the check from Mr. Schroeder in the amount of \$9,386.13, Respondent had received a check from Mr. Schroeder in the amount of \$1,700. The check for \$1,700 had been endorsed by Respondent to Mr. Salomon and said proceeds were reposing in the trust account of Mr. Salomon.

16. On or about May 13, 1988, acting in response to a request **from** Mr. Salomon for the sum of \$9,386.13 to be delivered to him for appropriate distribution to the beneficiaries of the estate of Jerry Mosca (the sole beneficiary of the estate of Anthony Mosca), Respondent deposited the sum of \$10,116.53 with Shearson, Lehman Brothers (the source of which is not clear from

the record). On the same date, Respondent received a check from Shearson, Lehman Brothers in the exact same amount, the payee thereof being "Shalle Steven Fine, trustee". This check was then endorsed "pay to the order of Warren M. Salomon, Shalle Steven Fine, Trustee" and delivered to Mr. Salomon by Respondent. Respondent admits the transactions occurred and the accuracy of the allegation.

17. On August 31, 1988, the estate of Jerry Mosca was closed, the accounts were approved, and Mr. Salomon and Respondent were discharged by the court. The funds were distributed, there were no shortages in any account and no client lost any funds.

ANALYSIS AND RECOMMENDATIONS

Rule 3-4.3 makes abundantly clear the responsibility of every member of the Bar to refrain from engaging in any conduct, whether in a professional capacity or in private life, which would bring the legal profession into disrepute. In relevant part, Rule 3-4.3 states:

"the commission by a lawyer of any act which is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or a misdemeanor, may constitute a cause for discipline."

Based upon the express language of Rule 3-4.3, your Referee

recommends the entry of an order denying Respondent's Motion Challenging the Sufficiency of the Complaint/Motion for Involuntary Dismissal.

Rule 5-1.1 of the Rules Regulating Trust Accounts expressly prohibits an attorney from utilizing money entrusted to him for anything other than the purpose for which the entrustment has occurred. Respondent acknowledges his receipt of money from Mr. Schroeder for the use and benefit of the heirs of Jerry Mosca, Jerry Mosca having been the sole beneficiary of the estate of Anthony Mosca. Respondent and Mr. Salomon made clear to your Referee the difficulty encountered by them from the heirs of Jerry Mosca and the apparent reluctance of such heirs to cooperate in the distribution of the Schroeder money. Your Referee agrees the lack of cooperation by the Mosca heirs contributed to, if not solely caused, all delay in reference to distribution of the Schroeder funds.

Respondent has offered no plausible explanation to your Referee as to why he engaged in the machinations above described in reference to the Schroeder funds. Respondent suggests there may have been mere negligence and/or confusion of funds on his part during the course of his operation of multiple business activities at or about the time the Schroeder funds were entrusted to him for distribution to the Mosca heirs.

Other than Respondent's testimony, there is no record evidence concerning such multiple business activities which would have contributed to, much less caused, the confusion of funds or negligence in the handling of the Schroeder money. By the same

token, other than the tangible exhibits offered by Complainant, there is no evidence indicative of any illegal intent, or mens rea, on the part of Respondent at the time the transactions about which complaint has been made actually occurred.

Your Referee finds there was absolutely no justification, in law or in fact, **for** Respondent having transferred from his trust account the funds received from Mr. Schroeder, which transfer resulted in the deposit of said funds into Respondent's operating account and the payment of expenses unrelated to the purpose for which the funds were received. It should be noted, however, there was no evidence such transfers of funds were for any purpose indicating a lack of moral turpitude on the part of Respondent, notwithstanding the absolute prohibition against such transfers by the relevant Rules of Professional Conduct.

Based upon the tangible evidence presented to your Referee, the authenticity of which was acknowledged by Respondent, and **based** upon Respondent's acknowledgment of having transferred funds from his trust account to his operating account, your Referee recommends Respondent be found guilty of having **violated** Rule 5-1.1 (general rules regulating trust accounts) and Rule 4-1.15 (safe keeping of property).

Rule 4-8.4 (c) prohibits an attorney **from** engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." Definitions of these several adjectives, as contained in Black's Law Dictionary, Sixth Edition, 1990, have a common denominator of bad intent. There is no evidence in the record before your Referee of any bad intent on the part of

Respondent. Your Referee recommends a finding of not guilty as to the allegations Respondent violated Rule 4-8.4 (c) of the Rules of Professional conduct.

Your Referee recommends Respondent be found guilty of violating Rule 3-4.3 as such rule relates generally to the requirement all attorneys observe the spirit of the Rules of Professional Regulation and avoid the commission of any act which tends to reflect unlawful conduct or conduct which is contrary to honesty and justice. Without a doubt, the manner in which Respondent manipulated the funds from Mr. Schroeder indicates a conscious desire on the part of Respondent to obfuscate and/or cover up what he recognized to have been improper utilization of funds of the Mosca estate. Such machinations constitute circumstantial evidence of, at the least, minor misconduct and, at the most, blatant violations of both the spirit and the express letter of the rules relating to the regulation of lawyer's trust accounts and clients' assets received by an attorney in a trust capacity.

RECOMMENDATION AS TO SANCTIONS

The Florida Bar acknowledges Respondent has not been previously disciplined for any conduct either as an attorney or in his private capacity. The Florida Bar argues the evidence, particularly the attempt to obfuscate and confuse the trail of the money by Respondent, clearly demonstrates those character flaws which should mandate, at the least, suspension from the practice of law if not disbarment. Respondent, with equal fervor, maintains his actions were mere negligence, there was no

intention to convert the funds to his own purpose and there was no damage done to any of the beneficiaries of the Mosca estates. Respondent offers his unblemished record as further justification for a finding of minor misconduct and negligent violation of the rules relating to trust accounts as opposed to the punishment sought by the Florida Bar.

In Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980), the Supreme Court reaffirms misuse of client's funds as one of the most serious offenses a lawyer can commit. The facts in Breed, however, clearly reflect the existence of a pattern of conduct on the part of the Respondent therein, thereby supporting a finding of an intention to deceive. It is the lack of evidence of a continuing course of conduct on the part of Respondent herein which persuades your Referee Respondent should be accorded leniency notwithstanding the recommendation he be found guilty of violating very important rules of attorney discipline.

Your Referee is not unaware of the holding of the Florida Supreme Court in Florida Bar v. Roth, 471, So.2d 29 (Fla. 1985), wherein the accused was found guilty of co-mingling, misappropriating, and converting to personal use, estate funds and insurance proceeds. Such activity was accompanied by additional acts evincing a lack of moral turpitude on the part of attorney Roth, which **lack** of turpitude was mitigated through restitution, charity work and lack of any prior disciplinary proceeding.

Your Referee cannot, in good conscience, overlook the apparent application of Florida Bar v. McShirley, 573 So2d 807 (Fla. 1991) to the instant case. A significant difference

between McShirley and the matter now before your Referee is the continuing pattern of conduct on the part of attorney McShirley. McShirley's conduct was done with an intention to convert funds to his personal use and with admitted knowledge of the existence of trust account deficits, which deficits were eliminated only in anticipation of an audit by the Florida Bar.

In the case sub judice, the Florida Bar acknowledges it had audited Respondent's trust account in reference to a matter unrelated to the present one. The audit revealed no irregularities other than those now before your Referee. Nonetheless, the record herein reveals Respondent knowingly utilized trust account funds for purposes outside the authority granted by virtue of the deposit with him by Mr. Schroeder of funds due the Mosca beneficiaries.

In the McShirley case, this court reaffirmed its previously stated willingness to disbar an attorney for stealing from a client even though the client is not injured. Florida Bar v. McShirley, supra, at page 808 and cases cited therein. The McShirley case further elucidates upon the function of discipline, to-wit:

1. 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 penalty.
2. The judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and

at the same time encourage reaffirmation and rehabilitation.

3. The judgment must be severe enough to deter others who might be prone, or tempted, to become involved in a similar violation.

Much like attorney McShirley, Respondent herein replaced the misappropriated funds before the Bar initiated any action against him. Respondent has clearly demonstrated genuine remorse, a cooperative attitude toward the disciplinary proceedings, the absence of client harm, the lack of any prior disciplinary actions and the long-time enjoyment of an excellent reputation. Regardless of the mitigating circumstances, the seriousness of intentional misappropriation (or misapplication) of client property cannot, and should not, be ignored.

Everything in the record before your Referee, and your Referee's personal observation of Respondent throughout the course of these proceedings, leads to the inescapable conclusion the defalcation now presented for review is an isolated instance of violation of the rules of discipline. In the opinion of your Referee, Respondent is not likely to repeat such egregious conduct in the future.

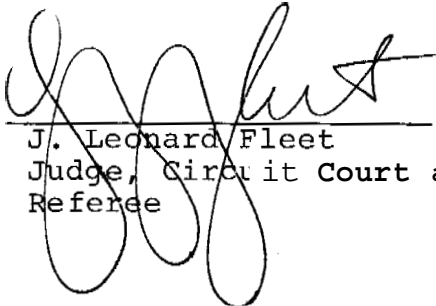
The foregoing considered, your Referee recommends the imposition of the following punishment upon Respondent:

1. Suspension from the practice of law for a period of ninety days from the date of the entry of the order of discipline by the Florida Supreme Court.
2. Require Respondent to take and pass the ethics

portion of the Florida Bar Examination.

3. Require Respondent to pay all costs associated with these disciplinary proceedings.

Respectfully submitted this 27 day of Sept., 1991,
in Chambers, at Ft. Lauderdale, Broward County, Florida.



J. Leonard Fleet
Judge, Circuit Court and
Referee