IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant

v. Florida Supreme Court No. 76-903

Richard M. McIver,

Respondent
_____/

ON PETITION TO REVIEW

ANSWER BRIEF OF COMPLAINANT

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DEFINITIONS OF TERMS AND ABBREVIATIONS

In this brief, the Respondent, Richard M. McIver, shall be referred to as "Respondent" or "Mr. McIver."

Witnesses shall initially be identified by full name and shall thereafter be referred to by their surname.

The abbreviation "TR" shall refer to the transcript of the final hearing held on September 23, 1991.

The abbreviation "ARR" shall refer to the Amended Report of Referee.

The abbreviation "RP" shall refer to the Respondent's Petition for Review and Request for Oral Argument.

STATEMENT OF THE CASE AND FACTS

On June 3, 1989 this Honorable Court entered an Order temporarily suspending Respondent, Richard M. McIver, from the practice of law.

Subsequently, on November 5, 1990, The Florida Bar filed a complaint charging Respondent with failing to maintain minimum trust accounting records, intermingling client funds with his own, and misappropriating client funds. (Complaint, Appendix "A").

Prior to filing its complaint, a subpoena was issued compelling Respondent to produce all bank statements and other records pertaining to the Richard M. McIver Trust Account (hereinafter "trust account") and the account of the Estate of Achille Spalla (hereinafter "estate account") which were maintained at First City Bank of Dade County. Respondent failed to comply with the subpoena claiming that all the requested documents had blown off the roof of his car. (TR 48).

A final hearing was held on September 23, 1991 before the Honorable June Johnson. The Florida Bar presented the testimony of Carlos Ruga, Bar Staff Auditor. Mr. Ruga testified under oath that he had audited various bank records pertaining to the trust account, the estate account, and other accounts used by Respondent that were obtained from several banking institutions. (TR 48-49). Mr. Ruga's audit revealed that Respondent had deposited monies belonging to several estates (Estate of Achille Spalla, Estate of Clinton Agee, Estate of Domenic DeFrancesco, Estate of Blazek, and Estate of Joseph F. Grass) in the trust account which also

contained his own funds.

According to Mr. Ruga, Respondent routinely paid client monies out of the trust account for personal expenses so that on several occasions the balance in the trust account was far below the amount belonging to the various estates. (TR 51-73). (Composites of Carlos Ruga, Appendix "B"). At one point, the trust account was deficient over seventy-six thousand dollars ($76,000.00) on one estate alone. (TR 53). Mr. Ruga concluded that Respondent had used client funds for personal purposes resulting in final deficiencies greater than fourteen thousand dollars ($14,000.00) from the Estate of Spalla and in excess of eighty thousand dollars ($80,000.00) from the Estate of DeFrancesco. (TR 54, 63).

Respondent stipulated at the final hearing that he had, indeed, failed to maintain minimum trust accounting records and he had improperly intermingled client funds, but Respondent denied misappropriation of client funds. (TR 12-13).

Accountant Brian Matlin testified on behalf of Respondent. Mr. Matlin stated under oath that Respondent used the trust account as an operating account for his law practice. (TR 89-90, 95). Mr. Matlin further testified that no client funds had been misappropriated, rather, they had merely been diverted to other accounts. (TR 89-91). When asked to identify these other accounts, Mr. Matlin admitted that he was unable to identify which accounts the funds had been diverted to but speculated that Respondent might have kept the "money in a safe deposit box or at his home." (TR 90-91). Mr. Matlin explained that his efforts to

trace the diversion of client funds into separate accounts was frustrated by his inability to trace cash transactions and by Respondent's unwillingness to provide financial records. (TR 100-102, 105). At one point, Mr. Matlin stated, "I had just as much trouble as [The Florida Bar] had getting records from Mr. McIver." (TR 99).

Finally, Mr. Matlin explained that any deficits exhibited in the trust account after the client funds were disbursed were attributable to legal fees which were owed to Respondent for his services rendered to the estates. (TR 79-80, 94. 96). However, when asked to explain the interim shortages in the trust account before the estates were closed and before the estate funds were completely disbursed, Mr. Matlin conceded that it was possible that Respondent borrowed money from third parties to cover the funds belonging to the estates. (TR 101).

Respondent testified under oath that the theoretical accounts alluded to by Mr. Matlin did not exist. (TR 122). Respondent further admitted that he had cash in his home to cover any shortages of client funds which occurred in his trust account. (TR 124-125). Respondent testified that he could have had as much as seventy-five thousand dollars ($75,000.00) in cash at his home which included funds belonging to clients because "[t]he estates may have been due some money." (TR 129-130).

As proof that no client funds had been misappropriated, Respondent offered, ".... All I know is that when it came time to fund anybody or pay anybody's money out to them, I had the money.

I never fell short in that way." (TR 130).

Upon consideration of all the evidence, the Referee found that Respondent had failed to maintain minimum trust accounting records, had commingled client and personal funds, and had misappropriated client funds. (ARR 2-3). The Referee recommended that Respondent by disbarred nunc pro tunc from May 4, 1989 for a period of five (5) years. (ARR 3).

Respondent appeals the Referee's finding that client funds were misappropriated and the recommended discipline.

SUMMARY OF ARGUMENT

The Referee's finding that Respondent misappropriated client funds is amply supported by the record. The audit of Respondent's accounts conducted by the Florida Bar indicated that sufficient funds were not available at all times to cover the amounts owing to the different estates, and Respondent conceded under oath that the funds in his trust account were deficient during certain periods of time. Additionally, Respondent admitted that he kept cash belonging to clients in his home.

Respondent was charged with the duty as trustee to maintain adequate trust account records and secure the funds belonging to the estates. Respondent's failure to maintain adequate records shifted the burden of proof upon him to rebut the presumption that he had misappropriated client funds. Respondent merely offered a theory without any proof that he had the funds belonging to clients in unrevealed accounts or in the form of cash in his home. The Referee was entitled to give whatever weight to Respondent's evidence she deemed deserving, and the Referee's finding of guilt indicates that Respondent's evidence was either non-credible or irrelevant. Regardless, the Referee's finding was correct and should not be disturbed.

The sanction of disbarment is warranted in a case where an attorney misappropriates client funds. Respondent's malfeasance was a long-standing and cumulative activity, and disbarment is appropriate.

QUESTIONS PRESENTED ON APPEAL

I. WHETHER THE FLORIDA BAR PROVED THAT RESPONDENT WAS GUILTY OF MISAPPROPRIATING CLIENT FUNDS BY CLEAR AND CONVINCING EVIDENCE.

11. WHETHER THE SANCTION OF DISBARMENT IS APPROPRIATE WHERE THE RESPONDENT FAILED TO MAINTAIN ADEQUATE TRUST ACCOUNTING RECORDS, COMMINGLED CLIENT AND PERSONAL FUNDS, AND MISAPPROPRIATED CLIENT FUNDS.

ARGUMENT

I. THE FLORIDA BAR PROVED THAT RESPONDENT WAS GUILTY OF MISAPPROPRIATING CLIENT FUNDS BY CLEAR AND CONVINCING EVIDENCE.

Respondent claims that the evidence presented by The Florida Bar at the final hearing did not support the Referee's finding that Respondent was guilty of misappropriating client funds entrusted to him in his capacity as personal representative or attorney of several estates. Respondent's argument on this appeal is no different from his unsuccessful argument before the Referee at the final hearing.

According to the testimony of Respondent's expert witness, Brian Matlin, the final deficiencies that occurred in the various estates were balanced by legal fees owed to the Respondent. For example, Mr. Matlin testified that with respect to the Estate of DeFrancesco, for which Respondent was the personal representative and attorney, Respondent was entitled to fees in the amount of eighty-five thousand dollars ($85,000.00) which offset a final deficiency in excess of eighty-one thousand dollars ($81,000.00). (TR 94). However, a trustee seeking to charge a trust with any expense, including attorney's fees, must demonstrate that the expense was reasonably necessary and was incurred for the trust's benefit. Barnett v. Barnett, 340 So. 2d 548, 550 (1st DCA 1976). The record reflects that Respondent made absolutely no attempt to show that his fees were reasonable and necessary. In fact, considering the relative size of the Estate of DeFrancesco, the Referee could have reasonably concluded that Respondent's fees were

excessive.[1]

The Florida Bar concedes that legal fees were not considered in its audit of Respondent's records. This same admission was made by The Florida Bar's auditor, Carlos Ruga, at the final hearing. (TR 42, 54, 57). However, legal fees owed to Respondent are relevant only with respect to client monies that remain unaccounted for after the estates were closed and the remaining funds were completely distributed to creditors and beneficiaries. The inclusion of legal fees is irrelevant to the issue of whether Respondent used client funds for personal purposes during the period he administered the estates.

Assuming, arguendo, that reasonable and necessary legal fees owed to Respondent were sufficient to cover the otherwise unexplained final deficits occurring in the estates,[2] legal fees do not justify the interim deficits in Respondent's trust account before the estates were closed.

For example, the audit by Mr. Ruga revealed the bulk of the funds belonging to the Estate of Achille Spalla had been transferred to the Richard M. McIver Trust Account. (Appendix "B"). After disbursements were made on behalf of the estate

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[1]Respondent allegedly was entitled to fees equal to $42,500.00 plus one-third of all income generated by the estate, computed by Mr. Matlin as fees of $42,500.00 on income of approximately $132,000. (TR 93-94). The receipts for the Estate of DeFrancesco, including interest, totalled $766,520.19. (Appendix "B"). Therefore, Respondent was allegedly entitled to fees equal to nearly 11.1 percent of the gross estate.

[2]Carlos Ruga, Bar Staff Auditor, noted a final deficit of $14,068.82 in the Estate of Spalla, and a final deficit of $81,551.69 in the Estate of DeFrancesco.

totalling sixteen thousand eight hundred six dollars and thirty-five cents **($16,806.35),** on November **30, 1983** the trust account should have contained at least ninety-five thousand two hundred ninety-two dollars and fifteen cents **($95,292.15).** Instead, the trust account contained the paltry sum of eighteen thousand six hundred one dollars and sixty-eight cents **($18,601.68),** leaving a shortage of seventy-six thousand six hundred ninety dollars and forty-seven cents ($76,690.47). A shortage of this magnitude is not explained by any legal fees owed to Respondent. On the contrary, Respondent's accountant, Brian Matlin, testified at the final hearing that Respondent was entitled to legal fees and costs totalling little more than fourteen thousand dollars **($14,000.00)** for services rendered to the Estate of Achille Spalla.[3] (TR 81-84).

Mr. Matlin recognized that Respondent's "legal fee theory" fell far short of explaining the interim deficiencies prior to the closing of the estates. To explain these gross interim deficits, Mr. Matlin offered a purely speculative theory that Respondent had maintained client funds in alternative accounts or less orthodox locations:

ON CROSS EXAMINATION

Questions by Bar Counsel, Warren Stamm, and answers by witness, Brian Matlin.

Q. You saw Mr. Ruga's Exhibit Number One. He showed you how much money was in there.

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[3]Although Mr. Matlin's testimony is murky at best, it appears that Respondent was entitled to fees equal to ten (10) percent of the grass estate, or **$11,326.53.** (TR **82).**

A. Right.

Q. The shortage of 11/30/83 was seventy-six thousand dollars?

A. Right.

Q. It was belonging to the account of Achille Spalla. We know that one hundred and twelve thousand dollars was received in the trust account for this purpose.

A. Right.

Q. Where did the one hundred and twelve thousand dollars go? We know that one hundred and twelve thousand dollars was deposited into the trust account on behalf of the Estate of Achille Spalla.

A. Right.

Q. My question to you is -- you said that this money was in different accounts. Were you able to ascertain which accounts those monies went to?

A. Not at this particular time.

Q. We know one hundred and twelve thousand dollars belongs to the Estate of Achille Spalla, is that correct?

A. Correct.

Q. So as of this date, Mr. McIver should have been able to pay one hundred and twelve thousand dollars to the Sulligans, is that correct?

A. But you don't know that he didn't have the money in a safe deposit box or at his home -- you are just looking at the trust account.

(TR 90-91)

Mr. Matlin offered absolutely no evidence to support his contention that Respondent kept client funds in other accounts except to state, "what would have happened is that when [Respondent] became suspended, the house of cards would fall down and someone would be the big loser. But that wasn't the case." (TR 90). However, even Mr. Matlin conceded that the "house of

cards" could have remained standing if Respondent simply borrowed funds from third parties to reimburse his clients for his misappropriations. (TR 101).

Furthermore, Mr. Matlin's theory that funds were kept in unrevealed accounts is not supported by the evidence and was rejected by Respondent:

ON CROSS EXAMINATION

Questions by Bar Counsel, Warren Stamm, and answers by Respondent, Richard M. McIver.

Q. You heard Mr. Matlin, your accountant, say that there were other sources of these funds or other places that monies went to -- did you hear him say that -- either in cash or otherth accounts? Did you hear him testify to that?

A. I heard him testify, but I don't quite follow you on that.

Q. What I am asking you is, do these other accounts or do these other cash places exist that Mr. Matlin testified to?

A. I don't think so. I know that I kept cash. I kept as much as twenty-five thousand or thirty-thousand in cash.

Q. Belonging to these people?

A. No.

Q. Did you ever use any of these estate monies --

A. The only money I used out of the estates was money that I was entitled to because of fees.

(TR 122)

* * *

Q. This is from the Estate of Achille Spalla. You heard testimony that there was a shortage as of this date, 11/30/83, of **$76,690.47.**

A. Was it taken into consideration that I already put that money into ITF accounts at Imperial Bank for these people, because

I couldn't locate them?[4]

(TR **123)**

* * *

Q. So in other words, you are telling me that on **11/30/83,** this seventy-six thousand dollars was in the Imperial Bank and that was money that belonged to them in ITF?

A. It was either Imperial Bank or I had cash at home to fund that if I needed to.

Q. So in other words, we are now dealing with a source of funds other than the trust account? We now have cash in your house.

A. Okay.

(TR **124-125)**

* * *

Q. **....** Were there any other sources?

A. As I said, I may have had seventy-five thousand dollars in my house or somewhere. But the bottom line is --

Q. Let's say you had seventy-five thousand dollars in your house; was that your money?

A. Sure it **was** my money.

Q. Did that money belong to any of the estates?

A. It may have. The **estates** may have been due some money.

(TR 129-130)

Despite the glaring inconsistencies, Respondent's own testimony clearly establishes that client funds were withdrawn from

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[4]The evidence does not support Respondent's contention. The audit of Respondent's bank records conducted by Carlos Ruga revealed that two disbursements totalling **$59,400.00** were made **from** Richard M. McIver Trust Account on March **26**, 1986 -- more than two years after the **$76,690.47** deficiency appeared in the trust account. Reciprocal deposits were made in the name of "F. Sulligan" (beneficiary of the Estate of Achille Spalla) at the Imperial Bank. (Appendix "B")

the trust account resulting in shortages. Respondent's act of removing client funds from the trust account for purposes unrelated to the respective estates was, in itself, a conversion of those funds.

Although Respondent claims that client cash funds were kept in his home for safekeeping, such an explanation cannot serve to exonerate him. A trustee who fails to maintain accurate trust accounts must carry the burden of proving that any disbursements from the account are for a proper purpose, there existing a presumption that the disbursement was a malfeasance by the trustee. Traub v. Traub, 135 So. 2d 243, 244 (2d DCA 1961). Accord Beck v. Beck, 383 So. 2d 268, 271 (3d DCA 1980). Respondent failed miserably to offer any proof the client funds were not misappropriated but, rather, were removed from the trust account for a proper purpose. Even if Respondent's story that client monies were secured at his home is believed, such a removal was certainly not related to a proper purpose of client funds.

Finally, Respondent's testimony should be given little, if any, weight. If Respondent's testimony were believed to exonerate him, it would be difficult to imagine any scenario where a dishonest trustee could not escape liability merely by asserting that "the money was under my mattress."

Respondent argues on this appeal that simply because he asserted an explanation--any explanation--the Referee was compelled to believe it and find Respondent not guilty of malfeasance. Of course, this is not the case. The Referee was able to directly

evaluate Respondent's demeanor, and her findings are entitled to a presumption of correctness. The Florida Bar v. Saxon, 379 So. 2d 1281, 1283 (Fla. 1980). Respondent has failed to carry his burden of showing that the Referee's findings were clearly erroneous or lacking in evidentiary support as required by The Florida Bar v. Carter, 410 So. 2d 920, 922 (Fla. 1991). The Florida Bar's evidence clearly and canvincingly proved Respondent's guilt, and the Referee's findings should be affirmed by this Honorable Court.

ARGUMENT

II. RESPONDENT'S CONDUCT INVOLVING FAILURE TO MAINTAIN MINIMUM TRUST ACCOUNTING RECORDS, COMMINGLING OF CLIENT AND PERSONAL FUNDS, AND MISAPPROPRIATION OF CLIENT FUNDS WARRANTS DISBARMENT.

Respondent argues that this Honorable Court should impose a lesser sanction than was recommended by the Referee. The Referee's recommendation that Respondent be disbarred nunc pro tunc for a period of five (5) years is appropriate considering the egregious nature of Respondent's violations.

In support of lesser discipline, Respondent first argues that "everyone was paid'' despite his misconduct. (RP 5). As this Honorable Court stated in The Florida Bar v. Breed, 378 So. 2d 783, 784 (Fla. 1979), disbarment is an appropriate sanction where an attorney has misappropriated client funds even though no client has been injured.

Respondent also claims that his remorseful attitude should mitigate his discipline. However, the Referee was best in a position to observe Respondent's attitude and demeanor, and her recommendation should be presumed correct. The Florida Bar v. Saxon, 379 So. 2d 1281, 1283 (Fla. 1980).

Although Respondent contends that he is remorseful, he vehemently denied before the Referee and continues to deny before this Honorable Court that he misappropriated client funds despite clear and convincing evidence to the contrary. Respondent's denial clearly separates him from the respondent in The Florida Bar v. McShirley, 573 So. 2d 807 (Fla. 1991) who admitted that he had converted client funds and demonstrated a cooperative attitude.

Conversely, Respondent failed to produce his trust accounting records and, instead, offered an incredible story that they had blown away. (TR 48).

Respondent asserts that his good character should also serve as mitigating evidence. Unfortunately, Respondent offered no character evidence on his own behalf to support such a conclusion. Only the unsworn statements of Respondent's attorney attesting to Respondent's character as a "good lawyer'' appear in the record. (TR 141). Such "evidence" is not worthy of this Honorable Court's Consideration.

However, should this Honorable Court find that mitigating circumstances exist, The Florida Bar respectfully submits that the recommendation of retroactive disbarment should be taken as evidence that some mitigation was considered by the Referee who could have imposed a lengthier discipline. The Florida Bar v. Eisenberg, 555 So. 2d 353, 355 (Fla. 1989). Therefore, additional mitigation of Respondent's sanction should not be entertained by this Honorable Court.

Theft of client funds is one of the most serious breaches of attorney ethics. The Florida Bar v. Tunsil, 503 So. 2d 1230, 1231 (Fla. 1986). This Honorable Court has noted that "misuse of a client's funds in itself warrants disbarment." The Florida Bar v. Knowles, 572 So. 2d 1373, 1375 (Fla. 1991). Accord The Florida Bar v. Wolbert, 446 So. 2d 1071 (Fla. 1984).

In The Florida Bar v. Rodriquez, 489 So. 2d 726 (Fla. 1986), this Honorable Court approved the recommended discipline of

disbarment where Rodriguez had admitted his use of client funds far personal expenses and his commingling of client funds with his own. Disbarment was imposed even though Rodriguez had demonstrated personal and emotional difficulties in mitigation and showed that he was on the road to rehabilitation.

Respondent's reliance on The Florida Bar v. Weiss, ***586*** So. 2d 1051 (Fla. 1991) is misplaced. In that case, this Honorable Court held that Weiss' disbarment was not deserved where his misappropriation of client funds had been merely negligent. The Referee's recommendation of disbarment had been based solely on the specific finding by the New Jersey Ethics Committee that Weiss had unintentionally misappropriated client funds, and this finding had been unchallenged by competent evidence in the Florida proceedings. The Florida Bar v. Weiss, ***586*** So. 2d 1051, 1053 (Fla. 1991). In support of the New Jersey finding was evidence that Weiss had erroneously relied on an accountant who maintained Weiss' trust accounts. Conversely, Mr. McIver kept his own accounts, and he knew that deficiencies existed.

The Florida Bar has presented clear and convincing evidence of Respondent's guilt, and the Referee's recommended discipline is appropriate.

CONCLUSION

The Referee's findings of guilt were supported by clear and convincing evidence. Respondent intentionally misappropriated client funds from his trust accounts. The sanction of disbarment is appropriate under these circumstances, and the Referee's recommendation should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Answer Brief on Respondent's Petition to Review was sent via Airborne Express to Sid J. White, Clerk of the Supreme Court of Florida, Supreme Court Building, 500 Duval Street, Tallahassee, Florida **32399-1927** and that a true and correct copy was mailed to Lance Wayne Shinder and Timothy K. Barket, Attorneys for Respondent, **2935** S.W. 3rd Avenue, Miami, Florida 33129; **and** John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32399-2300 on this 29th day of July, 1992.

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