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Case No. 77,325
TFB No. 87-25,534 (12B)

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

KEVIN RULE,

Respondent.

COMPLAINANT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Appellant, Kevin Rule, will be referred to as the "Respondent". The Appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "TR" will refer to the transcript of the Final Hearing held on August 27, 1991. "RR" will refer to the Report of Referee. "RB" will refer to Respondent's Initial Brief. "R" will refer to the record in this case.

STATEMENT OF THE CASE AND OF THE FACTS

The facts in this case are essentially undisputed. (R. Complaint, Response). In or about August of 1985, Respondent drafted a Will for Walter Kluge. Respondent was named as personal representative of the estate. Respondent and Respondent's sister were named as beneficiaries in the Will. Mr. Kluge died on or about April 26, 1986. Pursuant to Mr. Kluge's Will, Respondent took possession of a Concorde wristwatch valued at \$2,500.00, a gold coin valued at \$500.00, a gold ring valued at \$900.00 and a pen and pencil set valued at \$100.00. (R. Complaint, Response).

A major asset of the estate was a warehouse in Sarasota. In or about April of 1989, Respondent negotiated a sale of the warehouse. Respondent paid himself \$15,000.00 in attorney's fees from the proceeds of the sale of this property. Respondent had previously taken a personal representative fee of \$5,000.00. Respondent did not petition the Court for any portion of the \$20,000.00 in fees. (R. Complaint, Response).

On or about February 6, 1990, The Bar initiated an audit of Respondent's trust account records. The audit covered the period from October of 1987 through February of 1990. The examination of Respondent's trust account revealed that Respondent commingled funds within his trust account belonging to Sarasota Warehouse, Highland Apartments, and Thomas-Blough-Fogarty. Respondent informed The Bar that these were business ventures which he managed and/or in which he had an ownership interest. Respondent also had a shortage in his trust account which indicated a use

of clients' funds for purposes other than the specific purpose for which they were entrusted to Respondent. There is no evidence that Respondent knowingly or intentionally misappropriated any funds. Respondent did not have available for inspection a cash receipts and disbursements journal, ledger cards, monthly comparisons and annual listings. Respondent's bank had not been authorized to notify The Bar in the event that any trust check was returned due to insufficient funds or uncollected funds, absent bank error. Respondent was not in compliance with the minimum trust accounting requirements regulating The Bar. (R. Complaint, Response).

On May 29, 1990, the 12th Judicial Circuit Grievance Committee B found probable cause that there had been a violation of the Rules of Professional Responsibility (Conduct prior to January 1, 1987): DR 5-101(A) (a lawyer shall not accept employment if the exercise of his professional judgment will be or reasonably may be affected by his own financial, business, property or personal interests); DR 6-101(A) (a lawyer shall not handle a legal matter he knows or should know that he is not competent to handle); DR 6-101(A)(2) (a lawyer shall not handle a legal matter without preparation adequate in the circumstances); DR 6-101(A)(3) (a lawyer shall not neglect a legal matter); and the following Rules of Professional Conduct (Conduct after January 1, 1987): Rule 4-1.1 (a lawyer shall provide competent representation to a client); Rule 4-1.15(a) ((DR 9-102(A) (conduct prior to January 1, 1987)) (commingling); Rule 5-1.1 ((Integration Rule 11.02(4)(conduct prior to January 1, 1987))

(the use of clients' funds for purposes other than the specific purpose for which they were entrusted to the lawyer); Rule 5-1.2(b)(5) ((Bylaws section 11.02(4)(c)2.e)(conduct prior to January 1, 1987)) (a cash receipts and disbursements journal not available for inspection); Rule 5-1.2(b)(6) ((Bylaws Section 11.02(4)(c)2.f)(conduct prior to January 1, 1987)) (ledger cards not available for inspection); Rule 5-1.2(c)(1)b and (2) ((Bylaws Section 11.02(4)(c)3.a.ii and (b)(conduct prior to January 1, 1987) (monthly comparisons and annual listings not available for inspection); Rule 5-1.2(c)(4) ((Bylaws Section 11.02(4)(c)3.d (conduct prior to January 1, 1987)) (the bank was not authorized to notify The Bar in the event that any trust check was returned due to insufficient funds or uncollected funds).

The Florida Bar filed its Complaint in this matter with The Supreme Court of Florida on or about January 31, 1991. The Honorable Robert T. Shafer was appointed by this Court to act as the Referee in this disciplinary case.

The Final Hearing was held on August 27, 1991. The Referee found the Respondent guilty of violating the above-mentioned rules and recommended that he be suspended from the practice of law for six (6) months, and assessed the costs of these disciplinary proceedings.

Respondent served his Petition for Review on November 22, 1991. The Respondent served his Initial Brief, dated February 1, 1992, on The Florida Bar. This brief is filed in Answer to the Respondent's Initial Brief.

SUMMARY OF THE ARGUMENT

The facts are essentially undisputed in this case. Respondent requests that this Court reduce the Referee's recommended discipline due to the mitigating circumstances involved herein. However, the Referee considered these mitigating circumstances and found that the Respondent's misconduct warranted a six (6) month suspension.

Respondent drafted a will for Mr. Kluge which named Respondent personal representative and beneficiary. Respondent's sister was also named as a beneficiary. Respondent failed to advise Mr. Kluge to seek independent counsel. In his capacity as personal representative and counsel, Respondent took \$20,000.00 in fees without petitioning the Court and did not provide The Bar or the Court with an accounting in support of these fees. Respondent also violated various trust account rules involving commingling, shortages and poor record keeping.

Under the totality of the circumstances, the Referee's recommendation of a six (6) month suspension should be upheld.

POINT INVOLVED

A six (6) month suspension is the appropriate discipline in light of Respondent's conduct herein.

ARGUMENT

In order to determine an appropriate sanction, the Court must consider whether the judgment is fair to society, fair to Respondent and severe enough to deter others who might be prone to become involved in like violations. The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). The Referee's recommendation of a six (6) month suspension is appropriate to adequately protect the public, warn other members of the profession about consequences of similar misconduct, appropriately discipline Respondent for his misconduct, and still allow for and encourage reformation and rehabilitation.

The facts are essentially undisputed in this case. Respondent drafted a Will for Walter Kluge, and Respondent was named as personal representative of Mr. Kluge's estate. Respondent and Respondent's sister were named as beneficiaries in the Will. Yet, Respondent never advised Mr. Kluge to seek independent counsel. (TR, p. 3, L. 13-14). After Mr. Kluge's death, pursuant to the Will, Respondent took possession of a Concorde wristwatch valued at \$2,500.00, a gold coin valued at \$500.00, a gold ring valued at \$900.00 and a pen and pencil set valued at \$100.00.

A warehouse in Sarasota was a major asset of the estate. After Respondent negotiated a sale of the warehouse, he paid himself \$15,000.00 in attorney's fees from the sales proceeds.

Respondent had previously taken a personal representative fee of \$5,000.00. Respondent never petitioned the Court for any portion of the \$20,000.00 in fees. Respondent did not provide The Bar or the Court with an accounting in support of these fees.

The Bar initiated an audit of Respondent's trust account records. This examination revealed that Respondent commingled funds within his trust account belonging to Sarasota Warehouse, Highland Apartments, and Thomas-Blough-Fogarty. Respondent had an ownership interest in these ventures. Respondent also had a shortage in his trust account. Respondent did not have available for inspection a cash receipts and disbursements journal, ledger cards, monthly comparisons and annual listings.

Respondent requests that this Court reduce the Referee's recommended discipline due to the mitigating factors involved. (RB, p. 1). The Referee found that the Respondent had no prior disciplinary record, made full and free disclosure to the disciplinary board, had a cooperative attitude, and showed remorse for his conduct. (RR, p. 3). Taking into consideration these mitigating factors, the Referee recommended a six (6) month suspension.

The Bar is unable to find any caselaw directly on point with the allegations involved in this case. The caselaw either focuses on conflict of interest regarding the will or trust account violations. In The Florida Bar v. Weiss, 586 So. 2d 1051 (Fla. 1991), this Court suspended Weiss for six (6) months because he was grossly negligent in his handling of client trust accounts by failing to properly supervise his accountant's work.

Weiss did not educate his accountant about the rules concerning trust accounts, and an audit revealed shortages, commingling and poor record keeping. Weiss, like Respondent, did not intentionally or knowingly convert or misappropriate client funds.

The Weiss case illustrates that a six (6) month suspension is appropriate for the trust account violations herein alone. In addition, if you couple the trust account violations with the drafting of Mr. Kluge's Will, Respondent's being named as the beneficiary and personal representative, his sister being named as a beneficiary, taking a substantial fee without consent, and not furnishing an accounting for his fees, a six (6) month suspension is fair to the Respondent, The Bar, and the Public.

In The Florida Bar v. Jameison, Jr., 426 So. 2d 16 (Fla. 1983), Jameison was suspended for ninety (90) days for soliciting his client to fund \$20,000.00 for a foundation Jameison sought to establish for his own personal goals. Jameison did not advise his client to seek independent counsel prior to placing the \$20,000.00 into this foundation. Jameison also took excessive attorney's fees from these funds. This Court concluded that Jameison's actions were not committed with a dishonest intent, but rather resulted from his failure to foresee the potential conflict of interest.

In The Florida Bar v. Miller, 555 So. 2d 854 (Fla. 1990), Miller drafted a will for a client and was named as contingent beneficiary, but he failed to advise his client to seek independent counsel. This Court found that Miller's misconduct

warranted a public reprimand.

Respondent's case can be distinguished from the Jameison and Miller cases. The totality of Respondent's misconduct herein is more extensive. Besides Respondent's conflict of interest, drafting a will and making himself personal representative and beneficiary, Respondent took a substantial fee without petitioning the Court. Even though there is no evidence indicating that Respondent misappropriated any monies, the propriety of Respondent's use of these funds remains unanswered as Respondent never furnished an accounting of his fees. Together with this misconduct, Respondent commingled funds, had shortages in his trust account and failed to keep proper trust account records. Respondent's misconduct warrants a six (6) month suspension especially since, under Weiss, the trust account violations alone support this discipline.

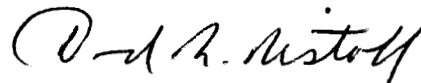
Further, under the Standards for Imposing Lawyer Sanctions 4.12, suspension is appropriate when a lawyer knows or should know he is dealing improperly with a client's property and causes injury or potential injury to a client. An audit of Respondent's trust account revealed several trust account violations, including commingling, shortages and improper record-keeping methods.

CONCLUSION

A six (6) month suspension is fair to society, fair to Respondent and severe enough to deter others who might be tempted to become involved in similar violations. The facts are essentially undisputed, and the caselaw suggests that, under the totality of the circumstances, a six (6) month suspension is appropriate. Using the Respondent's own words, "The Respondent does not argue that the recommended punishment of six months suspension is beyond the scope of reason." (RB, p. 1).

WHEREFORE, The Florida Bar asks this Court to approve the Referee's recommended discipline of suspension for six (6) months.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief has been furnished to Kevin Rule, Respondent, at 27 Fletcher Avenue, Sarasota, Florida 34237-6017, by Certified Mail, Return Receipt Requested No. P 852 027 190, and John T. Berry, Staff Counsel, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by regular U.S. Mail this 20th day of Feb., 1992.



David R. Ristoff