IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NUMBER 77,345

SUSAN M. ROSEN,

Respondent.

RESPONDENT'S REPLY BRIEF

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POINT I

THE BASIS FOR THE FLORIDA BAR'S AUDIT OF RESPONDENT'S TRUST ACCOUNT WAS NOT IN ACCORDANCE WITH THE RULES OF DISCIPLINE AND, THEREFORE, THESE PROCEEDINGS WERE TAINTED FROM THE ONSET AND SHOULD BE DISMISSED.

Respondent asks this Court to unequivocally reject The Florida Bar's position that the signature of a grievance committee chairman on a trust account subpoena constitutes a request by a grievance committee pursuant to Rule 5-1.2(d)(7). There is nothing in the record to indicate the chairman's signature on that trust account subpoena was nothing more than a ministerial compliance with a request by The Florida Bar. There is no showing that Grievance Committee 11"E" considered the subpoena or any evidence relating to the grievance against Respondent at the time the subpoena was signed. There was no indication there was any probable cause for such a subpoena.

Respondent submits that the chairman of Grievance Committee 11"E" did nothing more than sign a subpoena placed in front of him by the Bar staff. The Florida Bar has conceded that the basis for that subpoena was nothing more than the auditor's opinion that Ms. Rosen's trust account check to Mr. Paterna "didn't look right, ..." (T.62). The Florida Bar totally ignores the fact that the $10,000.00 check that "didn't look right" was a perfectly proper transaction that did not even constitute grounds for disciplinary proceedings against Respondent.

In other words, the Bar's auditors' gut feelings were wrong. The check from Ms. Rosen's trust to account to Mr. Paterna was, in fact, a perfectly proper transaction.

The Bar's audit was not predicated upon any of the eight items listed in Rule 5-1.2(d). The Bar did not comply with the Rules Regulating The Florida Bar and, therefore, the proceedings against Respondent should be dismissed. The Florida Bar v Rubin, 362 So.2d 12 (Fla. 1978).

Respondent submits that requiring The Florida Bar, in circumstances like that at Bar, to present its case to a grievance committee and to allow them (not the chairman acting at the behest of the Bar) to determine the propriety of an audit is the proper procedure to follow. This is particularly true now that all grievance proceedings are public and any records produced by a respondent pursuant to a Bar subpoena are subject to public scrutiny.

The Bar's power to reveal clients' financial affairs to the world must be subject to some oversight. Rule 5-1.2(d) provides just such supervision. The most important check on the Bar's authority Respondent submits, is the grievance committee; not the chairman. The deliberation of a duly constituted body is exactly the rein needed on prosecutorial powers.

There is no showing in the record that any grievance committee made any request for an audit. The only showing is that the chairman of a committee signed a subpoena presented to him by a staff member of the Bar. This Court must reject the Bar's

characterization of such a ministerial act as a request by a grievance committee.

POINT II

PORTIONS OF THE REFEREE'S FINDINGS OF FACTS ARE IMPROPER AND SHOULD BE OVERTURNED.

The Referee's finding that "Respondent's probation was violated.. .." is clearly erroneous and is without factual basis in the record.

In the proceeding before the referee in Case Number 75,805, the referee's sole finding that Respondent was not in strict compliance with her contract was his finding that

> She was not satisfactorily complying with that contract (not regularly attending meetings). Bar Exhibit L. Page 2.

Such a finding does not equate to a violation of one's probation. There was no adjudication of a violation of probation. Reapondent was not found in contempt. No finding was made as to what "not satisfactorily complying" constituted. Finally, Respondent's probation was extended upon consent, not after a contested evidentiary hearing.

The same referee that presided over the probation proceedings extrapolated upon his finding of unsatisfactory compliance and decided in the new case that such conduct constituted a violation of probation. It is too late to reopen the probation case now. The referee made no finding of violation in Case Number 75,805.

The most significant aspect of Respondent's probation, abstinence from alcohol and illicit drugs, has never been found to be violated.

The referee's finding that Respondent's probation had previously been violated was improper and was unsupported by the evidence. Accordingly, it should not be considered an aggravating factor in the determination of discipline.

The Florida Bar cites Benbow v Benbow, 157 So.2d 512, 519 (Fla. 1934) as support for its argument that Respondent should be disciplined for failure to produce records. Benbow does not stand for that proposition. It stands for the proposition that a trustee must keep clear, distinct and accurate accounts. Respondent maintains that she did, in fact, comply with the Bar's rules on trust accounting.

The Bar, for the first time, makes the argument that it is Respondent's burden to prove her innocence as to a willful failure to produce trust account records. Such is not the case. The Bar has the burden of proof by clear and convincing evidence and it must show a willful violation of the Bar's Rules. The Florida Bar v Rayman, 238 So.2d 594 (Fla. 1970).

The Bar suggests that Respondent should have filed a formal complaint against Mr. Paterna. There were already disciplinary proceedings pending against Mr. Paterna! To what avail would it have done Respondent to file such a grievance. The Florida Bar already knew about his misconduct relating to trust accounts.

Even if a formal complaint was not filed with The Florida Bar relating to Mr. Paternas' keeping Respondent's trust account records, the Bar was aware of it. As the Bar cited on page six of its own brief in the instant case, Respondent apprised the Bar of her inability to get to her records due to Mr. Paterna's misconduct in the answer that she filed with The Florida Bar. Did The Florida Bar follow up on her allegations? The Florida Bar sua sponte investigated Ms. Rosen's trust account when it felt something was amiss during its investigation of Mr. Paterna. Why did it not exercise that same initiative in trying to obtain Respondent's records from Mr. Paterna?

Respondent submits it would have been far easier for The Florida Bar to obtain records from Mr. Paterna than it would have been for her to do so. Furthermore, The Florida Bar had the burden of proof, by clear and convincing evidence, to show that Respondent did not maintain her trust account records in a proper fashion. They clearly did not meet that burden. Similarly, they had the burden to show that Respondent's failure to produce records was a willful violation. They made no such showing.

POINT III

THE REFEREE'S CONCLUSIONS OF LAW ARE, IN PART, INAPPROPRIATE AND SHOULD BE OVERTURNED.

The Florida Bar persists in its argument that Respondent has "misused" client funds when there is no evidence to support that claim. No client lost any funds as the result of Respondent's conduct. RR 4. No client funds entrusted to Respondent were used for any purposes other than for which the funds were intended.

The mere return of a check for insufficient funds does not automatically equate to misuse of another client's funds.

An example will completely refute the Bar's position. Assume a lawyer has $100.00 in her trust account and she deposits a $10,000.00 check into her trust account. She then disburses the $10,000.00 to the proper party but the check is returned because the closing funds have not cleared before her trust account check hits her bank. The trust fund check for $10,000.00 will be returned for insufficient funds. However, it certainly cannot be said that the lawyer misused any client funds. No other client's funds have been misused.

Respondent's trust offenses fall into two categories. First, on four instances she advanced small amounts of costs, while relying upon her clients to immediately provide the funds, but on the assumption that she had sufficient funds in her account to cover the checks. The second category is the three large checks discussed in the brief which were written in anticipation of large deposits being made to the trust account. The former situations were immediately cleared up upon notice and there is no showing of harm, or even inconvenience to any client. The latter three situations all involved instances where there was no possibility that the checks could have cleared unless the deposits forming the predicate for the disbursements were made. In other words, there was absolutely no risk that any client's funds would be misused.

The Bar improperly relies on The Florida Bar v Davis, 361 So.2d 159, 162 (Fla. 1979) as support for its position that

Respondent should be disciplined. In Davis, the lawyer was found guilty of issuing:

> four worthless checks with knowledge that there were insufficient funds on deposit with the bank to pay the checks on presentation. Id., p. 161.

There is no such showing in the case at Bar.

Ms. Rosen's checks were not worthless, either. They were immediately made good (when appropriate to do so). Mr. Davis' checks were never made good.

Rule 3-4.3 is consistently misused by The Florida Bar. It is not a rule proscribing conduct. Rule 3-4.3 is a jurisdictional statement, and nothing more. Put another way, it is an enabling rule. Quoting the entire rule makes this evident. Rule 3-4.3 says that

> The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibitive acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission by a lawyer of any act which is unlawful or contrary to honeety and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committee within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.

In other words, any act of a lawyer which is considered "unlawful or contrary to honesty and justice,...." constitutes grounds for discipline. Rule 3-4.3 is a jurisdictional statement.

The Referee's conclusion that Respondent's conduct violates Rule 3-4.3 is incorrect. A citation to Rule 3-4.3 certainly cannot be construed to mean that a lawyer has acted dishonestly.

It is most important to note that Respondent has not been found guilty of violating Rule 4-8.4(c) of the Rules of Discipline. That Rule proscribes conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent submits that a failure to find a violation of that Rule is a declaration that The Florida Bar has not proven that a lawyer has engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

POINT IV

IF RESPONDENT IS FOUND GUILTY OF MISCONDUCT, THE APPROPRIATE DISCIPLINE IS A PUBLIC REPRIMAND.

The Florida Bar would have this Court suspend Susan Rosen for two years for misconduct involving no dishonesty, fraud, deceit or misrepresentation and which resulted in absolutely no inconvenience or harm to her clientele. The Bar relies upon The Florida Bar v Davis, 361 So.2d 159 (Fla. 1978), The Florida Bar v Hartman, 519 So.2d 606 (Fla. 1988) and The Florida Bar v Breed, 378 So.2d 783 (Fla. 1979) as support for its position. All of those lawyers engaged in misconduct far more serious than Ms. Rosen's. Yet, none of those lawyers received a more severe suspension than that recommended in the case at Bar.

In The Florida Bar v Davis, 361 So.2d 159 (Fla. 1978) the accused lawyer was suspended for only one year for issuing four worthless checks with knowledge that there were insufficient funds

on deposit to cover them. In each instance, the recipients sued Mr. Davis and, as of final hearing, the judgments that they obtained against him had not been satisfied. At least two of those checks were drawn on Mr. Davis' trust account. In addition to issuing four worthless checks, Mr. Davis borrowed $1,000.00 from a client and did not repay her.

A more important finding in the Davis case is the fact that the referee found Mr. Davis guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. No such finding is apparent in the case at Bar.

Notwithstanding the multiple counts against and the specific finding of dishonest or fraudulent conduct, Mr. Davis was suspended for but one year.

In The Florida Bar v Hartman, 519 So.2d 606 (Fla. 1988) the accused lawyer was found guilty of four counts of misconduct. Included amongst those counts were his receiving, in trust, child support payments and then refusing to forward those sums to his clients, the mothers. It was specifically found that he failed to promptly deliver over $9,700.00 to his clients during a six year period beginning March 1, 1979.

Mr. Hartman's conduct also involved failing to disburse $7,000.00 in real estate proceeds and failing to use $3,500.00 in cash delivered by a client to pay off debts for that purpose. In fact, Mr. Hartman kept almost $500.00 of that sum without providing an accounting. Not surprisingly, Mr. Hartman also failed to keep proper trust account records.

Mr. Hartman's last act of misconduct was his participation in a usurious loan transaction between two of his clients. Despite the multiplicity of misconduct that he engaged in, Mr. Hartman received but a two year suspension.

Finally, The Florida Bar points to The Florida Bar v Breed, 378 So.2d 783 (Fla. 1979) as support for its Draconian recommendation for discipline. Mr. Breed was suspended for two years for misusing clients funds and for engaging in a complicated check-kiting scheme. The Bar's audit indicated that Mr. Breed's trust account was short by $15,675.00 in December 1975 and $40,400.00 in March 1976. Even allowing for funds arguably belonging to Breed, the referee found that his trust account was short by approximately $7,800.00 and, therefore, he had "converted clients' funds to his personal use." Id., p.784.

Mr. Breed was specifically found to have misappropriated clients funds and to have engaged in a check-kiting scheme. He received a two year suspension -- the same sanction that the Bar asks be given to Susan Rosen despite the fact that there was no benefit to her whatsoever.

Recently, this Court emphasized the significance of a failure by The Florida Bar to show conduct involving dishonesty, fraud, deceit or misrepresentation in determining the appropriate discipline to be imposed. In The Florida Bar v Neu, Case Number 76,158 (April 2, 1992) this Court suspended a lawyer for six months for numerous counts of misconduct. Significant among them is the fact that he used client funds, in the amount of $5,600.00, to pay

his personal income taxes. Neu was also found guilty of using over $40,000.00 in estate funds for dubious investment purposes without the approval of the probate court. Fortunately, after the money was lost, restitution was made. Finally, Mr. Neu earned interest on his trust account in violation of Bar Rules and failed to forward that interest to The Florida Bar Foundation. Ultimately, this Court suspended Mr. Neu for six months and ordered him to pay $6,386.54 in earned interest to the Bar Foundation.

Mr. Neu engaged in a protracted course of conduct of playing fast and loose with client funds, without court approval, and of using client's funds to pay his personal taxes. He did not pay the interest received on his trust account to The Florida Bar Foundation. In light of the fact that there was no dishonest or fraudulent conduct found, this Court, quite appropriately, determined that the proper discipline for his misconduct was a six month suspension.

The Bar would now have this Court suspend Ms. Rosen for four times longer than the discipline given to Mr. Neu even though her conduct was not nearly so serious. She was not reckless with her client's funds, she did not pay personal expenses with her client's funds, and she did not rob The Florida Bar Foundation of its interest on trust funds. She did not benefit from her acts. Most significantly, there has been no finding that she engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

The cases cited in Respondent's initial brief on pages 30

through 36 showed that the appropriate discipline for Respondent's misconduct is a public reprimand.

CONCLUSION

The Bar did not comply with Rule 5-1.2(d) in initiating the audit of Respondent's trust account. Accordingly, this case should be dismissed for the Bar's failure to abide by its own rules.

Should this Court determine that discipline is appropriate, the praper sanction is a public reprimand for failure to keep proper records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Reply Brief was mailed to Paul A. Gross, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 this 8th day of May, 1992.

JOHN A. WEISS