

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SUPREME COURT CASE NOS.

✓77,351 and 78,243

v.

ELLIS S. SIMRING,

Respondent.

REPORT OF REFEREE

I. Summary of Proceedings.

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on October 3 and 4, 1991.

The following attorneys appeared as counsel for the parties:
Kevin Tynan, Attorney for Petitioner, The Florida Bar,
5900 N. Andrews Ave., Suite 835, Ft. Lauderdale, FL 33309,
305-772-2245.

Neil F. Garfield, Attorney for Respondent, Garfield &
Associates, P.A., The World Executive Building, 3500 N.
State Road 7, Ft. Lauderdale, FL 33319, 305-485-7000.

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged:

After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

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Count I

1. The Florida Bar conducted an examination of the Respondent's Trust Account at NCNB National Bank, account number

0321300164 for the period commencing January 1, 1989 and ending on September 30, 1990. In performing the review of Respondent's trust account the accountant for the Florida Bar was required to create individual client ledger cards, bank reconciliations and a client liability list for specific dates because the records were not maintained nor provided by the Respondent. When the accountant for Petitioner requested client files, Respondent replied: "I threw them all away."

2. The following chart reflects the reconciled bank balance of Respondent's trust account on a given date, the total amount of client liabilities on that date, and the corresponding shortages in the trust account:

<u>Date</u>	<u>Bank Balance</u>	<u>Client Liabilities</u>	<u>Shortases</u>
3/31/89	\$ 7,006.36	\$ 48,866.43	\$41,860.07
4/30/89	(1,288.22)	46,770.96	48,059.18
5/31/89	12,827.53	55,902.39	43,074.86
6/30/89	5,319.84	44,141.24	38,821.40
7/31/89	21,349.09	39,647.12	18,298.03
8/31/89	5,610.42	45,186.79	39,576.37
9/30/89	3,317.74	46,675.65	43,357.91
10/31/89	219,839.99	236,121.91	16,281.92
11/31/90	18,078.89	36,792.96	18,714.07
2/28/90	4,788.68	32,438.61	27,649.93
3/31/90	22,062.75	75,718.46	53,655.71
4/30/90	9,763.09	76,524.83	66,761.74
5/31/90	14,086.33	81,813.49	67,727.16
6/30/90	863.65	52,746.00	51,882.35
7/31/90	(5,963.97)	50,196.00	56,159.97
8/31/90	(5,963.97)	50,196.00	56,159.97
9/30/90	(5,963.97)	50,196.00	56,159.97

3. I find that the bank balances, client liabilities and shortages listed above are accurate and correct. I find that the fluctuations in the amount of the various shortages were caused at times by the Respondent placing personal funds into his trust account. In fact, in November and December of 1990 the Respondent's actions caused an overage in his trust account. However, the shortages returned in January of 1990 and remained until the Respondent closed his trust account.

4. Although the aforesaid conduct violated several Rules of

Professional Conduct and Rules Regulating Trust Accounts (as will be discussed in Counts 11, II and IV), the Bar failed to meet its burden of proof in establishing an intentional theft of client monies. In order to establish a "theft" or "misappropriation" case, the Petitioner must establish by clear and convincing evidence that the Respondent intentionally or knowingly converted or misappropriated client funds. Primarily because of Respondent's improper trust accounting techniques (lack of records and documentation) the Petitioner's case amounted to merely establishing "paper shortages" in the trust account. Respondent cannot be said to have committed theft unless it is proven that he has taken client's property with intent to deprive the client of the right to the property. The evidence produced by the Petitioner falls short of establishing those requisite elements. The Petitioner seeks to raise a presumption of theft by repeated instances of shortages in the trust account over an extended period of time. However, Petitioner's case must fail in that regard, especially where no injured party was presented, no client complained to the Bar nor was any evidence presented that any client in fact failed to receive money due.

Count II

5. Prior to September 30, 1990, the Respondent maintained a trust account at NCNB National Bank designated as account number 0321300164.

6. The Florida Bar reviewed said trust account for the period commencing January 1, 1989 and ending September 30, 1990. The clear and convincing evidence has established that this account was not an interest bearing trust account.

7. The Respondent failed to deposit short term funds into an interest bearing trust account.

Count III

8. The evidence concerning the aforementioned trust account, as well as the stipulation between the parties, revealed that the Respondent unethically commingled his monies with that of his clients in the following manner:

Q. correct

a) On January 25, 1989, a loan of \$5,000.00 from Jean Bussman, the Respondent's bookkeeper, was deposited in the trust account.

b) On February 24, 1989, a loan of \$15,407.79 from Rusty, a sometimes client of the Respondent, was deposited in the trust account.

c) In March 1989, the Respondent deposited \$22,463.55, which he says was the proceeds from the sale of his home, in his trust account.

d) On August 28, 1989, the Respondent deposited \$10,247.00, which he said was the proceeds from the sale of some property he owned in Las Vegas, Nevada, into his trust account.

e) On November 9, 1989, \$17,360.00 was deposited into the trust account and Respondent states this was the net proceeds from the sale of property on Manor Drive in St. Lucie County, Florida which he used to own.

f) The Respondent made deposits in his trust account which were noted in the cash receipts journal as coming from personal funds during the period beginning January 1, 1989 through June 30, 1990 as follows:

<u>Date</u>	<u>Amount</u>
January 1989	\$ 41,415.31
February 1989	20,845.00
June 1989	19,021.65
July 1989	86,938.39
August 1989	4,894.00
October 1989	7,266.92
December 1989	2,000.00
February 1990	5,500.00
TOTAL	\$187,881.27

Count IV

9. The clear and convincing evidence concerning the aforesaid trust account also established that the Respondent failed to keep the following minimum required trust account records:

a) The Respondent was only able to produce duplicate

deposit slips from February 16, 1990 to the present which showed the date and the source of the deposit of trust funds.

b) The Respondent did not produce any separate ledger cards for each client or third party who entrusted funds to him for specific purposes.

c) The Respondent could not provide the Bar's auditor with any trust account bank reconciliation or reconciliations of ledger cards and trust bank balances.

d) The client matter for which a check was issued was not properly identified in the cash disbursement journal in the case of many checks.

10. The review also revealed that the Respondent failed to follow the minimum trust accounting procedures in that he failed to do monthly and yearly bank reconciliations for trust account number **0321300164**.

Count V

11. The Bar reviewed a second trust account of the Respondent's at NCNB National Bank, account number **3600908-839** entitled Ellis S. Simring Trust Account, for the period commencing February 1, 1989 and ending June 30, 1990.

12. The review of this trust account revealed that:

a) During the period reviewed the Respondent had **44** checks which were presented for payment and which were subsequently dishonored for insufficient funds;

b) On numerous occasions the bank balance, per the bank statement, was in an overdraft position; and,

c) During the entire month of May 1990, the bank balance was in an overdraft position.

Although the parties stipulated that "in at least three instances checks were issued from this account for client purposes" (emphasis added), the Petitioner failed to establish that said account was in fact used as an attorney/client Trust Account.

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13. In March of 1990, the Respondent represented Radcliff Barnett, a minor, concerning Barnett's claim for personal injury.

14. On or about March 5, 1990, the Respondent received \$45,000.00 on behalf of Barnett as settlement of Barnett's claims.

15. On March 5, 1990, the Respondent deposited the aforesaid \$45,000.00 into his trust account at NCNB National Bank, account number 0321300164.

16. This \$45,000.00 was to be distributed as follows:

<u>Name</u>	<u>Amount</u>
Broward General Hospital	\$16,046.76
VNA Home Care	4,800.00
Dr. Amico	150.00
Broward Neurological	100.00
Atlantic Ambulance	2,200.00
Abbey Foster	153.00
N. Broward Radiology	750.00
Dr. Neubeiser	600.00
South Florida Imaging	200.00
Simring Legal Fee	6,747.88
Simring Costs	3,252.12
Balance to Barnett	10,000.24
TOTAL	45,000.00

17. As Barnett was a minor, any and all disbursements of his settlement proceeds needed prior court approval.

18. The Respondent made the following disbursements against the Barnett monies that he held in trust, with each check making reference to the Barnett settlement:

<u>Date</u>	<u>Check #</u>	<u>Payee</u>	<u>Amount</u>
3/5/980	11377	Joan Simring (wife)	\$ 1,000.00
3/5/90	11678	Richard Simring (son)	1,000.00
3/5/90	11679	NCNB - Jill car	2,493.57
3/5/90	11680	NCNB - credit card	993.00
3/5/90	11681	Barnett Bank	1,251.46
3/5/90	11682	State Farm Ins., Lincoln	865.71
3/5/90	11683	State Farm Ins., V.W.	883.62
3/5/90	11684	State Farm Ins.	346.42
3/5/90	11685	State Farm Ins., Volvo	132.59
3/5/90	11686	State Farm Ins.	832.54
3/5/90	11687	Lease Am. Vendor copy mach.	383.05
3/5/90	11689	Volvo Finance N/A	1,392.42
3/6/90	11690	Jean a. Bussman (wages)	680.00
3/6/90	11691	Joan Simring (wife)	1,200.00
3/6/90	11692	Alex Barak	1,000.00
3/8/90	11695	Simring, Glaskin	3,000.00
3/9/90	11696	Steve Rasabi (loan)	375.00
3/9/90	11700	Tech Paper	77.06

3/9/90	11701	Richard Young Prod.	40.48
3/9/90	11702	D & S Publications	209.88
3/9/90	11703	Safeguard Bus. Systems	160.74
3/9/90	11704	Lawyers Diary - Manual	102.00
3/9/90	11705	Lawyers Coop.	69.12
3/9/90	11708	AT&T	265.12
3/9/90	11709	Southern Bell	261.30
3/9/90	11711	Federal Express	300.00
4/16/90	11817	Celia Cohen	1,600.00
4/16/90	11818	Marion Klein	400.00
5/30/90	11975	Clerk of Court	120.00
TOTAL :			\$21,435.08

19. The Respondent did not have court approval for the disbursements listed in paragraph 18 above.

20. The disbursements listed in paragraph 18 have no nexus or connection to Barnett's personal injury case and are solely Respondent's personal obligations.

21. In October of 1990, the Respondent closed his trust account at NCNB and to date has no other trust account.

22. The Respondent contends that he gave Harold Rubalow, a retired New York lawyer, \$35,000.00 in cash to hold for Barnett. Assuming that Rubalow did indeed hold \$35,000.00 in cash, the Respondent figuratively "broke every rule in the book", including court orders, as to how this money was to be held and when it was to be disbursed. The Respondent has stated that he took the money out of the trust account and gave it to Rubalow because the Internal Revenue Service (IRS) had threatened to close out his trust account since Respondent owed the IRS money. Respondent testified that he gave Rubalow the money in cash and did not obtain a receipt for the money. In this regard, the Respondent testified as follows: "... [U]sually when you do a cash transaction there's no documents at all. That's the purpose of it. If you want to leave a paper trail, then you don't do a cash transaction." After Respondent gave Rubalow the money, Respondent stated that he "had no idea what bank the money was in."

111. RECOMMENDATION AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY:

Based upon my findings of fact and the testimony adduced at trial, I find the Respondent guilty of the following rule violations:

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As to Count I

I recommend the Respondent be found guilty and specifically that he be found guilty of the following violations:

Rule 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] of the Rules of Discipline, and Rules 4-1.15(b) [A lawyer shall promptly deliver to the client funds which they are entitled to receive and must provide prompt accountings.], 4-1.15(d) [A lawyer shall comply with the Rules Regulating Trust Accounts.], and 4-8.4(a) [A lawyer shall not violate a disciplinary rule.] of the Rules of Professional Conduct and Rule 5-1.1 [Money entrusted for a specific purpose shall only be used for that purpose.] of the Rules Regulating Trust Accounts.

I recommend the Respondent be found not guilty and specifically that he be found not guilty of the following violations:

Rules 3-4.3 [The commission, by a lawyer, of any act contrary to honesty and justice may be a cause for discipline.] and 3-4.4 [Criminal activity by an attorney is cause for discipline.] of the Rules of Discipline, and Rules 4-8.4(b) [A lawyer shall not commit a criminal act.], and 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.] of the Rules of Professional Conduct.

As to Count II

I recommend the Respondent be found guilty and specifically that he be found guilty of the following violations:

Rule 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.], of the Rules of Discipline and Rules 4-1.15(d) [A lawyer shall comply with the Rules Regulating Trust Accounts.], and 4-8.4(a) [A lawyer shall not violate a disciplinary rule.], of the Rules of Professional Conduct and Rule 5-1.1(d) [Nominal or short term client funds must be deposited in an interest bearing trust account, the interest earned therefrom must be paid to the Florida Bar Foundation.] of the Rule Regulating Trust Accounts.

As to Count III

I recommend the Respondent be found guilty and specifically

that he be found guilty of the following violations:

Rule 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.], of the Rules of Discipline and Rules 4-1.5(d) [A lawyer shall comply with the Rules Regulating Trust Accounts.], and 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct.

As to Count IV

I recommend the Respondent be found guilty and specifically that he be found guilty of the following violations:

Rule 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] of the Rules of Discipline; Rules 4-1.15(d) [A lawyer shall comply with the Rules Regulating Trust Accounts.] and 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct, and Rules 5-1.1(c) and 5-1.2(b) and (c) [An attorney shall keep certain minimum required trust account records and shall follow certain minimum required trust accounting procedures.] of the Rules Regulating Trust Accounts.

As to Count V

I recommend the Respondent be found not guilty and specifically that he be found not guilty of the following violations:

Rule 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] of the Rules of Discipline, and Rules 4-1.15(b) [A lawyers shall promptly deliver to the client funds which they are entitled to receive and must provide prompt accountings.], 4-1.15(d) [A lawyer shall comply with the Rules Regulating Trust Accounts.], and 4-8.4(a) [A lawyer shall not violate a disciplinary rule.] of the Rules of Professional Conduct and Rule 5-1.1 [Money entrusted for a specific purpose shall only be used for that purpose.] of the Rules Regulating Trust Accounts.

CASE NUMBER 78,243

I recommend the Respondent be found guilty and specifically that he be found guilty of the following violations:

Rule 3-4.2 [Violations of the Rules of Professional Conduct is cause for discipline.] of the Rules of Discipline, and Rules 4-1.15(a) [A lawyer shall hold all client funds in trust.], 4-1.15(b)

[A lawyer shall promptly deliver funds to his client.], 4-1.15(c) [Contested funds shall be treated as trust funds.], 4-1.15(d) [A lawyer shall comply with the Rules Regulating Trust Accounts.], and 4-8.4(a) [A lawyer shall not violate a disciplinary rule.] of the Rules of Professional Conduct and Rule 5-1.1 [Money entrusted for a specific purpose must only be used for that purpose.] of the Rules Regulating Trust Accounts.

IV. RECOMMENDATION AS TO THE DISCIPLINARY MEASURE TO BE APPLIED:

The Respondent's actions in these two cases are very serious and warrant a eighteen (18) month suspension. In reaching this decision, I considered the following in aggravation of the sanction I would impose:

- 1) Selfish motive (use of client monies for his own purposes);
- 2) Pattern of misconduct (the unethical acts continued for a period of one year or longer);
- 3) Multiple offenses (I found the Respondent guilty of 5 counts of unethical conduct);
- 4) Substantial experience in the practice of law (admitted in 1973);
- 5) Vulnerability of a victim (Barnett is a minor).

In addition, I have considered the following evidence in mitigation:

- 1) The Respondent testified about the terrible mental strain he was under in 1989 and 1990 due to his own medical problems (i.e., a recurring flu and an iron deficiency), IRS problems, other monetary problems and most importantly his minor son's attempted suicide and mental instability;
- 2) Respondent's lack of prior disciplinary record: (?)

The Respondent's misconduct in this case is very serious. This serious offense warrants serious discipline - an eighteen (18) month suspension. The Respondent's total disregard for required trust accounting procedures demonstrated not only an utter disregard for the law but posed a tremendous danger to the public as well as to Respondent's specific clients. There were little or no records

indicating the precise source of the funds placed into the Respondent's trust account and little or no records indicating the purpose of those funds. Because of the Respondent's sloppy and intentionally improper trust accounting procedures, the exact extent of his misconduct and the resulting damage to his clients may never be known -- but the potential damage is obvious and apparent. Lawyers who fail to keep proper records of the receipt and disbursement of client funds subjects the clients' funds to risk of intentional or accidental loss at the hands of the lawyer or some third party with absolutely no protection for the client -- lawyers who commingle clients' funds with their own subject the clients' funds to the claims of creditors -- lawyers who give large amounts of client funds to third-parties with no documentation and "no idea" what the third-party is going to do to safeguard the money place the clients' funds at great risk and jeopardy. The Respondent was well aware of the Rules but simply ignored them, acting as if the law did not apply to him. Therefore, my recommendation to the Supreme Court is that Respondent be suspended from the practice of law for eighteen (18) months.

V. PERSONAL HISTORY:

The Respondent is 56 years of age and was admitted to the Florida Bar on December 14, 1973.

VI. STATEMENT OF PAST DISCIPLINE:

None.

VII. STATEMENT OF COSTS OF THE PROCEEDING:

A. Administrative Costs [Rule 3-7.6(k)]

1) Case No. 90-51,037 (17C)	\$ 500.00
2) Case No. 91-50,783 (17G)	<u>500.00</u>
Subtotal	\$1,000.00

B. Court Reporter Costs

1) Autera Deposition	\$ 45.00
2) Simring Deposition	301.75
3) Schain Deposition	149.50
4) 2/8/91 Hearing	174.34
5) 2/19/91 Hearing	88.41
6) 10/3/91 Final Hearing	<u>1,435.65</u>
Subtotal	\$2,194.65

C. Expert Costs


1) Barbara Winter, Ph.D.	\$1,571.50
2) Mark Widlansky, Bar Auditor (200.25 hrs.)	4,589.53
3) Schain Deposition	<u>270.00</u>
Subtotal	\$6,431.03

D. Miscellaneous Costs

1) NCNB - Cost for production of documents	\$ 96.10
2) Witness Fees	20.00
3) Service of Subpoenas	24.00
4) Bar Counsel Travel (3 trips to West Palm Beach -180 Miles at \$0.20)	48.00
5) Investigator's Costs	<u>107.23</u>
Subtotal	295.33
<u>TOTAL</u>	\$9,921.01

It is apparent that other costs may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent.

Rendered this 22nd day of November, 1991 at Palm Beach County, Florida.



 W. MATTHEW STEVENSON, Referee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Report of Referee has been sent this 22nd day of November, 1991 by first class mail to Kevin P. Tynan, Esq., 5900 N. Andrews Ave., Ste. 835, Ft. Lauderdale, FL 33309 and to Neil Garfield, Esq., 3500 N. State Rd. 7, Ste. 333, Ft. Lauderdale, FL 33319.



 W. MATTHEW STEVENSON, Referee