

047

FILED

SID J. WHITE

SEP 16 1991

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
v.

Supreme Court
Case No. 77,400

DAVID B. HAMILTON,
Respondent.

On Petition for Review of
the Referee's Report in a
Disciplinary Proceeding.

INITIAL BRIEF OF COMPLAINANT

PATRICIA S. ETKIN
Bar Counsel
The Florida Bar No. 290742
The Florida Bar
Suite M-100, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar No. 217395
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 222-5286

TABLE OF CONTENTS

	<u>Pages</u>
TABLE OF AUTHORITIES	ii, iii
INTRODUCTION	iv
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
SUMMARY OF ARGUMENT	9
ARGUMENT	
Disbarment is the appropriate disciplinary sanction for misconduct of an egregious and cumulative nature	10
CONCLUSION	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>The Florida Bar v. Breed</u> 378 So.2d 783 (Fla. 1980)	13
<u>The Florida Bar v. Gillis</u> 527 So.2d 818 (Fla. 1988)	13
<u>The Florida Bar v. Setien</u> 530 So.2d 298 (Fla. 1988)	13
<u>The Florida Bar v. Tarrant</u> 464 So.2d 1199 (Fla. 1985)	13
<u>The Florida Bar v. Vernell</u> 374 So.2d 473 (Fla. 1979)	13

OTHER AUTHORITIES

STANDARDS FOR IMPOSING LAWYER SANCTIONS

Standard 4.11	14
Standard 4.41	16
Standard 4.61	15
Standard 5.11	15
Standard 9.22(b)	16
Standard 9.22(c)	16
Standard 9.22(d)	16

RULES REGULATING THE FLORIDA BAR

RULES OF PROFESSIONAL CONDUCT

Rule 4-1.15(a)	7
Rule 4-8.4(c)	7
Rule 4-1.4(a)	8
Rule 4-1.4(b)	8
Rule 4-1.3	8
Rule 4-1.16(d)	8

RULES OF DISCIPLINE

Rule 3-4.3 7

RULES REGULATING TRUST ACCOUNTS

Rule 5-1.2(b) 7
Rule 5-1.2(c) 7
Rule 5-1.1 7

INTRODUCTION

In this brief, The Florida Bar is referred to as either "THE FLORIDA BAR", "THE BAR", or "Complainant"; DAVID B. HAMILTON will be referred to as the "Respondent" or "Hamilton" and other parties referred to in the Bar's Complaint will be referred to by their respective names or surnames for clarity.

Abbreviations utilized in this brief are as follows:

"Tr" refers to the Transcript of Proceedings before the Referee held May 6, 1991.

"RR" refers to the Report of Referee.

STATEMENT OF THE CASE

This disciplinary proceeding commenced on February 15, 1991 with the filing of a ten-count complaint against Respondent alleging numerous disciplinary rule violations.

On February 25, 1991, the Supreme Court assigned a referee to hear this matter. A hearing before the Referee was held on April 3, 1991 on The Florida Bar's Motion to Schedule Final Hearing. At that hearing the final hearing date of May 6, 1991 was selected and venue determined.

Prior to the final hearing, The Florida Bar filed a Motion for Order Deeming Matters Admitted pursuant to Rule 1.370, Florida Rules of Civil Procedure, based upon Respondent's failure to answer the Request for Admissions. By order dated April 11, 1991, the Referee granted The Florida Bar's motion and deemed the matters admitted. Accordingly, the issue which was to have been presented at the final hearing was limited to testimony and argument as it pertained to discipline.

Final hearing before the Referee was held on May 6, 1991. On May 2, 1991, Respondent filed a motion for continuance of the final hearing which was denied by the referee prior to commencement of the hearing (Tr. 7). Respondent announced at final hearing that he was unprepared to proceed with his defense (Tr. 8, 9) as well as argument on discipline (Tr. 16, 17). Respondent did not offer any

explanation of his actions nor did he present any testimony or evidence related to mitigation. The Referee found Respondent guilty of the misconduct and ordered the parties to file a written recommendation as to penalty in lieu of oral argument (Tr. 17 - 19).

Written Argument on Discipline was filed by each party. Thereafter, on June 25, 1991 the Referee issued a Report of Referee which recommended a three-year suspension and proof of rehabilitation as a disciplinary sanction (RR 12).

The Report of Referee was considered by the Board of Governors of The Florida Bar at its meeting held July 1991. The Florida Bar has filed the instant petition for review recommending rejection of the Referee's recommendation of discipline and in lieu thereof seeks entry of an order of disbarment.

STATEMENT OF THE FACTS

The ten-count complaint filed by The Florida Bar against Respondent alleges a myriad of misconduct involving a wide-range of disciplinary rule violations.

Counts I and II of the Complaint involve violations of required trust accounting recordkeeping and procedures and is based upon an audit of Respondent's trust account maintained during the period November 1989 through the closing of the account in July 1990. The audit revealed that Respondent failed to maintain the required trust account records and to comply with the minimum trust accounting procedures, specifically that Respondent: failed to maintain original or duplicate deposit slips and in the case of currency, an additional cash receipts book, clearly identifying the date, source of all trust funds received and the matter for which funds were received; failed to maintain documentary support for all disbursements and transfers from the trust account; failed to maintain a separate cash receipts and disbursements journal; failed to maintain a file or ledger for each client or matter; failed to prepare a monthly trust account balance reconciliation; failed to prepare an annual listing identifying the balance of unexpended trust money held for each client; failed to preserve reconciliations for the last six (6) years; failed to authorize and request that his bank notify The Florida Bar of any trust account

check which is dishonored for insufficient or uncollected funds; commingled his funds with funds belonging to clients and issued trust account checks to satisfy personal obligations.

Count III of the Complaint is likewise based upon the audit of Respondent's trust account but involves the issuance of worthless trust account checks, specifically the issuance of trust account checks which were dishonored by Respondent's bank for insufficient funds. These checks included two (2) checks to the Circuit Court, two (2) checks to Epicure market (a supermarket) and a check to a hair salon.

Counts IV and VII of the Complaint set forth two specific instances in which Respondent misappropriated client funds. The first instance occurred during the course of Respondent's representation of Harry M. Willner in a matter involving the collection of outstanding receivables. In or about December 1989, Respondent received a check made payable to "David Hamilton Trust for Herry [sic] Wilmer, A & J Window Service" in the amount of ONE THOUSAND ONE HUNDRED TWENTY THREE DOLLARS AND THIRTY FOUR CENTS (\$1,123.34) which represented the receivables Respondent collected on behalf of Willner. On January 2, 1990 Respondent deposited this check into his trust account and thereafter misappropriated the funds by issuing by issuing numerous checks from his trust account made payable to himself and others not associated with his

representation of Willner.

The second instance occurred during the course of Respondent's representation of Allen Weiss in connection with the filing of a lawsuit against a neighbor for harrassment. On or about February 16, 1990 Respondent received a check from Weiss in the amount of ONE HUNDRED AND FIFTY DOLLARS (\$150.00) which was to be used for costs associated with the filing of a lawsuit. After endorsing the check, Respondent received FIFTY DOLLARS (\$50.00) in cash and deposited the ONE HUNDRED DOLLAR (\$100.00) balance into his trust account. Respondent thereafter misappropriated the funds by issuing checks from his trust account made payable to himself and others not associated with his representation of Weiss.

Counts V and IX involve several instances of misrepresentation. In the first instance, Respondent misrepresented to Willner's granddaughter the manner in which he handled the Willner client funds. Respondent initially represented that he had not collected any proceeds on behalf of Willner. Respondent subsequently acknowledged that he had received a check on behalf of Willner but claimed that the check was returned by the bank because it lacked a signature and that Respondent had, therefore, mailed the check back to the drawer to be properly signed. Respondent's representations were false in that at the time such representations were made, Respondent had

received and misappropriated the proceeds he had both received on Willner's behalf.

Another instance of misrepresentation occurred during the course of Respondent's representation of Wendell Smith in a matter involving the appeal of an order of dismissal from County employment. In response to an inquiry from Smith concerning the status of his case, Respondent represented to Smith that he had filed an appeal and was waiting for a court date. Respondent later represented that a hearing date could not be scheduled because judges were on vacation. These representations, however, were false in that Respondent had never appealed the order of dismissal and there was no matter pending before any court. Moreover, Smith's claim was jurisdictionally barred. Nevertheless Respondent accepted or retained ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) towards his fee to perform legal services on behalf of Smith when he knew or should have known that the claim was jurisdictionally barred and that he could not, therefore, provide any legal service.

In addition, in several instances Respondent failed to perform any legal service on behalf of his clients. This misconduct is evidenced by Respondent's failure to file a lawsuit on behalf of Weiss as well as his failure to appear at a hearing on behalf of Calambichis. In effect Respondent abandoned the representation of his clients. In addition, Respondent failed to promptly and

properly communicate with clients and ignored numerous attempts made by clients to communicate with him. In fact, Respondent even moved his office and changed his telephone number without advising at least one client (Smith).

Respondent's actions which are the basis for this proceeding constitute a panoply of disciplinary rule violations, to wit: Rule 5-1.2(b) of the Rules Regulating Trust Accounts for failing to maintain the minimum trust accounting records (Count I); Rule 5-1.2(c) of the Rules Regulating Trust Accounts and Rule 4-1.15(a) of the Rules of Professional Conduct for failing to comply with the minimum required trust accounting procedures (Count II); Rule 4-8.4(c) of the Rules of Professional Conduct and Rule 3-4.3 of the Rules of Discipline for issuing worthless checks (Count III); Rule 5-1.1 of the Rules Regulating Trust Accounts and Rule 4-1.15(a) of the Rules of Professional Conduct for failing to use funds entrusted on behalf of a client for the specific purpose for which such funds were received (i.e., misappropriation) (Counts IV and VII); Rule 4-8.4(c) of the Rules of Professional Conduct for misrepresentation concerning the handling of client funds and the status of a client's legal matters (Counts V and IX); Rule 4-8.4(c) of the Rules of Professional Conduct for accepting or retaining a fee to perform legal services on behalf of a client when Respondent knew, or should have known, that the client's claim

was jurisdictionally barred (Count VIII); Rule 4-1.4(a) and (b) of the Rules of Professional Conduct for failing to respond to client inquiries and/or furnish the client with information necessary for the client to make informed decisions regarding the representation (Count IX); and Rules 4-1.3, 4-1.4(a) and 4-1.16(d) of the Rules of Professional Conduct for failing to diligently represent a client, failing to promptly and properly communicate with the client and failing to protect the client's legal interests upon termination of representation (Counts VI and X).

SUMMARY OF THE ARGUMENT

The ten-count complaint against Respondent details conduct of an egregious and cumulative nature which includes violations of trust account recordkeeping and procedures, issuing worthless checks, misappropriation, misrepresentation, neglect and abandonment. Considering the "composite conduct" of Respondent in conjunction with both case law and the applicable Standards for Imposing Lawyer Sanctions, it is clear that disbarment is the most appropriate disciplinary sanction.

ARGUMENT

DISBARMENT IS THE APPROPRIATE DISCIPLINARY
SANCTION FOR MISCONDUCT OF AN EGREGIOUS AND
CUMULATIVE NATURE.

In determining an appropriate disciplinary sanction, consideration must be given to the serious nature of the misconduct. In addition to trust accounting recordkeeping and procedures as well as the issuance of worthless checks, this disciplinary proceeding involves misconduct associated with Respondent's representation of four clients: Willner (Counts IV and V); Weiss (Counts VI and VII); Smith (Counts VIII and IX); and Calambichis (Count X) as summarized below.

Respondent represented Willner in a collection matter. He collected ONE THOUSAND ONE HUNDRED TWENTY-THREE DOLLARS AND THIRTY-FOUR CENTS (\$1,123.34) which he deposited into his trust account and thereafter misappropriated (Count IV). Respondent was later contacted by Willner's granddaughter to obtain information concerning the status of the collection. Respondent initially denied collecting the proceeds. Later, however, when confronted with the information that the funds had been paid to him, Respondent admitted to the granddaughter that he had received a check but explained that it was returned to obtain a proper signature (Count V). Both representations were false in that the time the statements were made Respondent had already received and

misappropriated the proceeds he had collected on behalf of Willner.

Respondent represented Weiss in connection with a lawsuit he was to initiate against a neighbor for harassment. Respondent received a check from Weiss in the amount of ONE HUNDRED AND FIFTY DOLLARS which was to be used for costs in the filing of a lawsuit. Respondent cashed the cost deposit check and retained FIFTY DOLLARS (\$50.00). He deposited the ONE HUNDRED DOLLAR (\$100.00) balance into his trust account and thereafter misappropriated these funds by issuing checks made payable to himself and others not associated with the representation of Weiss (Count VII). Respondent failed to file a lawsuit on behalf of Weiss and took little or no action to pursue the representation. Moreover, after advising Weiss that Weiss would receive notification of the court hearing date and that the filing of a lawsuit takes time, Respondent failed to promptly and properly communicate with Weiss concerning the status of the representation and his intentions with respect to filing a lawsuit (Count VI).

Respondent's representation of Smith involved the appeal of an order of dismissal of County employment. Respondent failed to return numerous telephone calls from Smith and at one point moved his office and changed his telephone number without advising Smith. Nevertheless, on one occasion in which Smith was able to contact Respondent, Respondent represented to Smith that he had filed an

appeal and was waiting for a court date. Respondent later explained that a court date could not be scheduled because the judges were on vacation. These representations were false in that Respondent had never pursued an appeal and at the time the statements were made there was no matter pending before any court. Moreover, Smith's claim was jurisdictionally barred and in fact an order dismissing the appeal had previously been entered in response to a motion to dismiss appeal filed by the County. Nevertheless, Respondent received and retained ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) in partial payment of his fee when he knew or should have known that Smith's claim was jurisdictionally barred and the appeal had been dismissed (Counts VIII and IX).

Respondent accepted SIX HUNDRED DOLLARS (\$600.00) as a fee to represent Calambichis, in a claim against an automobile dealer. In addition to failing to return numerous telephone calls from Calambichis Respondent took no action to pursue the claim and failed to attend a hearing with his client before the County Consumer Affairs Division. Respondent, therefore, abandoned the representation of Calambichis (Count X).

Respondent in the instant case engaged in several instances of serious misconduct including misappropriation, misrepresentation, neglect, abandonment, issuing worthless checks and violations of trust accounting recordkeeping and procedures. In determining

discipline, this Court deals more severely with cumulative misconduct rather than isolated instances. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

Moreover, any one of the instances of misappropriation, alone, justifies disbarment. The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980). In fact, this Court has disbarred a Respondent for a single instance of misappropriation involving only THREE HUNDRED AND FIFTY DOLLARS (\$350.00) of client funds. The Florida Bar v. Gillis, So.2d 818 (Fla. 1988). Disbarment is even further justified when considering the combination of misappropriation with the numerous other instances of misconduct. See The Florida Bar v. Tarrant, 464 So.2d 1199 (Fla. 1985), wherein this Court disbarred a respondent who engaged in misappropriation in conjunction with a failure to provide legal services, both types of misconduct which are present in the instant case.

In The Florida Bar v. Setien, 530 So.2d 298, 300 (Fla. 1988), this Court reaffirmed its policy that "where the composite conduct of a lawyer is 'gross', disbarment is warranted". The Florida Bar maintains that the "composite conduct" of Respondent in the instant case manifests a fundamentally unethical nature justifying disbarment.

Moreover, disbarment is clearly the appropriate disciplinary sanction when considering the Florida Standards for Imposing Lawyer

Sanctions. The instant case involves several violations of duties owed to clients, such as the failure to preserve the clients property (Standard 4.1), lack of diligence (Standard 4.4) lack of candor (Standard 4.6). In addition, Respondent violated the duty owed to the public in failing to maintain personal integrity (Standard 5.1).

Standard 4.1 pertains to a failure to preserve client property and is applicable to misconduct involving misappropriation of client funds:

4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

One of the most compelling examples of intentional misappropriation of client funds is detailed in Count VII of the Complaint. In this instance Respondent endorsed a check entrusted to him as a cost deposit and received FIFTY DOLLARS (\$50.00) in cash. The ONE HUNDRED DOLLARS (\$100.00) balance was deposited into Respondent's trust account and used to fund checks made payable to Respondent and others not associated with the representation of the client (Weiss).

In addition, as set forth in Count IV, Respondent received settlement proceeds on behalf of Willner which he deposited into his trust account and thereafter used for other unauthorized purposes. In an effort to conceal his acts misappropriation,

Respondent initially advised the client's granddaughter that he had not collected the settlement proceeds and when later confronted with contradictory information, he represented that the check he had received had to be returned to be properly signed. Respondent's subsequent actions of misrepresentation clearly reflect knowing or intentional action to conceal his misconduct and fully justifies disbarment without regard to the misappropriation. Standard 4.61 states:

4.61 Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury.

By issuing worthless trust account checks (Count III), Respondent has engaged in conduct which is unlawful or contrary to honesty (Rule 3-4.3 of the Rules of Discipline) as well as conduct involving dishonesty, fraud, deceit, or misrepresentation [Rule 4-8.4(c) of the Rules of Professional Conduct]. The latter rule also applies to Respondent's actions of accepting or retaining a fee to perform services in connection with a claim which is jurisdictionally barred. Standard 5.11, which is applicable to this type of misconduct, states, in pertinent part:

5.11 Disbarment is appropriate when . . .

(b) a lawyer engages in serious criminal conduct, a necessary element of which includes . . . fraud . . . or theft or . . .

(f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

Respondent's actions of neglect as set forth in Counts VI and X of the Complaint constitute a violation of Rules 4-1.3 and 4-1.6(a). Standard 4.41 which is applicable to this misconduct and states, in pertinent part:

4.41 Disbarment is appropriate when . . .

(b) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or

(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

It is apparent that in the case subjudice, each act of misconduct committed by Respondent (e.g., misappropriation, misrepresentation and neglect) has the potential to cause serious injury to the client. Respondent's disbarment is, therefore, fully warranted based upon the facts of this case and without regard to any aggravating factors which are present, such as a dishonest or selfish motive, a pattern of misconduct, and multiple offenses. Standards 9.22(b), (c) and (d).

CONCLUSION

The sanction of disbarment is warranted based solely upon a

misappropriation of client funds. Disbarment is even more fully justified when the misappropriation is accompanied by other misconduct. The instant case involves misconduct of an egregious and cumulative nature. Considering the "composite conduct" of Respondent in conjunction with case law and the Standards for Imposing Lawyer Sanctions, it is the position of The Florida Bar that disbarment is the appropriate disciplinary sanction. The Florida Bar, therefore, urges this Court to reject the referee's recommendation of suspension as a disciplinary sanction and in lieu thereof enter an order disbarring Respondent.

Respectfully submitted,



PATRICIA S. ETKIN
Bar Counsel
Attorney No. 290742
The Florida Bar
Suite M-100, Rivergate Plaza
444 Brickell Avenue
Miami, FL 33131
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of Complainant was sent by Federal Express to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927, and that a true and correct copy

was mailed to David B. Hamilton, Respondent, 605 Lincoln Road,
Suite 612, Miami Beach, Florida 33139 this 13th day of September
1991.



PATRICIA S. ETKIN
Bar Counsel