

FILED

SID J. WHITE

JUL 3 1991

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

v.

DAVID B. HAMILTON,
Respondent.

Supreme Court
Case No. 77,400

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

Pursuant to the undersigned being duly appointed as referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.5, Rules of Discipline, a Final Hearing was held on Monday, May 6, 1991. All of the pleadings, notices, motions, orders, transcripts and exhibits are forwarded with this report and the foregoing constitutes the record of this case.

The following attorneys were counsel for the parties:

On behalf of The Florida Bar: PATRICIA S. ETKIN

On behalf of the Respondent: pro se

Complainant filed a Motion for Order Deeming Matters Admitted pursuant to Rule 1.370, Florida Rules of Civil Procedures, based upon Respondent's failure to answer Complainant's Request for Admissions. Complainant's motion was granted. Accordingly, all of the factual allegations and disciplinary rule violations set forth in the Bar's complaint were deemed admitted pursuant to the order of this referee dated April 11, 1991.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:

Based upon the pleadings, and specifically the matters set forth in the Request for Admissions which have been deemed admitted, I find:

As to Count I

1. Respondent, DAVID B. HAMILTON, is, and at all times hereinafter mentioned was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. During 1989 through July 1990, Respondent maintained a trust account at Intercontinental Bank, Miami, Florida, Account No. 101435093 (hereinafter "trust account").

3. Carlos Ruga, The Florida Bar Staff Auditor, performed an audit of Respondent's trust account.

4. The aforementioned audit covered all recorded trust account transactions occurring between November 1989 through July 1990.

5. The audit revealed numerous trust accounting recordkeeping violations, as detailed below:

6. Respondent failed to maintain original or duplicate deposit slips and, in the case of currency or coin, an additional cash receipts book, clearly identifying the date and source of all trust funds received and the matter for which the funds were received.

7. Respondent failed to maintain other documentary support for all disbursements and transfers from the trust account.

8. Respondent failed to maintain a separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers and the account balance, and containing at

least: the identification of the client or matter for which the funds were received, disbursed, or transferred; the date on which all trust funds were received, disbursed or transferred and the reason for which all trust funds were received disbursed or transferred.

9. Respondent failed to maintain a separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing: the identification of the client or matter for which trust funds were received, disbursed, or transferred; the date on which all trust funds were received, disbursed or transferred; the check number for all disbursements; and the reason for which all trust funds were received, disbursed or transferred.

As to Count II

10. The audit revealed numerous trust accounting procedural violations, as detailed below:

11. Respondent commingled funds by depositing personal funds together with client funds into the trust account.

12. Respondent issued checks from the trust account made payable to himself and others to satisfy personal obligations.

13. Respondent failed to prepare a monthly comparison between the total of the reconciled balances of all trust accounts and the total of the trust account ledger cards or pages, together with specific descriptions of any differences between the two totals and reasons therefor.

14. Respondent failed to prepare at least annually a detailed listing identifying the balance of the unexpended trust money held

for each client or matter.

15. Respondent failed to prepare and/or preserve the reconciliation records referenced in Paragraphs 13 and 14, above, for the last six (6) years.

16. Respondent failed to authorize and request his bank where he is a signatory on a trust account to notify The Florida Bar Staff Counsel in the event any trust check is returned due to insufficient funds or uncollected funds absent bank error.

As to Count III

17. The audit revealed that Respondent issued at least seven (7) checks from his trust account which were dishonored by the bank due to insufficient funds, as detailed below.

18. On or about April 5, 1990, Respondent issued trust account Check No. 1043, made payable to Clerk, County Court, in the amount of SIXTY TWO DOLLARS (\$62.00).

19. Respondent's check, referenced above, was dishonored by the bank due to insufficient funds.

20. On or about April 10, 1990, Respondent issued trust account Check No. 1046 in the amount of ONE HUNDRED FIFTY TWO DOLLARS AND THIRTY SEVEN CENTS (\$152.37).

21. Respondent's check, referenced above, was dishonored by the bank due to insufficient funds.

22. On or about June 8, 1990, Respondent issued trust account Check No. 1083, made payable to Epicure Market, in the amount of TWENTY SIX DOLLARS AND SIXTY SEVEN CENTS (\$26.67).

23. Respondent's check, referenced above, was returned by the bank due to insufficient funds.

24. On or about June 11, 1990, Respondent issued trust

account Check No. 1084, made payable to Clerk of the County Courts, in the amount of THIRTY NINE DOLLARS (\$39.00).

25. Respondent's check, referenced above, was returned by the bank due to insufficient funds.

26. On or about June 8, 1990, Respondent issued trust account Check No. 1082, made payable to Premier Hair Stylist, in the amount of TWENTY TWO DOLLARS (\$22.00).

27. Respondent's check, referenced above, was returned by the bank due to insufficient funds.

28. On or about June 11, 1990, Respondent issued trust account Check No. 1086, made payable to Epicure Market, in the amount of NINETEEN DOLLARS AND ELEVEN CENTS (\$19.11).

29. Respondent's check, referenced above, was returned by the bank due to insufficient funds.

30. On or about June 1, 1990, Respondent issued trust account Check No. 1080, payable to Everhart Defective and Recovery, in the amount of FORTY ONE DOLLARS AND EIGHTY CENTS (\$41.80).

31. Respondent's check, referenced above, was returned by the bank due to insufficient funds.

32. Respondent trust account bank statements reflect an overdraft status on February 13, March 14, April 6, 9 and 10, June 1, 8, 12, 13, 14, 15, 18, 19, 29 and 30, 1990 through the closing of the account by the bank on July 2, 1990.

33. At the time each of the seven (7) trust account checks referenced in Paragraphs 18 through 31 were issued, Respondent knew or should have known that there were insufficient funds in his trust account to cover the obligation.

34. Respondent's actions, described above, constitutes the

issuance of worthless checks.

As to Count IV

35. In October 1989 Harry M. Willner (hereinafter referred to as "Willner") retained Respondent to recover outstanding receivables due him from a business which he sold.

36. 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) (hereinafter referred to as "Willner check").

37. The Willner check represented the receivables Respondent collected on behalf of Willner.

38. On January 2, 1990 Respondent deposited the Willner check into his trust account.

39. During January 1990 Respondent issued numerous checks from his trust account made payable to himself and others not associated with his representation of Willner.

40. Respondent used the proceeds from the Willner check for unauthorized purposes.

41. Respondent misappropriated the funds he had received on behalf of Willner.

As to Count V

42. Respondent failed to notify Willner of his receipt of the Willner check.

43. Respondent was contacted by Robin Willner, Willner's granddaughter, to obtain information concerning the status of Respondent's representation of Willner.

44. In one instance Respondent represented to Robin Willner

that he had not collected any proceeds on behalf of Willner.

45. Robin Willner subsequently learned that the proceeds due Willner had been paid to Respondent.

46. Robin Willner confronted Respondent with the aforementioned information.

47. In response, Respondent 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.

48. Respondent's representations to Robin Willner referred to in Paragraphs 44 and 47, above, were false in that at the time such representations were made, Respondent had received and misappropriated the proceeds he had received on Willner's behalf.

As to Count VI

49. In or about February 1990 Allen Weiss (hereinafter referred to as "Weiss") retained Respondent to file a lawsuit against a neighbor for harassment.

50. Respondent advised Weiss that he would receive notification of the court hearing.

51. Thereafter Respondent failed to file a lawsuit on behalf of Weiss and undertook little or no action to pursue the representation.

52. Respondent failed to promptly and properly communicate with Weiss concerning the status of the representation and his intentions with respect to filing a lawsuit.

53. On one occasion when Weiss confronted Respondent in his office to inquire about the status of the lawsuit, he was reassured

by Respondent that the filing of a lawsuit takes time.

Findings as to Count VII

54. On or about February 16, 1990 Respondent received a check from Weiss in the amount of ONE HUNDRED AND FIFTY DOLLARS (\$150.00) as a cost deposit to be used for costs associated with the filing of a lawsuit.

55. On February 20, 1990, Respondent endorsed the aforementioned check and deposited ONE HUNDRED DOLLARS (\$100.00) into his trust account and received FIFTY DOLLARS (\$50.00) in cash.

56. Respondent thereafter issued checks from his trust account made payable to himself and others not associated with his representation of Weiss.

57. Respondent used the funds he received from Weiss for unauthorized purposes.

58. Respondent misappropriated the funds which he received from Weiss as a cost deposit.

As to Count VIII

59. Wendell Smith (hereinafter referred to as "Smith") was terminated from employment by Dade County.

60. Smith initiated legal proceedings which, after arbitration, resulted in a recommendation to reinstate him.

61. On August 16, 1988, the Dade County Manager rejected the recommendation to reinstate Smith and entered an order of dismissal.

62. In or about February 1989 Smith retained Respondent to appeal the order of dismissal.

63. Respondent agreed to undertake the representation of Smith and accepted ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) as

partial payment of his total fee of TWO THOUSAND DOLLARS (\$2,000.00).

64. At the time Respondent undertook the representation he was advised by Smith that there had been a problem with the filing of the Notice of Appeal by Smith's former attorney in that it had been initially sent to the wrong office or address.

65. A motion to dismiss appeal was filed by the County which alleged that the notice of appeal had not been filed with the Personnel Director within the required thirty (30) days period.

66. On December 7, 1989 an order was issued by the Appellate Division, Dade County Circuit Court, dismissing Smith's appeal for lack of jurisdiction.

67. At the time he accepted the representation Respondent knew or should have known that the timely filing of a notice of appeal was a prerequisite to establishing appellate jurisdiction.

68. At the time he accepted the representation, or shortly thereafter, Respondent knew or should have known that the Smith's claim was jurisdictionally barred.

69. In or after October 1990, Smith located Respondent and confronted him with information that he had obtained from the appellate court reflecting that the appeal had been dismissed in December 1989 and no action had been undertaken by Respondent.

70. In response thereto and on numerous occasions thereafter, Respondent agreed to refund the legal fees paid by Smith.

71. Respondent never returned any funds paid to him by Smith for fees.

As to Count IX

72. Smith or others on behalf of Smith made numerous attempts

to contact Respondent to inquire about the status of Smith's case.

73. Respondent failed to return numerous telephone calls from Smith or others on Smith's behalf or initiate any action to communicate with Smith.

74. During the summer of 1990 Smith contacted Respondent for information concerning the status of the representation.

75. In response, Respondent advised Smith that he had filed an appeal and was waiting for a court date.

76. On another occasion Respondent explained to Smith that a hearing date could not be scheduled because judges were on vacation.

77. The above-referenced representations were false in that Respondent never filed an appeal and there was no matter pending before any court.

78. At one point Respondent moved his office and/or changed his telephone number without advising Smith.

79. In or about October 1990 Smith contacted the appellate court where he learned that Respondent had never filed a brief or undertook any action on his behalf.

80. Respondent never advised Smith that his claim was jurisdictionally barred.

As to Count X

81. In September 1990 Emmanuel Calambichis (hereinafter referred to as "Calambichis") retained Respondent to represent him in a claim against an automobile dealer.

82. Respondent received SIX HUNDRED DOLLARS (\$600.00) from Calambichis as a legal fee for the representation.

83. In early November 1990, Calambichis received notification

that a hearing before the Broward County Consumer Affairs Division was scheduled for November 29, 1990.

84. Calambichis made numerous unsuccessful attempts to contact Respondent by telephone.

85. On November 8, 1990 Calambichis sent written correspondence to Respondent, by certified mail, return receipt requested, advising him of the aforementioned hearing date.

86. Respondent received the written correspondence from Calambichis on November 9, 1990.

87. Respondent failed to appear at the hearing on behalf of Calambichis on November 29, 1990 and took no action to pursue Calambichis' legal matters.

88. Respondent never contacted Calambichis to advise that either he would not appear on Calambichis' behalf at the hearing on November 29, 1990 or would no longer represent him.

89. Respondent's actions, described above, constitutes an improper termination or abandonment of the representation of Calambichis.

III. RECOMMENDATIONS AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE

FOUND GUILTY: I recommend that Respondent be found guilty of violating the following disciplinary rules:

a. Rule 5-1.2(b) of the Rules Regulating Trust Accounts for failing to maintain the minimum trust accounting records. (Count I)

b. 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)

c. 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)

d. 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 to him on behalf of a client for the specific purpose for which such funds were received, and specifically his misappropriation of client funds as well as a client's cost deposit. (Counts IV and VII)

e. Rule 4-8.4(c) of the Rules of Professional Conduct for misrepresentation concerning his handling of client funds. (Count V)

f. 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 he knew, or should have known, that the client's claim was jurisdictionally barred. (Count VIII)

g. Rules 4-8.4(c), 4-1.4(a) & (b) of the Rules of Professional Conduct for misrepresentations to a client concerning the status of the client's legal matters and action he had undertaken on the client's behalf as well as his failure 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)

h. 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, failure to promptly and properly communicate with the client and a failure to protect the client's legal interests upon termination of representation. (Counts VI and X)

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that Respondent be suspended from the practice of law for three (3) years with proof of rehabilitation required for reinstatement in accordance with Rule 3-5.1(f) of the Rules of Discipline.

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

I find that the following costs were reasonably incurred by The Florida Bar.

Administrative Costs [Rule 3-7.6(k)(1), Rules of Discipline]	\$	500.00
Court Reporter:		
Hearing before Referee (4/3/91)		86.85
Final Hearing before Referee (5/6/91)		117.00
Miscellaneous and Investigative Costs:		

Bank Records	107.00
Investigations	234.60
Cost of Audit	<u>786.19</u>
<u>TOTAL</u>	1,831.64

At a conference call with the parties held June 3, 1991, Respondent confirmed to this Referee that he did not object to the costs submitted by The Florida Bar referenced above.

It is recommended that the foregoing costs be assessed against Respondent. It is further recommended that execution issue with interest at the rate of twelve percent (12%) to accrue on all costs assessments not paid within thirty (30) days of entry of the Supreme Court's final order, unless the time for such payment is extended by the Board of Governors of The Florida Bar.

Dated this 25th day of June, 1991.


 HARRY G. HINCKLEY, JR.
 Referee

Copies furnished to:

Patricia S. Etkin, Bar Counsel
 David B. Hamilton, Respondent