087

FILED
SID J. WHITE
DEC 20 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JAMES R. MCATEE,

Respondent.
_____/

Case No. 77,967

TFB File No. 89-00323-01A
and 90-01274-01A

COMPLAINANT'S ANSWER BRIEF AND INITIAL BRIEF IN SUPPORT OF CROSS-PETITION FOR REVIEW

MIMI DAIGLE
BAR COUNSEL
THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300
(904) 561-5600
ATTORNEY NO. 782033

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Florida Bar, Complainant below, files this Brief in answer to Respondent's Initial Brief and in support of its Cross-Petition for Review. "TR" will refer to the transcript of the final hearing held on August 19, 1991. "RRA" will refer to Respondent's Response to The Florida Bar's Request for Admissions. "Ex." will refer to exhibits entered into evidence at final hearing. "RB" will refer to Respondent's Initial Brief in support of his Petition for Review.

STATEMENT OF THE CASE AND FACTS

In March 1990, The Florida Bar performed an audit of Respondent's trust account for the period of time encompassing January 1987 through February 1990 (TR 29; Ex. 5). The audit revealed that Respondent was not in substantial compliance with the Rules Regulating Trust Accounts of The Florida Bar in that monthly trust comparisons had not been prepared for three years, with the exception of one month (TR 30, 46); monthly shortages ranging from a low of $96.50 to a high of $2,702.26 existed for almost the entire period covered by the audit (Ex. 5); checks had been issued against uncollected funds (TR 40-42); instances of commingling existed, where earned fees were transferred from one client to another so that a payment to a third party could be made on behalf of the second client (TR 43-45); and the trust account was not an IOTA account (TR 29-30).

The audit also confirmed that an employee of Respondent's firm had stolen trust money by not depositing all of the funds that had been received (TR 32-33). These thefts from trust were $400.00 in March 1987 and $200.00 in March 1988 (Ex. 5; TR 33). Employee thefts also occurred from accounts maintained by Respondent as bankruptcy trustee (TR 34). Other shortages were caused by depositing trust funds to the office account or by late deposits (TR 37-38). Respondent covered the shortages by transferring

earned fees from other clients (TR 34-35, 39), fees that should have been withdrawn by Respondent when they became due (Ex. 5).

While auditing Respondent's trust account, the Bar auditor additionally found a discrepancy in a fee taken by Respondent in a personal injury case (TR 46). In that matter, Respondent was initially employed by David Page, a college student who had been injured in an automobile accident several months earlier (TR 7, 9-11). Since the tortfeasor was not the car owner, insurance coverage was available from more than one company (RB 1). Mr. Page agreed to pay Respondent 28 percent of any sums recovered on his behalf, excluding any sums recovered from State Farm Insurance Company since State Farm had previously offered to pay Mr. Page the $100,000.00 limits of its policy (TR 9-11; Ex. 1). Contrary to Rule 2-106(E) of the Code of Professional Responsibility of The Florida Bar, the contingency fee agreement entered into with Mr. Page was not signed by Respondent (TR 11; Ex. 1).

On December 1, 1986, Clinicare, the company that had provided health care benefits to Mr. Page for injuries sustained in the accident, filed a Notice of Lien for $32,627.71 upon all sums recovered by Mr. Page as a result of the accident (TR 13; Ex. 2). Without Mr. Page's knowledge or consent, Respondent simultaneously began representing Clinicare in the Page matter on a contingency fee basis (TR 18, 48, 72-74; RRA). Respondent did not have a written fee agreement with Clinicare (TR 61).

Respondent, on behalf of Mr. Page, subsequently obtained an $80,000.00 settlement from Aetna Insurance Company (TR 16; Ex. 4). Pursuant to the terms of his agreement with Mr. Page, Respondent deducted a 28 percent fee, amounting to $22,400.00, from the $80,000.00 settlement (TR 17; Ex. 4). Respondent also paid the Clinicare lien from the settlement proceeds (TR 17-18; Ex. 4). Without Mr. Page's knowledge or consent, Respondent took a 28 percent fee from the $32,627.71 payment to Clinicare on the grounds that Respondent had represented Clinicare in the settlement of its claim against Mr. Page (RRA; TR 18, 61). Respondent's total fee in the David Page matter amounted to $31,535.76 on $80,000.00, or over 39 percent (TR 48). Respondent's closing statement to Mr. Page did not reflect the $9,135.76 in attorney fees Respondent deducted from the Clinicare lien for representing Clinicare (TR 17-18, 69; Ex. 4).

Based on the evidence presented at final hearing, the Referee recommended that Respondent be found guilty of all of the rules cited in The Bar's Complaint. As to Count I, the Referee recommended Respondent be found guilty of violating Rules 4-1.15(a) (a lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation); 4-1.15(c) (when in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be treated by the

lawyer as trust property, but the portion belonging to the lawyer or law firm shall be withdrawn within a reasonable time after it becomes due); and 4-5.3(b) (with respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer) of the Rules of Professional Conduct of The Florida Bar, and Rules 5-1.1(d) [interest on trust accounts (IOTA) program]; 5-1.1(f) (a lawyer may not disburse funds held for a client or on behalf of that client unless the funds held for that client are collected funds); and 5-1.2(c) (minimum trust accounting procedures) of the Rules Regulating Trust Accounts of The Florida Bar.

As to Count II, the Referee recommended that Respondent be found guilty of violating Rules 4-1.4(b) (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); 4-1.5(A) (An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee); 4-1.5(F)(1) (A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is

calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination); 4-1.5(F)(2) (As to contingent fees: Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client.); 4-1.5(F)(5) (In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm.); 4-1.7(a) (a lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client); 4-1.7(b) (a lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest); 4-1.7(c) (when representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and

risks involved); 4-1.8(f)(1) (a lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation); and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct of The Florida Bar; and Rule 2-106(E) (every attorney who, in connection with an action or claim for damages for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by an attorney for himself or for the law firm representing the client.) of the Code of Professional Responsibility of The Florida Bar.

As an appropriate discipline for such misconduct, the Referee recommended that Respondent receive a public reprimand; be placed on probation for three years; successfully complete the ethics portion of The Bar examination; forthwith repay to David Page the excessive portion of the fee collected, amounting to $9,135.76 plus interest at the rate of 12 percent per annum from March 14, 1989; and pay the costs of these proceedings.

In his initial brief, Respondent argues that 1) the Referee erred in finding Respondent guilty of any rule violations in the David Page matter, and 2) the trust accounting violations do not warrant the punishment recommended by the Referee. The Florida Bar, by contrast, asserts that the Referee was correct in his findings of fact and recommendations as to guilt but erred in recommending that Respondent receive only a public reprimand. Instead, The Florida Bar believes that a 91-day suspension is the appropriate discipline in this case.

SUMMARY OF ARGUMENT

Respondent has admitted the trust accounting violations cited in The Bar's Complaint and essentially does not dispute the facts in the remaining count. At issue, then, is whether Respondent violated conflict of interest rules, excessive fee rules, and misrepresentation rules as charged in Count II. The Florida Bar submits that Respondent clearly violated such rules by representing both Clinicare and David Page on the same matter without the latter's knowledge or consent; by twice taking a 28 percent fee on the Page case; and by failing to disclose on the closing statement to Mr. Page the fee Respondent had received from Clinicare. This conduct, given the presence of numerous aggravating factors, warrants a 91-day suspension from the practice of law.

ARGUMENT

ISSUE I

THE ESSENTIALLY UNDISPUTED FACTS OF THIS CASE SUPPORT THE REFEREE'S FINDING THAT RESPONDENT IS GUILTY OF UNETHICAL CONDUCT.

Respondent, both at final hearing and in his initial brief, has admitted the trust accounting violations set forth in Count I of The Bar's Complaint. Respondent also does not essentially dispute the facts of the David Page matter. Instead, the thrust of Respondent's argument is that those facts do not constitute a violation of the ethical rules governing attorney conduct. Respondent's position in this regard, however, is untenable, and the Referee was correct in so finding.

The Florida Bar asserts that Respondent's actions in the David Page matter were unethical in two significant respects. First, an inherent conflict of interest existed by virtue of the fact that Respondent, while representing David Page, in essence represented Clinicare in collecting its lien from Mr. Page. Respondent admits that he entered into a fee agreement with Clinicare pursuant to which he would receive 28 percent of whatever monies he collected from Mr. Page to satisfy Clinicare's lien (TR 63; RB 8). Obviously, the higher the amount collected, the greater Respondent's

fee and the less amount of money inuring to Mr. Page's benefit. Throughout these proceedings, however, Respondent has refused to acknowledge even the potential for a conflict of interest (TR 63-64), and only reluctantly has Respondent admitted that he should have disclosed to Mr. Page the nature of Respondent's relationship with Clinicare (TR 73-74). The following exchange between the Referee and Respondent at trial is illustrative of Respondent's unrepentant attitude:

> Judge: [M]r. Page was depending on you to get him the very best deal that you could get him from Clinicare, and you even talked to him about getting them to reduce [their claim]. And basically, in effect, they did reduce it by 28 percent and paid that 28 percent to you. And my question is, don't you feel like that 28 percent should have gone to Mr. Page?
>
> Witness: No, sir. At the most, it should have gone to . . .
>
> Judge: Don't you think you had an obligation to inform him . . .
>
> Witness: Well, I . . .
>
> Judge: (continuing) . . . "I have not been able to get them to reduce the claim, but I've gotten them to agree to pay me a $9,000 attorney fee; you better take this particular issue, as far as their claim, and go to another attorney and see what they can negotiate with Clinicare on this"?
>
> Witness: In retrospect, I probably should have informed him, yes.
>
> Judge: So, there was a conflict, wasn't there?

> Witness: I don't think there was, Your Honor; I think there was a limited representation of Mr. Page, which he was aware of.
>
> Id.

In his brief, Respondent relies heavily on the "common fund" doctrine and cites the Fidelity and Casualty Co. case as standing for the proposition that an "attorney is entitled to an attorney's fee award on a pro rata basis from the member of the class benefitted by the litigation" (RB 7) (emphasis added). Interestingly, this is the same premise upon which The Bar based its excessive fee argument at final hearing (TR 67-68). Yet, in his brief and at final hearing, Respondent has failed to understand that his fee in the David Page matter was not in fact calculated on a pro rata basis (TR 64, 67-68). Had it been, Clinicare would have paid a part of Respondent's legitimate $22,400.00 fee in proportion to the benefit it received in payment of its lien from the proceeds of the personal injury settlement. Thus, instead of collecting separate 28 percent fees from Clinicare and Mr. Page, Respondent would have properly collected one 28 percent fee to which Clinicare and Mr. Page would have contributed on a pro rata basis.

Respondent also cites Forsyth v. Southern Bell, 162 So.2d 916 (Fla. 1st DCA 1964) in support of his entitlement to an additional fee from Clinicare. However, in that case, the First District Court of Appeal held that an "insured is entitled to retain a proportionate share of the expenses, including attorney's fee incurred in the recovery from which the insurance company will

benefit to the extent of its subrogation claim." (emphasis added) Id. at 921. Thus, it is clear that whether the $9,135.76 fee received by Respondent from Clinicare is viewed as a "discount" of the Clinicare lien, as it was by the Referee in the above-cited exchange, or whether it is termed "equitable distribution of attorney fees," as it has been by Respondent, the money should have been remitted to David Page. Accordingly, Respondent not only violated conflict of interest rules by representing Clinicare and David Page simultaneously without the latter's consent, he also took advantage of the conflict situation to collect an excessive fee.

ISSUE II

THE PRESENCE OF NUMEROUS AGGRAVATING FACTORS IN THIS CASE WARRANTS THE IMPOSITION OF A 91-DAY SUSPENSION.

The existence of cumulative misconduct is generally afforded considerable weight in a determination of appropriate discipline in Bar proceedings. Cumulative misconduct can mean that an attorney has a discipline record; that previous discipline involved unethical conduct similar to that in the instant case; that the instant case involves repeated violations of a similar nature; or that the instant case involves more than one type of misconduct. Some of these factors, as well as other aggravating circumstances, are part of the record of this case.

The allegations in the Bar's Complaint against Respondent fall into three distinct areas of unethical conduct: technical trust accounting violations; conflict of interest charges; and excessive fee allegations. The presence of more than one type of misconduct warrants sterner sanctions than an isolated offense. TFB v. Mavrides, 442 So.2d 220 (Fla. 1983). In Mavrides, a member of The Florida Bar was found guilty of eight violations of the Code of Professional Responsibility. The Supreme Court of Florida found that none of the derelictions, standing alone, would require disbarment. The cumulative nature of the violations, however,

compelled the Court to accept the referee's recommendation of disbarment. Id.

Respondent's prior disciplinary record should also be taken into consideration in determining what discipline to impose. Last year Respondent was found guilty of neglecting a legal matter, failing to communicate with his client, and failing to return his client's property. TFB v. McAtee, Supreme Court Case No. 74,745. Though Respondent's misconduct in this case and in the previous case occurred during approximately the same time frame, this Court has held that cumulative misconduct can be found to exist when misconduct occurs near in time to other offenses, regardless of when discipline is imposed in each case. TFB v. Golden, 561 So.2d 1146, 1147 (Fla. 1990).

In addition to cumulative misconduct, the following aggravating factors, as found in the Florida Standards for Imposing Lawyer Sanctions, are relevant to the case at bar: dishonest or selfish motive; refusal to acknowledge the wrongful nature of the misconduct; substantial experience in the practice of law; and indifference to making restitution. While Respondent's trust accounting violations are technical in nature with no evidence of a dishonest motive, personal gain was clearly a motivation behind Respondent's handling of the David Page matter. By failing to disclose his agreement with Clinicare to Mr. Page and by misrepresenting the amount of his fee on the closing statement,

Respondent engaged in a course of dishonest conduct that enabled him to keep over $9,000.00 that should have gone to his client. At the final hearing held on the Bar's Complaint and in his Initial Brief, Respondent has refused to acknowledge the wrongfulness of his actions or Mr. Page's entitlement to the money (TR 73-74; RB 6).

This Court has not hesitated to suspend attorneys for misconduct similar to that in the case at bar. Based on the discipline imposed in those cases and on the presence here of numerous aggravating factors, The Florida Bar submits that Respondent should be suspended from the practice of law for 91 days. Respondent's actions in the David Page matter, coupled with his failure to maintain his trust account properly, warrant that Respondent prove rehabilitation before being reinstated to practice.

At times this Court has declined to impose a 91-day suspension, finding a three-month suspension more appropriate under the circumstances of a particular case. Absent from such cases, however, is a finding of dishonest conduct or client prejudice. In TFB v. Miller, 548 So.2d 219 (Fla. 1989), for example, the Court cited the absence of prior discipline, lack of greedy motive, and lack of client prejudice in suspending an attorney for 90 days for improper trust accounting procedures. Rejecting both the referee's recommendation of a public reprimand and the Bar's request for a six-month suspension, the Court found that a three-month suspension and a year's probation "would sufficiently punish Miller

and deter other lawyers from similar misconduct". Id. at 221. Since Respondent here is charged not only with improper trust accounting but with misrepresentation, conflict of interest, and collecting an excessive fee, a suspension of more than 90 days is clearly appropriate.

In TFB v. Carter, 502 So.2d 904 (Fla. 1987), as in Miller, supra, the Court found a three-month suspension and two years' probation sufficient punishment where there was no finding by the referee of dishonest conduct by the accused attorney. Like Respondent here, the attorney in Carter was charged with failing to supervise the recordkeeping of his nonlawyer personnel. The attorney in Carter also had been previously disciplined. Unlike that case, however, Respondent here is charged with additional types of misconduct, warranting sterner sanctions.

Finally, in TFB v. Lowe, 508 So.2d 6 (Fla. 1987), the referee recommended that the attorney be suspended for a period of three years for collecting an excessive fee by deceiving his client into believing the money was needed for a trial from which the client could expect a substantial award. In rejecting the respondent's contention that the recommended discipline was too harsh, the Supreme Court cited Lowe's dishonest conduct and the two private reprimands he had previously received. Id. at 8. Such factors are also a part of the record of this case and should be similarly taken into account.

CONCLUSION

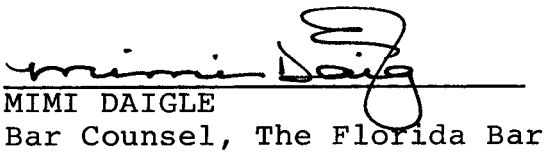
Based on the foregoing, The Florida Bar respectfully submits that this Court should uphold the Referee's findings of fact and recommendations as to guilt but order that Respondent be suspended from the practice of law for 91 days rather than merely reprimanded; be required to repay David Page the excessive portion of the fee collected; be placed on probation for three years; be required to successfully complete the ethics portion of The Bar examination; and be required to pay the costs of these proceedings.

Respectfully submitted,

MIMI DAIGLE
Bar Counsel, The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600
Attorney No. 782033

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint regarding TFB File Nos. 89-00323-01A and 90-01274-01A (Supreme Court Case No. 77,967) has been forwarded by certified mail #P981-962-731, return receipt requested, to JAMES R. MCATEE, Respondent, at his record Bar address of 3004 North Ninth Avenue, Pensacola, Florida 32503-5519, on this 19th day of December, 1991.



MIMI DAIGLE
Bar Counsel, The Florida Bar