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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

Supreme Court Case
No. 78,001

v.

MICHAEL I. ROSE,
Respondent.

The Florida Bar File
No. 89-71,622(11"E")

ON PETITION FOR REVIEW

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, the Complainant, will be referred to **as** either "The Florida Bar" or "the Bar".

MICHAEL I. ROSE, the Respondent, will be referred to as "Respondent" or "**Rose**".

Abbreviations in this brief are as follows:

App.Ex. denotes Appendix-Exhibit.

RR will denote the report of referee.

T will denote transcript. T followed by a date will indicate the date of the transcript and the number after the date will show the page numbers, **i.e.** T 11/18/91 -15 is page 15 of the transcript of November 18, 1991.

STATEMENT OF THE FACTS

The facts in this case are clearly stated on pages 1 through 3 of the Report of Referee (App,Ex.1) and the Stipulation of Facts (App,Ex,2). In the last sentence of the Statement of Facts of the Initial Brief of Respondent, it states: "The referee did not allow the Respondent to present character witnesses, but merely stated that she believed that they would make laudatory remarks about Respondent." In response to this, the Bar submits that the Respondent was not authorized to have character witnesses testify, as he did not place the names of the character witnesses on his witness list. (App,Ex.3). The first time Respondent requested character witnesses was after the final hearing was completed, in a Motion For Reconsideration and at a hearing to consider his Motion For Reconsideration, which was held on December 24, 1991. (The transcript mistakenly says December 24, 1981). On page 17 of the transcript of December 24, 1991, the Respondent indicated that he wanted Judge Arthur Franza and Judge Joseph Farina as character witnesses. However, those names were not on Respondent's witness list. (App,Ex.3).

The Respondent was not authorized to reopen this case for the purpose of presenting character witnesses. (App,Ex.4). The referee stated, on page 6 of the December 24, 1991 transcript: "I heard quite a bit about mitigation, In fact, that's mostly what the trial was about, mitigation." The referee further stated, "Quite frankly, if he had signed

someone else's name that was not family connected, and without the mitigating circumstances, I would have recommended disbarment, not thirty days suspension."

SUMMARY OF ARGUMENT

The Report of Referee should be approved. A referee's finding of fact should not be overturned unless they are clearly erroneous or without evidentiary support. The Florida Bar v. Carter, 410 So.2d 920,922 (Fla. 1991). In addition, the burden is upon the Respondent to prove the report of referee is erroneous, unlawful or unjustified. Rule **3-7.7(c)(5)**, Rules of Discipline.

The evidence is clear and convincing that the Respondent violated Disciplinary Rule 1-102(A)(4), Code of Professional Responsibility conduct involving a misrepresentation.

The discipline recommended by the referee (suspension for thirty days, plus costs) should be approved.

ARGUMENT

I

THE REFEREE'S FINDING THAT RESPONDENT WAS GUILTY OF MISREPRESENTATION SHOULD BE AFFIRMED.

The Respondent contends that he should have been found not guilty of misrepresentation for lack of evidence. Initial Brief of Respondent, pages 15-16. According to Black's Law Dictionary, Third Edition, misrepresentation is defined as follows:

An untrue statement of fact. An incorrect or false representation, that which if accepted, leads the mind to **an** apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead.

In the case at hand, the facts make it clear and convincing that Rose was guilty of misrepresentation, in violation of Disciplinary Rule 1-102 (A)(4) of the Code of Professional Responsibility.

More than **two** years after Rose was divorced, he sold 2,000 shares of Lance, Inc. Stock for approximately \$77,500.00 and used the funds for his personal use. The stock certificates were in the name of his ex-wife, as custodian for their children, under the Uniform Gift For Minors Act of Florida. Rose signed his ex-wife's name, without her authority, to client agreement forms, **stock** certificates **and** checks. (RR 1-2). When Rose signed his ex-wife's name to the foregoing documents, he created a misrepresentation. The

stock was the property of his minor children and he was not authorized to sign the documents or use the funds for his personal use.

Rose states in page 16 of his brief, "This Respondent fails to *see* what misrepresentation was made and to whom it was made." **The Bar** contends Rose should have seen that his actions constituted misrepresentations. It is obvious Rose created a misrepresentation when he signed his ex-wife's name to the documents and thereby obtained funds belonging to his minor children, which were in trust, with the ex-wife **as** custodian. The bank was a victim of misrepresentation, as it issued funds, believing the ex-wife signed the checks. Although an employee of the broker may have known that the signatures **were** not that of the ex-wife, the employer, Shearson Lehman, did not know and **Rose** made a misrepresentation to Shearson Lehman. The Referee states on page 3 of her report:

All funds, with interest, were refunded to the ex-wife, as custodian for the children by Shearson Lehman, as a result of an arbitration award and Respondent instituted the arbitration but sought the proceeds for his own account.

Obviously, Shearson Lehman was another victim of misrepresentation. Shearson Lehman paid Rose \$77,500.00 for the Lance, Inc., Stock and because an employee apparently knew the signature on the stock certificates was not authentic, Shearson Lehman made good the loss.

The referee found "that the Respondent knew or should have known that he had no right to sign his wife's name to the

account. He knew or should have known that he had no right to utilize the money in the custodian account for his personal benefit." (RR-3).

Rose signed his ex-wife's name (without her authority), to client agreement forms, stock certificates and checks. It is clear **and** convincing that these acts were done for the purpose of creating misrepresentation. If Rose had signed his own name to the above-mentioned documents, he could not have obtained the funds. Therefore, he had to mislead, whoever was concerned with purchasing the stock, issuing the checks and releasing funds from the bank.

Blacks Law Dictionary, supra, defines misrepresentation as "an untrue statement of fact. An incorrect or false representation." Was it not an incorrect or false representation for Rose to sign the name of his ex-wife, to documents which enabled him to sell the stock and obtain the **funds from that sale?**

The Florida Bar contends that the Referee's finding the Respondent guilty of misrepresentation should be affirmed. According to The Florida Bar v. Carter, 410 So.2d 920,922 (Fla. 1991) and The Florida Bar v. Wagner, 212 So.2d 770,772 (Fla. 1988), a referee's findings of fact should not be overturned unless they are clearly erroneous or without evidentiary support in the record. Rule 3-7.7(c)(5), Rules of Discipline, states that the burden is "...upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified."

Therefore, since the Respondent sought review, he has the burden of showing the Report of Referee is erroneous, unlawful or unjustified. The Respondent has not shown this. Moreover, there has not been a showing that the Referee's findings are "clearly erroneous or without support in the record." The Florida Bar v. Carter, supra. Therefore, the Report of Referee should be approved.

ARGUMENT

II

**THE REFEREE'S RECOMMENDED
DISCIPLINE SHOULD BE APPROVED**

The referee recommended that the Respondent be suspended from practicing law for thirty days. (RR 4 - App.Ex.1). On December 11, 1991, the Respondent filed a Motion **To Reconsider**, wherein he requested, inter alia, that the thirty day suspension be changed to an Admonishment for Minor Misconduct. The referee stated, referring to Rose:

Quite frankly, if he had signed someone else's name that was not family connected, and without the mitigating circumstances, I would have recommended disbarment, not thirty days suspension. T-12/24/91, page 8 (this transcript was mistakenly dated December 24, 1981).

The facts in this **case** show serious violations of ethics, despite the family connection. The Respondent, about two years after his divorce, opened an account with Shearson Lehman under the name of Janice Revitz Rose, custodian for her children. He signed the name Janice Revitz Rase to the account. (T.11/18/91-25). Respondent signed **the** name of his ex-wife to client agreement forms, stock certificates and checks in the amount of \$77,500.00. This was done without the wife's knowledge or permission. He used the funds for his own use, even though the stock certificates and checks were in the name of his wife, **as** custodian for their children, under the Uniform Gift for Minor Act. (RR 1-3). The Respondent

attempted to show that he thought the account was a revocable trust, which he could withdraw funds without anybody's authorization. Even if the account were a Totten Trust, he would have no authority to withdraw the funds, as he was not the custodian. His ex-wife was the custodian. As proof that he considered the account as a Totten Trust, he claimed he paid the taxes on the interest. (RR 3). However, the evidence shows that he didn't pay taxes on the account until after the divorce. (RR 3). The referee found that the Respondent knew or should have known that he had no right to sign the ex-wife's name to the account. (RR 3).

In The Florida Standards For Imposing Sanctions, Rule 5.11(f), it states:

Disbarment is Appropriate When:

A lawyer engaged in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.
(Underscoring supplied for emphasis).

Since the Referee found that Respondent's actions had a limited effect on his fitness to practice law, the Referee recommended thirty days suspension. Had the Referee found that Respondent's conduct had serious adverse effects on his fitness to practice law, **she** would have been authorized to recommend disbarment. (Underscoring supplied for emphasis).

Please note that a lawyer's misconduct has been found to adversely reflect on his fitness to practice law, even though the violation did not involve the practice of law. There are cases wherein lawyers who failed to file their personal income

tax returns (a misdemeanor) were found to be guilty of violating Disciplinary Rule 1-102(A)(6), conduct that adversely reflects on fitness to practice law. The Florida Bar v. Blanker, 457 So.2d 476 (Fla.1984); The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983).

In the case of The Florida Bar v. Hosner, 520, So.2d 567,568 (Fla.1988), the Supreme Court stated that lawyers are held to a higher standard of conduct in business dealings than are non-lawyers, and may be disciplined for conduct that is not related to the practice of law.

Rule 9.22 of Florida's Standards For Imposing Sanctions list aggravating matters which may be considered. Please consider the following aggravating factors:

9.22,(b) - Dishonest or Selfish Motives. The Bar submits that Rose was motivated by selfish motives when he improperly obtained **\$77,500.00** in funds which he used for his personal use.

9.22,(h) Vulnerability of Victim. The victims in this case were Respondent's two minor children. In addition, it is apparent that Respondent knew or should have known that his ex-wife had no knowledge of the existence of the **stock** in her name. (*See* page 190 of transcript dated November 18, 1991). Accordingly, the victims were vulnerable.

9.22,(i) Substantial Experience in The Practice of Law. The Respondent, has substantial experience in the practice of law **and** he should have known that he was not entitled to the funds he received from the sale of the Lance, Inc., Stock.

The Respondent has been a member of The Florida Bar since November 19, 1971.

In addition, the Respondent, in an effort to show that he believed the stock was held in a revocable trust, presented certain income tax returns, which showed he paid taxes on the interest earned from the Lance, Inc., Stock. However, the Referee discovered that the interest was paid for the period of time after Respondent was divorced. During the marriage, it is apparent that no **taxes** were **paid** on the dividends from the Lance, Inc., Stock. (**See** testimony, pages 190 - 191, November 18, 1991). This may be a consideration under Rule **9.22** (Deceptive practices during the disciplinary process).

The Florida Bar contends that the Referee was lenient with the Respondent, as there was sufficient evidence in this case to warrant a more severe form of discipline, if the **Referee** would have been so inclined. However, the Referee recommended only a thirty day suspension and payment of costs in the amount of \$2,090.55. (**RR 4**).

In view of the foregoing, the Referee's recommendation for a thirty day suspension and payment of costs in the amount of \$2,090.55, should be approved.

CONCLUSION

Based upon the evidence presented in these proceedings, it is clear and convincing that the referee's findings and recommendations should be approved.

The Respondent has the burden of proving that the referee's findings were erroneous or without evidentiary support. The Florida Bar v. Carter, supra. The respondent failed to meet this burden. Moreover, the discipline recommended by the referee should be upheld by this Court.

WHEREFORE, THE FLORIDA BAR, requests this Court to approve the Report of Referee and to suspend the Respondent from the practice of law for a period of thirty days and pay the costs to The Florida **Bar**, in the amount of \$2,090.55.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 6, 1992 the original and seven **copies** of the foregoing Answer Brief of **The Florida Bar** was served by U.S. Mail to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927 **and** that true **and** correct copies were mailed to the following:

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IN THE SUPREME COURT OF FLORIDA
(Before A Referee)

THE FLORIDA BAR,

Complainant,

v.

MICHAEL I. ROSE,

Respondent.

Supreme Court
Case No. 78,001

Fla. Bar File
No. 89-71,622(11E)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

I was appointed referee in this case on June 5, 1991. There were two hearings, to wit: On August 6, 1991 and on November 18, 1991. The Respondent waived venue and agreed to have these proceedings in Broward County rather than Dade County. (Transcript of August 6, 1991 at pages 26-27).

The following attorneys appeared as counsel for the parties:

For The Florida Bar - Paul A. Gross, Esq.

For The Respondent - James F. Pollack, Esq.

Michael I. Rose, Esq.

11. FINDINGS OF FACTS:

Most of the facts in this case were agreed to and are shown in the stipulation, which is part of the record. A synopsis of the facts is as follows:

Michael Rose, the Respondent, and Janice Revitz were married during 1974. They were divorced during June 1984. Both parties

are members of The Florida Bar. **Ryan Evan Rose** and **Darren A. Rose** are minor children of **Michael and Janice**. More than two years after the divorce, the Respondent sold 2,000 **shares** of common **stock**, issued by **Lance, Inc.**, for approximately \$77,500.00. Respondent used **these funds** for his personal use. The **stock** certificates were in the name of Janice Revitz, Custodian for **Darren A. Rose** and **Ryan Evan Rose**, Uniform Gift For Minor Act, Florida.

After the divorce, Respondent signed his ex-wife's name to client agreement forms and to the **stock** certificates. This was done without the ex-wife's authority. (See Stipulation).

During September 1986, Shearson Lehman Brothers **issued** two checks for **\$38,750.00** each, in return for the Lance Stock. One check was payable to the order of Janice Revitz **Rose**, Custodian for **Darren A. Rose**. The other check was payable to the order of Janice Revitz **Rose**, Custodian for **Ryan Evan Rose**. The Respondent signed the name Janic Revitz **Rose** on the **back** of each check.

Janice Revitz testified she did not authorize Respondent to sign her name to the checks. Also, Respondent, ~~by~~ Stipulation, agree~~s~~ with this.

Respondent contends that he did not need 'his ex-wife's authority to sign her name to the aforementioned documents. Respondent stated that he believed **the stock** was purchased as a Totten Trust or a revokable trust. Respondent stated he did not know **the** Uniform Gift For Minors Act created **an** irrevokable trust.

Also, Respondent testified the money used to purchase the Lance Stock was from his funds. The ex-wife stated she did not know where the funds came from. All Funds, with interest, were refunded

to the ex-wife, as custodian for the children.

as a result of an arbitration award. Respondent testified the arbitration had

It is without question that Janice Revitz did not give any consent to signing her name at the time of the sale or to the sale of the stock. This Referee also finds at the time of the sale,

that the wife had no knowledge of the existence of the stock in her name.

The Respondent contends, number one, that he didn't know that a gift under the Uniform Gifts to Minors Act, with his wife as custodian, divested him of any interest in the corpus of the gift, and number two, that his wife had consented to signing her name to other accounts and that he presumed this consent remained in effect, almost two and a half years after the divorce.

In his opening, Respondent contended that the purpose of putting the stock in the children's names was not to get the tax benefit, because he paid the taxes. However, examination of the tax returns shows no evidence of payment of taxes by the Respondent on this property until 1985, which was after the divorce.

The Referee finds that the Respondent knew or should have known that he had no right to sign his wife's name to the account. He knew or should have known that he had no right to utilize the money in the custodial account for his personal benefit.

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

I Recommend that the Respondent be found Guilty of violating the Code of Professional Responsibility - Disciplinary Rule 1-102(A)(4) (Conduct involving Misrepresentation). I recommend that Respondent be found Not Guilty of Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility and Florida Bar Integration Rule 11.02(3).

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

Considering the particular circumstances of this case; that it has Limited effect on Respondent's fitness to practice law, I recommend that the Respondent be suspended from practicing law for Thirty (30) Days.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD.

Age: 46

Date Admitted to Bar: November 19, 1971

Prior Discipline: The Respondent has no prior disciplinary record.


VI. STATEMENT OF COSTS:

This Referee finds the costs amounting to \$2,090.55 and enumerated in the attached CERTIFICATE CONCERNING COSTS submitted to this Court by The Florida Bar and through its counsel, Paul A. Gross, Esq., were reasonably incurred by The Florida Bar. It is

recommended that all such costs and expenses be charged to the Petitioner. It is further recommended that execution issue with interest at a rate of twelve percent (12%) per annum to accrue on all costs not paid within thirty (30) days of the Supreme Court's Final Order, unless time for payment is extended by the Board of Governors of The Florida Bar.

Dated this 24 day of December, 1991.

Respectfully submitted,



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CERTIFICATE OF SERVICE

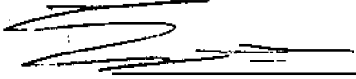
I HEREBY CERTIFY that on this 25 day of December 1991, copies of the above report were mailed to the following lawyers:
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