87,248

IN THE *SUPREME* COURT OF FLORIDA
(Before a Referee)

Case No. 78,001

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

THE FLORIDA BAR,

Complainant,

vs

MICHAEL I. ROSE,

Respondent.
_____/

INITIAL BRIEF OF RESPONDENT

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PREAMBLE

This is an appeal to the Supreme Court of Florida, of a Report of Referee dated December 24, 1991, in the Supreme Court of Florida.

The Appellant may be referred to, from the to time, as "ROSE" and or "Respondent" and the Appellee may be referred to, from time *to* the, as "The Bar" or "Complainant".

The following designations will appear in this Brief:

"TT" Transcript of Trial of 11/18/91

"TRH" Transcript of Hearing of 12/24/91

"APPX" Appendix

HISTORY OF THE CASE

The Florida Bar complained against Respondent, MICHAEL I. ROSE, a twenty-one year member with no previous grievance adjudication, that ROSE was guilty of misrepresentation and conduct adversely reflecting on his ability to practice law, and unmoral conduct. (APPX. 3-5)

The basis of the Complaint is that ROSE signed the name of his ex-wife, Janice Revitz Rose, hereinafter referred to as "Janice", to certain stock certificates which ROSE himself had placed in the name of Janice as custodian for the parties' children under the Uniform Gift to Minors Act. (APPX. 3-5)

If was further alleged that this was done without the authorization of Janice and that when the broker issued checks for the sale proceeds to Janice, as custodian, that ROSE signed her name to the back of the checks without her consent and presumably appropriated the funds. (APPX. 4)

Respondent answered the Complaint and took the position that the funds in questions were originally and always his own, and despite the fact that Respondent admitted opening the accounts as alleged, that there was no irrevocable donative intent, and that ROSE was under a misapprehension of law as to the effect of establishing the custodial accounts for his children, and that there was no need to obtain authorization from anyone else to use the accounts and their proceeds and that

there was no misrepresentation to anyone or any loss suffered by anyone. (APPX. 6-9)

At the Grievance Committee level, the Committee found that ROSE was guilty of misrepresentation but the Committee did not state against whom and it also found that ROSE had a reasonable belief that the funds represented by the Certificates were his, and that there was no intent to defraud his ex-wife, his children nor the broker. (APPX. 1-2)

Despite these findings, the Committee was of the opinion that the alleged non-stated misrepresentation adversely reflected ROSE's fitness to practice law. (APPX. 1)

The case was referred to and tried before the Referee on November 18, 1991 (TT - 1-192)

The Referee found that the Respondent was guilty af violation of Disciplinary Rule 1-102(A)(4); not guilty of Disciplinary Rule 1-102(A)(6) and not guilty of Florida Bar Integration Rule 11.02(3).

The Referee imposed a thirty day suspension. (APPX. 14) Timely Petition for Review was filed. (APPX. 16-18)

STATEMENT OF FACTS

The facts are basically not in dispute. The facts are basically set forth in the Report of Referee, pages 1 and 2 and the first two paragraphs of page 3.

The Referee stated that the testimony of the ex-wife "lacks credulity". (TT - 18).

The Respondent also showed that he paid the entire capital gain tax on $49,438.00 personally, as to the profits from the sale of the stock. (TT - 43)

The Referee found a slight discrepancy in the payment of dividends which were charged to the children's account, but in all other respects, ROSE assumed and paid for the use and profits on the money.

The Court refused to accept the fact that ROSE was under a mistaken belief that what he was setting up was in fact, a "Totten Trust". (TT - 22)

ROSE argued that it would never have been his intent to create a trust in which the children would be able to take everything in the account upon reaching the age of eighteen years, especially, since the children were well provided for in other trusts provided for their benefit. (TT - 66)

The Court rejected the fact that ROSE would have the right to have a contrary intent which could rebut the presumption that the establishment of the account permanently vested the beneficial interest in the funds and stocks in ROSE's children.

The Court rejected the case holdings tendered by ROSE which ROSE said established that the opening of such an account was not conclusive proof of the intent to donate. (TT - 22)

The Referee found that ROSE was guilty of misrepresentation but it was not specified who suffered the misrepresentation. The Referee found (APPX. 14) that there was limited effect in his fitness to practice law which was contrary to the findings of the Grievance Committee and suspended Respondent for thirty days. 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. (TRH - 18)

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THE SITUATION IN THE CASE AT BAR JUSTIFIES THE IHPOSITION OF A SUSPENSION FROM THE PRACTICE OF LAW

POINT II

WHETHER RESPONDENT COULD BE ADJUDGED GUILTY OF MISREPRESENTATION

SUMMARY OF ARGUMENT

POINT I

WHETHER THE SITUATION IN THE CASE AT BAR JUSTIFIES THE IKPOSITION OF A SUSPENSION PROM THE PRACTICE OF LAW

Under the facts of this case, and under the prior relevant decisions of this Court, a thirty day suspension for this sole practitioner is inappropriate and unjustified.

It is also Respondent's first grievance offense. The Grievance Committee found that the Respondent had a reasonable basis to believe that the funds involved belonged to him.

The evidence of Respondent's payment of the tax liability from the sale of the subject assets is the most relevant salient point in reference to his own intentions and belief.

A suspension accomplishes no purpose other than to financially harass and humiliate this Respondent.

ARGUMENT

POINT I

WHETHER THE SITUATION IN THE CASE AT BAR JUSTIFIES THE IMPOSITION OF A SUSPENSION FROM THE PRACTICE OF LAW

Assuming arguendo that under the facts in this case the Respondent could somehow be guilty of misrepresentation in a vacuum, the suspension of the Respondent from the practice of law is too severe and is not justified by the precedent in this Court.

The Referee refused to consider the contention made by the Respondent that by merely opening a custodial account under the Uniform Gift to Minors Act, that it became a totally irrevocable situation which under no circumstances could be considered as non-donative at the time of the account being established, (TT - 22)

The Respondent offered rulings by the Third District Court of Appeal of Florida in two sets of cases involving *Golden v Golden*. The first case, *Irving Golden v Faith Golden*, 434 So. 2d 978 (Fla. 3d DCA 1983), and then *Irving Golden v James Golden*, 500 So. 2d 260 (Fla. 3d DCA 1986). Both cases involved whether the establishment of an account in a minor's name, pursuant to the Uniform Gift to Minors Act is conclusive and non-rebuttable.

The Third District Court of Appeal in both cases ruled that such a gift is only presumptive and may be overcome to show fraud or mistake, or to otherwise demonstrate a contrary intent.

The Referee refused to understand (TT - 152) that it is possible to open an account in the name of another person, without making a completed gift by so doing. The Referee also did not understand that an endorsement by any person in the name of a named payee is effective if the person signing on behalf of the maker or drawer intends the payee to have no interest in the instrument. See ***6 Fla. Jur. 2d (Supp. 1992) Bills and Notes. 5493.***

The example quoted in the subject text indicates where a drawer makes a check payable to an existing person whom he knows, while intending to receive the money himself, allows that said payee shall have no interest in the check, and the *Code* validates this endorsement as now constituted.

This is exactly what ROSE intended to accomplish by virtue of his endorsement of Janice's name with the same signature that had opened the accaunts in her name.

The Respondent's unrefuted testimony was that he was not aware of the legal effect of opening such an account is buttressed by the fact that he paid the income tax on some $49,000,00 on the gain from the sale of the stock, personally.

Janice, a former securities attorney, testified that she herself did not know of the effect of establishing such an account. (TT. 96-97)

The Grievance Committee (APPX. 1) found that the Respondent had a reasonable basis to believe that the funds were his, and while the Referee doubtlessly has the right to make a contrary finding, the record has to have some responsible degree of evidence upon which a Referee can overrule a Grievance Committee.

Apparently, the sole basis for this finding in the mind of the Referee was the fact that at some time during the opening of the accounts, a small amount of stock dividends, were, by ROSE's testimony, mistakenly attributed to the accounts' tax number.

The Referee ignored the fact that ROSE personally paid many, many times more income taxes himself upon the sale of the stock.

The only possible testimony which could have been contra was given by Janice; and the Referee rejected her testimony as not being credible.

In view of the foregoing, and in view of the fact that the Referee found that there was little or no effect on the fitness of the Respondent to practice law, a suspension is grossly excessive.

This Court has declined to suspend attorneys in the following cases:

The *Florida Bar v Trinkle*, 580 So.2d 157 (Fla. 1991) in which the attorney was found guilty of overreaching in property transactions involving a relative's property with detriment to said relative.

The Florida Bar v Hosner, 520 So.2d 567 (Fla. 1988) This case dealt with the failure of the attorney, who operated a business, to provide a customer with a Satisfaction after eleven months after the debt having been paid.

It is to be noted that in the above two cases there is no mention of any prior disciplinary conduct, a factor also present in this cause.

In The *Florida Bar v Belleville*, 591 So.2d 170 (Fla. 1991) this Court approved the thirty-day suspension of Belleville for overreaching in a real estate transaction with an elderly person, apparently only because of prior disciplinary factors.

In The *Florida Bar v Suprina*, 468 So.2d 988 (Fla. 1985) this Court sustained a public reprimand where the lawyer was guilty of mishandling trust funds, conduct adversely reflecting on his fitness to practice law, and several other violations.

Each of these offenses not only were more serious than what this Respondent is charged with, but consisted of multiple or repeated violations.

In The *Florida* Bar *v Staley*, 457 So.2d 489 (Fla. 1984) this Court also approved a public reprimand and probation, even though a violation was judged when the lawyer was involved in a transaction when his own financial and business interest was involved. This attorney was also adjudged guilty of trust account violations and still no suspension was recommended.

The Florida Bar v Aaron, 490 So.2d 941 (Fla. 1986) the attorney was adjudged guilty of several trust account violations, and a contingence fee violation, but was found to have been cooperative and candid in his testimony.

Certainly in this matter, ROSE has been completely cooperative with The Bar and Grievance Committee and the Referee, in candidly admitting the facts that occurred in this situation, despite the fact that his interpretation of his responsibility and duties did differ from those of The Bar and the Referee.

In The *Florida Ear v Hero*, 513 So.2d 1053 (Fla. 1987) the attorney was adjudged to be guilty of trust account violations of several kind, and also failure to deliver funds to a client. This Court, in approving a public reprimand and probation, took note of the fact that among other things, Hero had no prior disciplinary actions.

It is undisputed in this cause that the Respondent has a twenty-one year history of practicing law without disciplinary matter (TT - 188) and it is noteworthy that in the case at bar,

all of the issues in this case grew out of one of the most bitter divorce cases in Dade County annals.

In Florida Bar Standards Relating ta Misconduct, the Referee is required to take into account circumstances of both aggravation and mitigation.

With reference to Standard *§9.22* factors which may be considered in aggravation, include: prior disciplinary offenses; the pattern of misconduct; multiple offenses; bad faith obstruction of the proceeding; and submission of false evidence. None of these factors appear in the subject case.

In addition, mitigating factors, *Standard 59.32,* include: absence of prior disciplinary proceedings; full and free disclosure; character or reputation. Each of these factors is present in the subject proceedings.

Furthermore, *Standard §5.14* indicates that admonishment is appropriate discipline when a lawyer's conduct does not reflect adversely on his fitness to practice law, a fact which the Referee did find.

It is also apparent that a sanction against a lawyer is to deter the behavior of the lawyer so as to prevent subsequent disciplinary offenses.

It must be absolutely obvious that this was at best, a one time incident which really did not involve the practice of law and was an inter-family matter which should have been resolved by a civil proceeding if Respondent's ex-wife had wished to pursue it.

In this case, the suspension for thirty days of a sole practitioner with no prior record serves no purpose other than to create a disproportionate hardship and to further humiliate the lawyer.

Certainly an admonishment in this type of proceeding is the only appropriate punishment. In addition to the suspension, the Respondent is required to bear several thousand dollars in Florida Bar costs which alone, together with an admonishment, will certainly be sufficient to remind Respondent of any responsibility or duties which he may have neglected.

An admonishment, or at best, a reprimand, falls in line with the other decisions which have been outlined herein.

The judgment of the Referee in reference to the penalty should be modified in this cause.

SUMMARY OF ARGUMENT

POINT II

WHETHER RESPONDENT COULD BE ADJUDGED GUILTY OF MISREPRESENTATION

Although allegedly guilty of misrepresentation, there is no point in the record of either the Grievance Committee, its opinion or in any of the proceedings, or opinion before the Referee, as to the slightest detail *of* what Respondent is alleged to have misrepresented, what reliance was made on the representation, and to whom it was made.

ARGUMENT

POINT II

WHETHER RESPONDENT COULD BE ADJUDGED GUILTY OF MISREPRESENTATION

Both the Grievance Committee and the Referee found the Respondent guilty of misrepresentation. But the Referee found that the conduct did not adversely reflect his fitness to practice law.

The key to the entire proceedings and the penalty imposed was the finding that the Respondent committed misrepresentation. However, neither the referee nor the Grievance Committee stated exactly what facts the Respondent allegedly misrepresented and to whom.

A misrepresentation cannot be made in a vacuum and shouted off of a high peak in the Alps for nobody to hear.

There are only three possibilities that existed in reference to Respondent's misrepresentation of anything.

Respondent could not have misrepresented any facts to his ex-wife Janice because Janice testified that she never knew about the existence of the accounts. (TT - 93)

Respondent could not possibly have misrepresented to the Broker, because the Broker handled each and every account that Respondent set up in exactly the same manner, (TT - 30-37 and TT - 129-132) as well as being aware and making no objection. (TT - 50-51) (TT - 142, *et seq.*)

If the Bank would be the third possibility, what misrepresentation was made to them? The endorsement of the checks was made by the same person signing, the same signature who opened the account, and the bank suffered no loss and the check was paid.

This Respondent fails to see what misrepresentation was made and to whom it was made. It does seem odd that the Grievance Committee and the Referee fail to document in any way, first, just who was misrepresented, and secondly, what the alleged misrepresentation was.

This Respondent should have been acquitted for lack of any evidence in this point.

CONCLUSION

The Respondent was adjudged guilty of misrepresentation by a Grievance Committee and by a Referee.

The misrepresentation was never identified nor were the parties to whom the misrepresentation ever allegedly made identified, nor was the purpose of the misrepresentation ever identified nor the harm.

The Respondent should not have been found guilty of these phantom misrepresentations made to unidentified parties.

What grew out of a bitter and long lasting divorce matter was that Respondent in the worst light of things and according to undisputed testimony, mistook the establishment of a Uniform Gift to Minors Act account for a Totten Trust.

The Grievance Committee believed that this was true. The Referee obviously took the position that whether she believed his intent or not, that it was impossible legally to establish a contrary intent.

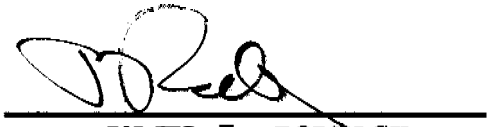
The law of the State is otherwise, and the decision of the Referee was made in error of its effect. No matter what, the penalty exacted against the Respondent is totally inappropriate and disproportionate.

The previous decisions of this Court involving much more serious miscreancies, even multiple offenses, indicate that where it is a first offense or a private or a family matter, that a lawyer's fundamental ability to practice law is not impaired and a suspension is not in order.

More particularly, a thirty-day interruption of a sole practitioner's practice and a two thousand dollars cost judgment, together with a reprimand, if the conviction stands, is more than sufficient together with the public knowledge among members of the Bench and Bar, his clients and peers of such a sentence and the attendant humiliation which he will suffer.

This Respondent asks far uniformity of punishment, which does not warrant the penalty invoked.

Respectfully submitted,



JAMES F. POLLACK

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy af the foregoing INITIAL BRIEF OF RESPONDENT and of APPENDIX were on this 25TH day of MARCH, 1992 mailed to:

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