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.

REPLY BRIEF OF RESPONDENT

JAMES F. POLLACK, ESQ.
(Fla. Bar 063720)
JAMES F. POLLACK, P.A.
328 Minorca Avenue
Coral Gables, Florida 33134
Telephone: (305) 443-6134

and

MICHAEL I. ROSE, ESQ.
(Fla. Bar 138858)
MICHAEL I. ROSE, P.A.
1525 Museum Tower
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 373-6300

Attorneys for Respondent
By: JAMES F. POLLACK

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PREAMBLE

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

The following designations will appear in this Brief:

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

REPLY TO APPELLEE'S POINT I

The Florida Bar counsel has obviously realized that neither the Referee nor the Complaint specifically charge this Respondent with any more than a general claim of alleged misrepresentation, and at no time did either the Complaint or the Referee's findings ever address the point of just exactly to whom the alleged misrepresentatian was found to be made.

Bar counsel states that when ROSE signed his ex-wife's name he "created a misrepresentation". This erroneous statement seems to echo the Court's own misapprehension that if a person signs a document giving a second person rights or assets without that second person's knowledge, that there seems to be something wrong with that act.

On page 85 of the transcript of the hearing on November 18, 1991, counsel for Respondent attempted to point out to the court that opening an account in the name of another is in no way an illegal act, and that a party known to counsel had opened up an account in counsel's name without counsel's knowledge until the lady died.

A question was asked of the Court (TT. 85): "*Did she* do anything wrong? The Referee's reply: "*I* think she did". The Referee's position that merely opening a bank account in some one else's name is a wrongful act shows complete misapprehension of this legal principle.

How many times have parents or grandparents opened up accounts in the names of children, grandchildren or others withaut the knowledge of the person under whose name the account was opened? Are all of those acts misrepresentations? All that the Respondent did was to sign the Respondent's own signature of his ex-wife's name. At best, he was guilty of ignorance of the legal effect of his act but not of a misrepresentation.

The Respondent's uncontested testimony in this record was that he misapprehended the effect of opening the account in the name of a custodian under the Gift to Minors Act.

Counsel for The Bar now, at this stage of the proceedings, makes for the first time an allegation that the Bank which cashed the checks was a victim of the misrepresentation because it issued funds based on the alleged signature of Respondent's ex-wife.

What the bank did in point of fact, was to issue the funds on the signature it had on its bank records, which was the same signature signed by the same person who opened and used the account.

The law cited in Respondent's Initial Brief on page 8 is directly applicable to the situation. See 6 Fla. Jur. 2d (Supp. 1992) Bills *and* Notes. 5493.

The Bar counsel, again for the first time, states that the Respondent was also guilty of making a repreaentation to the Broker, however, within the very same statement The Bar counsel admits that the Broker was aware, through its agents, servants, and or employees, that the signature was that of Respondent

signing his ex-wife's name, which was the same signature in which the account was opened and not that of his ex-wife's.

A misrepresentation cannot be made to the party who is aware of the true facts.

The Bar counsel then states that the Respondent was guilty of misleading whoever bought the stocks even though the transaction was obviously conducted through the stock broker, as a trade and not to any particular party.

It is apparent that in his desperate effort that to create for the first time alleged victims of misrepresentation, he has stretched the facts and the normal thought processes just about as far as one can go.

It seems clear that the Referee did not fully understand that the Respondent, by signing his signature in the way that the account was opened, misrepresented to nobody.

There is no doubt that the Respondent should have known the legal effect of opening an account under the Uniform Gift to Minors Act, as opposed to relying on information provided to him by the Broker, but this was a point of law not even known to his ex-wife herself, a Securities lawyer.

In summation, the Respondent intended no wrong, misrepresented to no one and no one was harmed.

The judgment of the Referee in regards to the guilt of the Respondent should be reversed.

REPLY TO APPELLEE'S POINT II

The Bar counsel states on page 9 of the Answer Brief of the Florida Bar that the Respondent is shown by the evidence not to have paid taxes in any of the subject stock until after the divorce. Such is not the case.

Respondent testified, at the hearing of November 18, 1991 (TT. 71) that he may have very well included income from the stock together with other income based upon his trading in the market, because if he was considered an investor, it would be a business and he would have included the income on the entire trading account rather than specifically in his own tax return. This testimony was never refuted.

The Bar counsel also fails, in any way, to challenge the number of cases referred to in Respondent's Initial Brief in which this Court had failed to suspend attorneys in a variety of cases over the last five or six years, when each case involved one or more actions of moral turpitude and false dealings with clients.

In two cases where there were no suspensions, the violations were second or third time grievances. One of the points involved in favor of an attorney, according to the Opinion, is that the Respondent-Attorney was *cooperative and candid with the investigation.* Respondent ROSE could not have been more cooperative and could not have been more candid than to admit the facts in this case.

The Bar counsel makes repeated references to the fact that the Respondent should have known that his legal position was an incorrect one in that legally, he should have known he had no right to withdraw funds from a "Gift to Minors Act" account.

No witness has challenged Respondent's own belief that he was not creating an irrevocable situation and that he intended to create, at most, a totten trust.

It is apparent that he did not have to give his children any more assets as he testified that he had previously placed about half a million dollars in trust for them. This testimony was never challenged, particularly by the ex-wife who certainly would have been in a position to do so.

The sum and substance of the whole case was that the Respondent has been suspended for thirty days from the practice of law without a previous disciplinary record, based upon an uncontroverted misapprehension of his legal rights.

It is most salient that even the Grievance Committee concluded that ROSE had a firm belief that the funds that he received farm the sale of the stock were, in fact, his own.

The Referee, in effect, penalized ROSE because he should have known what the law was under the Gift to Minors Act.

In this case, of the only two lawyers who testified, ROSE and his ex-wife, neither was aware of the legalities of the Gift to Minor's Act,

Based upon the prior decisions of this Court and on the unblemished prior disciplinary record of this Respondent, and based on the fact that no one suffered any harm, and that the

entire matter really arose out of estranged relations between two ex-spouses, the punishment is too severe.

An admonishment, or even a reprimand would have certainly been sufficient, in addition to the ongoing pain that Respondent lives every day from the aftermath of a failed marriage and a vindictive ex-spouse and in-laws.

CONCLUSION

The evidence, without contradiction, indicates that Respondent ROSE, believing that the establishment by him of an account with his ex-wife as custodian for the minor children was, in fact, the creation of a revocable totten trust.

The Grievance Committee so found. The Referee was under the mistaken impression that the establishment of an account in the name of a person without that person's knowledge is some kind of a wrongful act.

No legal authority has ever been cited by The Bar that this is true and in fact, almost every gift made by the setting up of an account to a child or grandchild could be considered wrongful.

No misrepresentation to any person, firm or individual was proved. The Bar's belated attempt to frantically find conclusions that were not set forth in the findings of the Referee is a little late.

The conviction of the Respondent should be set aside.

Even if the conviction were proper, the cited cases without rebuttal from The Bar indicate that the penalty found was too severe.

The Respondent's clean record for over twenty-years and the fact of mistake, and that this was the outgrowth of a bitter

divorce between two lawyers should not subject the Respondent to suspension.

Respectfully submitted,

JAMES F. POLLACK

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT was on this 20th day of MAY, 1992 mailed to:

PAUL A. GROSS, Bar Counsel
THE FLORIDA BAR
444 Brickell Avenue, M-100
Miami, Florida 33131

JOHN F. HARKNESS, JR., Executive Director
JOHN T. BERRY, Staff Counsel
JOHN A. BOGGS, Director, Lawyer Regulation
THE FLORIDA BAR
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

JAMES F. POLLACK, ESQ.
JAMES F. POLLACK, P.A.
328 Minorca Avenue
Coral Gables, Florida 33134
Telephone: (305) 443-6134

and

MICHAEL I. ROSE, ESQ.
MICHAEL I. ROSE, P.A.
1525 Museum Tower
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 373-6300

By _____
JAMES F. POLLACK
Attorneys for Respondent