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JUN 23 1999

CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant/Appellee

Case No. 78,589
TFB No. 90-11,166(6D)

v.

JOSEPH R. MIELE,
Respondent/Appellant.

APPELLEE'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Appellant, Joseph R. Miele, will be referred to as the "Respondent." The Appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar." "TR.I" will refer to the Final Hearing held on February 4, 1992. "TR. II" will refer to the Final Hearing held on February 4, 1992 (erroneously dated February 3, 1992 by the Court Reporter).

SUMMARY OF THE FACTS AND OF THE CASE

Respondent's Statement of the Facts and of the Case is essentially a recitation of those facts set forth in paragraph II of the Report of Referee. The Florida Bar has not challenged those facts.

However, a statement set forth in Respondent's Statement of Facts requires clarification. On page two (2) of his Initial Brief, Respondent stated he "**was** to be paid at the rate of One Hundred Fifty and no/100 Dollars (\$150.00) per hour for all subsequent work".

The Referee did not find that Respondent "was to be paid" **One** Hundred Fifty Dollars (\$150.00) per hour. The Referee stated on page three (3) of The Report of Referee that "Respondent claimed that he was to be paid \$150.00 per hour." (Emphasis added). Respondent provided no written contracts or letters of engagement in support of his claim of \$150.00 per hour beyond those fees actually paid by the Condo owners. In fact, Respondent's billing to the unit owners reflected a fee per unit charge when billed.

SUMMARY OF THE ARGUMENT

Point One: The Referee found as an aggravating factor that Respondent acted out of a selfish motive. The record is clear that Respondent cashed the attorney's fees and costs refund checks, did not advise the complainants that the attorney's fees were awarded for several months, and then required the complainant's to document the fees paid. Respondent's excessive delay in notifying his clients until several months after he had already cashed the checks shows a selfish motive.

Point Two: The Referee's finding that the Respondent should **pay** the entire cost of this proceeding is correct. The Referee's finding is one of discretion, **and** should not be set aside absent a showing of error. The allegations set forth in The Bar's Complaint were serious in nature. **The** Referee's findings of fact and guilt illustrate that Respondent failed to adequately communicate with his clients and that he failed to comply with certain trust account rules. While the Referee found Respondent not guilty as to several violations listed within the Complaint, the factual allegations were inextricably intertwined **so** as to make a separation of costs inequitable.

Point Three: The Referee recommended a public reprimand. In light of the facts herein as well as the aggravating factors

found by the Referee, a public reprimand is fair to the Respondent.

ARGUMENT

POINT ONE

Respondent argued that the Referee's finding of a selfish motive was not supported by the record. In June 1989, the Pinellas County Tax Collector's Office sent the condo owners tax refund checks to Respondent. Respondent also received two (2) checks designated as reimbursement for attorney's fees and costs. On June 15, 1989, Respondent cashed a check dated June 14, 1989, for fourteen thousand eight hundred dollars (\$14,800.00). Also on June 15, 1989, Respondent cashed a check dated June 14, 1989 for nine thousand eight hundred dollars (\$9,800.00). (R. Bar Ex.22). (TR. 11, p. 238, 1. 2). Respondent delivered the tax refund checks to the condo owners in August of 1989. Respondent denied that at the time he delivered the tax refunds checks in August of 1989 to the Williams' that he advised them the issue of whether the court would award attorney's fee had not yet been decided. However, Respondent admitted that he did not tell the Williams' anything about the court-awarded fees. (R.R. p. 3 and TR. 11, p. 272, 1. 19-23).

In January of 1990, Mr. Williams had a discussion with an individual in the Property Appraiser's Office, and learned of the attorney's fees reimbursement. (TR. I, p. 58, 1. 3-21). Mr. Williams and the other condominium unit owners, upon discovering the award of attorney's fees, demanded reimbursement from the Respondent. (R.R. p. 3).

A period of six (6) months had elapsed between Respondent's receipt **and** cashing of the attorney's fees and costs reimbursement checks and Mr. Williams' discovery of the award. Respondent had a selfish motive in not advising the owners of the award. That selfish motive was his receipt and negotiation of the **\$24,600.00** checks at a time when Respondent had no accounting or summary of his actual fees. Respondent had not prepared a summary of the fees he claimed were owed until after his deposition taken on February 27, 1992, over **two (2)** years after the receipt and negotiation of the checks. (TR. 11, p. 222, 1. 18-25). While the **Referee found** no dishonesty, deceit or misrepresentation, the Referee properly found that Respondent had a selfish motive.

POINT TWO

The Referee was correct in taxing Respondent with the entire cost of these proceedings. Respondent argues that the evidence introduced at the Final Hearing was not sufficient to prove by clear and convincing evidence that Respondent engaged in the theft of the reimbursed attorney's fees and costs or that Respondent engaged in misrepresentation. The Referee agreed, and stated that The Bar did "not establish by clear and convincing evidence that Respondent misrepresented the status of the attorney **fee** issue to his clients. What the record does disclose is that Respondent failed to provide his clients an accounting of his time or information concerning the court-awarded fees. Instead, Respondent required his clients to document that they were entitled to a refund of fees paid." (R.R. p. 4).

In essence, the Referee did not find clear and convincing evidence of theft and misrepresentation. The **Referee** did find Respondent's failure to even mention the award of attorney's fees and **costs** until January of 1990 a violation of Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requested for information), and Rule 4-1.4(b) (a lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding representation). The Referee also found Respondent guilty **as** to Rule 4-1.15(d) (a

lawyer shall comply with The Florida Bar Rules regulating trust accounts), and Rule 5-1.1(b) (a member of The Florida Bar shall preserve or cause to be preserved the records of all bank accounts or other records pertaining to the funds of property of a client for a period of not less than six (6) years). (R.R. p.6).

Respondent challenges the Report of Referee as to the taxing of the costs for the entire proceeding, wherein the Referee did not find theft or misrepresentation.

In The Florida Bar v. Davis, 419 So. 2d 325, 328 (Fla. 1982), where Davis had been charged in a three (3) count Complaint, the Referee found Davis guilty as to Count I and not guilty **as** to Counts II and III. The Bar sought review to recover the full cost of the proceedings. The Supreme Court of Florida held that the discretionary approach should be used in determining awards of costs in disciplinary proceedings. **The** Court allowed for one-third (1/3) of the costs to be awarded to The Bar in Davis. In Davis, there was a clear method for the Referee to divide the costs. Count I in Davis involved Davis' role in the selling of time shares. Count II involved escrow violations.

In the recent case of The Florida Bar v. Neu, Case No. 76,158, April 2, 1992, 17 **FLW** 5226, The Bar presented a two (2) count Complaint. Count I dealt with the improper use of guardianship funds for personal expenses. Count II related to Neu's retention of trust account's earned interest. In Count

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I, the Referee found Neu guilty of commingling, mismanaging funds, and violations of IOTA. The Referee found Neu not guilty of misrepresentation, and conduct reflecting on his fitness to practice law. **As** to Count 11, the Referee found Neu guilty as to failing to keep separate money placed in trust for **a** specific purpose. The Referee found Neu not guilty as to misrepresentation. Neu challenged the Referee's award of costs to The Bar, and sought to reduce them. This Court in Neu followed the principle stated in Davis, that the Court should use sound discretion in assigning the costs of disciplinary proceedings. This Court held that in "considering the seriousness of the charges brought against Neu, we find that The Florida Bar did not act unreasonably in seeking a harsh punishment **and** challenging the **Referee's** findings." This Court held that Neu should bear the full costs of the disciplinary proceedings.

Likewise, in the instant case the charges were serious in nature and **The** Bar did not act unreasonably. Assuming arguendo, that The Bar had not proceeded with the allegations regarding Respondent's alleged misrepresentation regarding the status of the attorney's fees issue (which **also** constituted The Bar's charges of theft), the case presented by The Bar would have been presented in the same fashion **as** it was, to establish a lack of adequate communication with the clients and a violation of trust requirements.

POINT THREE

The Respondent challenges the Referee's recommendation as to the sanction. The Referee recommended a public reprimand.

The Referee found Respondent guilty of failure to communicate and failure to comply with certain trust accounting rules. In addition to the Referee's mitigating factors, the Referee found three (3) aggravating factors. The Referee found prior disciplinary offenses. The Respondent had two (2) prior private reprimands. The Referee found selfish motive **and** substantial experience in the practice of law. **The** Referee's recommendation as to a public reprimand is fair to the Respondent and should be upheld.

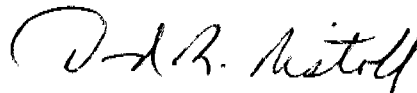
CONCLUSION

The Referee properly found selfish motive as an aggravating factor based upon the facts and evidence presented at the Final Hearing.

The Referee was correct in taxing the costs against Respondent.

A public reprimand is the appropriate sanction to be imposed given the Referee's findings of fact.

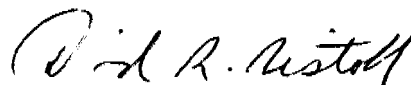
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to William D. Slicker, Esq., at NCNB Building, Suite 516, 501 First Avenue North, St. Petersburg, Florida 33701; John T. Berry, Staff Counsel, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this twenty-second day of June, 1992.



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