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SID J. WHITE
JUN 8 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

JOSEPH R. MIELE

Appellant/Respondent,

VS.

THE FLORIDA BAR,

Appellee/Complaint

CASE NO. 78,589

TFB NO. 90-11,166 (06D)

Appellant's Initial Brief

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Florida Standards for Imposing Lawyer Sanctions 10
Rule 4-3.8 of the Rules of Regulating The Florida Bar 8
Section 57.105, Florida Statutes. 1,2,9

Statement of Case and Facts

This is an appeal of a grievance proceeding that arose out of attorney Miele's representation of certain condominium unit owners, including himself, in the Coronet 300 building, an eleven story building in downtown St. Petersburg. The building was converted from apartments to condos in 1979. (Tr. 140) The Pinellas County Property Appraiser about tripled the assessment in 1980 and the unit owners decided to appeal. (Tr. 141) Separate lawsuits ensued during the years 1981-1987. At the conclusion of the litigation, including appellate proceedings, tax refunds and attorneys fees were awarded. Miele's retention of those court-awarded fees formed the primary basis for the Grievance Petition.

For the taxable year 1980, attorney Joseph McDermott represented the condominium association. (Tr. (Tr. 18-20) During this time, Miele assisted McDermott at both the trial and appellate levels. McDermott was paid in full for his services. At Miele's suggestion, McDermott moved for and was awarded attorney's fees pursuant to Section 57,105, F.S., but the award was reversed on appeal. (R's Ex. 9) However, in its opinion, the Second District Court of Appeal implied that attorney's fees might be awarded in subsequent litigation involving other taxable years. Schultz v. Williams, 472 So. 2d 1347 at 1348 (Fla. 2nd DCA 1985). McDermott refused to handle litigation for subsequent years because the fees were not enough for the work involved. (Tr. 22)

Excluding a mandamus action filed by attorney Ed Pennell, Miele represented the condominium owners for the taxable years

1981-1987. The condominium association and Miele did not enter into any written contract of employment. According to Miele, he was paid Four Thousand Six Hundred and no/100 (\$4,600.00) Dollars for his work for the taxable years 1981 and 1982 (Tr. 166, 172) and Three Thousand Five Hundred (\$3,500.00) Dollars for his work in defending against the appeal of the 57.105 attorney fee award. (Tr. 159) He was to be paid at the rate of One Hundred Fifty and no/100 (\$150.00) Dollars per hour for all subsequent work. (Tr. 170, 176) That rate was very reasonable. (Tr. 23) In fact, it was pretty skinny. (Tr. 119)

At the conclusion of the litigation in June of 1989, after a new Property Appraiser took office in Pinellas County, a series of stipulated final judgments were entered into which resulted in checks being issued for tax refunds and attorneys fees. Although the tax refund checks were issued in June of 1989, Miele, because he was out of state at the time the checks were mailed to him, did not deliver the tax refund checks to the unit owners until August of 1989. According to Complainants James and Frances Williams, when Miele delivered the tax refund checks to them, he falsely told Mr. Williams that the issue of legal fees was still pending. (Tr. 60) Miele testified that the issue of attorney's fees was never discussed. (Tr. 272) On January 23, 1990, Miele wrote to the units owners and asked for copies of any checks paid to him for fees and costs since his records had been destroyed. (R's Ex. 18) In

response, the unit owners sent letters on January 26, 1990 which demanded that the court awarded attorney fees be divided between them, with Miele getting none of the fees. (F.B. Ex. 18 and 20)

Miele admitted that he did not have his records because they had been damaged by rain and tar from a hole in the roof of where he had stored them and they had been thrown out. (Tr. 137-139) The roof repair was verified by the written testimony of the president of Flamingo Roofing Company. (R's Ex. 26)

The Referee found that the Florida Bar failed to establish by clear and convincing evidence that Miele had misrepresented the status of the attorney fee issue to his clients. The Referee found that Miele had failed to provide his clients with an accounting of his time or information concerning the court awarded fees. Instead, Miele had required that the clients document their claim to any of the fees. (Referee's Report p. 4)

The Referee further found that Miele had not maintained his trust account records. These were the files that Miele claimed were inadvertently destroyed in late 1986 or early 1987. Based on Miele's reconstruction of his time, he contended that the condominium association and unit owners actually owed him fees, even taking into account the court awarded fees. (Referee's Report p. 4 citing to R's Ex. 22) Complainant Williams asserted that he and the other unit owners were entitled to split all of the attorney fees that had been awarded to Miele. (Referee's Report p. 4 citing to F.B. Ex. 17)

The Referee found that the Florida Bar had not demonstrated by clear and convincing evidence that the fees charged were excessive or that Miele improperly retained the court-awarded fees. The Referee did find that Miele's failure to communicate with his clients resulted in their belief that the fees belonged to them. (Referee's Report p. 4)

Summary of Argument

Point One: The Referee found that Miele acted out of a selfish motive. The record is devoid of any evidence to support this finding. In fact, the record contains evidence to the contrary.

Point Two: The Referee found that the Respondent should pay for the entire cost of this proceeding when the allegations made by Williams were turned into a complaint by the Florida Bar against Miele without any evidence to support the allegations.

Point Three: The Referee recommended a public reprimand. However, his technical violations of the Bar Code did not result in any actual or potential injury to anyone but himself. Therefore, the proper sanction is an admonishment.

Point One

Miele objects to the finding that he was motivated by a selfish motive. The record does not support such a conclusion. On the contrary, it demonstrates Miele's utter lack of motivation by money.

First, the fees due for the 1983, 1984, 1985, and 1987 litigation were allowed to accumulate to be collected from the County first. A selfish person would not allow this to occur. Such a person would have been hounding the clients to be timely paid.

Second, the 1980 fee in the amount of Three Thousand Eight Hundred and no/100 (\$3,800.00) Dollars plus costs in the amount of Eight Hundred and no/100 (\$800.00) Dollars which totaled Four Thousand Six Hundred and no/100 (\$4,600.00) Dollars was testified by McDermott to be so low he did not wish to handle future cases. Yet Miele agreed to take future years at the fee level that McDermott felt was inadequate. Those fees were never raised through 1987. This is not the act of a selfish man.

Third, Miele does not understand how it is selfish to retain the money that he is indisputably (under the true ultimate facts) entitled to have. Under such a ruling, any attorney who accepted payment of fees for services rendered would be selfish.

Point Two

The factual testimony in the record is virtually uncontested.' The finding that the Bar Association (and complaining witnesses) failed to meet the burden of proof required is an understatement.

All of the facts established by the record may be taken as true. Having said this, there is not one scintilla of evidence that the Respondent has committed any of the ethical violations alleged, except the imprudent disposition of his records.

In short, the allegations contained in the Bar's Complaint were never supported by the facts.

The monies claimed by the Complainants were paid to a different attorney or were paid for services not reimbursed by the County. Therefore, the Complainants were never due any of the fees awarded by the Court Orders that were introduced into evidence.

Respondent's Exhibit 18 is Miele's letter to the Complainants (which you will note was sent prior to the Complainants' letters to Miele). Miele's letter asks for facts from which an accounting could be made. Respondent's Exhibit 20, which is Miele's letter to the Bar Association requests the same documentary evidence to support the allegations of the Complainants that they were due refunds.

If the true facts, which were admitted by the Bar's witnesses at the final hearing, were known at the beginning of this matter,

¹The allegation by Mr. and Mrs. Williams in paragraph 4 concerning the attorney fees was disposed of by the Referee in the first sentence of paragraph 5 of the Referee's factual findings.

the accounting would have been prepared and this matter would not have proceeded as far as the preliminary hearing. Instead, notwithstanding Miele's request, the documentary evidence was not supplied to him. See requests for admissions and letter.

Whether or not the Bar Counsel knew that the documentary evidence requested did not exist is not important. What is important is that allegations of theft and other acts of dishonesty were accepted by the Bar's Counsel at face value without ever demanding the proof to support those allegations. The fee accounting sheet made by Mr. Williams for the purpose of filing the Complaint falls in the class of allegations - not documentary evidence. Yet the Bar proceeded with the unfounded allegations of theft and dishonesty up until the twelfth hour when the complaining witnesses agreed on the stand that the funds they were seeking a refund of were paid to a different attorney or were for years of litigation and services not covered by the Court ordered fees.

Section 4-3.8 of the Bar Code setting out the special responsibilities of a prosecutor provides that in a criminal case a prosecutor shall refrain from prosecuting a charge that a prosecutor knows is not supported by probable cause. This section a fortiori requires due diligence on the part of the prosecutor to ascertain if there is a factual basis for the charges.

If a client came to an attorney and alleged that someone owed him money, the attorney would have a duty to investigate the facts

and to see what proof existed to support the allegations or else the attorney would be subject to sanctions pursuant to Section 57.105, F.S.

The stress that this caused Miele is beyond description. Allegations of theft and dishonesty are particularly offensive to a person who prides himself on his reputation for truth and honesty in the community.

It is inconceivable to Miele that he should be charged with the expenses of a prosecution that should have been worked out at the correspondence level. Had the Bar Counsel forced the Complainants to be as forthright in the beginning as they were at trial, the matter would not have proceeded any further.

Miele has never taken the position that he has been without fault. The maintenance of his records for a six year period is unequivocally his duty and he has admitted this candidly from the very beginning. Therefore, it seems just that Miele should pay those costs which were incurred through that point at which the Bar Counsel should have demanded the documentation from the Complainants and forwarded them to Miele.

Point Three

Pursuant to the Florida Standards for Imposing Lawyer Sanctions, an admonishment is the appropriate form of discipline if an attorney has been negligent and causes little or no actual or potential injury to a client.

In the case at hand, Miele failed to keep his records for six years. As a result, there was no injury to any client. The only one injured was himself. If he had kept his records and if he had wanted to pursue the matter, he could have billed the unit owners for his legal services that they never paid for.

However, the Referee imposed a discipline of a public reprimand. Pursuant to the Florida Standards for Imposing Lawyer Sanctions, such a sanction is the appropriate form of discipline if the attorney has been negligent and there is injury or potential injury to the client.

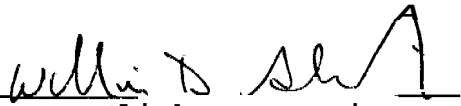
Accordingly, Miele submits that the Referee imposed a sanction that was not warranted by the facts and the Standards.

Conclusion

In conclusion, the Respondent does not feel that a public reprimand is called for when a member disposes of his records before the six year period expires. The Respondent suggests that an admonishment is appropriate and that a smaller portion of the costs, if any, should be assessed under the circumstances.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been sent by U. S. Mail to: David R. Ristoff, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, FL 33607; John T. Barry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300; and Bruce Bartlett, Chairman, P. O. Box 5028, Clearwater, FL 34616 on this _____ day of June, 1992.



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