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CLERK, SUPREME COURT

By _____
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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

CASE NO. 78,589

vs.

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

JOSEPH R. MIELE,
Respondent.

REPORT OF REFEREE

I. Summary of Proceedings:

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates: March 4, 1992; and March 26th, 1992. The following attorneys appeared as counsel for the parties: for the Florida Bar, David R. Ristoff, Esq.; for the Respondent, William D. Slicker, Esq.,.

Legend of Abbreviations:

For purposes of this report, the following abbreviations will be used:

- TR. I ----- Transcript of March 4, 1992 hearing
- TR. II ----- Transcript of March 26, 1992 hearing
- F.B. Ex. ----- Florida Bar Exhibit
- RP. Ex. ----- Respondent's Exhibit

11. Findings of Fact as to Each Item of Misconduct of Which the Respondent is charged:

After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

1. This grievance proceeding arises out of Respondent's representation of certain condominium unit owners, including Respondent, in the "Coronet 300", an eleven story building in St. Petersburg. When the Pinellas County Property Appraiser raised the assessment on the individual condominium units in 1980, the unit owners retained Respondent to represent them in order to lower the assessments. Separate lawsuits were required for each year in which the matter was in dispute (1980 - 1987). At the conclusion of the litigation, including appellate proceedings, tax refunds and attorneys fees were awarded. Respondent's retention of those court-awarded fees forms the primary basis for the Grievance Petition.

2. For the taxable year 1980, Respondent arranged for attorney Joseph McDermott to represent the condominium association in its litigation. TR. I, p. 20. During this time, Respondent assisted Mr. McDermott at both the trial and appellate levels. Mr. McDermott was paid in full for his services. At Respondent's suggestion, McDermott moved for and was awarded attorney's fees pursuant to F.S. Section 57.105, but that award was reversed on appeal, RP. Ex. #9. In that opinion, however, 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, 1348 (Fla. 2nd DCA 1985).

3. Excluding a mandamus action filed by attorney Ed Pennell, Respondent represented the condominium unit owners for the taxable years 1981 - 1987. The condominium association and Respondent did

not enter into a written contract of employment. According to Respondent, he was paid \$4,600.00 for his trial work involving the 1981 and 1982 taxable years. TR. I, p. 172. For the other lawsuits filed for the remaining taxable years, Respondent claimed that he was to be paid \$150.00 per hour. TR. I, pp. 176 - 177, 225 - 226.

4. 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 which resulted in checks being issued for tax refunds and attorneys fees. Although the tax refund checks were issued in June of 1989, Respondent, because he was out of state at the time the checks were delivered to him, did not remit the tax refunds to the individual condominium association unit owners until August of 1989. According to complainants James and Frances Williams, Respondent, at the time he delivered their tax refund checks in August of 1989, falsely told him that the issue of whether the court would award attorney's fees had not yet been decided. Respondent denied making this statement to the Williams', but admitted that he told the Williams' nothing about the court-awarded fees because he felt that those fees belonged to him. When complainant James Williams learned of the award of fees in January of 1990, he wrote Respondent a letter demanding a portion of those fees. F.B. Ex. #18. Other condominium unit owners, upon discovering the award of attorney fees, demanded reimbursement from Respondent. F.B. Ex. #20.

5. Based on the evidence presented, the Referee finds that Petitioner has not established 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 to 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. F.B. Ex. #19.

6. Respondent has not maintained his trust account records. Respondent claims that those records along with the files pertaining to the tax litigation discussed above were inadvertently destroyed in late 1986 or early 1987. TR. I, pp. 249-250. Based on his reconstructed record of events, Respondent contends that the condominium association and unit owners actually owe him additional monies, even after taking into account the court awarded fees. RP. Ex. #22. Complainant Williams has asserted that he and the other unit owners are due substantial attorney fee reimbursements from Respondent. F.B. Ex. #17.

7. Petitioner has not demonstrated by clear and convincing evidence that the fees charged were excessive or that Respondent improperly retained the court-awarded fees. However, Respondent's failure to communicate with his clients over the course of this litigation resulted in complainants' bona fide belief that at least a portion of the fees belonged to them.

111. Recommendation as to Whether or Not the Respondent
Should be Found Guilty:

As to the allegations contained in the Complaint, I make the

following recommendations as to guilt or innocence:

I recommend that Respondent be found not guilty of the following violations of the Rules of Professional Conduct:

(a) Rule 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client);

(b) Rule 4-1.5 (An attorney shall not collect an illegal, fraudulent or clearly excessive fee);

(c) Rule 4-1.15(a) (A lawyer shall hold in trust separate from the lawyer's own property, funds and property of client's that are in lawyer's possession in connection with a representation);

(d) Rule 4-1.15(b) (Upon receiving funds or other property in which a client has an interest, a lawyer shall promptly notify the client);

(e) Rule 4-1.15(c) (When in the course of representation, a lawyer is in possession of property in which both the lawyer and another person claim interest, the property shall be treated by the lawyer as trust property);

(f) Rule 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects);

(g) Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation);

(h) Rule 5-1.1 (Money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose);

(i) Rule 5-1.1(c) (Minimum trust accounting records shall be

maintained and minimum trust accounting procedures must be followed by all attorneys practicing in Florida who receive or disburse trust money or property);

(j) Rule 5-1.2(b) (2)(3)(4)(5)(6) and (7) (Minimum trust accounting records as outlined in these rules should be maintained); and

(k) Rule 5-1.2(c) (1)(2)(3) and (4) (Minimum trust accounting procedures as outlined in these rules should be followed).

I recommend that Respondent be found guilty of the following violations of the Rules of Professional Conduct:

(a) Rule 4-1.4(a) (A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information);

(b) Rule 4-1.4(b) (A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding a representation);

(c) Rule 4-1.15(d) (A lawyer shall comply with the Florida Bar Rules regulating trust accounts);

(d) 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 or property of a client for a period not less than six years).

IV. Recommendation as to Disciplinary Measures to be Applied:

Having recommended that Respondent be found guilty of the above-described disciplinary violations, I recommend that Respondent receive a public reprimand pursuant to Rule 3-5.1(d),

Rules of Discipline.

V. Considerations Applied in Determining Recommended Discipline:

After finding of guilt and prior to recommending discipline pursuant to Rule 3-7.6(k)(1)(4), I considered the following personal history and prior disciplinary record of the Respondent, to-wit: year admitted to bar: 1962; prior disciplinary convictions and disciplinary measures imposed therein: private reprimand 1970; private reprimand 1973. The prior misconduct was not the same or similar to this violation.

Assravatins Factors:

Prior disciplinary offenses, selfish motive, and substantial experience in the practice of law.

Mitigating Factors:

Timely good faith effort to rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative effort toward proceedings, character or reputation, remoteness of prior offenses, and insufficient proof that Respondent's actions or inactions resulted in actual loss or injury to the clients,

Case Authority:

The Referee has reviewed three decisions considered by the undersigned to have involved more serious ethical violations than have occurred in the instant case. Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986); Florida Bar v. Hipsh, 441 So. 2d 617 (Fla. 1983); Florida Bar v. Burn, 433 So. 2d 1209 (Fla. 1983). In two of the three cases, the discipline ultimately imposed was a public

reprimand while in the third (Stalnaker) the Respondent was suspended from the practice of law for a period of ninety (90) days for improperly retaining fees belonging to his law firm. Here, although Respondent's failure to communicate with his clients is a serious matter, it is suggested that a public reprimand is an appropriate sanction where there has been a failure to establish that the clients were actually entitled to the funds retained by Respondent.

VI. ~~Statement of Costs~~ and Manner in Which Costs Should be taxed:

I find the following costs were reasonably incurred by the Florida Bar:

Administrative Casts pursuant to		
Rule 3-7.6 (k)(1)	\$	500.00
Status Conference 11/20/91		
Bar Counsel Travel Expenses	\$	6.36
Depositions 2/27/92		
Court Reporter Attendance	\$	57.50
Transcript - Original	\$	297.60
Transcript - Copy	\$	31.50
Bar Counsel Travel Expenses	\$	14.40
Final Hearing 3/4/92		
Bar Counsel Travel Expenses	\$	9.36
Trust Account Audit		
Auditor, Pedro Pizarro, Expenses	\$	241.52
Investigator Expenses		
Walter Granger		
15.2 hours @ 20.00/hour	\$	304.00
TOTAL		\$1,462.24

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent.


DATED this 14th day of April, 1992.



 HON. JAMES M. BARTON, II
 REFEREE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to David R. Ristoff, Esq., Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport - Marriott Hotel, Tampa, Florida, 33607; William D. Slicker, Esq., NCNB Building, Suite 516, 501 1st Avenue North, St. Petersburg, Florida 33701, John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; this 14th day of April, 1992.



HON. JAMES M. BARTON, II
REFEREE