IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

YVONNE E. REED,

Respondent-Appellant.

Supreme Court Case
No. 79,766

The Florida Bar File
No. 91-50,685 (17E)

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar". Yvonne E. Reed, Appellant, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

STATEMENT OF CASE AND FACTS

The respondent's version of the facts and case is incomplete and argumentative. Therefore, The Florida Bar feels constrained to set forth the correct version of the same below.

The bar initiated its investigation of respondent on December 19, 1990, when Michael and Kathie Heller filed a complaint alleging that the respondent had engaged in certain unethical acts during the sale of their home to Dimetrio Garcia and Carol Sullivan. After thorough investigation, a grievance committee entered a finding of probable cause on April 30, 1992. A two day trial was held in February of 1993 and a report of referee, finding respondent guilty of numerous ethical violations and recommending a two year suspension from the practice of law, was rendered on March 4, 1993. Respondent took exception to the report of referee and filed a motion for rehearing, which relief was denied on June 28, 1993. On August 5, 1993, respondent served her petition for review, which petition requests the court to review the referee's findings of guilt and recommendation of a two year suspension.

This action revolves around several related real estate transactions concerning one certain home in Lighthouse Point, Florida initially owned by the Hellers. The basic transactions are as follows:

DATE	PARTIES	DEED	CONSIDERATION
8/30/90	Heller to Sullivan	warranty	$290,000.00[1]
8/31/90[2]	Sullivan to Respondent	quit claim	none
1/17/91	Respondent to Martino	warranty	$265,000.00

[1] While a check was delivered in this amount, the instrument was altered, by persons unknown, from its original face amount of $90.00.

[2] While the quit claim deed is dated August 31, 1990, the grantee was left blank until October 25, 1990. RR 10.

See RR 2-4 and TFB exhibits E, G, and S. The referee correctly noted in her report that respondent performed the following roles in the transactions referenced above:

a. Sullivan and Garcia's realtor;[3]

b. Sullivan and Garcia's attorney;

c. the Hellers' attorney;[4]

d. closing agent;

e. escrow agent;

f. property owner;

g. Sullivan and Garcia's landlord. RR 11.

In August of 1990, Sullivan, a friend of respondent's[5] , and Garcia, Sullivan's boy friend, retained respondent as their realtor in their search for a new home. TT 241. Respondent, a realtor with Prudential Florida Realty, brought Sullivan and Garcia to the Hellers' home, which was listed by Fred Panton, who was with a different branch office of Prudential Florida Realty. TT 115-125. On August 12, 1990, Garcia, Sullivan and the Hellers reached an agreement on the sale of the home. RR 2. By this agreement Garcia and Sullivan agreed to pay $290,000.00 in cash and this cash would be used to satisfy all outstanding mortgages and the remainder, less costs, would be paid to the Hellers. RR 2. Respondent, acting as realtor for both sides of the

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[3] Since realtors represent the seller in the sale of a home, except in very rare occasions where it is fully disclosed that the realtor is only representing the buyer, respondent also represented the Hellers as realtor. See the testimony of Joanna Youngblood, a broker for Prudential Florida Realty at TT p.180, 1.23 through p.182, 1.1 and respondent's own testimony at TT p.247, 1.1-6.

[4] The referee found that this attorney-client relationship was very limited. RR 9-10.

[5] See TFB exhibit Q at 4 and TT 245.

transaction and as attorney for Garcia and Sullivan, participated in the negotiations on the purchase and the preparation of the contract that documented the parties agreement. RR 2.

By August 30, 1990, respondent had prepared all of the closing documents, inclusive of the seller's closing instruments, and proceeded to close the transaction. RR 2. The Hellers appeared on August 30, 1990 and executed a warranty deed and the other necessary documents to pass title. RR 2. However, it was discovered that Garcia and Sullivan would be unable to close at that time, so the Hellers granted them an additional twenty-four hours to complete the sale. Resp. Exhibit 6.

Subsequently, Sullivan and Garcia experienced difficulty in securing the cash necessary to close the transaction. Therefore, respondent assisted the parties in restructuring the agreement. RR 2. The new agreement called for Sullivan and Garcia to produce $90,000.00 cash at closing and to take the property subject to two mortgages which were to be satisfied within thirty days of closing by the purchasers. RR 2. Both of these mortgages contained due on sale clauses and were not assumable by the purchasers. RR 2-3.

On August 31, 1990, Garcia presented respondent with a cashier's check, drawn on the Banco de Credito Argentino payable through the Bank of New York in the face amount of $90,000.00. RR 4-5. Respondent presented this check to her bank, Capitol Bank, deposited the check into her trust account and was allowed to draw checks against the cashier's check. RR 5. Respondent then commenced the closing of this sale. The Hellers were given respondent's trust account check in the amount of $35,924.30, as their portion

of the closing proceeds, and Sullivan took title to the property.[6] Respondent then had Sullivan execute a quit claim deed, wherein the grantee was left blank. For services rendered to the Hellers, Garcia and Sullivan, respondent was paid approximately $5,000.00 as a real estate commission, $5,500.00 in legal fees by Garcia and Sullivan and $300.00 for legal fees charged against the Hellers proceeds. RR 8.

Garcia and Sullivan failed to provide any further funds to complete this sale and on or about September 25, 1990, but no later than September 28, 1990, respondent was advised that the check she had received from Garcia had been altered and that the Bank of New York was making a claim for the return of the $90,000.00. RR 6. The check that Garcia had provided was in fact a $90.00 check, which check was altered by persons unknown to respondent. RR 6. Prior to receiving notice of the true nature of the cashier's check at issue, respondent had disbursed $61,490.30[7] of the $90,000.00. RR 6.

On October 25, 1990, respondent inserted her own name as grantee on the previously executed quit claim deed and took title to the property. RR 3. Respondent paid no consideration for the transfer of title to the property. RR 3. As Sullivan and Garcia failed to provide any monies to her for rent or towards the outstanding mortgages, respondent, on October 31, 1990, caused

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[6] While Garcia, the person supplying the funding for this transaction, was on the first deed drafted for this sale (TFB exhibit E), he was not on the warranty deed actually used to pass title. See TFB exhibit F. Respondent at trial testified that the Hellers had voiced some concerns about Garcia and that this was one of the factors in keeping Garcia off the deed. TT 267. However, respondent, while writing to a police detective about the bounced check opined that she "would not take the risk" of having Garcia on the deed, as she did not know him. See TFB exhibit Q at 4.

[7] $5,500.00 of which was paid to respondent as fees and $17,400.00 was remitted to Prudential for real estate commissions, part of which was later paid to respondent. RR 6.

an eviction notice to be placed on the residence. RR 3. Sullivan and Garcia left the property on November 19, 1990. RR 3.

Shortly after taking title, respondent marketed the home for resale and also leased the premises to persons unknown to Sullivan, Garcia and the Hellers and was paid approximately $200.00 for the rental. RR 3 and 5. During the course of respondent's ownership of the home, respondent used the remaining portions of the $90,000.00 still in her trust account to make mortgage payments and satisfy other expenses related to the property. RR 5. Respondent made over $28,000.00 in payments relating to the property even though she had actual knowledge of the dispute over the ownership of these trust monies. RR 6-7. It should be noted that the Hellers remained liable for the mortgages during this time frame, even though respondent was title owner of the property. RR 4.

On or about December 18, 1990, Roseanna Martino agreed to purchase the home from respondent for $265,000.00. RR 4. The Reed to Martino transaction closed on January 17, 1991. RR 4. The closing agent satisfied the outstanding mortgages and paid respondent $8,123.51, as the cash proceeds of the sale. RR 4. In addition, respondent took back a $25,000.00 mortgage on the home, which mortgage had matured to a value of $30,000.00 at the time of trial. RR 4. The testimony adduced at trial was that respondent was attempting to pay this note over to the Bank of New York in exchange for a release of the bank's claim for $90,000.00. TT p.309, l.18 to p.310, l.8.

The referee found that respondent had engaged in several conflicts of interest in that her multiple roles in these transactions caused her to place her own interests above those of the people she represented. RR 9-10. The foregoing is evidenced by respondent's decision to take title to the property,

continue to use the "tainted" monies to protect the property after taking title, and the ultimate resale of the property with the proceeds payable to respondent, the bulk of which are now ostensibly pledged to the Bank of New York.

The referee also found that respondent had misused trust monies in that she should not have used these disputed funds until the ownership dispute was resolved. RR 6-7. The bar had urged the referee to find that this misuse was a theft of trust monies, but the referee disagreed and found this misuse to be technical in nature. RR 7.

The bar's complaint also included a charge that respondent had collected a clearly excessive fee. The referee found respondent not guilty of this aspect of the bar's complaint.

The referee has recommended a two year suspension for the foregoing ethical breaches and the bar in this appeal seeks to uphold this recommendation.

SUMMARY OF ARGUMENT

This case arises, not because respondent was the unlucky recipient of an altered check, but as a result of respondent's decision to represent all sides in a real estate transaction, including her own. Respondent's conflict laden relationship to this transaction was only exasperated when it was discovered that one set of clients could not deliver the cash to fund the purchase and that the only funds provided were by way of an altered check. One bad decision (forcing Sullivan to quit claim the property to respondent) led to another (knowingly using disputed trust monies to protect respondent's property from foreclosure). Each such decision pulled respondent deeper and deeper into the morass created by respondent's conflicting loyalties to the Hellers, Sullivan, Garcia and herself. In the end analysis respondent was paid $5,500.00 in attorneys fees, approximately $5,000.00 in real estate commissions, $200.00 in rent, approximately $8,000.00 in sale proceeds and a promissory note valued at over $30,000.00. She even took the last remaining dollar from her trust account from the initial deposit of $90,000.00. Yet there is still the very real possibility that respondent will have to return all or part of this conflict aided profit to the Bank of New York.

Respondent has abandoned any claim that she is not guilty of the ethical violations found by the referee. Accordingly, the only issue on this appeal is the propriety of the recommended sanction of a two year suspension from the practice of law. Respondent contends that she should receive an admonishment or at most a public reprimand for her ethical misdeeds. The bar finds this position to be untenable due to the serious nature of the misconduct and urges this court to adopt the referee's recommended sanction.

ARGUMENT

I. THE REFEREE'S RECOMMENDED SANCTION OF A TWO YEAR SUSPENSION IS CONSISTENT WITH THE PRECEPTS OF LAWYER DISCIPLINE.

Respondent's brief, while factually orientated, does not contest the referee's findings of fact or guilt. Accordingly, the only issue for determination on this appeal is whether or not this court should adopt the referee's recommendation of a two year suspension from the practice of law.

It is well settled that "a referee's recommendation on discipline is afforded a presumption of correctness, unless the recommendation is clearly erroneous or not supported by the evidence." The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992); The Florida Bar v. Roberts, 626 So. 2d 658, 659 (Fla. 1993). In the case at hand, the respondent has failed to demonstrate that the referee's recommended sanction is "clearly erroneous or not supported by the evidence." Thus, the recommended two year suspension must be upheld.

Respondent has been found guilty of three distinct unethical acts related to the sale and resale of a certain home in Lighthouse Point, Florida. In Count I respondent was found to have improperly disbursed approximately $28,000.00 from her trust account for expenses directly related to the home when she was title owner of the same. RR 11. In Count III[8], the referee found a conflict of interest in that respondent had represented all sides in the first real estate closing. RR 12. Lastly, respondent was found guilty of another conflict of interest in the same transaction in that she allowed her own interests to conflict with those of her clients. RR 13. Each act of misconduct

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[8] Respondent was found not guilty of Count II, which alleged that respondent had collected a clearly excessive fee.

will be discussed below relative to the appropriateness of the recommended two year suspension.

A. The misuse of trust money.

Respondent's trust account violations arise from her acceptance and later deposit of what appeared to be a cashier's check in the amount of $90,000.00 drawn on the Banco de Credito Argentino payable through the Bank of New York. The respondent sought provisional credit for the use of the $90,000.00 prior to proceeding to close the transaction. RR para. 20. In addition it is clear that Capitol Bank, where respondent held her trust account and the Bank of New York, the corresponding bank on the draft in question, on August 31, 1990, gave respondent authority to use the $90,000.00. However, it was later discovered that the draft had been altered from its original face amount of $90.00. RR 6. Respondent's use of the $90,000.00 prior to notice that the draft had been altered is not an issue. The referee found that it was respondent's continued use of the trust monies, after knowledge that the Bank of New York was making a claim against the funds, that was unethical.[9] RR 6-7.

Respondent claims that her use of disputed trust funds warrants only the imposition of a public reprimand. Respondent's brief at 31. In reaching this erroneous conclusion, respondent points this court towards two public reprimand cases in which the lawyers were disciplined for trust account improprieties. The Florida Bar v. Lumley, 517 So. 2d 13 (Fla. 1987); The

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[9] Respondent, in her brief, attempts to argue that there was no dispute concerning the funds since Capitol Bank had changed its position several times on whether or not they were going to demand a return of the $90,000.00. See respondent's brief at 30. What respondent fails to point out is that the Bank of New York had filed suit against respondent to collect these funds. TT 89-93. This lawsuit clearly demonstrates that there was a dispute over the funds in question.

Florida Bar v. Dougherty, 541 So. 2d 610 (Fla. 1989). The Dougherty decision is distinguishable due to the extensive mitigation found, in that the lawyer had fully cooperated with the bar[10] and had given "extensive personal and legal contribution(s) to his community". Dougherty at 612. Respondent's assertion of mitigation will be discussed below.

In Lumley, the court specifically found that there was "no intent to deprive the clients of their money". Lumley at 14. Respondent's conduct in this case is dissimilar. In the case at hand, the respondent purposefully spent approximately $28,000.00 of disputed monies on a home that she owned.

Respondent attempts to convince the court that her actions were made in good faith, with the intent to protect all parties and that the only person harmed by her misuse of disputed trust funds was herself. What respondent's argument ignores is that "(r)egardless of no client being injured, trust account violations are serious transgressions". The Florida Bar v. Wilson, 599 So. 2d 100, 101 (Fla. 1992); The Florida Bar v. Breed, 378 So. 2d 783, 785 (Fla. 1979) [Disbarment is warranted for misuse of client trust monies even though no client is injured.].

This court has made a distinction between the negligent handling of a trust account and the intentional misuse of the same. See for example The Florida Bar v. Weiss, 586 So. 2d 1051 (Fla. 1991) [Six month suspension for grossly negligent handling of a trust account.]; The Florida Bar v. Simring, 612 So. 2d 561 (Fla. 1993) [Disbarment for intentional misuse of client

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[10] In this case respondent had to be forced to give discovery and came close to having discovery sanctions imposed against her for failing to give discovery. The most telling example of respondent's noncooperation was the production at trial of several documents that were requested upon the filing of the bar's complaint, but never produced until the final hearing. TT 313-326.

funds.]. In this case respondent's actions were intentional. She purposefully spent disputed funds to protect the house, that she owned, from foreclosure. While the referee found this to be a technical violation of the rules, the Bar most respectfully disagrees.

B. The dual representation.

The referee correctly points out that respondent represented both sides in the Heller to Sullivan and Garcia sale. RR 9. In the referee's opinion this representation, as a lawyer, was limited in nature. RR 9. The referee reaches this conclusion as the Hellers had a second lawyer, Joseph Hubert, in the background helping the Hellers make decisions once the deal started falling apart. RR 9-10. Respondent grasps upon this finding and attempts to minimize her conflict and then blames the Hellers insistence on closing for all her misfortunes in this transaction. However, respondent's argument misses the mark. It is respondent's representation of the Hellers, as their lawyer to complete the Hellers' closing documents and as their realtor,[11] which causes respondent to be obligated to accede to the Hellers' request to close. Perhaps if respondent only had one master, Sullivan and Garcia, who were clearly unable to close pursuant to the terms of the contract, respondent would not have felt compelled to bring the parties together to renegotiate and close the transaction. Of course had the deal not closed, respondent's real estate commission could have been forfeited.

As an extension to this argument, respondent also contends that the Hellers were not harmed by respondent's actions. The referee clearly resolved this argument by noting that respondent's actions "adversely affected the Hellers in that the Hellers remained liable for one of the

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[11] See footnote 3.

mortgages that attached to the property" even though first Sullivan and then respondent owned the home. RR 10.

Respondent next points to The Florida Bar v. Teitelman, 261 So. 2d 140 (Fla. 1972) and argues that based upon Teitelman respondent could have represented both the buyer and the seller in this transaction if certain criteria were met. Respondent misreads Teitelman and the criteria set forth therein. The Teitelman decision is not about when a lawyer can represent both sides in a real estate transaction. Rather, Teitelman "dealt with those situations in which an attorney, while representing one party, also directly bills the other party a fee for preparing legal documents" when that lawyer did not represent the party so billed. The Florida Bar v. Belleville, 591 So. 2d 170, 172 (Fla. 1991). In fact, the first Teitelman requirement, referenced in respondent's brief, is that there be a "client-attorney relationship between such attorney and the seller". Id. The referee found such a relationship between respondent and the Hellers.

But there is more than just a simple dual client conflict found in this case. What makes this case different from Teitelman is the fact that respondent had a second role to play for the Hellers as their realtor. It is this additional role that should have caused the respondent to suggest that the Hellers have someone else prepare their closing documents.

Last year in a pure dual client conflict of interest case, this court suspended a lawyer for six months. The Florida Bar v. Mastrilli, 614 So. 2d 1081 (Fla. 1993). In Mastrilli the court was faced with a situation where the lawyer had represented a driver and a passenger in the same automobile for damages arising from an accident. Id. at 1082. Mastrilli eventually stopped representing the driver and then sued the driver on behalf of the passenger.

Id. This is strikingly similar to respondent's eviction of Sullivan and Garcia from the Lighthouse Point home.[12]

In a less serious conflict case a lawyer received a public reprimand for representing both sides in the sale of a business, and having an additional conflict problem due to a close personal relationship with one of the parties to the sale. The Florida Bar v. Stone, 538 So. 2d 460, 461 (Fla. 1989). But in Stone you did not have the additional conflicts arising from acting as a realtor or the other roles played by respondent in this transaction. The case at hand is also more serious as there are trust accounting violations.

C. The personal conflict.

We now turn to the decisions that formed the predicate for this case. Without these decisions respondent would not have been in a position to feel the need to use disputed trust monies to protect her property from foreclosure or to request a client to quit claim their home to her for no consideration. In Count IV respondent has been found guilty of two distinct personal conflict rule violations. The first conflict was a violation of R. Reg. Fla. Bar 4-1.7(b), which provides in pertinent part that a "lawyer shall not represent a client if the lawyer's exercise of professional judgement may be materially limited by . . . the lawyer's own interests". Respondent's personal stake in this transaction is created by the various roles that she played and the expectation of monetary gain therefrom (i.e. a real estate commission). The second conflict arises from respondent's failure to follow the precepts of how

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[12] Also of interest was respondent's sworn letter to detective Ruebottom (TFB exhibit Q) and respondent's testimony regarding the same. TT 300-304. In this letter respondent reveals everything she knew about the real estate transaction as well as everything she knew about Sullivan and Garcia. Some or all of this information may have been governed by the attorney client privilege.

lawyers must conduct themselves when engaging in business transactions with clients. R. Reg. Fla. Bar 4-1.8(a). First, the terms of the transaction must be "fair and reasonable" and disclosed in writing. The transfer of a home, no matter how tenuous an ownership interest, for no consideration[13] can hardly be described as "fair and reasonable". Further, respondent did not advise Sullivan to seek independent counsel prior to assigning all of her interest in the home to respondent.[14]

Respondent's major premise underlying her argument that she should at most receive a public reprimand is that no one was harmed by her actions. This is far from accurate. Sullivan and Garcia gave respondent the home in which they were living and were later evicted from this home by respondent. Garcia did not even have a say in this decision because he was not on the deed as respondent did not know him and would not put him on the deed. TFB exhibit Q at 4. It is true that Sullivan and Garcia's ownership interest in the home was tenuous at best, but it was an ownership interest. The Hellers were harmed by the fact that they no longer had an ownership interest in the home, but were still liable for at least one of the mortgages. If the home had been foreclosed, it was the Hellers whose credit rating was the most at risk. Lastly, the Bank of New York was harmed in that respondent spent approximately $28,000.00 in which they had a claim of ownership. The bar concedes that not every one came into this transaction with clean hands, but

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[13] When pressed on the issue of what, if any, consideration was paid to Sullivan, respondent replied that she "bought her lunch that day". TT p. 283, l.25 to p.284, l. 13.

[14] In fact, when asked if she had advised Sullivan to seek independent counsel, respondent answered: "Why should I tell her to get independent counsel"? TT p. 285, l.20-23

that does not give a lawyer license to take advantage of them or to ignore the rules that regulate an attorney's conduct.

Respondent also alleges that she did not profit from this conflict. The following reflects the monies collected by respondent in these transactions:

PURPOSE	AMOUNT
Martino proceeds (RR 16)	$ 8,123.51
Legal fees (RR 5)	5,500.00
Rent (RR 8)	200.00
Real estate commission (RR 8)	5,000.00
Trust balance (RR 5)	1.00
TOTAL	$18,824.51

Respondent testified to the following expenditures against these funds:

PURPOSE	AMOUNT
Materials (TT 329)	$ 2,500.00
Eaton (TT 328-329)	6,731.35
Horsman (TT 329)	1,688.58
Miscellaneous (TT 331)	2,000.00
TOTAL	$12,919.93

The Martino promissory note valued at $30,000.00 is more than likely a wash as it is pledged to the Bank of New York. A comparison of the two figures reveals a profit to Reed of $5,904.58. This is hardly a loss.

Respondent contends that she should receive at most an admonishment for the violations found by the referee as to Count IV. Respondent's brief however makes reference to three cases in which the lawyers received some form of suspension.

The respondent refers to a disciplinary action wherein the lawyer was suspended for two months for purchasing 220 acres of land from a client without making the proper disclosures or informing the client to seek independent counsel. The Florida Bar v. White, 368 So. 2d. 1294 (Fla. 1979). The bar sees the White decision as a good starting point in what discipline should attach for Count IV, but there is one major factual difference in the

White case. In White, the lawyer paid consideration for the purchase of the client's property. Id. at 1295. In the case at hand no consideration was paid.

Respondent also cites to The Florida Bar v. Dunangan, 565 So. 2d 1327 (Fla. 1990) where a lawyer was suspended for sixty days for among other things representing his own interests at a closing to protect his fees, rather than the client's interests. Again this appears to be a good starting point for the discussion on the appropriate sanction, but respondent's actions in having her clients give her their home for no consideration is factually more reprehensible than a lawyer trying to recover monies owed by the client by failing to advise the clients that he intended to deduct past due legal fees from the proceeds of the real estate transaction prior to the actual closing.

In a serious conflict of interest case with fraud overtones, a lawyer was suspended for two years. The Florida Bar v. Feige, 596 So. 2d 433 (Fla. 1992). In Feige the court found that the lawyer had engaged in certain conduct that led to the lawyer and his client being sued by the client's ex-husband. Id. at 435. The court agreed with the referee:

> that the conflict of interest inherent in Feige's representation of Whalen in Gale's lawsuit was so fundamental that it could not be condoned by the client, even with full disclosure.

Id. Also see The Florida Bar v. Ward, 472 So. 2d 1159 (Fla. 1985). In the case before the court the referee specifically found that "respondent's own interests were inherently in conflict with the interests of her clients" in the various transactions. RR 11.

D. Aggravation and Mitigation.

The referee did not make specific findings on aggravation and mitigation. However, several aggravating factors are present as well as a few mitigating factors. The Florida Standards for Imposing Lawyer Sanctions

(hereinafter the Standards) set forth what may or may not be considered as aggravation or mitigation. Standard 9.22 lists ten factors which may be considered as aggravation, of these ten the following factors are present in this case:

(a) prior disciplinary offenses (1986 private reprimand);[15]

(b) dishonest or selfish motive (explained below);

(d) multiple offenses (three counts of misconduct);

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency (failed to give complete discovery);[16]

(g) refusal to acknowledge wrongful nature of conduct;

(i) substantial experience in the practice of law (admitted in Florida in 1976 and prior to that in Louisiana).

Respondent argues that there are three mitigating factors that the court ought to consider. At trial respondent had several character witnesses who testified as to respondent's otherwise fine reputation and character. The bar does not contest this mitigating factor. However, the bar is at a loss to understand respondent's argument as to two other alleged mitigating factors.

First, respondent contends that there is an absence of a dishonest or selfish motive. Standard 9.32(b). The bar most strenuously disagrees and urges this court to find the converse to be the case. It is clear from the record that the driving force in the initial decisions by respondent that she intended to make as much money as she possibly could from the real estate

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[15] The referee found the reprimand to be innocuous and found that it did not affect her recommendation on discipline. RR 14.

[16] See footnote 10.

deal. If the transaction had closed without the problems that arose later, respondent would have collected a real estate commission, a share of the title insurance premium and attorney's fees from the buyer and the seller. There was no other money to be made on this transaction unless you actually owned the property. Thus, it is clear that the respondent had a selfish motive for engaging in the initial misconduct.

Next, respondent wants this court to find as mitigation, an alleged timely good faith effort to make restitution and to rectify the consequences of her misconduct. Standard 9.32(d). Respondent's brief at page 23 argues that the respondent "took timely action to rectify the misconduct of **others**[17]". (original emphasis) Respondent points to the referee's finding that she "took the only path that would conserve the property and would reduce the exposure of all parties", including respondent's exposure. RR 12. The referee was referring to respondent's improper use of trust monies and not respondent's decision to compel her client to quit claim the property to respondent. It is inescapable how respondent's decision to break the Rules of Professional Conduct, by spending disputed trust monies to protect a home she owned from foreclosure, can be considered as mitigating.

A comparison of the one mitigating factor present in this case to the dearth of aggravation leads to the conclusion that there is little to mitigate the violations found by the referee and much to aggravate any sanction warranted in this matter.

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[17] Respondent does not explain what efforts she took to cure her own misconduct.

E. The sanction.

On prior occasions this court has held that a disciplinary sanction must serve the following purposes:

> First, the judgement must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgement must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgement must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983). Of these three factors the court has found that the most important concern of the court "in defining and regulating the practice of law is the protection of the public from incompetent, unethical and irresponsible representation." The Florida Bar v. Dancu, 490 So. 2d 40, 41 (Fla. 1986). The court in Dancu explains that:

> The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence. Id. at 41-42.

An application of the foregoing standards to the referee's recommended two year suspension and respondent's request for no more than a public reprimand, clearly denotes that the respondent's preferred sanction is not enough discipline and that the referee's recommended sanction of a two year suspension is supported by the evidence in this case.

A public reprimand is only warranted in cases of "isolated instances of neglect, lapses of judgement, or technical violations of trust accounting rules without willful intent." The Florida Bar v. Rogers, 583 So. 2d 1379, 1382

(Fla. 1991). This is not one of those instances because the misconduct is to pervasive and not one isolated act. In Rogers, the court rejected an argument that a public reprimand should be imposed and instead ordered a suspension for the lawyer's conflict of interest arising from a business relationship with a client as well as the lawyer's failure to render a full accounting. Id. at 1383.

Respondent contends that Standard 4.13 applies for the trust accounting violations and Standard 4.33 or 4.34 for the conflict violations. However, respondent fails to reconcile the fact that all three of these standards refer to the ethical breaches being negligent rather than intentional. Nowhere in the record is there any evidence that respondent "negligently" misused trust funds. On the contrary the referee found respondent's use of the trust money to be a knowing intentional expenditure of disputed trust monies. RR 6-7. Also missing from the record is any mention that respondent's various conflict of interest violations were anything less than intentional.

The applicable Standards for the trust account violations are Standards 4.11 and 4.12. Standard 4.11 requires disbarment for intentionally converting client monies regardless of any client injury. Standard 4.12 requires a suspension when the lawyer "knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client". This respondent has done. The Hellers could have been injured in a foreclosure action while they were still obligated under the mortgage and the Bank of New York had to sue respondent to recover its money.

The appropriate Standard for the conflict violations is Standard 4.32 which states that:

> Suspension is appropriate when a lawyer knows of a conflict of interests and does not fully disclose to a client the possible conflict, and causes injury or potential injury to a client.

It is clear that respondent did not fully discuss with Sullivan the conflicts arising from her request for the property and that she should have made better disclosure to the Hellers. RR 13.

This court has in the past disbarred lawyers for conduct very similar to respondent's. In The Florida Bar v. Neely, 587 So. 2d 465 (Fla. 1991), the lawyer had obtained title to the home of his mother's client, without informing the mother's client that she should seek independent counsel prior to executing the deed. Neely also engaged in other acts of misconduct such as failing to preserve escrow funds and engaging in fraudulent misconduct. Id. at 466-467. Neely was disbarred by this court. Id. at 468. An attorney was likewise disbarred for representing two parties in the same transaction without revealing one side of his dual representation, for taking legal fees and other interests in the transaction without full disclosure and then creating phony letters to mislead anyone trying to unravel the lawyer's bad acts. The Florida Bar v. Crabtree, 595 So. 2d 935, 936 (Fla. 1992).

CONCLUSION

This court, in The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1991), disbarred a lawyer for charging clearly excessive fees, engaging in massive conflicts of interest and intentionally misusing funds, from an estate. The court in reaching this decision favorably commented upon the following passage from The Florida Bar v. Moore, 194 So. 2d 264, 269 (Fla. 1966):

> It is settled that, except in exceptional circumstances . . ., an attorney may not represent conflicting interests in the same general transaction, no matter how well-meaning his motive or however slight such adverse interest may be.

> The rule in this respect is rigid, because it is designed not only to prevent the dishonest practitioner from fraudulent conduct but also to preclude the honest practitioner from putting himself in position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

The respondent placed herself in such a position where she had to serve more than one interest and frequently she had to choose between her own interests and that of a client. The referee has found that this misconduct warranted a two year suspension. The authorities cited above clearly demonstrate that a public reprimand or an admonishment is not an appropriate sanction. In light of the fact that some lawyers have been disbarred for conduct similar to respondent's, the referee's recommended two year suspension does not appear unreasonable.

As the respondent has failed to demonstrate the referee's recommendations on discipline are clearly erroneous or not supported by the evidence, the referee's recommended two year suspension should be upheld.

WHEREFORE, The Florida Bar respectfully request this court to approve the referee's recommendation that the respondent be suspended from the practice of law for two years, as well as the imposition of costs against the respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing answer brief of The Florida Bar has been furnished via regular U.S. to Louis M. Jepeway, Jr., Esq., Biscayne Bldg., Suite 407, 19 W. Flagler Street, Miami, FL 33130-4404; J. David Bogenschutz, Esq., Jefferson Bank Building, 600 S. Andrews Ave., Suite 500, Fort Lauderdale, FL 33301; and to John A. Boggs, Director of Lawyer Regulation, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 23rd day of February, 1994.

KEVIN P. TYNAN