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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

HAROLD BEHRMAN,

Respondent.
_____/

Supreme Court Case
No. 81,866

The Florida Bar File
Nos. 93-70,213(11G)
93-70,455(11G)

COMPLAINANT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

Rules Regulating The Florida Bar

RULES **PAGE**

Florida Standards for Imposing Lawyer Sanctions

STANDARDS **PAGE**

SYMBOLS AND REFERENCES

For the purposes of this Answer Brief, The Florida Bar will be referred to as either The Florida Bar or the Bar. Harold Behrman will be referred to as the Respondent or Behrman. Other parties and/or witnesses will be referred to by their respective surnames.

References to the transcript of proceedings before the Referee will be noted as TR and page number. References to the Report of Referee will be noted as RR and page number. References to exhibits introduced by The Florida Bar at final hearing will be noted as TFB Ex. and exhibit number. References to exhibits introduced by Respondent at final hearing will be noted as R Ex. and exhibit number. References to the Amended Initial Brief of Petitioner will be noted as Respondent's Brief and page number.

STATEMENT OF THE CASE

On November 25, 1992, the Respondent, Harold Behrman, was ordered emergency suspended by the Florida Supreme Court in Supreme Court Case No. 80,774. The allegations which resulted in Respondent's emergency suspension are the same allegations which are the basis of The Florida Bar's complaint against Respondent. On December 2, 1992, Respondent filed a Petition to Withhold Disposition of Emergency Suspension which was opposed by The Florida Bar.

On December 7, 1992, a Petition for Leave to Resign Pending Disciplinary Proceedings was filed with this Honorable Court in Supreme Court Case No. 80,864. On January 11, 1993, the Respondent filed a Petition to Withhold Disposition of Petition to Resign. Subsequently, on January 25, 1993, Respondent sought to withdraw his Petition for Leave to Resign. Pursuant to Court Order dated April 15, 1993, Respondent was permitted to withdraw his Petition for Leave to Resign.

On May 21, 1993, Respondent filed a Motion to Lift Emergency Suspension which was denied pursuant to Court Order dated June 23, 1993. Prior to the entry of said order, The Florida Bar filed its complaint in this cause (Supreme Court Case No. 81,866) on June 1,1993.

On February 1, 1994, Respondent filed a Motion to Dissolve Emergency Suspension Pursuant to Rule 3-5.2(f). On February 23, 1994, Respondent's motion was granted and he was ordered reinstated.

Subsequently, the Honorable Bernard R. Jaffe was appointed Referee in this cause and the matter proceeding to final hearing on March 28, 1994. The Report of Referee was rendered on June 23, 1994. On October 13, 1994, orders were entered denying Respondent's Motion for Reconsideration and clarifying and amending the previously entered Report of Referee.

STATEMENT OF THE FACTS

Respondent is a seventy-nine year old man who became a member of the New York Bar in 1939. He practiced law for a brief period of time before becoming involved in the retail business which became his source of livelihood. At the height of his mercantile career, the Respondent owned and operated nine retail shops in three states. Several years after selling his business, Respondent took the Florida Bar examination and was admitted to The Florida Bar in 1987. (TR.17-18).

In approximately June, 1991, Respondent began an office space sharing arrangement with one R. Mark Hunter. (TR. 27). The two had met approximately a year prior to that when they encountered one another for the first time on a golf course. (TR. 19). Subsequent to that first meeting, Hunter retained Respondent to handle a personal injury claim on behalf of his wife. A business relationship subsequently resulted between the two men. (TR. 20).

Although Respondent never inquired of Hunter as to the nature of his business, Hunter "volunteered a lot of information" to which Respondent listened. (TR. 27). Hunter held himself out as a Pennsylvania attorney and loan broker with the ability to assist people who wanted to borrow money, but were without the collateral necessary to obtain funding. (TR. 28-29). Hunter purported to represent people with considerable funds who, for a fee, would provide letters of credit to serve as collateral for prospective borrowers to post with the lending source of their own choice. Although Respondent subsequently agreed to became involved in Hunter's business dealings, he made no attempt to verify Hunter's representations regarding either his attorney status or his business activities. (TR.29-30).

In approximately the fall of 1991, Hunter inquired of Respondent as to whether he would be

interested in acting as escrow agent with regard to deposits solicited by Hunter from prospective borrowers. (TR. 31). Hunter advised Respondent that he would be paid $1000.00 per transaction for providing this service and Respondent agreed. (TR. 33). Respondent then proceeded to open a trust account at Family Bank for the express purpose of handling the transactions associated with Hunter.(TR. 36). Four Hunter related transactions passed through Respondent's trust account at Family Bank. (TR. 36).

The first such escrow transaction involved one John Dodds who, on behalf of Green Point Development, issued a check made payable to Respondent on October 16, 1991 in the amount of $23,000.00. (TFB Ex. 1). Pursuant to his discussions with Hunter, Dodds believed and intended that these funds would remain in Respondent's trust account pending closing of the loan. No discussions took place between Respondent and Dodds at that time. (TR. 229). On October 28, 1991, twelve days after receipt of Dodds' money, Respondent disbursed Dodds' funds as follows: $14,666.66 to R. Mark Hunter and $7,333.33 to one John Allen. (TFB Ex. 1). Pursuant to his fee agreement, Respondent retained $1,000.00 for himself. Respondent testified that he disbursed Dodds' funds in accordance with a contract entered into between Dodds and Hunter which was presented to Respondent by Hunter for his review. Respondent further testified that he was no longer in possession of the contract as it was missing from his office along with the entire file. (TR. 43). Dodds testified that he did not authorize the disbursement of those funds entrusted to Respondent. (TR. 232). He further testified that no funding ever occurred, nor did he ever recover any portion of his $23, 000.00. (TR. 239). Additionally, while Dodds did state that he signed a Commitment to Purchase on December 5, 1991, that document did not authorize the release of any funds. (TR. 242-244). In any event, the Commitment to Purchase was dated subsequent to

Respondent's release of Dodds' funds.

The second escrow transaction involved one John Blanton who, on behalf of Pines Investment Group, transferred $12,000.00 to Respondent's trust account on December 3, 1991 to be held as a deposit pursuant to a lending transaction under negotiation with Hunter. (TFB Ex. 2). On December 7, 1991, four days after receipt of Blanton's funds, Respondent disbursed $10,990.00 of Blanton's funds to Hunter. (TR. 49). The testimony showed that Blanton had faxed a letter to Respondent at the fax number shared by Respondent and Hunter directing that his deposit funds not be released until the loan closed. (TFB Ex. 11). As with Dodds, Respondent testified that he disbursed the funds pursuant to a missing commitment contract. (TR. 50). Blanton testified that he never authorized the disbursement of his funds (TR. 50) and that Respondent never reimbursed him any portion of his funds. (TR. 101). Finally, no funding was ever received by Blanton. (TR. 101).

Captain Eslie Birchwood, president and chief executive officer of Sunbird Airways, was called as a witness by The Florida Bar. Captain Birchwood testified as to his business dealings with R. Mark Hunter and Respondent. On December 4, 1991, Birchwood issued a check made payable to Harold Behrman, Esquire in the amount of $25,000.00 (TFB Ex. 14). This check was to serve as a good faith deposit on the financing which Birchwood was seeking through Hunter. Prior to remitting the check to Respondent, Birchwood testified that he spoke directly with Respondent who assured him that his money would be safe in his custody. (TR.124). Birchwood also testified that he forwarded Respondent an escrow agreement which, among other things, provided that the $25,000.00 in escrow funds was not to be released to anyone unless and until successful closing took place on the loan. (TR. 118, TFB Ex. 12). No certificate of deposit ever materialized and no closing ever took place. (TR. 67). Birchwood eventually learned from Hunter that his escrow funds had

been disbursed by Respondent. (TR. 128). He then made numerous requests upon Respondent for the return of his money. (TR. 129, 137, 139-142; TFB Ex. 15, 16, 17, 18). Respondent advised Birchwood that he would attempt to retrieve the funds from Hunter. Birchwood eventually contacted the Federal Bureau of Investigations. Subsequent to such contact, he was able to recover directly from Hunter approximately $16,000.00, leaving him $9,000.00 short of his initial investment. (TR. 143). Respondent never offered to repay any funds to Birchwood, including the $1,000.00 Respondent kept for himself as a fee. (TR. 67, 143).

The fourth transaction in which Respondent was involved was a deposit received from one Kenneth Oker-Blom on behalf of Dreamland International, on December 9, 1991, in the amount of $40,000.00. (TFB Ex. 4). Respondent testified that subsequent to inquiry by the Bar, he met with Mr. Oker-Blom who furnished him with an affidavit stating essentially that the disbursements made by Respondent were in accordance with the commitment previously signed by him. (TR. 197, R Ex. 1). Subsequent testimony revealed that Oker-Blom's affidavit was notarized by one Langdon Ryder Littlehale, an employee of Respondent's for twenty-four years. (TR, 250). Although Littlehale stated that the affiant furnished a foreign identification document with a photograph on it (TR. 253), the affidavit was not notarized in accordance with statutory requirements that the document itself indicate the means by which the affiant identified himself. (TR. 254).

Testimony was also provided by Carol Gunter who worked as a legal secretary for Hunter. (TR. 178). Gunter testified that Hunter reviewed mail, faxes, and telephone messages intended for Respondent prior to passing them on to him and that Hunter sometimes withheld these communications from Respondent. (TR. 165-166). Despite having observed this behavior, Gunter did not relay this information to Behrman until just prior to leaving her employment. (TR. 176).

The Bar's complaint also alleged that Respondent failed to comply with a subpoena duces tecum served on him by the Bar requiring him to produce certain specified trust accounting records and documentation. Respondent's testimony throughout these proceedings was that his files containing the subpoenaed documents were missing from his office under mysterious circumstances and could not be located. (TR. 75 - 76). However, Respondent never contacted police authorities to report the disappearance of his files. (TR. 76).

In conclusion, Respondent's testimony was essentially to the effect that he relied on Commitments furnished to him by Hunter in disbursing the deposits received from the four investors. As evidenced by The Florida Bar's exhibits one through four, Respondent made disbursements directly payable to R. Mark Hunter and/or John Allen, Hunter's purported business partner. He made no independent attempts to confirm with the investors, the propriety of his disbursements. Similarly, he made no efforts to refund any money to any of the parties when it was discovered their funds had been improperly utilized. Finally, he was unable to produce any documentation pursuant to the subpoena as he testified that the pertinent files were missing.

Respondent's assertions regarding the Bar's assessment of the evidence and the witnesses is both self-serving and inaccurate. The fact that the Referee found Respondent guilty of some, but not all of the allegations does not mean that the allegations were unnecessary or improper. Rather, it indicates that the Bar was correct in its belief that Respondent was guilty of misconduct. Moreover, an amendment of the Bar's complaint would not have obviated the need for a trial in this cause as incorrectly stated by Respondent.

On June 23, 1994, the Report of Referee was tendered by Judge Jaffe, Referee in this cause. Included among the Referee's findings were that Respondent received the funds of Blanton and

Dodds and disbursed those funds in violation of his duties as escrow agent and in reliance on a contract said to be missing. The Referee also found that Respondent did not comply with trust accounting requirements, particularly with regard to the issuance of a trust account check to Hunter in payment of Respondent's rent obligations.

It was recommended by the Referee that as to Counts I and II of the Bar's complaint that Respondent be found guilty of violations of Rule 5-1.1(a) (Money or other property entrusted to an attorney for a specific purpose... is held in trust and must be applied only to that purpose) of the Rules Regulating Trust Accounts and as to Count III that Respondent be found guilty of violating Rules 5-1.1(c) (preserving trust accounts as official records), 5-1.1(d) (minimum trust account records and procedures shall be maintained), and Rule 5-1.2(b) (minimum trust account record requirements) of the Rules Regulating Trust Accounts. The Referee recommended that Respondent receive a ninety (90) day suspension, pay The Florida Bar's costs in the amount of $4,929.98, and make restitution to Blanton, Dodds, and Birchwood in the amount of $1,000.00 each as per a designated payment plan.

SUMMARY OF ARGUMENT

The findings of fact made by the Referee are neither clearly erroneous nor lacking in evidentiary support and are fully supported by the record before the Referee and this court. Moreover, a Referee's findings of fact enjoy a presumption of correctness and will be upheld unless that presumption is overcome by a showing that the findings lack competent substantial supporting evidence or are clearly erroneous. The Respondent has failed to satisfy his burden and has not been able to overcome the presumption of correctness. The Referee was able to first hand observe the witnesses directly and to render judgment as to issues of credibility and weight of evidence. Those judgments, as reflected by the Report of Referee, are supported by the evidence although contrary to the Respondent's position.

The Referee recommended a disciplinary sanction which includes a non-rehabilitative period of suspension, taxation of costs, and restitution. Such a disciplinary sanction is appropriate in light of the Referee's findings of fact and rule violations which include failure to disburse in accord with Respondents' duties as escrow agent, failure to utilize trust funds for the purpose for which entrusted, and failure to comply with trust accounting procedures and record keeping requirements.

ARGUMENT

I. THE REFEREE CORRECTLY FOUND THAT RESPONDENT DISBURSED FUNDS IN VIOLATION OF HIS DUTIES AS ESCROW AGENT.

Unless clearly erroneous or lacking in competent substantial evidence, a Report of Referee is presumed to be correct and will be upheld. The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993); The Florida Bar v. Smiley, 622 So. 2d 465 (Fla. 1993). Having sought review of the Referee's Report, the burden is upon the Respondent to show that the Referee's findings were either clearly in error or lacking evidentiary support. The Florida Bar v. McClure, 575 So. 2d 176 (Fla. 1991). Respondent fails to satisfy his burden and to overcome the presumption of correctness inherent in the Referee's Report.

While the evidence produced at trial showed that assorted investors were defrauded by R. Mark Hunter, that does not lessen Respondent's obligations and responsibilities with regard to those who entrusted their funds to him. Clearly Dodds, Blanton, and Birchwood all felt secure in entrusting their funds to Respondent precisely because they believed their money would be safe within the sanctity of the attorney trust account. As the evidence also showed, these investors took additional steps in their attempts to make clear the terms under which they were entrusting their funds to Respondent. Respondent failed to live up to their trust and to his obligations.

The record does not support Respondent's contention that he disbursed funds in accordance with his duties as escrow agent. Rather, the record indicates that Respondent claims to have disbursed in reliance on missing contracts, as well as a blank contract containing boilerplate language. The Bar's position continues to be that even the blank contract and commitments on which Respondent claims to have relied does not authorize the disbursement of the escrow funds.

The Florida Bar exhibits 6, 9, and 19 consist of Commitments to Purchase Certificates of Deposit. Paragraph six of those commitments states that disbursements from the commitment fee escrow account will be applied to the purchase of the certificate of deposit. However, the testimony and documentary evidence are undisputed that no certificate of deposits were ever provided. Moreover, Respondent always disbursed from the escrow account with checks made payable directly to Hunter and/or Hunter's purported associate, John Allen. Checks were never payable to the entities which Hunter purportedly represented. Disbursement in this manner is not consistent with even Respondent's version of an authorized disbursement.

The questionable circumstances under which Respondent disbursed the funds were sufficient to cause a reasonable person to inquire as to the propriety of the transaction. This is even more true where the escrow agent is an attorney as lawyers especially must be circumspect in their conduct when handling funds belonging to others. Williams v. Hunt Brothers Construction, Inc., 475 So. 2d 738 (Fla. 2d DCA 1985). The evidence and testimony clearly support the Referee's findings that Respondent disbursed funds in violation of his duties as an escrow agent.

II. THE REFEREE CORRECTLY FOUND THAT RESPONDENT WAS GUILTY OF VIOLATING RULE 5-1.1(a) WHICH REQUIRES THAT MONEY RECEIVED IN TRUST BE USED FOR THE PURPOSES ENTRUSTED.

Rule 5-1.1(a) of the Rules Regulating Trust Accounts provides, in pertinent part, as follows:

> Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose.

Judge Jaffe recommended that Respondent be found guilty of violating 5-1.1(a) of the Rules Regulating Trust Accounts. Review of the Report of Referee (Appendix A) indicates that recommendation was predicated upon the Referee's finding that Respondent disbursed escrow deposit funds within days of receiving same and further, that such disbursement was contrary to the conditions of its deposit with Respondent. The Referee's findings are overwhelmingly supported by the testimony and evidence presented to him.

Rule 5-1.1(a) stands on its own and operates independently of any other rule provision. Contrary to Respondent's position, it need not be read in conjunction with Rule 4-1.15(a) which in essence is the rule which prohibits an attorney's commingling of a client or third person's funds. By its terms, Rule 4-1.15(a) specifically applies to situations in which the funds are in a lawyer's position in connection with a representation. Rule 5-1.1(a) is not as limited in its scope and in fact is the applicable rule for situations where an attorney is acting as an escrow agent.

This court has repeatedly held that even when acting in a personal matter, an attorney can be held professionally accountable. The Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968). Attorneys must avoid tarnishing the professional image or damaging the public. The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989). Even if one were to accept Respondent's tenuous argument that

no attorney-client relationship existed, the fact is he can and will be held professionally accountable nonetheless.

Finally, fact finding responsibilities in disciplinary proceedings rest with the Referee. The Florida Bar v. Hirsch, 359 So. 2d 856 (Fla. 1978). Such findings are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). The record before this Honorable Court clearly and overwhelmingly sets forth support for the Referee's findings. Accordingly, Respondent has failed to satisfy the burden and the Referee's findings should not be disturbed.

III. THE REFEREE CORRECTLY FOUND THAT RESPONDENT FAILED TO COMPLY WITH TRUST ACCOUNTING RULES 5-1.1(d) AND 5-1.2(b) WHEN HE ISSUED A CHECK IN PAYMENT OF RENT FROM HIS TRUST ACCOUNT.

Respondent himself concedes that he was in technical violation of trust account regulations when he disbursed a rent check directly from his trust account to Hunter. Although he seeks to downplay the seriousness of such an offense, he does not deny it.

The rules specifically require that certain minimum trust accounting records be maintained and that certain minimum trust account procedures be followed. Respondent failed to maintain such records and abide by such procedures. This resulted in the Referee's finding of guilt as to trust accounting violations. See The Florida Bar v. Neely, 488 So. 2d 535 (Fla. 1986). If Respondent believed he had properly earned the $1,000.00 fee per escrow transaction, those funds should have been removed from his trust account and placed in his operating account. Finally, the Referee's findings indicate that not only was the issuance of the check contrary to the rule requirements, but that Respondent failed to maintain his trust account records in accordance with regulatory requirements.

The Bar takes issue with Respondent's position that failing to disburse fees from the trust account to the operating account is akin to money retained pursuant to a proper retaining lien. Obviously, a retaining lien is properly exercised where an attorney retains physical possession of documents or funds belonging to a client as a result of fees and costs due the attorney for services rendered that client. However, property entrusted for a specific purpose is not subject to a retaining lien regardless of outstanding attorney's fees.

IV. THE REFEREE PROPERLY RECOMMENDED THAT RESPONDENT BE SUSPENDED AS A RESULT OF HIS MISCONDUCT.

At the culmination of the trial in this cause, the Referee concluded that the Respondent had violated Rules 5-1.1(a) (Money held in trust must be applied only to the purpose for which entrusted), 5-1.1(c) and (d) (preservation of trust account records and maintenance of trust account procedures), and 5-1.2(b) (minimum trust account records) of the Rules Regulating Trust Accounts. As a result of that misconduct, the Referee recommended that the disciplinary sanction imposed include a ninety (90) day suspension. (Appendix "A"). The Referee's recommendation was appropriate in light of his findings of fact and is supported by the record and preceding case law.

Failure to deliver over funds of a third party which have been entrusted for a particular purpose and which have been held in trust is a most serious matter. Where, however, the funds were entrusted specifically because the party holding them is an attorney, it is even more egregious. After all, lawyers especially must be circumspect in their conduct when handling funds belonging to others. The Florida Bar v. Ruskin, 232 So. 2d 13 (Fla. 1970).

Florida Standards for Imposing Lawyer Sanctions, Section 7.0, provides that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Having found Respondent guilty of misconduct with regard to his duties as escrow agent and such misconduct resulting in injury to various parties, suspension is clearly the appropriate sanction.

An example of the seriousness with which misuse of escrow funds and violation of fiduciary duty is viewed is The Florida Bar v. Golden, 566 So. 2d 1286 (Fla. 1990). In Golden, the respondent received a five year disbarment having been found guilty of misconduct for the second time.

Although the underlying facts in Golden evidence an intent by that respondent to clearly sacrifice other's rights in order to benefit himself, this case is pointed out as an indicator of the seriousness with which violation of attorney's fiduciary duties is viewed.

In The Florida Bar v. Collier, 458 So. 2d 266 (Fla. 1984), the respondent received a three year suspension having been found guilty of various rule violations including failure to apply entrusted money of clients to the purpose for which entrusted. In The Florida Bar v. Condon, 632 So. 2d 70 (Fla. 1994), the respondent received an eighteen month suspension having been found guilty of comingling, using client funds for purposes unrelated to the client's business, and other trust acccounting violations.

The practice of law is a privilege which carries with it responsibilities, as well as rights. When one violates their responsibilities as an attorney, they must expect to be disciplined for such a transgression. Suspension is the appropriate discipline for Respondent's misconduct.

V. THE REFEREE PROPERLY RECOMMENDED THAT RESPONDENT BEAR THE COST OF THESE PROCEEDINGS.

Rule 3-7.6(k)(1)(E) was the rule applicable to costs at the time the Report of Referee was entered in this cause. The rule provides for the Referee's Report to include a statement of costs by The Florida Bar and a recommendation as to the manner in which such costs should be taxed. Costs of disciplinary proceedings are defined to include investigative costs, travel and out of pocket expenses, court reporters' fees, copy costs, witness and traveling expenses, and a $500.00 charge for administrative costs. It further proves that costs taxed shall be payable to The Florida Bar. While the rule does not specifically address the factors involved in determining the taxability of costs, case law clearly provides that taxing of costs is discretionary with the Referee. Moreover, where the Bar prevails, the Bar should and historically has recovered its costs. The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982).

Respondent's argument regarding his being taxed the Bar's costs in these proceedings is fatally flawed and must fail. First and foremost, the Bar prevailed in this cause. Although conveniently ignored by Respondent in his argument, the fact remains that the Referee, like the Bar, found Respondent's actions to be violative of the rules regulating attorney conduct. Respondent's statements throughout his brief that trial in this matter and the resulting costs were unnecessary is simply not true. Trial in this matter was unavoidable as were the resulting costs. Respondent seems to think that the testimony of secretary Carol Gunter was sufficient to exonerate him of all allegations of wrongdoing. Not only does the Bar take issue with this assessment of the witness' testimony, but apparently so does the Referee as evidenced by his findings. Moreover, even if one were to interpret Dodds' testimony in a similar fashion to Respondent, witnesses Blanton's and

Birchwood's testimony cannot be interpreted as vindicating Respondent. In fact, just the contrary is true. Moreover, contrary to the statements contained in Respondent's brief, his September 16, 1992, letter to the Bar does not offer to make restitution of the fees kept by him. Rather, it only offers to return same to his trust account which is hardly the same thing as returning the money to its rightful owner.

All costs sought by The Florida Bar and taxed against the Respondent are clearly and expressly provided for in Rule 3-7.6(k)(1)(E), Rules of Discipline, and Rule 5-1.1(c) and 5-1.2(e) of the Rules Regulating Trust Accounts, the latter applying to the costs of audit. Rules 5-1.1(c) and 5-1.2(e) clearly provide that when necessitated by failure to maintain requisite trust account records or failure to produce such records upon direction, grounds exist for disciplinary action without regard to any other matter. Further, the cost of audit and investigation necessitated by such failure may be taxed against a respondent. Respondent completely ignores the fact that his failure to produce subpoenaed trust account records and documentation, coupled with the seriousness of the complaints filed against him, necessitated and warranted the resulting audit and investigation.

Finally, as the testimony of witnesses Blanton and Birchwood was necessary to evidence the efforts undertaken by these two investors to secure the safety of their deposit money, the Referee properly taxed the associated costs against the Respondent.

In The Florida Bar v. Wilson, 616 So. 2d 953 (Fla. 1993), the full amount of the Bar's costs were taxed to the respondent even though he was not found guilty of all the allegations against him. The court specifically found that the auditor's costs and court reporter's fees involved both proven and unproven charges and that the charges could not be readily segregated. The difficulty in segregating the costs coupled with the fact that respondent's misconduct caused the initiation of both

proven and unproven charges, resulted in the court's finding no abuse of discretion in the referee's taxation of costs to respondent.

The taxing of costs is historically a discretionary matter properly within the province of the Referee. The Referee did not abuse his discretion in taxing the costs of these proceedings against the Respondent.

VI. THE REFEREE PROPERLY RECOMMENDED THAT RESPONDENT BE REQUIRED TO PAY RESTITUTION.

Rule 3-5.1(i) provides that in addition to other disciplinary sanctions, a respondent may also be ordered or agree to pay restitution "to a complainant or other person" if the disciplinary order finds that the respondent received a clearly excessive, illegal, or prohibited fee or has converted trust funds or property. Clearly, having heard the testimony and viewed the evidence presented to him, the Referee concluded that restitution of the "fee portion" of the victims' money was appropriate. Interestingly enough, Respondent argues that the Referee erred in recommending the restitution which Respondent now claims, for the first time, that he was willing to make all along.

The evidence is undisputed that Blanton and Dodds never recovered any portion of their respective investments of $12,000.00 and $23,000.00. Captain Birchwood, however, was fortunate enough to recover approximately $16,000.00 of his $25,000.00 investment. This partial recovery having come after reporting the matter to the Federal Bureau of Investigations and being advised by the federal authorities that he should take whatever he could get. (TR. 143). Certainly, no portion of that money was furnished by Respondent. (TR. 143).

John Dodds, John Blanton, and Eslie Birchwood were the victims of a fraud in which Respondent played a crucial role. Without Respondent's trust account and willingness to disburse, the plan could not have been carried out. Respondent's position that he should not be required to pay restitution "as he did everything in good faith that he was required to do" (R's Brief, 25) is belied by the fact that these innocent investors lost their money to a fraud. For Respondent to argue that signed commitment agreements authorize him to keep the fee is to add insult to injury.

Finally, the Referee was well within his province and authority in ordering restitution and

declining to hear further argument regarding his decision and recommendation. "Restitution is symbolic of repentance, honesty, and a desire to do the right thing under the circumstances." In re: Dawson, 131 So. 2d 472, 474 (Fla. 1961). As recognized by the Referee, the time has come for Respondent to do the right thing.

VII. THE FLORIDA BAR SATISFIED ITS BURDEN OF PROVIDING EVIDENCE WHICH MET THE CLEAR AND CONVINCING STANDARD OF PROOF.

The requisite standard of proof in Bar disciplinary proceedings is that the evidence of misconduct must be clear and convincing in order for a referee to find an accused lawyer guilty of the allegations against him. The Florida Bar v. Quick, 279 So. 2d 4 (Fla. 1973); The Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1970). Respondent refers us to the case of Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA, 1983) which defines clear and convincing as follows:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which witnesses testify must be distinctly remember; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz at 800.

Birchwood, Blanton, and Dodds testified precisely, explicitly, without hesitancy as to what occurred during the course of their transactions with Hunter and Respondent. There was neither confusion nor inconsistency in their testimony. They were, in short, credible witnesses as evidenced by the Referee's findings that their money was entrusted to Respondent for a specific purpose and that Respondent disbursed in violation of the escrow and for purposes other than those for which it was entrusted to him.

Much evidence was presented as to the investors' efforts to specify and control the disbursement of their funds. Although the Referee did not find that Respondent acted criminally or fraudulently, he did find that Respondent disbursed funds in violation of his ethical obligations under the Rules Regulating Trust Accounts. The evidence absolutely and conclusively established that

Blanton, Dodds, and Birchwood entrusted their money to Respondent to serve as a good faith deposit in their attempts to secure funding through Hunter. In fact, the finding never materialized, never even came close to materializing. The deposit funds were not to be released until closing on their loans. No closing ever occurred. As a result of Respondent's improper disbursement, Blanton and Dodds lost a total of $35,000.00. Birchwood recovered only a portion of his investment. The evidence clearly and convincingly established that Respondent not only improperly disbursed trust funds, but also failed to comply with trust account record and procedure requirements. Respondent cannot shield himself with Hunter's wrongdoing forever. He must now accept responsibility for his role in this matter.

The practice of law is a privilege and not a right. It carries with it certain responsibilities, just as it carries certain rights. The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989). It was Respondent's responsibility to safeguard those trust funds and he failed to do so. The Bar has proven by clear and convincing evidence that Respondent has violated Rule 5-1.1(a)(c) and (d) and Rule 5-1.2(b) of the Rules Regulating Trust Accounts. Respondent's position that the Bar proceeded without just cause is preposterous as evidenced by the Referee's findings themselves.

CONCLUSION

The Referee's findings of fact are entitled to a presumption of correctness. Review of the record of these proceedings provides a clear and convincing evidentiary basis upon which the Referee's findings are predicated. The findings are neither erroneous nor unjustified. In fact, they are clearly supported by the evidence and testimony. Moreover, in light of those findings, the recommendation of a disciplinary sanction to include a non-rehabilitative period of suspension, taxation of costs, and restitution is appropriate and warranted under the circumstances.

Moreover, any requests for relief by Respondent with regard to the taxing of Respondent's costs against the Bar and with regard to the issuance of press releases is inappropriate, not having properly been brought as a subject of appellate review and without support in fact and/or law.

Accordingly, the Referee's finding and recommendations should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Answer Brief was sent via Airborne Express, airbill number 3369997724, to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was sent via certified mail, return receipt requested (Z 044 345 059) to Kenneth D. Stern, Esquire, 7000 W. Palmetto Park Road, Suite 203, Post Office Box 3878, Boca Raton, Florida 33427, and via regular mail to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this 6th day of March, 1995.

Arlene K. Sankel

ARLENE K. SANKEL, Bar Counsel

APPENDIX

A. Report of Referee dated June 23, 1994.

B. Order dated October 13, 1994.