097 FILED
SID J. WHITE
MAR 30 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant

vs.

HAROLD BEHRMAN,

Respondent.
_____/

Supreme Court Case
No. 81,866
(TFB #93-70,213 (11G) and
93-70, 455 (11G))

REPLY BRIEF of RESPONDENT/PETITIONER

On Appeal from Report and Recommendation, and Orders
of Referee in Florida Bar Disciplinary Proceeding

Kenneth D. Stern, Esquire
KENNETH D. STERN, P.A.
7000 W. Palmetto Park Rd.
Suite 203
Post Office Box 3878
Boca Raton, FL 33427-3878
(407) 338-3000
Fla. Bar No. 244929

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

ARGUMENT

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

The cases cited by the Florida Bar support Respondent's position. In *The Florida Bar v. Winderman*, 614 So.2d 484 (Fla. 1983), the Court noted that the Referee had made "sixty-seven carefully documented findings of fact." *Id.* at *486.* In *The Florida Bar v. Smiley*, 622 So.2d 465 (Fla. 1993), this Court reiterated the Referee's finding of numerous misrepresentations and falsifications and concealment of material facts, all willful. The attorney in *The Florida Bar v. McClure*, 575 So.2d 176 (Fla. 1991) had withheld funds from estate clients and was found guilty of conduct involving dishonesty, fraud, deceit or misrepresentation; so egregious were the acts found to have been committed that the referee in *McClure* actually recommended disbarment.

The record has consistently shown, and the Florida Bar has all along known, that Respondent had every reason to believe that the disbursements from the account were in conformance with executed commitment contracts between the borrowers and the entities, Altima and Koning. While Respondent initially alleged that these executed contracts disappeared and were missing, during the course of the hearing before the Referee, contracts signed by the complainants were put into evidence by Bar Exhibits 9, 19 and Respondent's Exhibit A

Those contracts, which the borrowers admitted signing and which the Respondent has at all times maintained justified his disbursements, in pertinent part provide as follows:

> 6. COMMITMENT FEE: Beneficiary agrees to remit a commitment fee in the amount of one (1) percent of the face amount of the Certificate at the time the Beneficiary transmits the executed commitment to purchase the Certificate to Altima. The commitment fee associated with this commitment to purchase the Certificates to

> be established by *John Allen to direct Escrow Agent*, in a banking institution of his choice. Any and all *disbursements from the commitment fee escrow account* will be applied to the purchase of the Certificate.
>
> 20. COMMITMENT FEE REFUND: If [any one of specified factors] causes Altima to decide to withdraw its commitment . . . then the Beneficiary shall be entitled to a refund to [sic] the commitment fee paid to the escrow Agent.... *Altima agrees to instruct Escrow Agent* to refund the commitment fee to Beneficiary *less all fees, charges and out-of-pocket expenses* incurred by Altima (not exceed *[sic]* one-third of the commitment fee). * * *

As previously noted, the Respondent also was given a document entitled "Appointment of Counsel" which directed him as escrow agent to take directions from Hunter. (*See* Amd. Init. Br. at p.5.) Nonetheless, *the Referee completely ignored those documents. The Referee also chose to ignore the uncontroverted testimony of Hunter's secretary, Carol Gunter, wherein she explained how all telephone calls, faxes and mail to the Respondent were diverted by Hunter to cover his and his wife's wrongdoing.*

The Referee's Findings of Fact and recommended disciplinary measures did not articulate any basis for his conclusion that Respondent was guilty of violating Rule 5-1.1(a) ("an attorney must apply money entrusted to him for a specific purpose only to that purpose."). Indeed, the Referee even acknowledged that the purpose of the escrow was "to permit (Hunter's) clients to process the borrowers' application." (Report of Referee, p.1). The Referee referred to nothing, and the record contains nothing, which could justify a finding that Respondent knowingly did anything, through malfeasance or culpable negligence, to constitute a violation of Rule 5-1.1(a).

A finding of guilt could be based only upon limitations that may have been set either within the contract itself (as to which no limitation existed) and not upon limitations separately set between

the borrowers and Hunter, *not with Respondent, who was never involved in any negotiations between Hunter and the* borrowers. The Florida Bar adduced no evidence even tending to show that Respondent violated his duties as an escrow agent. The Referee clearly had a duty to articulate and document a basis in the record for his finding and recommendation of guilt; this he did not do. There is no competent, substantial evidence to support this finding of guilt, and the recommendation of guilt as to Rule 5-1.1(a) should be rejected.

The Bar admits (Ans. Br., 9) that "the evidence produced at trial showed that assorted investors were defrauded by R. Mark Hunter." The Bar does not also admit, although it cannot deny, that the evidence produced at trial showed that Respondent was also duped by Hunter; one cannot logically deny that Respondent also was "defrauded."[1]

The Respondent has been accused in a gratuitous press release (Appendix A hereto) of defrauding innocent people, has had a lifelong reputation for decency and honesty destroyed, and has lost the livelihood which he had established in his later years. Respondent respectfully urges this Honorable Court to acknowledge that these constitute no less a loss due to Hunter's duplicity and deceitfulness than the losses suffered by his other victims.

The recommendation that Respondent be found guilty of Rule 5-1.1(a) (applying money entrusted for a specific purpose only to that purpose) is legally, as well as factually, insupportable. Absent a showing that an escrow agent knows or should know that the Agreement on which he

---

[1]The Referee attached to his Report a fax message investor Blanton said he had sent to Respondent, advising that he was wiring $12,000 for the deposit to the escrow account, and instructing that the escrowed amount was not to be disbursed until funding and closing of the transaction. However, Blanton admitted in his trial testimony that, when he called to confirm that the money had been received, he spoke with Hunter, not Respondent. (Tr., 93-94.)

relies is not reflective of the intent of the person depositing the funds, the escrow agent cannot be faulted for adhering to the Agreement. *McGehee Interests, Inc. v. Alexander Nat. Bank*, 102 Fla. 140, 135 So. 545, 548 (1931). Where an escrow agent disburses in total accordance with the written agreement and instructions he has received, he has no liability for the disbursements merely because he subsequently is advised by one of the parties that the other party had induced the deposit to escrow by a fraud; the conditions for disbursement having been met, the escrow agent is neither guilty of wrongdoing nor liable for the disbursement. *Johnson Realty & Invstmt. Co. v. National City Bk. of Tampa*, 95 Fla. 282, 116 So. 229, 230-31 (1928). Thus, there is no legal basis for the Referee's recommendation of Guilty as to Rule 5-1.1(a).

II. THE REFEREE ERRED IN FINDING THAT RESPONDENT DID NOT COMPLY WITH THE REQUIREMENT OF RULE 5-1.1(a) TO APPLY MONIES RECEIVED IN TRUST FOR THE PURPOSES ENTRUSTED, AND ERRED IN RECOMMENDING A FINDING OF GUILT AS TO SUCH VIOLATION

The cases dealing with violations of this rule involve situations where an attorney *knowingly* applies money for an unauthorized use. *See, e.g., The Florida Bar v. McNamara*, 634 So.2d 166 (Fla. 1994) (attorney representing buyer of his client company told buyer he would use funds per its request either to hold them as deposit or pay buyer's tax obligation, and then converted the money to his personal or office use); *The Florida Bar v. Nunn*, 596 So.2d 1053 (Fla. 1992) (attorney representing client in personal injury case received two check from an insurer to pay bills, and instead of placing funds in a trust account, deposited the checks to general operating account); and *The Florida Bar v. Randolph*, 238 So.2d 635 (Fla. 1970) (lending trust funds to a friend and to corporations in which the attorney had ownership interests, pledging trust funds as security for a

supersedeas bond for another client in an unrelated manner, etc.). This Respondent was guilty of neither intentional nor negligent wrongdoing.

III. THE REFEREE ERRED IN FINDING THAT RESPONDENT FAILED TO COMPLY WITH RULES 5-1.1(d) AND 5-1.2(b) WHEN HE ISSUED A RENT CHECK FROM HIS TRUST ESCROW ACCOUNT TO PAY HIS OFFICE RENT AND ERRED IN RECOMMENDING A FINDING OF GUILT AS TO SUCH VIOLATIONS

Respondent reiterates that he ought not to have paid his rent directly from the trust account, even though there was more due him in fees from the trust account than the amount of that one check. However, Respondent takes exception to the Bar's statement that "property entrusted for a specific purpose is not subject to a retaining lien regardless of outstanding attorney's fees." That is a simplified misstatement of Rule 5-1.1(a) which expressly provides for retention of money on which a lawyer has a valid lien for services. Moreover, the rule is inapposite here. Had the contracts not contained paragraphs 6 and 20 providing for such application, the Bar's point might have some validity.

Even if Respondent failed to maintain ledger cards and a cash receipts and disbursements journal, the records he did keep, and which were stolen by Hunter and/or his wife, were complete as to the transactions which occurred, all receipts and disbursements and reasons therefor. The writing of the rent check does not change this.

IV. THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT BE SUSPENDED

In *The Florida Bar v. Holmes*, 353 So.2d 85 (Fla. 1977), an attorney had "a loosely

constructed agreement ... with clients for the management of a trust account and payment of legal fees." When the referee in the disciplinary proceedings found him guilty of mishandling the trust account and the trust monies, in a manner constituting (in this Court's words) "technical, *not willful*, violations of the ... disciplinary rules ... " (emphasis supplied), the attorney did not even respond. The referee recommended a public reprimand, nothing more; this Court concurred. Yet, the Bar here seeks a suspension where the only agreement of which Respondent knew was that reflected in contracts which Hunter's victims themselves admit having signed.

This Honorable Court in *The Florida Bar v. Winderman*, 614 So.2d 484 (Fla. 1993) rejected the Referee's recommendation of a two-year suspension, despite the outrageously willful and wanton behavior of Winderman, in favor of a one-year suspension with one year of probation. Here, Respondent Behrman was under a one-year Emergency Suspension for fifteen months, without having had any evidentiary hearing.

Even without more, the Bar's delayed and protracted prosecution of this case would justify great mitigation of any penalties otherwise thought appropriate herein. *The Florida Bar v. Randolph*, 238 So.2d 635, 638-39 (Fla. 1970), and cases cited. When prejudicial delay is accompanied by other mitigating factors, such as those present here, the impropriety of a suspension is all the more obvious. In *The Florida Bar v. Perez*, 608 So.2d 777 (Fla. 1992), an attorney indiscriminately exchanged trust funds for repayment of personal loans owed to him. This Court, holding that the findings of the referee were supported by competent substantial evidence, rejected the Bar's attempt to obtain a six-month suspension, and imposed a public reprimand.

The reason for the Court's action was the existence of mitigating factors, all of which exist here: (a) no prior or subsequent disciplinary record; (b) no proof of an intent to defraud; (c) [the

Respondent] fully and freely cooperated with the Bar; (d) at the times in question, [Respondent] was inexperienced and had just commenced his first year of practice (this Respondent's very limited and belatedly undertaken practice is analogous, and his total unfamiliarity with sophisticated construction loan procedures surely made him at least as susceptible to Hunter's deceitfulness as were the highly sophisticated businessmen who believed everything he told them); (e) the long delay before disciplinary charges were brought may have prejudiced [the Respondent] because significant witnesses were not available to be examined; and (f) [Respondent] was remorseful and expressed willingness to correct any deficiencies in his practice. These are substantially the factors set forth in Fla. Stds. Imposing Law. Sancs. 9.32.

Suspension is wholly inappropriate. At most, Respondent could have been given an admonishment pursuant to Fla. Stds. Imposing Law. Sancs. 4.14. However, given what he has suffered to date, that would be rubbing salt into a wound that should never have been inflicted and which will never fully heal.

V. THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT PAY THE COST OF THE PROCEEDINGS

Respondent respectfully incorporates herein his comments in Section V of his Initial Brief, at pp. 23-25 thereof.

"[I]t is this Court, and not the referee, that taxes costs against a respondent or the Bar." *The Florida Bar v. Bosse*, 609 So.2d 1320 (Fla. 1992). A discretionary approach must be used in disciplinary actions. It is appropriate, in assessing the amount of costs to be awarded, "to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are

unreasonable." *The Florida Bar v. Davis*, 419 So.2d 325, 328 (Fla. 1982).

The Bar in its Answer Brief (p. 17) says limply that "as the testimony of witnesses Blanton and Birchwood[2] 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." However, those efforts were relevant, if at all, only to the Bar's claim that Respondent intentionally misrepresented the situation in response to a Bar inquiry, a charge as to which the Referee recommends a finding of Not Guilty.

As to the Referee's recommendation that Respondent be found guilty of applying trust account funds to a purpose other than that for which they were entrusted, Blanton's and Birchwood's testimony would have been relevant *only* if the Respondent had been shown to have known or had reason to know that he was not complying with the borrowers' wishes. As previously noted (section I, *supra*), an escrow agent who disburses in strict accordance with his instructions does not become culpable of wrongdoing if he later is apprised of facts showing that the escrow agreement was procured by fraud, *McGehee Interests, Inc. v. Alexander Nat. Bank*; *Johnson Realty & Invstmt Co. v. National City Bk. of Tampa;* both *supra.*

What, then, was the purpose of the live testimony of Blanton and Birchwood? Blanton admitted that he never called to speak to Respondent to see if he had the funds. (Tr., 102-103). He further admits that the fax (TFB Ex. 11) which he thought he was sending to Respondent was sent

---

[2]Birchwood's testimony was objected to by Respondent, since there had not been any formal complaint by him, and because the Bar had chosen not to call Dodds, an investor who the Bar knew would confirm Respondent's innocence; the Bar responded that it wanted Birchwood's testimony to show that Birchwood "was not a satisfied customer "of Hunter, to try to prove that Respondent made a misrepresentation in his September 1992 response letter saying (based on Hunter's representations to him) that all investors were satisfied with the resolution of their situations. Said the Referee, "Within that scope, you may inquire." (Tr., 53-55.)

to the fax number shown on Hunter's letterhead. (Tr., 104.) He concedes that when he went to the office to see Hunter that neither Hunter nor himself saw or spoke to Respondent. (Tr., 105.) When Blanton and his partner met with Hunter in his office, they never asked Hunter to permit them to talk to Respondent; this was because he never had any reason to think that Respondent was in any way involved significantly as a principal in Hunter's operations. (Tr., 107.)

Birchwood claims to have spoken to Respondent prior to sending in his check, but states merely that he asked for an assurance from Respondent who said (according to Birchwood) "that he was an older gentleman and that he was not about to steal $25,000." (Tr., 123-24.) Birchwood conceded (Tr., 151-52) that he did sign the contract (TFB Ex. 6) which stated that the escrow agent would be instructed to return the commitment fee, less as much as one-third of the fee. He also testified (Tr., 143) that he received two-thirds of his deposit back. He had never even met Respondent until the day of the hearing, March 28, 1994. (Tr., 144.) Thus, the costs of bringing Blanton and Birchwood should not be taxed against Respondent.

Nor should the deposition costs be taxed. The deposition testimony consisted of what Respondent had previously told the Bar; statements by secretary Carol Gunter that would have been as openly made to an investigator in an informal interview had the Bar bothered to speak to her prior to the January, 1994 depositions. Indeed, those depositions showed that no trial could be justified, and involved the very issues as to which Respondent was exonerated.

The trial transcript, ordered by the Bar to decide whether to appeal, was not an expense necessitated by the Respondent. It was occasioned by the Respondent's victory on all the charges involving wrongful intent. Respondent should not pay costs for his victory; the Bar should.

No audit was necessitated by Respondent, whose records were stolen by Hunter. Four

investors sent in one check each; Respondent then disbursed these funds. For the Bar's "auditors" to charge $1,098.46 to read the bank records of these four transactions is ludicrous.

The only cost items as to which the Bar could arguably be said to be entitled are those for administrative ($500.00)[3] and investigative costs ($753.02), assuming the latter could be justified, since only trust account record keeping and disbursements, all matters of record, were subjects of recommendations of guilty findings against Respondent. The law permits this Court to refuse to assess any costs against Respondent, since *Respondent* was the prevailing party as to the most serious charges.

The test for whether a plaintiff has prevailed is whether he has "succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Where he "secured most of the relief originally requested in the suit," he prevails. *Smith v. Adler*, 596 So.2d 696, 697 (Fla. 4th DCA 1992). A defendant is entitled to similar treatment when he prevails. Accordingly, no costs should be assessed against Respondent, and he should be awarded his costs of $ 212.90 plus $523.00 for transcript copies, for a total of $735.90.

VI. THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT MAKE RESTITUTION

It must first be stressed that the Respondent did offer to return to the escrow account the fee which he had received out of the escrow funds. In his September 16, 1992 letter (TFB Ex. 9) responding to the Bar's first inquiry regarding complainant John Blanton (Pines Investment),

---

[3]It should be noted that Respondent was billed for, and paid, $250.00 for administrative costs, shortly after the complaint was filed.

Respondent said:

> As to acceptance of that fee in that manner, in retrospect it appears to have been unwise to have funded the fee in that manner. I should have awaited payment directly from Altima and in that regard, *I am prepared to return that fee to the Trust Account.*

(Emphasis supplied.) Restitution should not be required of Respondent to *any* of Hunter's victims.[4] Respondent did not convert trust funds to his own use. He did no intentional wrong. Respondent has no civil liability for his disbursements, as he followed his instructions as to the conditions under which disbursements were to be made. *McGehee Interests, Inc. v. Alexander Nat. Bank; Johnson Realty & Invstmt Co. v. National City Bk. of Tampa*, both *supra*.

VII. THE BAR FAILED TO MEET ITS BURDEN OF CLEAR AND CONVINCING PROOF

As is shown in Sections I and II, *supra*, the Referee's conclusory statement regarding Counts I and II is wholly unsupported by the record and unsupported by any factual finding by the Referee, and his recommendation of a finding of Guilty as to alleged violations of Rule 5-1.1(a) should be rejected, and a finding of not guilty on that charge should be made.

The Bar is obligated to prove each matter by clear and convincing evidence. This has not been done. Respondent clearly followed what he reasonably believed were the strict guidelines he properly had sought. There was no showing by a scintilla, much less a preponderance, much less

---

[4]If restitution is ordered, it should be limited to $1,000 each to Blanton and Dodds, but the recommendation of $1,000 to Birchwood is wholly improper, in view of the fact that Birchwood received the two-thirds reimbursement from Hunter that he was entitled to receive under the contract, and gave a release therefor. As the Referee had stated at the August 15, 1994 hearing that he would rescind his recommendation of restitution of $1,000 to Birchwood if a copy of Birchwood's Release were produced, and as it was produced, restitution as to Birchwood should not be required. (*see*, Init. Br., pp. 25-26.)

the requisite clear and convincing evidence, that Respondent had knowledge, or reason to know, that he was not adhering scrupulously to his acknowledged obligations.

The seriousness of an attorney's obligations as an escrow agent are not at issue here, because Respondent has always acknowledged his obligations, and diligently sought to comply with them. Nor do we suggest that "willful ignorance" should be countenanced, but that is not what happened here.

As to the question of violation of the trust account record keeping requirements, Respondent did keep his trust account book and his bank statements; had they not been stolen by Hunter, he would obviously have produced them. He thus should be deemed not guilty of violating Rule 5-1.1(c). Respondent concedes that he did not adhere to the requirements of Rules 5-1.1(d) and 5-2.1(b) as to what additional records need be kept, but respectfully notes that these shortcomings would not have resulted in any inability to "track" all trust account receipts and disbursements.

CONCLUSION

This elderly man[5] was totally misled by Hunter. Further suspension of this Respondent cannot be justified, given the far more serious behavior for which suspensions are imposed. At most, he should be given an admonishment for not having maintained ledger cards and a receipt and disbursements journal. Fla. Stds. Imposing Law. Sancs. 4.14. The Court should refuse to impose the large amount of costs involved with the travel of witnesses who proved nothing other than that they were deceived by Mark Hunter, not by Respondent, and with a trial which was patently unnecessary. The order of restitution should be reversed entirely, as Respondent is not guilty of

[5]Advanced years are properly considered as a mitigating factor. *The Florida Bar v. Stark*, 616 So.2d 41, 43 (Fla. 1993), citing *The Fla. Bar v. Crowder*, 585 So.2d 935 (Fla. 1991).

wrongdoing; in any event, as the Referee had ruled that no restitution would be required as to Birchwood if Respondent would produce proof of Birchwood having given a release in return for receiving the two-thirds of his deposit which was all that his contract with Hunter called for, and as Respondent did furnish that proof, the recommendation of restitution as to Birchwood surely should be rejected. *(See, Amd. Init. Br. at P. 25.).*

Finally, this Court should require The Florida Bar to issue a press release declaring that Respondent was vindicated, and that its prior characterization of Respondent as having participated in fraudulent behavior was erroneous, and that the Bar expresses its regrets and apologies to Respondent. As a Court has the inherent power to control professional conduct, even to the point of prohibiting a party from disseminating defamatory information about the other, *see Shevin v. Thuotte*, 339 So.2d 253, 254-55 (Fla. 2d DCA 1976), so does this Honorable Court have the inherent power to require a party to disseminate information to recant previously disseminated defamatory information.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was sent by U.S. Mail to Arlene K. Sankel, Esq., Bar Counsel, THE FLORIDA BAR, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 and to John T. Berry, Esq., Staff Counsel, THE FLORIDA BAR, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 29 day of March, 1995.

Respectfully submitted,

KENNETH D. STERN, P.A.

By: _____

Kenneth D. Stern
Counsel for Respondent BEHRMAN
7000 W. Palmetto Park Rd., Suite 203
Boca Raton, FL 33427-3878
(407) 338-3000
Florida Bar No. 244929

Mr. White, Brf. was due to be served by 3-21-95. Do we accept this Brf. or get him to file a mot. to accept Brf. as timely?

INDEX TO APPENDIX

Court suspends 3 lawyers

The Florida Supreme Court has suspended three South Florida lawyers, two for misuse of trust accounts.

The court suspended on an emergency basis Harold Behrman, 77, of Miami. Behrman is accused of enticing investors to give him $100,000 refundable deposits, then turning over the money to associates.

Two investors filed complaints with The Florida Bar saying that Behrman failed to return their money and that they did not authorize him to make disbursements.

James A. Brown, 49, of Fort Lauderdale, was suspended on an emergency basis for failing to produce trust account records.

The Bar subpoenaed the records because one of Brown's trust account checks had bounced. Brown also diverted trust accounts, resulting in shortages of as much as $97,000, The Bar said.

Kenneth P. Liroff, 50, was suspended indefinitely for failing to submit to a drug test. He must pay $1,046 in disciplinary costs and abstain from alcohol and drug use.

Sun Sent
Sunday 1/3/93