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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARZELL MITCHELL, JR.,

Respondent.

_____/

Supreme Court Case
No. 81,901

The Florida Bar Case
No. 91-50,560(15C)

ANSWER BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

In order to ensure a clear record, the following terms of reference will be utilized throughout this brief: The Florida Bar, the appellee herein, will be referred to as "the Bar". Marzell Mitchell, Jr., the appellant herein, will be referred to by his full name, as "respondent", or as "Mitchell". Reference to the final hearing transcript will be made by utilizing the symbol "T" followed by the transcript page number. Exhibits introduced into evidence at the final hearing will be referred to as "Exhibit ____". References to the report of referee will be made by utilizing the symbol "RR".

STATEMENT OF THE CASE AND OF THE FACTS

I. STATEMENT OF THE CASE

Following a finding of probable cause by Fifteenth Judicial Circuit Grievance Committee "C", a complaint was filed with this Court on June 7, 1993. On June 18, 1993, the Honorable Leonard L. Stafford was appointed as referee. A final hearing was had on December 3, 1993. Judge Stafford's report of referee was served on the parties on December 9, 1993. The report of referee and the record were filed with the Court on December 13, 1993.

The referee's report recommends that respondent be suspended from the practice of law for a period of ninety (90) days with automatic reinstatement, recommends that respondent meet with a representative of The Florida Bar's Law Office Management Advisory Service (LOMAS) during the period of his suspension and at his own expense to ensure his understanding of trust accounting records and procedures which are required by the Rules Regulating Trust Accounts prior to his return to the practice of law, further recommends a one year probation period following the suspension during which time respondent's trust account is to be subject to periodic, unannounced audits by The Florida Bar, and taxes costs against the respondent.

The report of referee was considered by the Board of Governors of The Florida Bar at its February, 1994 meeting. By letter dated February 18, 1993 (sic), the parties were notified that the Bar would not seek review. Respondent's petition for review was filed March 3, 1994.

II. STATEMENT OF THE FACTS

Respondent completed the Trust Accounting Certificate which accompanied his 1988 - 89 dues statement by stating that he did hold, receive or disburse trust funds during the relevant period but did not keep all required trust records and follow all required trust accounting procedures. Respondent failed to affirm that there was no shortages in any individual client account or his overall trust account. Bar Exhibit 3. Predicated upon his apparent admission that he was not in substantial compliance with trust account recordkeeping requirements and his failure to affirm that there were no trust account shortages, the chair of Fifteenth Judicial Circuit Grievance Committee "C" issued a witness subpoena duces tecum on February 12, 1991 compelling production of respondent's trust account records for the period commencing January 1, 1989 to the present. Respondent was served with this subpoena on February 14, 1991. Bar Exhibit 2.

In response to the subpoena, respondent produced only some bank statements and cancelled checks. (T 39-40, Bar Exhibit 5, pp 15-17). Thereafter, a subpoena was served on respondent's bank to obtain missing checks and bank statements. (T 39-40). In response to written inquiry from the bar's then auditor, the respondent provided some additional information and closing statements. (T 40). Following the bar auditor's examination of the records produced by respondent and the bank, the auditor issued a report in which he found numerous violations of the Rules of Professional Conduct and Rules Regulating Trust Accounts. Thereafter, the grievance committee permitted the respondent additional time to produce certain additional trust accounting records which had not been previously produced. (T 40, Bar Exhibit 5, pp 43 - 47 and 51).

As a result of the grievance committee's finding of probable cause, a formal complaint was filed with the Supreme Court of Florida on June 7, 1993. The referee conducted a final hearing on December 3, 1993, and the respondent was found guilty of violating Rules Regulating The Florida Bar 4-1.15(a) [a lawyer may not commingle his own funds with those of clients]; 4-1.15(d) [a lawyer shall comply with the Rules Regulating Trust Accounts]; 4-8.4(a) [a lawyer shall not violate the Rules of Professional Conduct]; 5-1.1(c) [minimum trust accounting records shall be maintained by all attorneys practicing in Florida who receive or disburse trust money]; 5-1.1(d)(2) [all nominal or short-term funds belonging to clients which are placed in trust with any member of The Florida Bar shall be deposited into one or more interest-bearing trust accounts for the benefit of the Foundation]; 5-1.2(b)(2) [a lawyer must maintain original or duplicate deposits slips clearly identifying the date and source of all trust funds received and the client or matter for which the funds were received]; 5-1.2(b)(3) [a lawyer must maintain original cancelled checks, all of which must be consecutively numbered]; 5-1.2(b)(5) [a lawyer must maintain a separate cash receipts and disbursements journal]; and 5-1.2(b)(6) [a lawyer must maintain a separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements or transfers and any unexpended balance, and containing the identification of the client or matter for which trust funds were received, disbursed or transferred, the date on which all trust funds were received, disbursed, or transferred, the check number for all disbursements, and the reason for which all trust funds were received, disbursed, or transferred]; 5-1.2(c)(1)(a) [a lawyer shall cause to be made monthly reconciliations of all trust bank or savings and loan

association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the balance per bank with the balance per the checkbook and the cash receipts and disbursements journal]; and 5-1.2(c)(1)(b) [the lawyer shall cause to be made monthly a comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the two totals and reasons therefor].

SUMMARY OF ARGUMENT

In bar disciplinary proceedings, the party seeking review of a referee's findings and recommendations must demonstrate that the referee's findings are clearly erroneous or lacking in evidentiary support, and unless that burden is met, the referee's findings are upheld on review. Because the record is replete with clear and convincing evidence to support the referee's findings, respondent has failed to demonstrate any error.

The gravamen of respondent's argument is that he and his clients will be harmed if he is suspended from the practice of law for his failure to maintain required trust account records and follow required trust accounting procedures. Respondent's argument would be somewhat more persuasive if he had not been disciplined on not one but two prior occasions for precisely the same conduct. Respondent has been given every opportunity to correct his trust account problems and has simply failed to do so.

Because the referee's findings are supported by the evidence, his findings of fact and his disciplinary recommendation should be upheld.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS ARE SUPPORTED BY THE EVIDENCE AND SHOULD BE UPHELD BY THIS COURT.

It is axiomatic that when the findings of fact made by the referee are supported by competent substantial evidence, they must be upheld by this Court. The Florida Bar v. Seldin, 526 So. 2d 41 (Fla. 1988), The Florida Bar v. Neely, 502 So. 2d 1237 (Fla. 1987). The party seeking review bears the burden of showing that the referee's findings are clearly erroneous or lacking in evidentiary support, and unless that burden is met, the referee's findings will be upheld on review. The Florida Bar v. McClure, 575 So. 2d 176 (Fla. 1991). Respondent has not and cannot meet that burden. Rather than citing the evidence he deems insufficient, respondent has chosen to make the sweeping, unsupported assertion that the referee lacked sufficient evidence and then advance all of the reasons why the suspension would be unfair to him.

Not one but two bar auditors examined respondent's trust account and opined that respondent had failed to follow minimum trust account procedures and to maintain the minimum trust account records required. That respondent now claims to have corrected his errors does not vitiate his wrongdoing, particularly when the record is devoid of evidence to support that claim. More significantly, respondent has been disciplined on two prior occasions for engaging in precisely the same conduct. Respondent received a private reprimand in 1978 predicated upon his failure to maintain appropriate trust account records. At that time, it was determined that respondent's infraction was a result of ignorance rather than willful misconduct. (RR 10) In 1986, respondent received a public reprimand and was placed on probation for two

(2) years for his failure to maintain adequate trust accounting records and for commingling personal funds with trust funds. The Florida Bar v. Mitchell, 493 So. 2d 1018 (Fla. 1986). Thus, respondent has for many years been on formal notice of certain deficiencies in his trust account. However, he failed to make any effort to correct those deficiencies and now claims the recommended discipline is too harsh. While the situation in which respondent finds himself is unfortunate, he could have prevented it had he chosen to do so.

Whether any clients were dissatisfied is irrelevant to respondent's failure to maintain proper trust account records and follow mandated trust accounting procedures. Respondent also advances the argument that he is the "only African-American private general legal practitioner within a fifty mile radius of the Fort Myers area" and that his suspension would eliminate the African-American community's opportunity to obtain attorney services from an attorney with the same ethnic background. Respondent's minority status is not a mitigating factor in a disciplinary proceeding. As stated by this Court in The Florida Bar v. Anderson, 594 So. 2d 302, 304 (Fla. 1992), "... past discrimination does not create a privilege to commit crime or flout the standards of professional ethics".

It is not uncommon for attorneys to suffer hardship when they are suspended from the practice of law; however, that fact does not prevent attorneys from being suspended. Further, although respondent claims to have suffered a financial hardship "due to the economic strain this investigation has created on him and his practice", the record below is devoid of any evidence whatsoever to support that assertion. Finally, respondent's argument that he has instituted new procedures, hired a certified public accountant and installed computer technology is not only unsupported by the

record before the referee but is in fact contradicted by the record. At the final hearing, the respondent, when requesting probation rather than suspension, testified that he did not have sufficient funds to hire an accountant (RR 164 - 165).

A. THE RECORD IS REPLETE WITH EVIDENCE THAT RESPONDENT COMMINGLED PERSONAL FUNDS WITH CLIENT FUNDS

The thrust of respondent's argument seems to be that there were only three instances of commingling and that each instance has a reasonable explanation. Such is not the case. Respondent argues that the first instance of commingling, the deposit of $1,550 of personal funds was to maintain the minimum required balance in order to avoid service charges by the bank. Had respondent maintained an IOTA account, there would have been no issue concerning service charges. (Bar Exhibit 5, p. 12). On the other two occasions acknowledged by respondent, he argues that even if other client funds were in his trust account at the time he deposited fee checks, that fact is irrelevant. Respondent simply fails to grasp the concept of commingling. That fact is best illustrated by his admission that he deposited fees on a criminal case into his trust account, (T 115 - 116) despite his testimony that criminal cases are generally a flat fee rather than an hourly fee. (T 131).

The bar's auditor testified to numerous instances of commingling by respondent. (T 40 -44). Respondent's "good faith belief" that the deposit of his fees into his trust account was necessary to maintain the mandatory minimum balance is neither reasonable nor logical predicated upon his assertion that the prior deposit of $1,550 was for that purpose.

B. RESPONDENT DID NOT FOLLOW MINIMUM TRUST ACCOUNTING PROCEDURES AND FAILED TO MAINTAIN MINIMUM TRUST ACCOUNT RECORDS

Notwithstanding respondent's claim that he converted his account to an IOTA account subsequent to the bar's investigation of his trust account and his claim that the interest earned has been paid to The Florida Bar Foundation, those claims are unsupported by the record. The respondent submitted no such evidence and is precluded from arguing facts outside the record. The evidence clearly supported the referee's finding that respondent failed to maintain an IOTA account. (T 59-60)

Respondent's claim that his conduct was not intentional, that he has now taken steps to correct the error of his ways, which is also unsupported by the record below, and that he should receive a lesser sanction is not persuasive. This respondent has on two prior occasions been sanctioned for improperly maintaining his trust account. Each rule violation found by the referee is supported by the record. To aid the Court in its review of the record, the following is a list of the violations found and the appropriate reference to the record:

VIOLATION	FINAL HEARING TRANSCRIPT PG(S)
4-1.15(a)	40-44
4-1.15(d)	54
5-1.1(c)	52
5-1.1(d)(2)	59-60
5-1.2(b)(2)	52
5-1.2(b)(3)	52
5-1.2(b)(5)	53
5-1.2(b)(6)	53
5-1.2(c)(1)(a)	54
5-1.2(c)(1)(b)	54

The referee's disciplinary recommendation is supported by relevant case law, respondent's prior disciplinary history, and Florida Standards for Imposing Lawyer Sanctions. Because they are interrelated, the commingling, record-keeping and procedures violations pertaining to respondent's trust account are discussed together.

In The Florida Bar v. Hosner, 513 So. 2d 1057 (Fla. 1987), the Court considered the referee's recommendation of a ninety day suspension and three years probation for failure to follow proper trust accounting procedures (including the failure to prepare periodic reconciliations) and intermingling (commingling) of personal funds with funds held in trust for clients. Since the evidence showed and the referee found negligence and potential client injury, the Court found Standard 4.13 (from the Florida Standards) to be applicable. This standard provides that a public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. In view of the standard found to be applicable, the Court concluded that a public reprimand (with three years probation) was the appropriate discipline.

While Hosner indicates that a public reprimand would be appropriate discipline for respondent's trust account violations, respondent's prior disciplinary history for similar violations takes him beyond mere negligence and into the realm of intentional misconduct contemplated by Standard 4.12 of the Florida Standards (suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client). Respondent has been disciplined twice before for precisely the same conduct.

The Bar is aware that the Court has repeatedly held that "a public reprimand should be reserved for isolated instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent." See The Florida Bar v. Rogers, 583 So. 2d 1379, 1382 (Fla. 1991); The Florida Bar v. Dougherty, 541 So. 2d 610, 612 (Fla. 1989); and The Florida Bar v. Welty, 382 So. 2d 1220, 1223 (Fla. 1980). Given his two prior disciplinary sanctions for technical violations of trust accounting rules and the awareness of these rules arising from such sanctions, respondent's latest misconduct of a similar nature should be treated as willful and therefore deserving of more than a public reprimand.

In addition to the willful nature of his misconduct, respondent's trust account infractions must result in enhanced discipline because they are cumulative in nature. Standard 9.22(a) (from the Florida Standards) recognizes prior disciplinary offenses as an aggravating factor. Further, the Supreme Court of Florida has held that cumulative misconduct will be dealt with more harshly than isolated acts of misconduct. See The Florida Bar v. Dubbeld, 594 So. 2d 735, 736 (Fla. 1992); The Florida Bar v. Coutant, 569 So. 2d 442, 443 (Fla. 1990); The Florida Bar v. Golden, 561 So. 2d 1146, 1147 (Fla. 1990); The Florida Bar v. Bern, 425 So. 2d 526, 528 (Fla. 1982); and The Florida Bar v. Vernell, 374 So. 2d 473, 476 (Fla. 1979).

Finally, respondent failed to follow the clear mandate of the rules regulating trust accounts in that he failed to deposit all nominal or short-term funds belonging to clients or third persons (placed in trust) with him into one or more interest-bearing trust accounts for the benefit of The Florida Bar Foundation. Even prior to the time participation in the interest on trust account program (interest generated from funds nominal in amount or held for

a short term would inure to the benefit of The Florida Bar Foundation) was not mandatory, the Court recognized that an attorney could not maintain an interest bearing trust account and retain the proceeds of the interest generated for the attorney's own benefit. See The Florida Bar v. Newhouse, 520 So. 2d 25, 27 (Fla. 1988).

CONCLUSION

Pursuant to R. Regulating Fla. Bar 3-4.1, every member of The Florida Bar is charged with notice and held to know the standards of ethical and professional conduct prescribed by the Court. Article XI, Rule 11.02(1) of the Integration Rule of The Florida Bar (this rule was in effect at the time of respondent's first disciplinary offense) imposed a similar requirement. Notwithstanding such notice, respondent excused his first misconduct (resulting in the 1978 private reprimand) on the basis of ignorance of the rules. In the face of Rule 3-4.1, his 1978 explanation, and his subsequent public reprimand in 1986, respondent has no excuse for not knowing the rules as they pertain to the trust accounts.

Ordinarily, the first disciplinary sanction acts as a wake-up call to the reasonably prudent attorney and serves to create heightened sensitivity to and awareness of all rules of ethical and professional conduct prescribed by the Court. Evidently the first alarm wasn't sufficiently loud because respondent committed additional trust account infractions for the period May 1, 1980 through May, 1983, resulting in the 1986 public reprimand. If the first alarm wasn't loud enough, one would think the second alarm would be a clarion call for respondent to put his law practice in order and assiduously adhere to all rules of ethical and professional conduct. Regrettably this did not occur and respondent is being prosecuted a third time for various trust account violations. Because respondent did not appropriately respond to the relatively gentle prods of a private reprimand and public reprimand, more stringent measures are appropriate. Given respondent's prior disciplinary

history, the referee's disciplinary recommendations are appropriate and should be upheld.

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 have been sent by regular mail to Marzell Mitchell, Jr., Esq., 2000 Main Street, Suite 406, Fort Myers, FL 33901 and to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300 on this 15th day of April, 1994.

Luain T. Hensel

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