

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case No.: 81,901

Florida Bar Case No.: 91-560(15c)

vs.

MARZELL MITCHELL, JR.,

Respondent.

RESPONDENT'S INITIAL BRIEF

On Review from the Referee's Report and Recommendation issued
December 9, 1993, in Fort Lauderdale, Broward County, Florida.

Marzell Mitchell, Jr.
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PRELIMINARY STATEMENT

In this brief, the Respondent, Marzell Mitchell, Jr., will be referred to by name or as the Respondent. The Complainant will be referred to as the Bar.

Citations to the original one volume record on appeal will be made by letter "R" and the appropriate page number.

STATEMENT OF THE CASE

This is an appeal from an Order of the Referee recommending to the Supreme Court a three month suspension for Respondent in violation of particular rules of conduct. A hearing on the Bar's complaint for disciplinary action was held on December 3, 1993 before Referee Leonard C. Stafford. Respondent appeared pro se. On December 9, 1993, the Referee filed his Findings of Fact, Conclusions of Law, Memorandum and Recommendation that Respondent be suspended for three (3) months with automatic reinstatement at the end of this period. Respondent was also placed on a one year probation period pursuant to Rule 3-5.1(c). A copy of the Referee's report is appended.

Respondent disputes the Referee's suspension recommendation and requests that the Supreme Court modify the Referee's recommendation by reversing the suspension and allowing the Respondent be placed on either a one or two year probation with periodic audits of his trust account.

STATEMENT OF THE FACTS

On February 14, 1991, the Florida Bar, served a subpoena to Mr. Mitchell for his Barnett trust account records, account #1639500407. A month later, the Bar, then served upon the Barnett bank a subpoena for Mr. Mitchell's trust account records for the period January 1, 1989 through February 1991.

On June 7, 1993, the Florida Bar issued a complaint against Mr. Mitchell. The original complaint stated that Mr. Mitchell violated six rules regulating the Florida Bar. This included the following alleged violations:

- Count I: That Mr. Mitchell commingle his personal funds, and legal fees, with that of his clients.
- Count II: That Mr. Mitchell calculated and received an excessive fee amount for a personal injury claim.
- Count III: That Mr. Mitchell failed to maintain trust accounting records.
- Count IV: That Mr. Mitchell failed to follow minimum trust accounting procedures.
- Count V: That Mr. Mitchell violated Rule 4-1.15(a) in that a lawyer may not commingle his own funds with those of his clients.
- Count VI: That Mr. Mitchell had not established an IOTA account for the benefit of the Florida Bar.

Mr. Mitchell was found not guilty on Count II of the complaint but found guilty on Counts I, III, IV, V, and VI.

As to Count I, the Bar specifically refers to a bank statement with the copy of a personal check attached depicting a deposit of fifteen hundred (\$1500) dollars into the trust account. (See Bar's Complaint, exhibit 8) The bank statement also indicated that there

was a negative balance. Mr. Mitchell, in his attempt to avoid the negative balance and to defray bank costs, deposited this fifteen hundred dollar check into the trust account #1639500407. At the time of the deposit, there were no other funds, particularly clients' funds, in Mr. Mitchell's trust account.

After two years of denying Mr. Mitchell access to his records, the Bar discovered two checks for attorney fees which were deposited into Mr. Mitchell's account. These checks were the result of successful worker's compensation claims that Mr. Mitchell had settled and were directly made out to Mr. Mitchell by each employers' insurer. In both situations, the insurer issued a check in the name of the attorney and one for the clients. In this case, the clients were Berthena McCarter and Mary Benton. The Bars' accusations in Counts I and V charging Mr. Mitchell with commingling of funds directly focused on these checks.

In each case, Mr. Mitchell did not deposit the client's checks into his trust account since these checks required only the names of the clients. In each situation, Mr. Mitchell had the authority to settle. In each case, Mr. Mitchell was not aware as to whether these individuals would get their money or accept the amount the clients were entitled to or accept Mr. Mitchell's fees, since each had relocated to different addresses. Particularly, Ms. Benton had moved from Florida to California and back to Georgia during the period her claim was being settled. Mr. Mitchell believed he was not entitled to collect his attorney fees until after the clients agreed to the amounts and signed their closing statements.

Therefore, Mr. Mitchell deposited his future fees in his trust account pending each client's acquiescence to the settlement amounts.

Mr. Mitchell, a sole practitioner, is the only African-American private general practitioner within a radius of fifty miles of the Fort Myers area. Mr. Mitchell is not an accountant nor does he have any accounting experience. However, Mr. Mitchell maintained the minimum trust requirements, procedures and records to the best of his ability.

Additionally, as to Count VI, Mr. Mitchell was under the misconception that the interest bearing trust account was in fact an IOTA account. During these proceedings, Mr. Mitchell learned that his trust account was not an IOTA. Whereupon Mr. Mitchell immediately contacted Barnett bank and pursued the matter to change the trust account over to an IOTA account. This modification took place in August, 1991 and the account has been an IOTA account from that date through the present time. Moreover, the interest earned on these client monies has been paid to the Florida Bar Foundation to date.

SUMMARY OF THE ARGUMENT

In the current Bar investigation, the Referee held that Mr. Mitchell should be suspended for three months when the alleged trust fund violations took place over three years ago. The Referee's decision is excessive and should be modified to reflect the actual impact of Respondent's harm and reflect that Mr. Mitchell has made the necessary changes to mitigate any potential future violations. Thus, Mr. Mitchell contends that the Referee's decision is erroneous since it is not substantiated by the record.

ARGUMENT

I. RESPONDENT, MARZELL MITCHELL, JR., MUST BE FOUND NOT GUILTY ON ALL COUNTS SINCE THE EVIDENCE DOES NOT SUPPORT THE REFEREE'S RECOMMENDATION.

Attorney Mitchell submits that the goal of every disciplinary action is the public's protection and not the attorney's punishment. DeBrock v. State of Florida, 512 So. 2d 164, 167 (Fla. 1987) citing The Florida Bar v. Massfeller, 170 So. 2d 834, 839 (Fla. 1964). The referee's findings of fact and recommendation should normally be upheld unless clearly erroneous or without support. The Florida Bar v. Weinstein, 624 So. 2d 261 (Fla. 1993) citing The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986).

Additionally, the Florida Supreme court has long held that a bar disciplinary action must serve three purposes:

- (a) the judgment must be fair to society;
- (b) the judgment must be fair to the attorney; and,
- (c) the judgment must sufficiently deter other attorneys from similar misconduct.

Weinstein, 624 So. 2d at 260, citing, e.g., The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992); The Florida Bar v. Loro, 433 So. 2d 983, 986 (Fla. 1983); The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970).

First, Mr. Mitchell submits that the Referee lacked sufficient evidence in which to recommend a three month suspension since the charges were not derived from a client's formal complaint. This recommendation is not fair to the general Fort Myer's area where Mr. Mitchell practices. In fact, no client was dissatisfied with

Mr. Mitchell's handling of their case. For example, in one instance, Mr. James H. Lewis stated he was "perfectly satisfied" with Mr. Mitchell's handling of his claim especially when no other attorney would take him and his wife's personal injury claim. (See, Mr. James H. Lewis Sworn Statement to Bar Counsel 12/3/93; p.4, lines 7-17).

Although Mr. Mitchell has clients from all economic and racial backgrounds, Mr. Mitchell's primary practice consists of serving an African-America community in which he is the only African-American private general legal practitioner within a fifty mile radius of the Fort Myers area. Mr. Mitchell's suspension would eliminate the African-American community's opportunity to obtain attorney services from an attorney with the same ethnic background. Mr. Mitchell handles a considerable amount of cases on a pro bono basis. Without Mr. Mitchell's availability to the community, many people would not be able to have their day in court.

Additionally, Mr. Mitchell has cases pending on appeal and in the lower courts. A three month suspension at this time would be detrimental and possibly bring substantial hardship to his clients.

Second, this recommendation is unfair to Mr. Mitchell because a consecutive three month suspension will result in a substantial economic hardship to his solo practice. Mr. Mitchell is the major income producer in his family and many people rely on his income for their survival. For example, these proceedings have necessitated the withdrawal of his daughter Lynn from undergraduate studies at the University of Miami due to the economic strain this

investigation has created on him and his practice.

Third, this recommendation does not sufficiently deter other attorneys from misconduct since the Referee gave him no guidance as to how a sole practitioner should handle transactions concerning the trust account. Respondent is aware of the CLE's and Florida Bar Rules available to him in obtaining this information, however, a suspension does not deter the potential violator. Rigorous and continuous education on these procedures would be a more reasonable solution in deterring future misconduct by attorneys. Mr. Mitchell submits that a mandatory number of CLE credits in trust accounting procedures per reporting period would provide a better means of deterring future misconduct by attorneys.

Moreover, the alleged violations occurred (according to the Bar's complaint) between January 1, 1989 and February 28, 1991 which was over three years ago. Since that time, Mr. Mitchell has instituted new procedures and hired a certified public accountant to make monthly reconciliations of his trust account records. Mr. Mitchell has also installed computer technology to assist him in the proper maintenance of his records. Requiring measures such as these would help promote compliance from other attorneys.

A. Respondent Must Be Found Not Guilty Of Commingling Of Funds Since There Were No Client Funds In His Trust Account.

Rule 4-1.5(a) of the Rules regulating Trust Funds states that "In no event may the lawyer commingle the client's funds with those of the lawyer to those of the lawyer's law firm." Commingling of funds is defined as the act of a fiduciary mingling funds of his

client with his own funds. Black's Law Dictionary p. 246 (6th Ed. 1993). Additionally, Rule 5-1.1(e)(7) entitled Determination of Nominal or Short Term Funds states:

The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short term. In the exercise of this good faith judgment, the lawyer shall consider such factors as:

- (A) the amount of a client's or third person's funds to be held by the lawyer or law firm;
- (B) the period of time such funds are expected to be held;
- (C) the likelihood of delay in the relevant transaction(s) or proceeding(s);
- (D) the cost to the lawyer or law firm of establishing and maintaining an interest bearing account or other appropriate investment for the benefit of the client or third person; and
- (E) minimum balance requirements and/or service charges or fees imposed by the financial institution.

The determination of whether a client's or third person's funds are nominal or short term shall rest in the sound judgment of the lawyer or law firm. *No lawyer shall be charged with ethical impropriety or other breach of professional conduct based on the exercise of such good faith judgment.*

(emphasis added.)

The Florida Bar in Counts I & V in its complaint, alleged that Mr. Mitchell commingled funds by depositing attorney fees and personal funds with client funds in his trust account. The Referee reviewed a bank statement with the copy of a personal check to Mr. Mitchell attached depicting that a deposit of this check into the trust account took place. (See Bar's Complaint, Exhibit 8). The bank statement indicated that there was a negative balance and to avoid such, Mr. Mitchell put personal funds into his trust Account. In other words, there were no other funds in the account at the

time of Mr. Mitchell's personal fund deposit.

Mr. Mitchell made these deposits of his personal funds into the trust account in a good faith effort to maintain the minimum balance requirement and keep the trust account open. (See Rules 5-1.1(e)(7)(D),(F)). Barnett bank required that Mr. Mitchell needed to maintain a \$1,000.00 balance in his trust account or service fees would be incurred. Mr. Mitchell had experienced some negative balances in his trust account (arising from the imposition of service fees) due to no minimum client funds being available to maintain the minimum \$1,000.00 balance. (See, Transcript of Grievance Committee dated August 13, 1991, p. 8-11). Consequently, Mr. Mitchell was attempting to comply with the bank's minimum balance requirements and at the same time, comply with the Bar's trust accounting procedures by not allowing the trust account to undergo a negative balance. (See Rule 5-1.1(e)(7)(E)).

Additionally, the Florida Bar has submitted particular checks that were made out to Mr. Mitchell for attorney fees in settlement of two worker compensation actions and deposited into his trust account. The checks were in settlement of claims settled on behalf of Mr. Mitchell's clients Bethena McCarter and Mary Benton. In each case, the employers' insurer issued two separate checks: one to the attorney for attorney fees and one to the client for her settlement amount. In each case, Mr. Mitchell deposited the attorney fees into the trust account. Ms. McCarter's check was deposited around 9/11/90 and Ms. Benton's check was deposited around 7/90.

Mr. Mitchell deposited these fees into the Trust account since he believed he was not yet entitled to the attorney fees until each client received her settlement money and signed her closing statement. In each instance, the client was in the process of moving and Mr. Mitchell was diligently attempting to ascertain their whereabouts. For example, Ms. Benton had moved from Florida to California and back to Georgia.

Mr. Mitchell had the authority to settle, but was not aware if and when these individuals would get their money or accept the amount the clients were entitled to or acquiesce to the amount of Mr. Mitchell's fees. Mr. Mitchell made the good faith decision that since there was the possibility that his attorney fees could be in dispute, that these short term funds should go into the trust account.

Mr. Mitchell submits that whether other client's funds were present in this trust account at the time these attorney fees were placed in the account is irrelevant. In Mr. Mitchell's judgment, these checks or attorney fees may or may not have been agreed to by the client and therefore, the fees were not properly his to spend. (See, Rules 5-1.1(e)(7)(A), (B), (C)).

The Florida Bar submitted other checks for attorney fees as evidence that Mr. Mitchell commingled attorney fees with that of his client's funds. However, the Florida Bar has not submitted any deposit slips or other evidence indicating that these other checks were ever deposited in the Trust account. Even if Mr. Mitchell did deposit these checks for attorney fees into the trust account, he

believed, in good faith, that the checks were needed in his trust account to maintain the bank's minimum balance.

Respondent has at all times maintained his trust account as conservatively as possible. If Respondent was unclear whether the checks made out to him for attorney fees would be agreeable to his client, he kept the checks in the trust account until the client filled out his closing statement. Once Mr. Mitchell was absolutely sure his fees were agreed to, he either transferred the amounts out of the trust account or left some money in the trust account to maintain the bank's minimum balance requirements. Although this conduct is now questioned by the bar and deemed in violation of the trust account rules, Mr. Mitchell at all times acted in good faith.

Respondent asks that the Supreme Court render its ruling with the additional knowledge that Mr. Mitchell's conduct did not harm any clients. All of Mr. Mitchell's client funds have been accounted for and each client has obtained the proper amounts agreed upon. Mr. Mitchell's conduct was neither wilfully nor intentionally instituted to abrogate the trust accounting procedures, but made in good faith.

B. Mr. Mitchell Must Be Found Not Guilty of Violating Rules 5-1.1(e) & 5-1.2 Since He Met The Minimum Requirements Of Trust Accounting Records and Procedures.

In Counts III, IV, VI of the Referee's recommendation to Florida Supreme Court, allegations were made that Mr. Mitchell did not maintain the minimum requirements for trust accounts as established by Florida Bar Rules 5-1.1(e) [where an attorney must established an IOTA account] and 5-1.2 [where the attorney must

maintain minimum standards for trust accounting records and procedures.]

Mr. Mitchell acknowledges that prior to the Bar commencing its investigation he was under the misconception that his interest bearing trust account was in fact an IOTA account. However, once the Bar instituted these proceedings, Mr. Mitchell learned that his trust account was not an IOTA. Mr. Mitchell did not intentionally fail to make the trust account an IOTA account, and upon learning of this error, immediately changed the trust account over to an IOTA account. This modification took place in August, 1991 and the account has been an IOTA account from that date through the present time. Moreover, the interest earned on these client monies has been paid to the Florida Bar Foundation to date.

Prior to these proceedings, Mr. Mitchell maintained a cash receipts and disbursements journal and maintained client closing statements that acted as client ledger cards. Although monthly reconciliations were not done prior to this investigation, Mr. Mitchell now has the proper trust accounting procedures and records in effect.

Mr. Mitchell has waited three long years for the Bar's investigation to be completed. During this time, he has continued practicing law and maintaining his trust account records in accordance with the trust accounting rules and procedures to the best of his ability. During this investigation, Mr. Mitchell was shown by a certified public accountant, for the first time, exactly what methodology was necessary to comply with the trust accounting

rules. Mr. Mitchell would like the Supreme Court to know that now that he understands the necessary trust accounting schedules and process needed to comply with the rules, the prior errors he made in good faith will not be repeated. Mr. Mitchell is making every possible effort to mitigate any further infractions from occurring.

CONCLUSION

Mr. Mitchell should be found not guilty on all counts charged since the Florida Bar never introduced sufficient evidence to warrant a three month suspension. Additionally, Mr. Mitchell has abided by the professional rules of conduct and in certain instances made good faith sound judgments in which he should not have been charged or found guilty. Since that time, Mr. Mitchell has sought the services of a Certified Public Accountant and business software to maintain and regulate his trust account records and procedures.

Mr. Mitchell maintains that the penalty should be commensurate with the accusation and that the Bar's costs of investigation should be reduced or eliminated since Mr. Mitchell did not violate the rules of professional responsibility. Mr. Mitchell is open to a year's periodic audit by the Florida Bar accounting department. A three month suspension harms both the Fort Myers community by denying them access to Mr. Mitchell's services, and Mr. Mitchell's current and potential clients. This recommendation is also unfair to Mr. Mitchell and should be altered or modified to properly reflect the nature of the violations in light of the unintentional nature of the violations and the subsequent corrective efforts made

by Mr. Mitchell. Therefore, Mr. Mitchell requests that the Supreme Court order Mr. Mitchell to perform community service, attend additional CLE classes or any alternative remedy the court deems is fair in lieu of a three month suspension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been hand/mail to: Luain T. Hensel, Assistant Staff Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florida, and Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 this 6th day of April, 1994.

Marzell Mitchell, Jr.
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