

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

v.
MARZELL MITCHELL, JR.,
Respondent.

Supreme Court Case
No. 81,901

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

FILED

SID J. WHITE

DEC 13 1993

REPORT OF REFEREE

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

I. SUMMARY OF PROCEEDINGS:

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, a final hearing was held on December 3, 1993. The respondent appeared pro se; Luain T. Hensel, Esq., appeared on behalf of The Florida Bar.

II. FINDINGS OF FACT AS TO EACH ACT OF MISCONDUCT WITH WHICH THE RESPONDENT IS CHARGED:

After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As to All Counts

1. The Respondent, Marzell Mitchell, Jr., is, and at all times hereinafter mentioned was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. The Florida Bar conducted an examination of respondent's trust account for the period January 1, 1989 through February 28, 1991 pursuant to Rule 5-1.2(d)(7), Rules Regulating Trust Accounts.

3. The trust account examined by the bar was Account #1639500407 maintained at Barnett Bank and identified as "Marzell Mitchell, Jr. Trust Account".

As to Count I

4. On one occasion during the period of the bar's review of respondent's trust account, he deposited personal funds into his trust account; on multiple occasions during the period of the bar's review of respondent's trust account, he deposited legal fees into his trust account.

5. The deposit of personal funds, including legal fees, into his trust account constitutes commingling by the respondent.

As to Count II

6. In or about June, 1990 respondent concluded the settlement of a personal injury case on behalf of Elmira Lewis in the sum of thirty-one thousand forty dollars (\$31,040), which settlement was comprised of the following:

A. Ten thousand dollars (\$10,000) paid by Bankers and Shippers and deposited into respondent's trust account on July 5, 1989;

B. Ten thousand dollars (\$10,000) paid directly to Elmira Lewis by her underinsured insurance carrier (Allstate);

C. A structured settlement to be paid directly to Elmira Lewis by Allstate in the sum of two hundred thirty dollars (\$230) per month for a period of forty-eight (48) months for a total of eleven thousand forty dollars (\$11,040).

7. An identical settlement was concluded by respondent on behalf of James Lewis in or about June, 1990, the only difference being that the ten

thousand dollars (\$10,000) paid by Bankers and Shippers on behalf of James Lewis was deposited into respondent's trust account on March 26, 1990.

8. Respondent submitted at least two different closing statements to the bar in relation to the two settlements described above, and each closing statement indicated a different total settlement as well as different amounts for attorney's fees.

9. The respondent calculated his fee on the total value of the settlement for each client rather than reducing the amount of the structured settlement to its present value, thereby taking an excessive fee. However, the client did not complain about the amount of the fee and when questioned under oath by bar counsel prior to the final hearing, testified that whatever amount of the settlement had been taken by the respondent as a fee was acceptable to the client.

10. The client ledger card and closing statements submitted by the respondent in relation to the above described settlements did not accurately reflect the deposits to and disbursements from the respondent's trust account. Notwithstanding that fact, the respondent's incorrect closing statements and ledger cards were the result of his failure to understand trust account requirements rather than an intentional misrepresentation.

As to Count III

11. During the period of the bar's review of his trust account, respondent failed to maintain the minimum trust account records required by the Rules Regulating Trust Accounts.

12. Specifically, the respondent did not maintain the following:

A. All original or duplicate deposit slips for all periods under examination.

B. All original cancelled checks, all of which must be numbered consecutively.

C. A separate cash receipts and disbursements journal containing all required information.

D. Client ledger cards which indicated the date on which trust funds were received, disbursed or transferred, the check number of all disbursements, and the reasons for the receipt, disbursement or transfer.

As to Count IV

13. During the period of the bar's review of his trust account, respondent failed to follow minimum trust accounting procedures.

14. Specifically, the respondent did not maintain:

A. A monthly reconciliation of all trust 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.

B. A monthly comparison between the total of the reconciled balances of the trust account and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the two totals and reasons therefor.

As to Count V

15. In or about June, 1990, respondent concluded the settlement of a workers' compensation case on behalf of Mary Benton in the sum of ten thousand dollars (\$10,000).

16. During the examination of respondent's trust account, respondent produced a closing statement for Mary Benton reflecting his receipt of attorney's fees in the sum of two thousand dollars (\$2,000).

17. In connection with the examination of his trust account, respondent produced a client ledger card for Mary Benton reflecting the deposit of ten thousand dollars (\$10,000) on June 1, 1990 and disbursements as follows:

- A. "Miscellaneous" in the sum of \$710
- B. "Attorney's fees" in the sum of \$2,000
- C. "Balance to client" in the sum of \$7,290.

18. Respondent received the sum of two thousand two hundred fifty dollars (\$2,250) as attorney's fees, a sum exceeding that which he represented.

19. Respondent never deposited the sum of ten thousand dollars (\$10,000) into his trust account on behalf of Mary Benton on June 31, 1990 or at any other time during the period of examination.

20. The only deposit into respondent's trust account having a nexus to Mary Benton was the sum of two thousand two hundred fifty dollars (\$2,250) on July 9, 1990.

21. The only disbursement from respondent's trust account having a nexus to Mary Benton was the disbursement of the two thousand two hundred fifty dollars (\$2,250) to respondent.

22. During the period of examination, no disbursement was ever made to Mary Benton.

23. The client ledger card and closing statement submitted by the respondent in relation to the settlement for Mary Benton did not accurately

reflect the deposits to and disbursements from the respondent's trust account. Notwithstanding that fact, the respondent's incorrect closing statement and ledger card were the result of his failure to understand trust account requirements rather than an intentional misrepresentation.

As to Count VI

24. On October 1, 1989, participation in the Interest on Trust Account Program (IOTA) became mandatory.

25. In November, 1989, respondent deposited personal funds into his trust account and thereby established an interest bearing trust account, but it was not for the benefit of The Florida Bar Foundation, Inc. (Foundation).

26. Between November, 1989, and the end of the period under review, February 28, 1991, respondent's trust account earned interest in the sum of five hundred forty-eight dollars and forty-one cents (\$548.41), which sum was never remitted to the Foundation.

27. On January 14, 1991, the balance in respondent's trust account was fifty-six dollars and two cents (\$56.02).

28. During the period of the bar's review of respondent's trust account, the interest earned by the account was expended and was not remitted to the Foundation.

III. RECOMMENDATIONS AS TO WHETHER THE RESPONDENT SHOULD BE FOUND GUILTY:

As to each count of the complaint, I make the following recommendations as to guilt or innocence:

As to Count I

I recommend that the respondent be found guilty and specifically that he be found guilty of a violation of Rules 4-1.15(a) [a lawyer may not

commingle his own funds with those of clients] and 4-8.4(a) [a lawyer shall not violate the Rules of Professional Conduct], Rules of Professional Conduct.

As to Count II

Predicated upon my finding that the respondent's conduct was negligent rather than willful or intentional, I recommend that the respondent be found not guilty.

As to Count III

I recommend that the respondent be found guilty and specifically that he be found guilty of a violation of Rules 4-1.15(d) [a lawyer shall comply with the Rules Regulating Trust Accounts] and 4-8.4(a) [a lawyer shall not violate the Rules of Professional Conduct], Rules of Professional Conduct; and Rules 5-1.1(c) [minimum trust accounting records shall be maintained by all attorneys practicing in Florida who receive or disburse trust money], 5-1.2(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], Rules Regulating Trust Accounts.

As to Count IV

I recommend that the respondent be found guilty and specifically that he be found guilty of a violation of Rules 4-1.15(d) [a lawyer shall comply with the Rules Regulating Trust Accounts] and 4-8.4(a) [a lawyer shall not violate the Rules of Professional Conduct], Rules of Professional Conduct; and Rules 5-1.1(c) [minimum trust accounting records shall be maintained by all attorneys practicing in Florida who receive or disburse trust money], 5-1.2(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], Rules Regulating Trust Accounts.

As to Count V

I recommend that the respondent be found guilty and specifically that he be found guilty of a violation of Rules 4-1.15(a) [a lawyer may not commingle his own funds with those of clients], Rules of Professional Conduct. However, predicated upon my finding that respondent's conduct was negligent rather than willful or intentional, I recommend that the respondent be found not guilty as to all other rule violations charged by the bar.

As to Count VI

I recommend that the respondent be found guilty and specifically that he be found guilty of a violation of Rules 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], Rules of Professional Conduct; and Rule 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], Rules Regulating Trust Accounts.

IV. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that the respondent be suspended from the practice of law for a period of three (3) months with automatic reinstatement at the end of the period of suspension as provided in Rule 3-5.1(e), Rules of Discipline. I further recommend that respondent contact and 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 respondent's understanding of the trust accounting records and procedures which are required by the Rules Regulating Trust Accounts prior to his return to the practice of law. In addition, I recommend that following the suspension, respondent be placed on probation for a period of one year as provided in Rule 3-5.1(c). The terms of probation recommended are that respondent's trust account be subject to periodic, unannounced audits by The Florida Bar during the period of probation.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD: After a finding of guilt, and prior to recommending discipline, I considered the

following personal history and prior disciplinary record of the respondent, to wit:

Respondent is 56 years of age and has been a member of The Florida Bar since December 20, 1974.

Prior disciplinary convictions and disciplinary measures imposed therein include a private reprimand in 1978 predicated upon respondent's failure to maintain appropriate trust accounting records. At that time, it was determined that respondent's infraction was a result of ignorance rather than willful misconduct. 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.

Other personal data: Respondent's failure to appear for a properly noticed deposition and respondent's failure to appear in person or to telephone at the time of a properly noticed hearing necessitated by his failure to appear for deposition were considered as aggravating factors.

VII. STATEMENT OF COSTS OF THE PROCEEDING AND MANNER IN WHICH

COSTS SHOULD BE TAXED: I find the following costs were reasonably incurred by The Florida Bar:

Administrative costs per Rule 3-7.6(k)(1)(E)	\$ 500.00
Investigator Costs	
2/14/91 serve subpoena on respondent for trust account records	32.01
3/13/91 serve subpoena on bank for records and witness fee	19.12
10/22/92 service of subpoena on James Lewis by Collier Co. Sheriff	12.00
Charge from bank for records	127.84
Witness fee and mileage	
James Lewis	5.00
Mark Widlansky	12.20

Court Reporter Costs	
Grievance Committee Hearing - 8/13/91	
Per Diem	40.00
Transcript	156.30
Sworn statement of James Lewis	
11/12/92	73.11
Deposition - non-appearance 9/17/93	49.16
Deposition - non-appearance 11/12/93	47.95
Hearing on bar's motion to strike	
11/24/93	To be determined
Final hearing - per diem and transcript	
12/3/93	To be determined
TOTAL INTERIM COSTS	<u>\$1,074.69</u>

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent. Bar counsel is hereby directed to submit a final statement of costs directly to the Supreme Court of Florida.

DATED this 9 day of December, 1993 at Fort Lauderdale, Broward County, Florida.



LEONARD L. STAFFORD, Referee

Copies furnished to:

Luain T. Hensel, Bar Counsel
Marzell Mitchell, Jr., Respondent