

047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RAYMOND E. CRAMER,

Respondent.

Case No. 82,114

[TFB Case No. 93-30,140 (09B)]

6/20

FILED

SID J. WHITE

MAY 27 1994

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The report of referee dated December 21, 1993, shall be referred to as "ROR", followed by the appendix page number.

All bar exhibits entered at the final hearing shall be referred to as "B-Ex."

All respondent's exhibits entered into evidence at the final hearing shall be referred to as "R-Ex".

The transcript of the final hearing dated November 18, 1993, shall be referred to as "T", followed by the referenced page number(s).

STATEMENT OF THE CASE

The Ninth Judicial Circuit Committee "B" voted to find probable cause in this matter on May 18, 1993. The bar filed its complaint with the Supreme Court of Florida on July 21, 1993. This Court appointed the referee on or about July 28, 1993. The final hearing was held on November 18, 1993. The referee issued the report on December 21, 1993. In the report, the referee recommended the respondent be found guilty of violating Rules Regulating The Florida Bar as charged in the bar's complaint. On March 4, 1994, the respondent petitioned for review seeking review of the rule violations found by the referee. The respondent filed his brief in support of his petition for review on May 10, 1994. This answer brief follows.

STATEMENT OF THE FACTS

Beginning in or around February or March, 1990, the respondent became unable to work full time due to serious health problems. For approximately five months, he was out of the office completely due to open heart surgery. Thereafter, he returned to work on a restricted basis.

Between March, 1991, and March, 1992, the respondent became delinquent in paying to the Internal Revenue Service certain employee taxes in the approximate total amount of \$43,635.71. The respondent was served with a notice of intention to levy in July, 1992. Because he feared the IRS would garnish his operating account, he decided to leave in his trust account legal fees earned on behalf of Aarbor Realty, a company owned by the respondent. He made deposits and disbursements under the name of Aarbor Realty to pay operating and personal expenses. He intentionally sought to deceive the IRS and protect funds from any lien by maintaining his money in the trust account under the name of Aarbor Realty. Although the respondent's intention was to acquire additional time to negotiate a payment plan with the IRS, his negotiations were unsuccessful and as a result a tax lien was imposed against him.

Further, the respondent represented Olan Fore as the defendant in the civil case. The parties entered into a

settlement agreement whereby Mr. Fore was to pay the plaintiff a certain amount of money. For this purpose, Mr. Fore gave the respondent approximately \$13,743.42 to be deposited to the trust account. Instead, the respondent deposited the funds into his operating account and used them for office purposes. The respondent later deposited personal funds to the trust account, a portion of which was used to pay the plaintiff's attorney.

A review of the respondent's trust account showed he failed to maintain it in substantial minimum compliance with the rules. He maintained no cash receipts book despite receiving cash for deposit and made no yearly reconciliations. Despite failing to properly maintain his trust account, the respondent certified on his 1991 and 1992 bar dues statements that he maintained his trust account in substantial minimum compliance with the rules.

A review of the respondent's office account also showed that numerous checks were returned due to insufficient funds and negative balances existed on approximately nine occasions.

The referee found the following violations: 3-4.3 for engaging in conduct that was contrary to honesty and justice; 4-1.15(a) for commingling; 4-1.15(b) for failing to promptly notify a third person upon the receipt of funds which that person was entitled to receive; 4-1.15(d) for failing to comply with The Florida Bar Rules Regulating Trust Accounts; 4-8.4(a) for

violating the Rules of Professional Conduct; 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; 5-1.1(a) for utilizing trust funds for purposes other than those for which they were entrusted to him; 5-1.1(d) for failing to maintain the minimum required trust accounting records; and 5-1.2(b) for failing to maintain the minimum required trust accounting records, namely a cash receipts book and yearly reconciliations. As discipline, the referee recommended a ninety (90) day period of suspension and payment of The Florida Bar's costs, totalling \$1,287.12.

SUMMARY OF THE ARGUMENT

The respondent takes issue with the referee's findings that the respondent has engaged in dishonest conduct. The referee found violations of rule 3-4.3 for engaging in conduct that was contrary to honesty and justice as well as rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The referee's findings of dishonesty are fully supported by the record and properly noted in his report of referee.

The respondent takes further issue with the referee's findings set out in the report of referee, paragraphs seven and eight, ROR-A2. These findings reflect that the respondent deposited \$13,743.42 into his operating account. Clearly, the respondent's client, Olan Fore, had given these funds to the respondent to be deposited into his trust account for purposes of paying a settlement amount owed by Mr. Fore. The respondent admits using these funds for purposes other than those for which they were entrusted to him. Further, on April 28, 1992, the respondent covered Mr. Fore's loss by depositing \$27,425.00 of his own money into his trust account. It is well settled that such conduct is a violation of the Rules Regulating The Florida Bar.

The referee has followed the bar's recommendation that the

respondent be suspended for a period of ninety (90) days and pay The Florida Bar's costs in this matter. This discipline is not unduly harsh and is appropriate in this case given the factual situation.

ARGUMENT IN ANSWER TO RESPONDENT'S INITIAL BRIEF

POINT I

THE REFEREE'S FINDINGS OF FACTS AND CONCLUSIONS ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

Unless clearly erroneous or unsupported by the evidence, it is well settled that a referee's findings of fact in bar disciplinary proceedings must be upheld, The Florida Bar v. Gross, 610 So. 2d 442 (Fla. 1992). The party seeking review of said findings carries a heavy burden of demonstrating that the referee's report is erroneous, The Florida Bar v. Miele, 605 So. 2d 866 (Fla. 1992). The respondent has failed to meet this requirement.

The respondent takes issues with the referee's findings that the respondent has engaged in dishonest conduct. The referee found violations of rule 3-4.3 for engaging in conduct that was contrary to honesty and justice as well as rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The referee's findings of dishonesty are fully supported by the record and properly noted in his report of referee. It is well settled that intent is a requirement to prove this violation, The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). Clearly, the respondent had this necessary mindset of intent. This is reflected by the referee's finding in paragraph three of his report wherein the referee notes that the

respondent feared the IRS would garnish his operating account for his law office because he owed back taxes, ROR-A2. Therefore, the respondent made the conscious and intentional decision to leave in his trust account earned fees which should have been withdrawn. Further, on or about April 28, 1992, the respondent deposited into his trust account \$14,023.56 under Aarbor Realty's name. When the respondent engaged in these actions regarding the misuse of his trust account in order to mislead the IRS, the respondent was aware that on July 8, 1992, the IRS had sent him a notice of intention levy advising him that he needed to reply within thirty days to avoid enforcement of the action, ROR-A2, paragraph 2. Please note that the respondent admits at page two of his brief that paragraphs two and three of the report were stipulated and are not disputed. The respondent does, however, dispute the referee's conclusion in paragraph five of the report of referee. Paragraph five is merely a logical conclusion of the referee based upon the facts set out and stipulated by the respondent in the above paragraphs. As the trier of fact, the referee had the opportunity to observe the respondent and make conclusions. The referee's conclusions are well supported by the evidence and should be upheld.

While the respondent correctly points out that the bar drafted the report of referee, the bar responds that this was done at the referee's request. The referee requested that a proposed report be forwarded to him as well as to the respondent

for the referee's review. The bar did so. The referee exercised his discretion in choosing to accept it. This is fully proper.

The respondent admits to the violation regarding the commingling of personal and trust funds in his trust account. However, the respondent attempts to distinguish his case because he kept accurate records noting the deposit of his personal funds into his trust account. This is irrelevant as to whether or not the respondent was guilty of commingling. It is well settled that personal funds shall not be commingled in a respondent's trust account with clients' funds and to do so knowingly merely for convenience is intolerable and outrageous, The Florida Bar v. Padgett, 481 So. 2d 919 (Fla. 1986).

The respondent takes further issue with the referee's findings set out in the report of referee, paragraphs seven and eight, ROR-A2. These findings reflect that the respondent deposited \$13,743.42 into his operating account. Clearly, the respondent's client, Olan Fore, had given these funds to the respondent to be deposited into his trust account for purposes of paying a settlement amount owed by Mr. Fore. The respondent admits using these funds for purposes other than those for which they were entrusted to him. Further, on April 28, 1992, the respondent covered Mr. Fore's loss by depositing \$27,425.00 of his own money into his trust account. It is well settled that such conduct is a violation of the Rules Regulating The Florida

Bar. A respondent's fiduciary duty with respect to his client's funds deposited with him to be held in trust is sacred. The fact that the respondent used these funds for personal purposes is a clear and direct violation of these rules. While the respondent later made good on these funds, this is a mitigating factor only and does not excuse the respondent's guilty actions. The respondent appears not to understand the gravity of his wrongdoing.

The respondent also does not dispute the referee's findings in paragraph eleven regarding the fact that the respondent's office (nontrust) account for the period of February, 1992 through May, 1992, had numerous checks returned for insufficient funds, ROR-A3. In mitigation, the respondent notes that all checks were returned and were made good at that time. The bar would note once again that this is a mitigating factor only.

The majority of the referee's findings were based upon a stipulation of facts entered into on November 4, 1993, between the respondent and The Florida Bar, copy of which is attached in the Appendix to this brief, A5-A9. Based upon these stipulations, as well as further evidence presented at the final hearing, the referee made his conclusions of fact. The referee's conclusions of facts are well supported by the record and should be upheld upon review.

ARGUMENT IN ANSWER TO RESPONDENT'S INITIAL BRIEF

POINT II

THE REFEREE'S RECOMMENDATION OF A NINETY DAY SUSPENSION IS APPROPRIATE GIVEN THE FACTS OF THIS CASE.

Upon making findings that the respondent had engaged in violations of the Rules Regulating The Florida Bar involving dishonesty, fraud, and misrepresentation with respect to the respondent's intentional use of his trust account to deceive the IRS and protect personal funds from an imminent IRS lien as well as his misconduct in failing to hold client funds in trust and improperly commingling personal funds with trust funds, as well as numerous insufficient checks in his law office account, the referee recommended the ninety day suspension. Clearly, the referee took into consideration the mitigating factors in this case. In paragraph one of the referee's findings of fact, he notes the respondent's heart condition affected his conduct. At the final hearing, the respondent's mitigating factors were noted specifically, T-15. He has had heart related medical problems and he has been very cooperative with The Florida Bar in this investigation. For these reasons, the bar does not seek more than a ninety day suspension. However, there is case law which supports a suspension for in excess of ninety days where the respondent's mitigating factors are not present.

In Padgett, supra, simple commingling of personal and client funds as a matter of convenience warranted a six month suspension

from the practice of law. Any suspension of more than ninety days is significant because the attorney must prove rehabilitation prior to being reinstated. The respondent would not have to do so if this ninety day suspension in the case at hand is imposed.

In The Florida Bar v. Burke, 578 So. 2d 1099 (Fla. 1991), this Court issued a ninety-one day (91) suspension where the attorney had not engaged in misappropriation but was guilty of gross negligence in handling client funds. Mr. Burke had engaged in significant commingling of clients' assets. It should be noted that Mr. Burke had a previous ninety (90) day suspension for negligent trust account maintenance that occurred during the same period as the negligence in the case at hand, The Florida Bar v. Burke, 517 So. 2d 684 (Fla. 1988). The respondent's case is more serious because he intentionally engaged in misconduct violative of these rules rather than doing so through extremely sloppy accounting procedures as Mr. Burke did.

In The Florida Bar v. Hirsch, 342 So. 2d 970 (Fla. 1977), an attorney was suspended for three months, no proof of rehabilitation required, where client funds deposited in his trust account were dissipated due to his debt to the bank. The attorney paid the obligation to his client, but only after repeated demands. The respondent has engaged in far more misconduct in addition to the isolated instance concerning his

client, Mr. Fore, described above.

It is well settled that misconduct by an attorney involving personal income tax obligations warrants significant discipline. In The Florida Bar v. Blankner, 457 So. 2d 476 (Fla. 1984), this Court suspended an attorney for six months, requiring proof of rehabilitation prior to reinstatement, where the attorney failed to file timely personal income tax returns resulting in probation and fines being imposed on him by federal court.

In The Florida Bar v. Miller, 548 So. 2d 219 (Fla. 1989), this Court suspended a lawyer for ninety (90) days with the requirement that a certified public accountant temporarily monitor his trust account after the resumption of practice. The attorney used trust account funds for unauthorized purposes without dishonest intent and apparently without any knowledge of the problems existing in his trust account.

In The Florida Bar v. Welty, 382 So. 2d 1220 (Fla. 1980), the attorney was suspended for six months for misconduct related to deficits in his trust account extending over a two year period and amounting at times to over \$24,000.00.

Finally, for an example of case law similar to the respondent's conduct in transferring funds to avoid his creditors, one should look at The Florida Bar v. Rood, 620 So. 2d

1252 (Fla. 1993). In this case the attorney conveyed property to his father with the intention of defrauding his creditors. The lawyer had a significant prior disciplinary history. Disbarment was warranted. See also The Florida Bar v. Scott, 566 So. 2d 765 (Fla. 1990). In this case the attorney was suspended for ninety-one (91) days, requiring proof of rehabilitation, where he conveyed property to another individual in order to avoid his creditors.

The Florida Standards for Imposing Lawyer Sanctions also support a suspension. Standard 4.12 calls for a suspension when a lawyer knows or should know he is dealing improperly with client property and causes injury or potential injury to a client.

The fact that the respondent's trust account was involved warrants even greater discipline in the case at hand. However, in view of the respondent's mitigating factors of his health condition as well as his cooperativeness with The Florida Bar, a ninety (90) day suspension as well as payment of costs is fully appropriate.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact and conclusions as well as his recommendations of discipline of a ninety (90) day suspension and payment of The Florida Bar's costs currently totalling \$1,287.12.

Respectfully submitted,

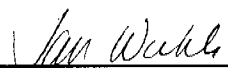
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By:



JAN WICHROWSKI
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing answer brief and appendix have been furnished by regular U. S. mail to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by certified mail No. P 381 851 725, return receipt requested, to Mr. Raymond E. Cramer, respondent, at 220 E. Irlo Bronson, Suite 106, Kissimmee, Florida 34744; and a copy of the foregoing has been furnished by regular U. S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 25th day of May, 1994.

Jan Wichrowski

JAN WICHROWSKI
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RAYMOND E. CRAMER,

Respondent.

Case No. 82,114

[TFB Case No. 93-30,140 (09B)]

APPENDIX TO COMPLAINANT'S INITIAL BRIEF

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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

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DEC 27 1993
THE FLORIDA BAR
ORLANDO

THE FLORIDA BAR,

Complainant,

vs.

Case No. 82,114

[TFB Case No. 93-30,140(09B)]

RAYMOND E. CRAMER,

Respondent.

REPORT OF REFEREE

- I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held on November 18, 1993. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to the The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar Jan Wichrowski

For The Respondent In pro se

- II. Rule Violations Charged: 3-4.3 for engaging in conduct that is contrary to honesty and justice; 4-1.15(a) for commingling; 4-1.15(b) for failing to promptly notify a third person upon receipt of funds which that person is entitled to receive; 4-1.15(d) for failing to comply with The Florida Bar rules regulating trust accounts; 4-8.4(a) for violating the Rules of Professional Conduct; 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; 5-1.1(a) for utilizing trust funds for purposes other than those for which they were entrusted to him; 5-1.1(d) for failing to maintain the minimum required trust accounting records; and 5-1.2(b) for failing to maintain the minimum required trust accounting records, namely a cash receipts book and yearly reconciliations.

- III. Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged: Pursuant to the Stipulation of Facts entered into by the parties on November 15, 1993, I find:

1. Beginning in or around February or March 1990, the respondent became unable to work full time due to serious health problems. From April, 1990, through

September 1990, he was out of the office completely due to open heart surgery. Thereafter, he returned to work on a restricted basis which continues to this day.

2. Between March, 1991, and March, 1992, the respondent became delinquent in paying to the Internal Revenue Service (IRS) certain employee taxes in the approximate total amount of \$43,635.71. On July 8, 1992, the IRS sent the respondent a notice of intention to levy advising him that he needed to reply within thirty (30) days to avoid enforcement of the action.

3. The respondent feared the IRS would garnish his operating account for his law office so he decided to leave in his trust account legal fees earned on behalf of Aarbor Realty, a company owned by the respondent. On or about April 28, 1992, he deposited to his trust account \$14,023.56 under Aarbor Realty's name.

4. The respondent made disbursements in the approximate amount of \$16,318.78 against the funds on deposit in his trust account under the name of Aarbor Realty to pay operating and personal expenses.

5. The respondent intentionally sought to deceive the IRS and protect funds from any lien by maintaining his funds in the trust account under the name of Aarbor Realty.

6. Although the respondent hoped to acquire additional time to negotiate a payment plan with the IRS, negotiations were not successful and a tax lien was imposed against him.

7. The respondent represented Olan Fore as the defendant in a civil case brought by Macasphalt. The parties entered into a settlement agreement whereby Mr. Fore was to pay the plaintiff a certain amount of money. For this purpose, Mr. Fore gave the respondent approximately \$13,743.42 to be deposited to the trust account. Instead, the respondent deposited these funds to his operating account and then used them for office purposes.

8. On or about April 28, 1992, the respondent deposited to his trust account \$27,425.00 of his personal funds, a portion of which was used to pay \$14,023.56 to Macasphalt's attorney. This payment represented the settlement funds given to the respondent by Mr. Fore and which were never deposited to the trust account.

9. A review of the respondent's trust account by The Florida Bar for the period of March, 1991, through August, 1992, showed he did not maintain it in substantial minimum compliance with the Rules Regulating The Florida Bar. The

respondent failed to maintain a cash receipts book despite receiving cash for deposit and made no yearly reconciliations.

10. Despite failing to properly maintain his trust account, the respondent certified on his 1991 and 1992 bar dues statement that he maintained his trust account in substantial minimum compliance with the rules.

11. The bar also reviewed the respondent's office account for the period of February, 1992, through May, 1992. The audit revealed that numerous checks were returned due to insufficient funds and negative balances existed in the account on approximately nine occasions.

IV. Recommendations as to Whether or Not the Respondent Should Be Found Guilty: I recommend the respondent be found guilty or not guilty of the following rule violations, as noted:

| | |
|-----------|--------|
| 3-4.3 | guilty |
| 4-1.15(a) | guilty |
| 4-1.15(b) | guilty |
| 4-1.15(d) | guilty |
| 4-8.4(a) | guilty |
| 4-8.4(c) | guilty |
| 5-1.1(a) | guilty |
| 5-1.1(d) | guilty |
| 5-1.2(b) | guilty |

V. Recommendation as to Disciplinary Measures to Be Applied:

Ninety (90) days suspension.

VI. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 55

Date admitted to bar: May 10, 1974

Prior disciplinary convictions and disciplinary measures imposed therein: The Florida Bar v. Cramer, Case No. 09A83C79, private reprimand administered by an appearance before the board of governors for engaging in an improper business transaction with a client wherein they had differing interests.

VII. Statement of costs and manner in which costs should be taxed: I find the following costs were reasonably

incurred by The Florida Bar.

| | | |
|----|---------------------------------|------------|
| A. | Grievance Committee Level Costs | |
| | 1. Transcript Costs | \$ 0 |
| | 2. Bar Counsel Travel Costs | \$ 0 |
| B. | Referee Level Costs | |
| | 1. Transcript Costs | \$ 91.65 |
| | 2. Bar Counsel Travel Costs | \$ 49.84 |
| C. | Administrative Costs | \$500.00 |
| D. | Miscellaneous Costs | |
| | 1. Investigator Expenses | \$495.63 |
| | 2. Witness Fees | \$ 0 |
| | 3. Copy Costs | \$150.00 |
| | TOTAL ITEMIZED COSTS: | \$1,287.12 |

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, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 21st day of December, 1993.

/s/ Oliver L. Green, Jr.

OLIVER L. GREEN, JR., Referee

Original to Supreme Court with Referee's original file.

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