

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court Case  
No. 87,153

087

Complainant,

v.

OSVALDO FRANCISCO VALLADARES

Respondent.

FILED

NOTARIAL

JUN 28 1996

CLERK OF THE COURT

By

Clifford D. [unclear]

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The Florida Bar's Initial Brief

On Petition for Review

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STATEMENT OF THE CASE AND FACTS

A final hearing was conducted on April 1, 1996 by Referee Raphael Steinhardt pursuant to The Florida Bar's three count complaint against the Respondent. The Referee found Respondent to be in violation of a number of Rules. In regard to Count I, the Referee found that Respondent was in violation of Rule 4-1.15(a) which requires that client's and third party's funds be kept in trust; Rule 4-1.15(c) regarding retaining disputed funds; and 4-1.15(d), compliance with trust accounting rules.

Also, as to Count I, the Referee found the Respondent to be in violation of Rule 4-8.4(g) for his failure to respond to the Bar's written inquiries and Rule 5-1.1(e)(2), which requires an interest bearing account, and Rule 5-1.2, which requires maintaining minimum trust account records.

These findings were based to a large degree upon the uncontradicted testimony of The Florida Bar's Auditor, Carlos Ruga. Based upon a review of Respondent's bank records, Ruga testified that Respondent had issued at least 59 dishonored checks and 192 overdrafts with charges of \$25.00 each totaling \$4,800 (T.34). He also testified that Respondent's trust account was in a state of "total disarray". Also, funds intended for costs had been improperly deposited in Respondent's operating account, (T.35-37). That conduct constituted commingling. (T.38). Furthermore, Ruga

testified that Respondent's operational account was not an IOTA account. (T.39). Ruga's affidavit is attached as Exhibit A.

During trial, Ruga also testified that during his review of the account records the bank produced, he was able to ascertain that there was an additional trust account that Respondent had not disclosed. (T.34-35) This undisclosed trust account then became the subject of a court order wherein Respondent was to bring all those records for Ruga's review. Ruga was unable to do anything with the records from the undisclosed trust account because Respondent did not produce all of the records. (T.41)

Count II dealt with Respondent's continued practice of law despite his suspension for dues delinquency. The Referee found that Respondent was in "technical" violation of Rule 4-5.5, which prohibits the unlicensed practice of law; and stated that it was unintentional.

A former client, Richard Shindler, testified in support of Count III of the Bar's complaint. He stated that the Respondent had been hired to handle at least five civil cases and that there had been a total lack of communication. (T.68 ff). The Referee's Order found that Respondent was in violation of Rule 4-1.4(a), and also mentioned that Complainant **was** not dissatisfied with the quality of Respondent's work. (T.88-89) There was no allegation by the Bar that Respondent's efforts were ineffective nor an

testified that Respondent's operational account was not an IOTA account. (T.39). Ruga's affidavit is attached as Exhibit A.

During trial, Ruga also testified that during his review of the account records the bank produced, he was able to ascertain that there was an additional trust account that Respondent had not disclosed. (T.34, 35) This undisclosed trust account then became the subject of a court order wherein Respondent was to bring all those records for Ruga's review. Ruga was unable to do anything with the records from the undisclosed trust account because Respondent did not produce all of the records. (T.41)

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allegation that the client was prejudiced. The Referee's report reflects that the efforts were effective and that the client was not prejudiced.

Violations of Rule 4-8.4(g) (failure to respond to Bar inquiries) were alleged by the Bar in all three counts. In regard to Count II, the Referee found that there was a "technical" violation of the rule, and he found a violation of the Rule in regard to Count I, as stated above and Count III.

The Referee also found that the Respondent had voluntarily admitted himself to a drug abuse program and was actively participating in the Florida Lawyers' Assistance program where he was progressing satisfactorily.

The Referee recommended a ninety-day suspension which, of course, would result in automatic reinstatement pursuant to Rule 3-5.1(e), three years of probation, continued participation in the Florida Lawyers Assistance program, and monitoring and periodic testing. The Bar has asked for disbarment or a three year suspension.

The Bar filed a timely Petition for Review on May 29, 1996. The petition takes issue with the discipline recommendation. The petition referred to the automatic reinstatement aspect related to the ninety-day suspension.

Respondent has moved to dismiss this appeal. The Bar has



submitted to this Court that the Petition clearly relates to discipline and is adequate to invoke jurisdiction and, alternatively, that leave to amend the petition should be granted.

### SUMMARY OF ARGUMENT

The ninety-day suspension recommended by the Referee is neither fair to society nor a sufficient deterrent when viewed in relation to Respondent's violations of the Rules of Professional Conduct. Respondent violations pertain to ethical principles that are of great significance in the disciplinary system; namely trust account violations and failure to respond to the Bar, among others.

The number and nature of Respondent's ethical violations call for discipline which is more severe than a ninety-day suspension. In addition, Respondent's failure to disclose a trust account and then to fail to produce all records pursuant to the Referee's order should be considered in aggravation of the discipline. The most serious discipline, disbarment, could be considered by this Court. If disbarment is deemed inappropriate, the suspension for ninety days should, nevertheless, be rejected, and a longer suspension should be imposed.

## ARGUMENT

### THE NINETY-DAY SUSPENSION RECOMMENDED BY THE REFEREE IS INADEQUATE

The sanction resulting from a Bar disciplinary action must serve three purposes: The sanction must be fair to society; the sanction must be fair to the attorney; and the sanction must be severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Neu, 597 So.2d 266, 269 (Fla. 1992). This Court's review of a referee's recommendations as to disciplinary measures is broader than that afforded to factual findings because the ultimate responsibility to order an appropriate sanction rests with this Court. The Florida Bar v. Rue, 643 So. 2d 1080, 1082 (Fla. 1994).

The ninety-day suspension is an inadequate deterrent and is unfair to society for a number of reasons. First, a ninety-day suspension will result in automatic reinstatement in accordance with Rule 3-5.1(e). This was recognized in the Referee's Order. Automatic reinstatement would not appear to be desirable for a person with an admitted substance **abuse** problem. Respondent should be given discipline which will not result in automatic reinstatement but will require meeting the burden of full compliance with the Rules and regulations governing admission to

the Bar as provided by Rule 3-7.10(a).

Second, the ninety-day suspension is not commensurate with the nature of the violations. This Court can take judicial notice of the fact that trust account violations have produced many disbarments. Obviously, it is desirable to effectuate firm discipline to deter that type of activity. Failure to respond to the Bar's inquiries (Rule 4-8.4 (g)) is another serious violation insofar as it demonstrates a disregard of and contempt for the process of lawyer discipline, which potentially undermines the discipline system as a whole.

Third, the substance abuser and not substance abuse should be properly viewed as the responsible party. It is difficult to determine that such is the case from the Referee's report. Respondent's efforts to seek rehabilitation, while commendable, cannot serve to exonerate him. As this Court has stated on a number of occasions, addiction can explain behavior but does not excuse it. The Florida Bar v. Setien, 530 So.2d 298 (Fla. 1988); The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989); The Bar v. Shuminer, 567 So.2d 430, 432 (Fla. 1990).

It is significant that this Respondent was found to have violated a number of rules. The cumulative effect of those violations mandates more serious discipline than the ninety day

suspension,

In The Florida Bar v. Hirsch, 342 So.2d 970 (Fla. 1977), a case decided under the former rules, the Respondent was found to be in violation of one rule. Respondent held in trust \$3,311.51 to be paid to a Tallahassee bank. He did pay the bank but only after considerable delay and many demands. Hirsch was given a ninety-day suspension for that single trust account violation. Likewise, In The Florida Bar v. Miller, 548 So.2d 219 (Fla. 1989), this Court held that failure to keep trust account records and to follow trust account procedures, without any other rule violations, warranted a ninety-day suspension.

The same discipline of a ninety-day suspension was approved by this Court in The Florida Bar v. Welch, 427 So.2d 720 (Fla. 1983). Welch was found to be in violation of two related trust account violations including commingling and inadequate record keeping violations found in this case as well. Welch was given a ninety-day suspension on the basis of those two violations alone.

Respondent also violated Rule 4-5.5 by practicing while suspended. Such a violation, alone, has resulted in disbarment, The Florida Bar v. Rauman, 558 So.2d 994 (Fla. 1990).

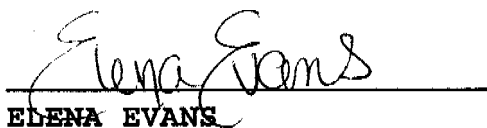
The appropriate discipline in this matter should be determined in the context of the foregoing cases. The Referee found that the

Respondent in this case has violated a number of Rules Regulating Professional Conduct. Cumulative and/or multiple violations have justified disbarment. The Florida Bar v. Williams, 604 So.2d 447 (Fla. 1992); The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1983) while the offenses involved in the foregoing cases may be considered to be more serious than in this cause, these and the cases cited above recommend at the very least, a suspension of greater duration than ninety days, if not disbarment. Disbarment should be considered in view of the evidence presented that Respondent did not disclose a trust account and after court order did not produce all records of the undisclosed trust account.

Florida Statutes for Imposing Sanctions, 9.22(e) and (f) which provide in pertinent part: Factors which may be considered in aggravation: Aggravating factors include: (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during this disciplinary process. This Court has found that cumulative misconduct combined with aggravating circumstances demonstrates ethical breaches of the most serious order warranting harsh discipline. The Florida Bar v. Inglis, 660 So.2d 697 (Fla. 1995)

**CONCLUSION**

The Bar urges this Court to deny the recommendation of the Referee that the Respondent should receive a ninety-day suspension. The Bar believes that the record and findings of violations demand a harsher discipline. If this Court believes disbarment is inappropriate, then a suspension for a longer period of time, than ninety-days should be imposed in order to serve as a deterrent, to be fair to society, and also justly avoid **automatic** reinstatement.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief on Petition for Review was forwarded Via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Richard B. Marx, Attorney for Respondent, at P.O. Box 330946, Miami, Florida 33233, on this 27th day of June, 1996.

  
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**Bar Counsel**



APPENDIX

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- A. Affidavit of Staff Auditor, Carlos Ruga.