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SUPREME COURT

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

Supreme Court Case
No. 87,153

vs.

OSVALDO F. VALLADARES,
Respondent.

_____ /

REPLY BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

For the purposes of this Reply Brief, The Florida Bar will be referred to as either The Florida Bar or the Bar. Respondent will be referred to as either Respondent or Osvaldo F. Valladares. Witnesses may be referred to by their surnames only.

References to the transcript of the final hearing before the Referee will be set forth as TR. and page number. References to the Initial Brief of The Florida Bar will be set forth as TFB's Brief and page number. References to Initial Response Brief of Respondent will be set forth as R's Answer Brief and page number. References to the Report of Referee shall be set forth as RR and the page number.

STATEMENT OF THE CASE AND FACTS

The Florida Bar reiterates its Statement of Facts as set forth in its Initial Brief and sets forth the following additional facts in response to statements contained in Respondent's **Answer** Brief.

In his Statement of the Facts, Respondent states that Mr. Ruga did not have any knowledge as to whether the Respondent misappropriated funds entrusted to him. (R's **Answer** Brief, p. 43). It is worthy to note that Mr. Ruga additionally testified that he was unable to complete an audit due to Respondent's failure to provide records pursuant to the subpoena that was served upon him. (TR. 41). In addition, the Respondent ignores the testimony by Ruga that during his review of the incomplete records available to him he discovered an undisclosed trust account. (TR. 34 - 35)

ARGUMENT

WHETHER THE REFEREE ERRED IN NOT RECOMMENDING
RESPONDENT RECEIVE A REHABILITATIVE SUSPENSION
IN LIGHT OF THE REFEREE'S FINDING THAT THE
RESPONDENT COMMITTED NUMEROUS RULE VIOLATIONS
INCLUDING TRUST ACCOUNT VIOLATIONS.

The Respondent should receive, at a minimum, a rehabilitative suspension considering the numerous violations which were found by the referee and in view of the Respondent's non-disclosure of a trust account. Notwithstanding the mitigating factor of addiction, in order to fulfill the purposes of lawyer discipline, this Court should impose a stricter sanction than the ninety day suspension recommended by the Referee.

A. The Mitigating Factor Of Addiction Must Be Balanced Against The ,ever y -- The Respondent's Misconduct and The Injury And Wam Caused To The Public.

In determining the appropriate discipline in a case where substance abuse is a mitigating factor, the Court must balance the Respondent's addiction with the injury and harm caused to public by the Respondent's misconduct. The Florida Bar v. Golub, 550 So.2d 456 (Fla. 1989). In the instant case, the injury and harm caused to the public by the Respondent, despite his addiction, require

disbarment or a rehabilitative suspension.

The Respondent inaccurately states that the instant case is most similar to The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987). In Sommers, supra, the Court ordered a ninety-day suspension as the result of a several count complaint resulting from neglect allegations. However, the instant case is most similar to The Florida Bar v. Wells, 602 So.2d 1236 (Fla. 1992). In Wells, supra, the Respondent was found guilty of a multiple count complaint which included neglect of a legal matter. In addition, the Respondent wrote a trust account check which was returned for insufficient funds. The Bar's audit revealed that the Respondent failed to maintain his trust account in accordance with the rules and regulations governing trust accounts. Wells at 1237.

The Wells Court noted that the case was factually similar to Sommers, supra. However, the Court held that a stronger sanction was required because of the severity of the misconduct. In order to protect the public, discourage similar misconduct, punish the errant lawyer and encourage rehabilitation, the Court imposed an eighteen month suspension. Wells at 1239.

The facts regarding the Respondent's handling of his trust and operating accounts are not in dispute. The Respondent paid his client with an operating account check which was returned for

insufficient funds. The Bar's audit revealed that the Respondent had returned checks from his operating account during every month of 1995 with the exception of March. Moreover, from January 1, 1993 to August 31, 1995, the Respondent had 59 checks returned for insufficient funds. (TR.34) The Respondent paid over four thousand dollars in bank fees alone for the bounced checks. (TR.34)

This Court has consistently held that trust account violations are one of the most serious that an attorney can commit. The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989). **An** attorney is required to remain worthy of the special trust which this Court and the Florida Bar encourage the public to place in the legal profession. The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986). In Tunsil, supra, like the instant case, the Respondent argued that his problems were caused by addiction. The Respondent had also demonstrated a cooperative attitude towards Bar proceedings. However, the Court held that the mitigating factors could not erase the serious nature of the Respondent's conduct nor diminish it to the same punishment which is granted for less serious offenses. Tunsil at 1231.

Through a long line of cases, this Court has consistently imposed a rehabilitative suspension for the passing of worthless checks. The seriousness of the conduct is not mitigated by the fact

that the Respondent makes restitution. The Florida Bar v. Mayo, 439 So.2d 888 (Fla. 1983) (imposing a one year suspension where the Respondent had written checks for insufficient funds); and The Florida Bar v. Solomon , 589 So.2d 286 (Fla. 1991) (disbarring a Respondent for, inter alia, writing worthless checks on his operating account).

In the instant case, the Respondent's addiction and his commendable efforts at rehabilitation must be weighed against the severity of the trust account violations committed by the Respondent. As this Court has stated, while addiction may explain Respondent's conduct, it does not excuse it. The Florida Bar v. Setien, 530 So.2d 298 (Fla. 1988). The Court should require the Respondent to demonstrate rehabilitation prior to returning to the active practice of law. In view of the aggravating factor of the undisclosed trust account, the imposition of disbarment , or at minimum, a rehabilitative suspension would serve to protect the public, deter similar misconduct and encourage rehabilitation. Florida Bar v, Pahules, 233 So.2d 130 (Fla. 1970). Lastly, The Florida Standards for Imposing Lawyer Sanctions direct that aggravating factors may justify an increase in the degree of discipline.

B. The Bar's Petition For Emergency Suspension Was Filed in Good Faith and Based Upon The Incomplete Records Provided By the Respondent.

Rule 3-5.2 provides that this Court may issue an order of Emergency Suspension based upon an affidavit which proves clearly and convincingly that the attorney is causing great public harm. The petition for emergency suspension and the supporting affidavits submitted by the Florida Bar were filed in good faith and based upon the incomplete information provided to the Bar by the Respondent.

On September 15, 1995, pursuant to Rule 3-7.4, a subpoena duces tecum was issued to the Respondent and Capital Bank for the records which are required to be maintained pursuant to Rule 5-1.2. The subpoena was issued subsequent to the receipt of a Florida Bar complaint alleging trust account problems. Augusto Goncalves filed the complaint with the Florida Bar after receiving a check drawn from the Respondent's operating account in the amount of five hundred dollars (\$500) which was dishonored for insufficient funds.

On September 25, 1995, the deadline for producing the operating and trust account records required by the subpoena, the Respondent appeared at the Florida Bar offices.(TR-33). The Respondent produced only records from an inactive trust account.

(TR-33).

At the meeting, the Respondent advised Carlos Ruga, the Staff Auditor of the Florida Bar, that the majority of the Respondent's transactions were handled through his operating account.(TR-34) Ruga advised the Respondent the operating account records had to be produced in order to ensure that client funds were not being used improperly. (TR-34). Later that afternoon, the Respondent produced an incomplete set of operating account records.(TR-34)

After receiving bank statements from the Respondent's bank, Ruga conducted a review of the Respondent's operating account. The audit revealed that the Respondent's operating account, which by his own admission was the primary account used in his practice, had been overdrawn every single month with the exception of May during 1995. The bank statements showed numerous overdrafts and checks returned for insufficient funds. (TR-34) (RR 8).

In Ruga's affidavit for the emergency suspension, he states that the conclusions contained within the affidavit are based on the incomplete records which were then available and the Respondent's statement to Ruga that his addiction was negatively affecting his ability to practice. (Ruga's Affidavit to Petition For Emergency Suspension, Appendix A).

The preliminary investigation revealed the possibility of

great public harm especially considering the disarray of the Respondent's trust account and the negative effects of his addiction. Although, the petition for emergency suspension did erroneously plead that there **was** clear and convincing evidence of misappropriation, this Honorable Court should not be distracted from the fact that Respondent was suffering from an admitted serious chemical dependency and his trust accounts were in total disarray. In addition, these factors supported by Ruga's affidavit were sufficient to move the Court for an emergency suspension and for same to be granted. At the time that Ruga's affidavit was filed with this court, there was no evidence that the checks had been paid by the Respondent. Moreover, Ruga's review of the banking records showed that money from Goncalves had been improperly deposited in the Respondent's operating account. (TR-37-38).

The Bar's Petition was based on the available evidence that was presented by the Respondent at the time that the petition was filed. As the Respondent admitted, he failed to provide the Florida Bar with the required records to conduct a complete audit of his trust and banking accounts. (R's Answer to The Florida Bar's Complaint, Appendix B) .

Indeed, a complete set of trust account records were not provided to The Florida Bar until the day of the final referee

hearing in this matter. The existence of a second trust account only became known to the Bar on March 21, 1996. On March 25, 1996, the Referee ordered the Respondent to produce records regarding the trust account to the Bar. The trust account records were not provided until April 1, 1996 after the commencement of trial before the Referee.

The failure of the Respondent to produce all of the required operating and trust account records hampered Ruga from completing his audit of the Respondent's records. As Ruga states in his affidavit, his conclusions were based upon review of the incomplete records provided by Respondent and Capital Bank. There was no attempt by Ruga or The Florida Bar to misrepresent the harm which the Respondent posed to the community. Further, the Respondent admitted that the statements contained in Ruga's affidavit were correct. (Respondent's Answer to The Florida Bar's Complaint, Appendix B) ,

CONCLUSION

The facts of this case require that the Respondent receive a stricter sanction than the ninety day suspension recommended by the Referee. The Respondent's addiction must be weighed against the severity of his misconduct and the public harm which was caused. In addition, the discipline must be enhanced due to Respondent's lack of disclosing a trust account despite a properly served subpoena. In the instant case, in order to fulfill the purposes of lawyer discipline, the Respondent should receive disbarment or at minimum, a rehabilitative suspension of three years.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Reply Brief 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 33132, on this 8th day of August, 1996.


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APPENDIX

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- A. Affidavit of Staff Auditor, Carlos Ruga.
- B. Respondent's Answer to The Florida Bar's Complaint.