IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court No. 87,351

Florida Bar File No. 96-50,589(7I)

v.

FRANK THOMAS, 11,

Respondent.

THE FLORIDA BAR'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Case

The bar's complaint was filed on February 7, 1996. It consisted of three (3) counts, the first of which charged respondent with violations of Rules Regulating The Florida Bar 3-4.3 and 4-8.4(c) by the intentional misrepresentation to a client regarding a disbursement set forth on a personal injury settlement closing statement, the second of which charged respondent with a violation of Rules Regulating The Florida Bar 4-1.5(f)(4) by respondent's charging a contingent fee in excess of that permitted by the cited rule and the third of which charged respondent with violations of Rules Regulating The Florida Bar 4-1.15(b) and 5-1.1 by failing to account to and pay to his client that which his client was entitled to and misappropriating funds entrusted to him.

Respondent filed an answer denying the charged violations. After a full, plenary hearing, the referee filed a report in which he recommended that respondent be found guilty of violating Rules Regulating The Florida Bar 4-1.5(f)(4) and 5-1.1 and not guilty of violating any of the other rules charged as hereinabove recited. The referee has recommended that the respondent receive a public reprimand, make restitution of an excessive fee to his client and pay the bar's costs.

At its regular September, 1996 meeting, the Board of Governors of The Florida Bar voted to seek review of the referee's recommendations.

Facts

Heretofore, on or about March 30, 1992, one Helene Rottblatt [hereinafter called "Rottblatt"] slipped and **fell** sustaining personal injuries. [Admitted in respondent's answer]. Respondent undertook representation of Rottblatt in connection with a claim to recover damages for the personal injuries sustained by Rottblatt in the slip and fall case [Admitted in respondent's answer],

Respondent effected a settlement in Rottblatt's slip and fall case and confirmed the same with Rottblatt by letter to her dated June 23, 1995 [Bar's Exhibit 4 in evidence; 157[1]]. In such letter, respondent represented to Rottblatt, inter alia, as follows:

Enclosed are the following:

> 1. Aetna's check made payable to 'HELENE ROTTBLATT A SINGLE WOMAN AND THOMAS & THOMAS HER ATTY" in the amount of $21,000. As you know, this claim was settled for $16,000.00. The additional $5,000.00 is the Med Pay amount due Dr. Yehudian. Please endorse this check and return it to me for deposit into our trust account and appropriate disbursement.

Respondent prepared and presented to Rottblatt a closing

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[1] All number references are to pages of transcript of final hearing unless otherwise denoted.

statement executed by Rottblatt on June 28, 1995 [Bar's Exhibit 6 in evidence; 1641. The statement shows, as follows:

SETTLEMENT STATEMENT

RE: HELENE ROTTBLATT vs. HOME SAVINGS BANK

Total Recovery		$21,000.00
Less Med Pay to Dr. Irage Yehudian		5,000.00
		$16,000.00
LESS: Attorney's Fees	$5,333.00	
Dr. David S. Muransky	360.00	
		5,693.00
Net Recovery after Expenses		$10,307.00

Note: All medical obligations for both claims are paid in full.

Dated: *6/28/95* /s/HELENE ROTTBLATT

Respondent subtracted the $10,693.00 in deductions reflected in the closing statement [Exhibit 2] and remitted the balance of the total settlement recovery in the sum of $10,307.00 to Rottblatt [Admitted in respondent's answer; 164].

On or about July 24, 1995, respondent remitted to Irage Yehudian, M.D. the sum of $3,100.00 by a trust account check upon which respondent indicated "Payment of final bill - Rottblatt" [Bar's Exhibit 11 in evidence; 1801.

Respondent retained for his own use and purposes $1,900.00 of the $5,000.00 represented by respondent to Rottblatt as dedicated to Dr. Yehudian in respondent's June 23, 1995 letter [Bar's Exhibit

4 in evidence] and in the settlement statement prepared by respondent, presented to Rottblatt by respondent and executed by her on June 28, 1995 [Bar's Exhibit 6 in evidence]. While respondent denied this allegation in his answer, he admitted that he retained such $1,900.00 upon the final hearing [180].

Respondent's retention of the $1,900.00 as aforesaid, was without the knowledge, permission or consent by Rottblatt [47-52].

At the time respondent represented to Rottblatt in his June 23, 1995 letter to her [Bar's Exhibit 4 in evidence] that "The additional $5,000.00 is the Med Pay amount due Dr. Yehudian" and at the time respondent presented the settlement statement [Bar's Exhibit 6 in evidence] to Rottblatt which recited "Less Med Pay to Dr. Irage Yehudian $5,000.000", respondent knew that in truth and in fact Dr. Yehudian had agreed to accept $3,100.00 in full payment of Rottblatt's bill, respondent knew that he intended to pay to **Dr.** Yehudian $3,100.00 and not the $5,000.00 represented in his letter and settlement statement and respondent knew that his representations in his letter and settlement statement were false. These allegations were established by the following clear and convincing evidence.

Dr. Yehudian had, prior to his receipt of respondent's $3,100.00 trust account check [Bar's Exhibit 11 in evidence],

received a total of $4,900.00 represented by two additional checks, both dated July 11, **1995**, one in the amount of $2,358.00 and the other in the amount of $2,542.00 **[See** Bar's Exhibits **9** and 10 in evidence; 173, 175]. When the $3,100.00 trust account check remitted by respondent to Dr. Yehudian [Bar's Exhibit 11 in evidence] is added to the $4,900.00 previously received by Dr. Yehudian, the total received by Dr. Yehudian amounts to $8,000.00. By a fax communication to Dr. Yehudian dated June 21, **1995** [Bar's Exhibit **8** in evidence; 172], which communication was prior to his June 23, **1995** letter to Rottblatt and the June **28, 1995** settlement statement, respondent confirmed with Dr. Yehudian that the doctor had agreed to accept total medical fees of $8,000.00, thus producing the $3,100.00 balance actually paid by respondent and received by the doctor. Respondent knew at the time that he directed his June 21, 1995 fax to Dr. Yehudian that Dr. Yehudian had received $4,900.00 and would only receive $3,100.00 from the settlement proceeds. Respondent testified:

> Q. And the $3,100?
>
> A. And the $3,100, that is when he told me he would accept that. I confirmed it by fax to him and that was all pursuant to my agreement with Helene Roth or Ms. Rottblatt prior to the settlement [171].

At the same time respondent was representing Rottblatt in

connection with her slip and fall case, respondent was also representing her in connection with a claim to recover for personal injuries she had sustained as a result of an automobile accident [150]. Respondent's firm secured two (2) separate contingent fee agreements, one relating to the March 30, 1992 slip and fall case [Bar's Exhibit 3 in evidence; 151] and the other relating to the January 6, 1992 auto accident [Bar's Exhibit 2 in evidence; 151]. Each such contingent fee agreement restricts fees to the amount of recovery in the specifically referred to case. The two checks totaling the $4,900.00 [Bar's Exhibits 9 and 10 in evidence] received by Dr. Yehudian were remitted as PIP payments in connection with the auto accident, not the slip and fall case [172 - 174]. Each such check was remitted by the auto insurance carrier, Amico. The slip and fall case settlement proceeds were remitted by Aetna [See Bar's Exhibit 5 in evidence]. Thus, the total slip and fall proceeds remitted to respondent amounted to $21,000.00 as reflected by the settlement check [Bar's Exhibit 5 in evidence] and by the settlement statement prepared by respondent [Bar's Exhibit 6 in evidence]. Applying the one-third contingent fee percentage to the $16,000.00 net settlement proceeds as reflected on respondent's settlement statement produces a fee of $5,333.00 as computed by respondent [See Bar's Exhibit 6 in

evidence]. Respondent, concededly, took $5,333.00 plus $1,900.00, or $7,233.00.

Respondent never accounted to his client regarding the disbursement of the $1,900.00 to himself from the $5,000.00 he twice represented to her as a payment to Dr. Yehudian. Respondent could point to no documentation establishing such accounting. Ms. Rottblatt testified, as follows:

> Q. When is the first time that you became aware of a problem with the settlement, approximately?
>
> A. When I returned from New York around August 31st I called Doctor Irage Yehudian and told him that I was back from New York, and the case was settled, and I understand that he got the check for $5,000 from Frank Thomas. And I spoke with his bookkeeper who said to me, we never got a check for $5,000.
>
> so I --
>
> Q. What is his bookkeeper's name? I'm sorry to interrupt you. Do you remember?
>
> A. Julie.
>
> Q. Okay.

A. So I became very upset and I went over to Frank Thomas' office and I asked him what happened with the $5,000 that you wrote to me in the letter and told me on the phone that was earmarked for Doctor Yehudian in settlement of his bill?

And he said, I paid him.

I said, well, according to Julie, his secretary, that is not the amount that you paid him.

And he immediately got very loud, started shouting at me, got very defensive, started waving his hands around, and told me that his secretary was out to lunch and when she comes back if he has to ask her to look for a copy of the check, he wants somebody to pay $150 an hour for the time it takes to look for that check.

And I guess that somebody - I assume that somebody was going to have to be me. And that to me was very out of the ordinary. If he had paid the amount to Doctor Yehudian that he said he did, why wouldn't he then just show me

a copy of the check. Why was he telling me I'd have to pay $150 an hour and he doesn't know how long it would take to find it.

So I knew right away that he was trying to hide something. And his behavior was such that it frightened me a little that he reacted so.

SUMMARY OF ARGUMENT

The findings of fact reported by the referee are grounded in clear and convincing evidence adduced at the final hearing. When such findings are compared, however, with the referee's recommendations as to guilt and his recommended sanction, an inexplicable oxymoron is confronted. The referee's findings of fact clearly and convincingly establish each and every rule violation charged in the bar's complaint and dictate a sanction of disbarment.

ARGUMENT

I. THE FINDINGS OF FACT RECITED BY THE REFEREE CLEARLY AND CONVINCINGLY ESTABLISH ALL VIOLATIONS CHARGED BY THE BAR.

Respectfully, the referee's findings of fact simply do not jibe with his recommendations regarding guilt. In fact, even the predicate statements in his recommendations regarding guilt are inconsistent with his conclusions.

The bar charged that respondent violated Rules Regulating The Florida Bar 3-4.3 [conduct contrary to honesty and justice] and 4-8.4(c) [conduct constituting dishonesty, fraud, deceit, or misrepresentation] by knowingly representing to Rottblatt, first in his June 23, 1995 letter that "The additional $5,000.00 is the Med Pay amount due Dr. Yehudian" and then in the June 28, 1995 settlement statement "Less Med Pay to Dr. Irage Yehudian $5,000.00" when at the time of each such representation respondent knew that, in truth and in fact, Dr. Yehudian was to receive only $3,100.00 and by respondent's pocketing the $1,900.00 difference.

After meticulously reciting each and every fact regarding respondent's representations to Rottblatt [See Report of Referee, pages 2 through 4; paragraphs II(H) through II(M), inclusive], the referee then found:

N. Respondent was aware when he sent the June 23, 1995 letter to Rottblatt stating "The additional $5,000.00 is the Med Pay amount due Dr. Yehudian" and when Rottblatt signed the closing statement stating "Less Med Pay to Dr. Irage Yehudian $5,000.00". that Dr. Yehudian was owed, in truth and in fact, only $3,100.00 since respondent knew that Dr. Yehudian would be paid approximately $4,900.00 by AMICA, Rottblatt's automobile insurance carrier. Additionally, respondent knew at said time, as confirmed by his fax dated June 21, 1995 to Dr. Yehudian, that Dr. Yehudian agreed to receive $8,000.00 as total payment for his treatment of Rottblatt [Report of Referee, page 41.

In his recommendations regarding guilt, the referee recites:

A. While this court finds that at the time respondent represented to Rottblatt by means of the letter dated June 23, 1995 and in the closing statement that he prepared that Dr. Yehudian was due $5,000.00, when in truth and

in fact respondent knew Dr. Yehudian was only owed $3,100.00, this court does not find respondent guilty of a violation of Rules 3-4.3 or 4-8.4(c) [Report of Referee, page 6; paragraph III(A)].

In the bar's view, the referee's exoneration of respondent vis a vis Rules Regulating The Florida Bar 3-4.3 and 4-8.4(c) is belied by the record and by the referee's own findings and observations.

The bar charged respondent with a violation of Rules Regulating The Florida Bar 4-1.15(b) which rule mandates that a lawyer 'shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive . . .' In his findings of fact, the referee specifically recites that respondent was not, under any circumstances, entitled to the $1,900.00 difference between the $5,000.00 he represented to his client as being paid to Dr. Yehudian and the $3,100.00 actually paid to the doctor with respondent pocketing the difference [See Report of Referee, pages 5 and 6; paragraphs II(R) through II(U), inclusive]. He then recites:

V. This court finds that by retaining the $1,900.00 due Rottblatt, respondent took money

> entrusted to him for a specific purpose, and did not apply said money for that purpose [Report of Referee, page 6; paragraph II(V) I.

In his recommendations regarding guilt, however, the referee reports:

> C. As to Count III, this Court finds respondent not guilty of a violation of Rule 4-1.15(b), but finds respondent guilty of a violation of Rule 5-1.1 [Report of Referee, page 7; paragraph III(C)].

As in the case of his findings regarding the charges of dishonesty, the referee's conclusions regarding the 4-1.15(b) charge axe inconsistent. Having found that respondent was not entitled to pocket the $1,900.00 and that his retention thereof amounted to a breach of a specific entrustment in violation of Rules Regulating The Florida Bar 5-1.1, it is respectfully submitted that there could be no other conclusion but that respondent violated his duty promptly to remit the $1,900.00 to his client as mandated by Rules Regulating The Florida Bar 4-1.15(b)and, ironically, as directed by the referee in his recommendations as to disciplinary measures to be applied [See Report of Referee, page 7; paragraph IV(2).

II. RESPONDENT'S MISREPRESENTATIONS AND MISAPPROPRIATION WARRANT IMPOSITION OF THE SANCTION OF DISBARMENT.

Distilled to its basics, the facts established below, as reported by the referee present a respondent who misrepresented to a client the distribution of settlement proceeds and then misappropriated a portion of such proceeds. Such misconduct, it is respectfully submitted, warrants disbarment.

In **Florida Bar v. Schiller**, 537 so. 2d 992 (Fla. 1989), this Court reiterated that upon a finding of misuse or misappropriation there is a presumption of disbarment, With three (3) dissents for disbarment, the Court, in **Florida Bar v. McShirley**, 573 So. 2d 807 (Fla. 1991), imposed **a** three (3) year suspension in a misappropriation case where there was restitution prior to bar involvement, remorse, cooperation and lack of client harm. In the case at bar, however, there has been no restitution [See Report of Referee, page 5; paragraph II(T)]. Certainly, respondent's client has suffered harm by not receiving the $1,900.00 skimmed by respondent from the designated medical payment to Dr. Yehudian. The record is devoid of any indication of remorse on respondent's part.

The **Florida Standards for Imposing Lawyer Sanctions** indicate that disbarment is the appropriate sanction. Standard 4.11 recites

that disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury. Standard 4.61 recites that disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury.

CONCLUSION

It would seem axiomatic that in the hierarchy of bar offenses, none could be worse than misrepresenting to and misappropriating from a client. Respondent did both. He should be appropriately sanctioned.

All of which is respectfully submitted.

David M. Barnovitz #0335851

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to by U.S. Mail addressed to respondent at 1917 Harrison Street, Hollywood, Florida 33309 this 2nd day of October, 1996.

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