IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	
Petitioner-Appellant,	)	**Supreme Court**
	)	**No. 94,099**
v.	)	
	)	**The Florida Bar File**
DOMENIC LEONARD GROSSO,	)	**No. 98-50,994(15F)**
	)	
Respondent- Appellee.	)	
_____)		

THE FLORIDA BAR'S INITIAL BRIEF

DAVID M. BARNOVITZ, #0335551
Bar Counsel
The Florida Bar
5900 North Andrews Avenue, Suite 835
Fort Lauderdale, FL 33309
(954) 772-2245

JOHN A. BOGGS, #253847
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5839

JOHN F. HARKNESS, JR. #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5839

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CERTIFICATION AS TO FONT SIZE AND STYLE

Pursuant to this court's Administrative Order In Re: Brief Filed in the Supreme Court of Florida, the undersigned bar counsel hereby certifies that this brief is produced in a font that is 14 point proportionately spaced Times New Roman style.

STATEMENT OF THE CASE AND FACTS

Case

The bar's complaint was filed on October 3, 1998. The referee conducted the final hearing on February 25, 1999, March 12, 1999, and April 12, 1999. The referee issued his report dated May 15, 1999, finding respondent guilty of two rule violations: R. Regulating Fla. Bar 4-1.15(a)[A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation...Other property shall be identified as such and appropriately safeguarded] and 4-1.15(b)[Except as stated in this rule or otherwise permitted by law or by agreement with the client, 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 and, upon request by the client or third person, shall promptly render a full accounting regarding such property]. The referee recommended that respondent be suspended for a period of fifteen days.

The referee's report was considered by the bar's board of governors at the meeting which ended August 21, 1999. The board determined to petition for review of the referee's fifteen day sanction, seeking a ninety-one day suspension in lieu thereof.

Facts

Respondent undertook representation of one Michael Cusick in a dissolution of marriage case during the course of which Mr. Cusick was charged with domestic abuse. Mr. Cusick entered a no contest plea and was placed on a one year term of probation. As a condition of his probation, Mr. Cusick had to give up physical possession of his firearms collection during the term of his probation [2/25/99 hearing transcript, page 9].

Respondent advised the court and the assistant state attorney that he would take possession of his client's weapons collection and that he would retain custody and control thereof until Mr. Cusick's probation was terminated. The court and state attorney's office approved of such arrangement [See paragraphs 6 and 7 of the bar's complaint admitted in paragraph 1 of respondent's answer].

Respondent took possession of a total of thirty-one firearms, which he agreed to hold in trust for his client until the end of the probation period [See paragraph 8 of the bar's complaint admitted in paragraph 1 of respondent's answer]. A letter memorializing the agreement between respondent and his client was sent to the presiding judge along with a list of the firearms received by respondent [See the bar's composite exhibit A in evidence].

Mr. Cusick's probation ended on or about October 7, 1997, at which time he made demand on respondent for the return of his gun collection [See paragraph 11 of the bar's complaint admitted to in paragraph 1 of respondent's answer]. By letter to Mr. Cusick

dated the same date, respondent informed his client that he required a letter from the probation department confirming that the probation had been terminated [See page 1 of the bar's composite exhibit C in evidence]. Mr. Cusick immediately produced such confirmation [See page 2 of the bar's composite exhibit C in evidence]. On October 15, 1997, respondent returned to Mr. Cusick twenty-nine of the thirty-one firearms that had been entrusted to him as evidenced by an inventory and receipt dated that day [See the bar's exhibit B in evidence].

By letter to Mr. Cusick dated October 16, 1997, respondent acknowledged that two of the firearms that had been entrusted to him were missing, with one likely still kept in respondent's garage [See the bar's exhibit D in evidence]. Respondent had stored the gun collection in his garage where some rusted and pitted [2/25/99 hearing transcript, page 15]. By letter to Mr. Cusick dated October 17, 1997, respondent acknowledged that the condition of the firearms was such as being "a little dusty and dirty" and advised his client that insofar as the missing items were concerned:

> "I'll do what I can, okay? I'll call you, you don't have to call me [See the bar's exhibit E in evidence].

By October 30, 1997, having not, as of that date, received his missing firearms, Mr. Cusick made repeated calls to respondent who, by letter of that date, wrote to his client, stating:

> I don't want to be bothered with you any more, Michael. Don't bother me,

> don't call me. I will get you your weapons back and we will end this. You have 29 weapons to sell, Michael. Is this the only thing that is going on in your life. Have you got other things to do? When I find them, I will give them to you. In addition, I believe one of the weapons I gave you might belong to Mike Barbera, a friend of mine, because he said he left one in my son's room when he was staying there. So I will get them to you, Michael, okay? Don't call me. I will call you. [See the bar's exhibit F in evidence].

Still not having received the missing weapons, Mr. Cusick wrote to respondent by letter dated November 5, 1997, again requesting the return of the missing items [See the bar's exhibit G in evidence]**.** Respondent replied by a November 7, 1997, letter in which he stated:

> I got your note and we met personally on November 6. By the way, it was my birthday. Mike, you're like a dog with the bone. I told you that I would look for those two items and when I found them I would return them. My response is the same. When I find them, I find them. Again, in reference to that pistol, I believe that was the one you brought to the office. I'll have to look hard and deep for that one. I think I may have brought it home. I'm not going to get into this anymore. I'll give them to you when I can. [See the bar's exhibit H in evidence].

One of the weapons returned to Cusick by respondent, a 9 mm carbine, was missing the bolt handle thereby rendering the weapon inoperable. [See bar exhibits E and G in evidence]. On or about August 7, 1998, respondent paid to Mr. Cusick $280.54 for the lost .45 handgun. [See paragraph 15 of the bar's complaint admitted to in paragraph 1 of respondent's answer]. Despite repeated demands, Respondent failed to return the .45 carbine and the bolt handle for the 9 mm carbine, the .45 carbine being represented by Cusick as a collector's item and irreplaceable [2/25/95 hearing transcript, pages 23, 24,

and 28]. The items were not returned as of February 25, 1999, the date of the final hearing in the disciplinary proceeding below [2/25/99 hearing transcript, pages 32 and 33].

With respect to the missing .45 carbine, respondent testified, under oath, at the final hearing, as follows:

> The other weapon, Your Honor, the one weapon that is missing I believe it's a carbine. I had contacted Mr. Cusick last year, which wasn't that long ago. It was about two or three months ago. I left a message on his machine indicating the fact I had found that weapon and to make some sort of arrangements to come over and pick it up. He in turn called me back - I still have these messages on our machine - and said we should make some sort of arrangements. And then I got this from the Bar, and I just never followed up in reference to that. ***But I do have the weapon, the one that's in the cardboard box.*** [2/25/99 hearing transcript, page 32, emphasis supplied].

On the very same point, Mr. Cusick testified, under oath, at the final hearing, that he had written a letter to respondent in July, 1998, [bar's exhibit J in evidence] requesting that respondent gather the various missing items and return them as soon as possible. He then testified that subsequent to such July, 1998, letter, respondent had made one call to him around the time of the letter suggesting that Mr. Cusick come to respondent's home and pick up his [Cusick's] property; that Mr. Cusick responded by stating that respondent should call with a date when he wished to meet; and that from that time forward to the date of the final hearing, respondent had made no further contacts [2/25/99 hearing transcript, pages 22 and 23].

The referee announced at the conclusion of the final hearing that a report would

be entered recommending that respondent be found not guilty conditioned upon his return to Mr. Cusick of the missing rifle within fifteen days from the date of the final hearing. He warned respondent that he would be found guilty should he not comply and emphasized and re-emphasized the necessity that respondent comply within the referenced fifteen (15) day period [2/25/99 hearing transcript, pages 44 and 45].

Notwithstanding the foregoing, respondent did not make any effort at contacting Mr. Cusick within the fifteen days allotted to him, which fifteen day period ended on March 12, 1999. [3/18/99 hearing transcript, pages 4 through 8].

Even after a March 18, 1999, hearing was set to address respondent's total disregard of the opportunity afforded to him, he made no effort to contact Cusick to return the weapon. [3/18/99 hearing transcript, pages 6 and 7]. At the March 18, 1999, hearing, having been informed that this bar discipline case would be called immediately upon the conclusion of the referee's trial calendar call, respondent nonetheless determined to leave the area to have a cup of coffee, causing him to be tardy and necessitating that the referee dispatch a bailiff to find him.[3/18/99 hearing transcript, pages 3, 4].

Upon the March 18, 1999, hearing, respondent, despite having represented under oath at the original hearing that " I do have the weapon, ***the one that's in the cardboard box***" (emphasis supplied) , now asserted:

> And the weapon that I have - and I talked to Mike about this -

> this is a weapon that I found, that I told him I had found. And the only problem was, Your Honor, he said the one that he gave me was in a box. ***The one I found was not in a box.*** (March 18, 1999, transcript, page 6 , emphasis supplied].

Subsequent to such hearing, by letter dated April 7, 1999, addressed to Mr. Cusick, and copied to the referee, respondent reported:

> Dear Michael: As I reported to you before, I have searched high and low to try to locate the carbine, without any success.

Respondent then, in such letter, making reference to alleged conversations with Cusick, all of which were dehors the record, enclosed a check to Mr. Cusick's order for what respondent considered to be restitution for the missing firearm. The letter was received in evidence as the bar's exhibit L.

In addition to such letter constituting an ex parte communication to the referee (see report of referee, page 8, item 31), respondent directly contradicted his testimony in the original hearing in which he stated that he had located the missing carbine, a position that he still maintained at the March 18, 1999, hearing.

SUMMARY OF ARGUMENT

This case involves the misuse of property (a firearms collection) which was specifically entrusted to respondent by his client for a specific purpose. It is the bar's

position that a misuse of property entrusted to an attorney for a specific purpose carries with it the same consequences as would occur had the subject of the specific entrustment been funds.

Among other aggravating factors, the referee found that respondent testified falsely, under oath, at the final hearing.

The bar submits that a respondent's misuse of property entrusted to him for a specific purpose, coupled with his false testimony under oath and an extensive discipline history mandates a sanction of at least a 91-day suspension; that the referee's recommendation of a 15-day suspension viewed in light of his findings of fact and of law is an anomaly and does not serve the purposes of formal disciplinary proceedings as enunciated in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970).

ARGUMENT

POINT I - UPON A FINDING OF PERJURY AND/OR MISUSE OR MISAPPROPRIATION OF PROPERTY, THERE IS A PRESUMPTION OF DISBARMENT.

Perjury

In his report, the referee states:

> Most perplexing of all, respondent testified falsely, under oath, in stating that he had found the missing carbine, when, in truth and in fact, he had not. That's as egregious, if not more so, than the violations respondent was charged with in the bar's complaint and for which respondent has been found guilty [report of referee, page 11].

This court has brooked no tolerance for attorney perjury. Thus, in The Florida Bar v. O'Malley, 534 So.2d 1159 (Fla. 1988), it stated:

> "Our system of justice depends for its existence on the truthfulness of its officers. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment.

In the case at bar, the court is presented with a respondent who, at the final hearing before the referee, falsely testified regarding one of the firearms that had been specifically entrusted to him. At first, he testified:

> The other weapon, Your Honor, the one weapon that is missing I believe it's a carbine. I had contacted Mr. Cusick last year, which wasn't that long ago. It was about two or three months ago. I left a message on his machine indicating the fact I had found that weapon and to make some sort of arrangements to come over and pick it up. He in turn called me back - I still have these messages on our machine - and said we should make some sort of arrangements. And then I got this from the Bar, and I just never followed up in reference to that. ***But I do have the weapon, the one that's in the cardboard box.*** [2/25/99 hearing, page 32, emphasis supplied].

He then changed his story at a subsequent hearing, when he testified:

> And the weapon that I have - and I talked to Mike about this - this is a weapon that I found, that I told him I had found. And the only problem was, Your Honor, he said the one that he gave me was in a box. ***The one I found was not in a box.*** (March 18, 1999 transcript, page 6 , emphasis supplied].

Subsequent to such hearing, by letter dated April 7, 1999, addressed to Mr. Cusick, and copied to the referee, respondent confessed:

> Dear Michael: As I reported to you before, I have searched high and low to try to locate the carbine, without any success [bar's exhibit L in evidence].

Misuse of Client Property

The referee found that respondent had violated R. Regulating Fla. Bar 4-1.15(a) and 4-1.15(b) as a result of respondent's failing properly to safeguard his client's property and as a result of his failure promptly to return all items held in trust for his client [report of referee, pages 8 and 9].

This court has repeatedly and consistently held that misuse of client funds is among the most serious infractions a lawyer can commit. The Florida Bar v. Dubow, 636 So.2d 1287 (Fla. 1994); The Florida Bar v. MacMillan, 600 So.2d 457 (Fla. 1992); The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990); The Florida Bar v. Breed, 378 So. 2d 783 (Fla. 1979).

The bar submits, that although the axiom cited makes reference to "funds" the court would include as an equally serious offense, the misuse of client property [other than funds]. No distinction is made between funds and property in the Florida Standards

for Imposing Lawyer Sanctions. Standard 4.12 provides:

> Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

R. Regulating Fla. Bar 4-1.15(a) makes specific reference to "funds and property." The same is true with respect to Rule 4-1.15(b). Rule 5-1.1 entitled "Nature of Money or Property Entrusted to Attorney" makes no distinction.

The Florida Bar v. MacMillan, 600 So.2d 457 (Fla. 1992) appears to be the only published opinion dealing directly with a respondent's misuse of client property as distinguished from client funds. There, among other violations, the respondent was found by the referee to have violated R. Regulating Fla. Bar 5-1.1 and 4-1.15(a) "for failure and inability to deliver . . . three items of jewelry entrusted to him as guardian. .."[page 459]. While the court approved the report of referee, its discussion focused exclusively on other misconduct with only preamblatory reference to the missing jewelry.

The court has considered an attorney's negligent handling of client funds, contrasted with intentional misuse thereof, as warranting severe sanctions. In The Florida Bar v. Weiss, 586 So.2d 1051 (Fla. 1991), the court imposed a six-month suspension for such negligent misuse. In The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991), the court noted:

> Although restitution has been made, it makes little difference to the beneficiaries whether money was withheld from the estates intentionally or

through negligence (178).

The bar most respectfully urges that there is no distinction to be drawn between an attorney's intentional or negligent misuse of client funds and an attorney's intentional or negligent misuse of client property other than funds. It would follow, therefore, that in the case at bar, respondent's inability to return two of his client's firearms that had been specifically entrusted to him, constitutes an offense of the same seriousness as those in the above cited cases.

POINT II - THE REFEREE'S SANCTION RECOMMENDATION IS TOO LENIENT AND INCONSISTENT WITH THE FINDINGS OF FACT, ANALYSIS OF LAW AND AGGRAVATING FACTORS RECITED IN HIS REPORT.

The referee's recommendation of a fifteen day suspension is inconsistent with his own findings and the precedent cited by him in his report of referee.

In arriving at his sanction recommendation, the referee examined the standards, duty violated, precedent, and mitigating and aggravating factors, acknowledged the extremely serious nature of respondent's misconduct and the equally serious sanctions meted out in similar cases but then recommended a sanction which appears to bear no relationship to his own analysis.

The referee first considered the duty violated and found:

Florida Standards for Imposing Lawyer Sanctions, Standard 4.12 provides:

> Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury

to a client [Report of Referee, page 9, article IV].

The referee then discussed both precedent and Florida Standards for Imposing Lawyer Sanctions, reporting:

> The Supreme Court of Florida has addressed an attorney's dealing with client property in a negligent or grossly negligent manner, concluding that suspension is an appropriate sanction in such cases. In The Florida Bar v. Weiss, 586 So.2d 1051 (Fla. 1991), involving negligent misuse of client funds, the Court, in imposing a six-month (6) suspension, contrasted cases of intentional misuse versus negligent or grossly negligent conduct and determined that suspension, rather than disbarment, was the appropriate sanction. The same is true in The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991), where the Court, in imposing a three-year (3) suspension, noted:
>
> > Although restitution has been made, it makes little difference to the beneficiaries whether money was withheld from the estates intentionally or through negligence (178).
>
> While the reported cases involve instances of attorney misconduct vis a vis client and/or third party funds, the Florida Standards for Imposing Lawyer Sanctions and the Rules Regulating The Florida Bar make no distinction between client funds or other client property. Thus, Standard 4.1 is entitled "Failure To Preserve The Client's Property." Rule 4-1.15(a) makes specific reference to "funds and property." The same is true with respect to Rule 4-1.15(b). Rule 5-1.1 entitled "Nature of Money or Property Entrusted to Attorney" makes no distinction. In The Florida Bar v. MacMillan, 600 So.2d 457 (Fla. 1992), the respondent was suspended for two (2) years for various violations including respondent's inability to return items of jewelry entrusted to him.
>
> In applying the factors set forth in Florida Standards for Imposing Lawyer Sanctions, Standard 3.0, I find that the duty violated, viz., an attorney's need zealously to safeguard property entrusted to him, is one of the most serious duties that confronts an attorney [Report of Referee, Article IV, pages 9 and 10].

Turning his attention to mitigating and aggravating factors and respondent's discipline history, the referee reported:

Mitigation

In mitigation, I find that respondent made an attempt to make restitution [Report of Referee, Article IV, page 10].

Aggravation

> There was no evidence introduced to indicate that respondent's mental state was, in any manner, impaired. Respondent caused actual injury to his client in causing the property entrusted to respondent to become degraded through improper storage and by losing items of property, one said to be irreplaceable. . . In aggravation, I find that respondent has an extensive disciplinary history as enumerated below, submitted a false statement during the final hearing, and has substantial experience in the practice of law.
>
> It is difficult to determine whether respondent's attitude during these bar disciplinary proceedings was cavalier or lackadaisical. He defaulted in filing an answer to the bar's complaint causing a judgment by default to be entered. Bar counsel stipulated to the vacating of the default upon respondent's offering an excuse, which excuse, [that respondent's secretary placed the bar's complaint in the wrong file] in itself, demonstrated a lack of supervision by respondent of his office personnel. At the hearing set to find out why respondent had not taken advantage of the opportunity I had afforded to him to escape a recommendation of guilt, respondent, being informed that his case would be called immediately upon the conclusion of my trial calendar call, determined to leave the area to have a cup of coffee, causing him to be tardy and necessitating that I dispatch a bailiff to find him.
>
> Most perplexing of all, respondent testified falsely, under oath, in stating that he had found the missing carbine, when, in truth and in fact, he had not. That's as egregious, if not more so, than the violations respondent

was charged with in the bar's complaint and for which respondent has been found guilty. See The Florida Bar v. Segal, 663 So. 2d 618 (Fla. 1995) and R. Regulating Fla. Bar 4-3.3(a)(1) which provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. He wasted the time of this referee and of bar counsel [Report of Referee, Article IV, pages 10 and 11].

Discipline History

A. In The Florida Bar v. Grosso, Florida Bar File No. 94-50,320(15F), a report of minor misconduct was entered on May 6, 1994, imposing the sanction of an admonishment for respondent's violations of Rules Regulating The Florida Bar 4-1.2(a) which mandates that an attorney comply with client directions; 4-1.3 which mandates that a lawyer provide diligent representation; and Rule 4-1.5(a) which prohibits the collection of an excessive fee. Respondent was directed to refund the excessive fee to his client.

B. In The Florida Bar v. Grosso, Florida Bar File No. 93-51,029(15F), a report of minor misconduct was entered on June 21, 1994, imposing the sanction of an admonishment for respondent's violation of Rules Regulating The Florida Bar 4-1.3 which mandates that a lawyer provide diligent representation.

C. In The Florida Bar v. Grosso, 647 So.2d 840 (Fla. 1994), an order was entered by the Supreme Court of Florida imposing a ten-day (10) suspension for respondent's violations of Rules Regulating The Florida Bar 3-4.8 and 4-8.4(g), which rules mandate that a respondent file written responses to bar investigative inquiries, upon respondent's total default in responding to a bar investigative inquiry, in responding to a grievance committee's subsequent inquiry, and for defaulting in the referee level proceeding commenced upon the committee's finding of probable cause.

D. In The Florida Bar v. Grosso, 659 So.2d 1090 (Fla. 1995), an order was entered by the Supreme Court of Florida imposing a public reprimand for respondent's violations of Rules Regulating The Florida Bar 4-1.1, which rule mandates that an attorney provide competent representation to clients; Rule 4-1.3, which rule mandates that an attorney

provide diligent representation; and Rule 4-1.4(a), which rule mandates that an attorney respond to client inquiries and keep clients reasonably informed regarding the status of cases [Report of Referee, Article V, pages 12 and 13] [Report of Referee, Article V, pages 13 and 14].

In the bar's view, the referee's acknowledgment of the extremely serious nature of respondent's trust offenses and what the referee found to be aggravation as egregious or more so [compared to the trust violations] in respondent's testifying falsely under oath, when coupled with respondent's extensive discipline history, renders the referee's 15-day suspension recommendation an anomaly. The bar respectfully submits that, at a minimum, the respondent be sanctioned with a 91-day suspension which the bar suggests would best conform to the purposes of discipline as enunciated in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) and especially the third such enunciated purpose, viz., "to deter others who might be prone or tempted to become involved in like violations (132)".

POINT III - A CAUTION BY THE COURT REGARDING THE CONSEQUENCES OF AN ATTORNEY'S MISUSE OR MISAPPROPRIATION OF PROPERTY AS DISTINGUISHED FROM FUNDS WOULD BENEFIT THE PUBLIC AND THE BAR.

There is a dearth of precedent involving the consequences resulting from an attorney's misuse of property [as distinguished from funds] entrusted to the attorney for a specific purpose. The bar respectfully requests that the court consider the issuance [in its opinion and order herein] of a caution to the public and the bar that the same

consequences result from the misuse of property as from the misuse of funds. Upon oral argument in The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989), the bar urged the court to address the issue of an attorney's entering into an agreement deterring an individual from bringing an allegation of misconduct to the attention of the bar. The court graciously addressed such issue by stating: "We caution the public and the Bar that any such agreement is not enforceable." Such caution has been of inestimable value to the public and to the bar. It is respectfully submitted that a pronouncement by the court regarding a property entrustment to an attorney will be equally invaluable.

CONCLUSION - MISUSE BY AN ATTORNEY OF PROPERTY ENTRUSTED TO HIM FOR A SPECIFIC PURPOSE COUPLED WITH FALSE TESTIMONY TO A REFEREE AND AN EXTENSIVE DISCIPLINE HISTORY SHOULD RESULT IN A SANCTION OF AT LEAST A 91-DAY SUSPENSION.

All of which is respectfully submitted.

David M. Barnovitz, # 0335551
Bar Counsel
The Florida Bar
5900 North Andrews Avenue, Suite 835
Fort Lauderdale, FL 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been served upon the respondent by U.S. Mail addressed to him at 900 North Federal Highway, Boca

Reflections, Suite 420, Boca Raton, FL 33432 on this day of ,1999.

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David M. Barnovitz