IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

DOMENIC L. MASSARI III,

Respondent.
_____/

Case No. SC01-724

TFB No. 2000-11,891 (13F)

REPORT OF REFEREE

I. Summary of Proceedings:

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings according to the Rules Regulating The Florida Bar, any pleadings, notices, motions, orders, transcripts, and exhibits are forwarded to The Supreme Court of Florida with this report, and constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Brett A. Geer, Esq.
For the Respondent: John A. Weiss, Esq.

II. Nature of the Case:

On April 4, 2001, The Florida Bar filed a Complaint against Respondent, based on Bar grievances originally filed by attorneys Susanna Shea and Daniel Moody, and by Officer K.K. Clark of the Tampa Police Department. The case was tried in Clearwater, Florida, on August 20 and 21, 2001, at which the following witnesses testified: Ronald D. Martinez, Donna Durbin, Kirby Harlow, Ray Green, Larry Rardon, Brenda Rona Terry, Judith Hebert, Brad Muller, and the respondent, Domenic L. Massari III. A hearing on sanctions was held September 27, 2001. This report followed.

III. Findings of Fact:

Respondent represented Ronald D. Martinez and his Florida corporation, Martinez Construction and Design, Inc., in a civil case involving a contract dispute over monies owed for a residence that Mr. Martinez' corporation had built for a Dr. and Mrs. Steen. In September, 1997, Mr. Martinez executed a document titled "Contractor's Final Affidavit" pursuant to the litigation. (Bar's Exhibit 1.) Prior to the case settling, Mr.

Martinez had paid Respondent $7,000.00 in fees. On February 14, 2000, the case settled at mediation. The Steens agreed that Mr. Martinez' company would receive $30,000.00 from funds held in escrow by First American Title Insurance Company. Mr. Martinez and Respondent agreed that, upon receipt of the $30,000.00, Respondent would receive an additional $5,000.00 in legal fees, plus costs (if any), to conclude the representation. For his part, Mr. Martinez agreed to release the claim of lien that his corporation had placed on the Steens' real property. The Steens' counsel, Moody & Shea, P.A., provided Respondent with a blank form Satisfaction and Release of Lien, to effectuate this aspect of the agreement.

Someone other than Ronald Martinez signed Mr. Martinez' name to the Satisfaction and Release of Lien. Respondent's longtime secretary, Judith Hebert, notarized the document, attesting that Mr. Martinez had indeed affixed his signature to it on March 8, 2000. On March 13, 2000, Respondent traveled to First American Title Insurance Company and presented the forged Satisfaction and Release of Lien to Donna Durbin, the office manager. The undersigned specifically finds that Ronald D. Martinez did not sign the Satisfaction and Release of Lien on March 8, 2000; moreover, at no time did Mr. Martinez grant any power of attorney to Respondent, nor did he otherwise authorize Respondent to sign any legal document in his stead. Ms. Durbin accepted the document Respondent presented and she gave Respondent a check for $30,000.00, made payable to Martinez Construction and Design, Inc.

Though the check did not identify him as a payee, Respondent indorsed and negotiated the check and deposited the funds into his client trust account on the day he received it, March 13, 2000. Respondent did not notify Mr. Martinez of his receipt of the funds into his trust account, nor did he inform Mr. Martinez generally of the true facts surrounding how and when he had obtained the funds. Within a short time, Respondent made five separate disbursements encompassing the entire $30,000.00, for his own purposes. The disbursements were as follows: 1) On March 13, 2000, Respondent disbursed $7,238.30 as his "fee" for the Martinez representation; 2) on March 16, 2000, Respondent disbursed $4,500.00 to himself; 3) on March 24, 2000, Respondent disbursed $9,711.70 from the Martinez ledger account to another client ledger account, ostensibly to refund fees paid to him previously by another client; 4) on March 28, 2000, Respondent disbursed $7,800.00 to himself; and 5) on March 30, 2000, Respondent disbursed the remaining $750.00 to himself. Respondent admits that these disbursements were made for his own personal use or benefit. Respondent failed to advise Mr. Martinez of the true facts surrounding his use and disbursement of the funds, at any time. The undersigned finds that Mr. Martinez was entitled to receive the funds in March, 2000, when Respondent received them.

When Mr. Martinez did not receive his settlement proceeds in a timely manner, he asked Respondent about it, but did not receive a satisfactory response. Then sometime in May,

2000, Mr. Martinez expressed his concerns to an attorney-friend of his, Larry Rardon, who suggested that he contact the title company holding the money. Acting on this suggestion, Mr. Martinez called First American Title Insurance Company in Tampa, Florida. The escrow assistant, Kirby Harlow, told Mr. Martinez that his account showed a zero balance, and that his proceeds had been disbursed back in March. Mr. Martinez then traveled to the title company, on or about May 26, 2000, and met with the office manager, Ms. Durbin, and Ms. Harlow. They showed him the Satisfaction and Release of Lien that Respondent had delivered to the title company (and which the title company had caused to be recorded in the official records). Mr. Martinez told Ms. Durbin and Ms. Harlow that the notarized signature on the document was not his. They also showed Mr. Martinez the negotiated check, and he declared that he had not indorsed or negotiated the check. Ms. Durbin then notified the Steens' legal counsel, Moody & Shea, P.A., regarding Mr. Martinez' declarations. Moody & Shea, P.A. contacted the Tampa Police Department and The Florida Bar, both of which initiated investigations.

On June 13, 2000, Respondent deposited $24,200.00 back into the client ledger account of Martinez Construction & Design, Inc. On that same day, Respondent paid $24,200.00 to Mr. Martinez, thus retaining $5,800.00 as his fee. Respondent and/or his staff prepared a letter addressed to Sergeant C.J. Waters of the Tampa Police Department, which Respondent wanted Mr. Martinez to sign. The evidence is in dispute regarding the intent of the letter. In any event, Mr. Martinez, satisfied to have received his money, did not wish to see criminal charges pressed against Respondent, and so informed the police, which ultimately did not pursue the matter.

On October 3, 2000, pursuant to the Bar investigation, Respondent and his counsel met with assistant staff counsel Brett A. Geer of The Florida Bar, at the Bar offices in Tampa. Respondent presented Mr. Geer with a document titled "Martinez Escrow Instructions." (Bar's Exhibit 10.) That document contains a notarized signature of Ronald D. Martinez, as well as Respondent's notarized signature. Respondent attempted to rely on this notarized document as a sort of grant of authority from Mr. Martinez to himself, to explain his conduct involving his receipt, possession, and use of Mr. Martinez' proceeds. The "Martinez Escrow Instructions" recites that the document was signed on February 14, 2000; however, the undersigned specifically finds that Ronald Martinez did not sign that document on that date, or on any other. The signature of Ronald Martinez appearing on the "Martinez Escrow Instructions" is a transposition of his actual signature appearing on Bar's Exhibit 1, the Contractor's Final Affidavit. As such, it must be concluded that the "Martinez Escrow Instructions" document is fraudulent. Though no direct proof was adduced showing who was responsible for concocting the document, the undersigned finds that Respondent is the only person who had motive and reason for transposing the signatures. The fact that the transposed signature appears on the document is evidence of a deliberate and knowing act.

IV. Recommendations as to Whether or Not the Respondent Should be Found Guilty:

The evidence is clear and convincing that Respondent is guilty of violating the following Rules Regulating The Florida Bar:

> Rule 4-1.4(b) (A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.)
>
> Rule 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 the lawyer's possession in connection with a representation. [...].)
>
> Rule 4-1.15(b) (Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. 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 [...].)
>
> Rule 4-3.4(b) (A lawyer shall not fabricate evidence, or counsel or assist a witness to testify falsely [...].)
>
> Rule 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.)
>
> Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Further, I find the Complainant did not carry its burden of proving by clear and convincing that Respondent violated the following pleaded rules:

> (Rule 4-3.3(a) (A lawyer shall not knowingly make a false statement of material fact to a tribunal.)
>
> Rule 4-4.1(a) (In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.)
>
> Rule 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.)

V. Recommendations as to Disciplinary Measures to be Applied:

I recommend that Respondent be disbarred for five (5) years from the practice of law in Florida, subject to readmission through the Florida Board of Bar Examiners. Respondent must also pay all expenses incurred by The Florida Bar in bringing this proceeding, which expenses are identified herein.

VI. Personal History and Past Disciplinary Record:

Respondent is 48 years old, and was admitted to The Florida Bar on October 18, 1973. He has no previous disciplinary record, and is not certified in any practice area.

Aggravating Factors: The following factors described in the Florida Standards for Imposing Lawyer Sanctions are found to aggravate the instant misconduct: Dishonest or selfish motive (Standard 9.22(b)); Pattern of misconduct (Standard 9.22(c)); Multiple offenses (Standard 9.22(d)); Submission of false evidence, false statements, or other deceptive practices during the disciplinary process (Standard 9.22(f)); Refusal to acknowledge wrongful nature of conduct (Standard 9.22(g)); Substantial experience in the practice of law (Standard 9.22(i)).

Mitigating Factors: Absence of a prior disciplinary record (Standard 9.32(a)).

VII. Statement of Costs and Manner in Which Costs Should be Taxed:

I find that the following costs incurred by The Florida Bar in this proceeding, as set forth in the Bar's Amended Affidavit of Costs, were reasonably incurred:

Administrative costs pursuant to Rule 3-7.6(o)(1)(I).....	$ 750.00
Bar Expenses	7,209.78
Staff Investigator Expenses.....	480.70
TOTAL COSTS INCURRED BY THE FLORIDA BAR:	$ 8,440.48

It is recommended that the finalized itemized costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning thirty (30) days after the judgment in this cause becomes final, unless a waiver is granted by the Board of Governors of The Florida Bar.

DATED this _____ day of _____, 2001.

Hon. J. Thomas McGrady III
Referee

Copies:

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