

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant

Supreme Court No.
SC03-420

v.

The Florida Bar Case No.
2002-51,218(15B)

GARRY R. SPEAR,

Respondent/Appellant.

_____ /

INITIAL BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as “the Bar” or “The Florida Bar.” Garry R. Spear, Appellee, will be referred to as “respondent.” The transcript of the hearing before the Referee will be denoted by the symbol “(T.____)”.

STATEMENT OF THE CASE

In February 2002, the Bar received information that \$85,000.00 may be missing from respondent's account. On March 11, 2003, The Bar filed a complaint against respondent. On April 2, 2003, respondent filed his answer. On June 10, 2003, a case management conference was held, followed by a final hearing on June 30, 2003. On August 1, 2003, the referee issued his report, recommending a three year suspension. A petition for reviewed was filed.

STATEMENT OF THE FACTS

Respondent operated a law practice in Boca Raton in 2001, before beginning a medical compliance business in Deerfield Beach. (T-13, 15) In the latter part of 2001, he represented Ramelle and Glenn Dinofer in their attempt to purchase a day care center. (T-13) The deal was not consummated and Thomas Truex, the attorney for the sellers, returned the deposit to Respondent. (T-13) On December 21, 2001, \$85,000.00 was wired from Truex' trust account to Respondent's trust account. The funds were actually placed into Respondent's operating account. (T-17, 39) Within five days, Respondent transferred \$75,000 from the account to a purpose for which he has failed to explain. (T-39)

On February 25, 2002, Ramelle Dinofer contacted Thomas Truex to inquire about the return of her deposit as she had not been informed by Respondent of its return in December. Truex contacted The Florida Bar after speaking with Ms. Dinofer to report Respondent's conduct. (T-6, 10) The Florida Bar requested Respondent provide an explanation and the required trust records to demonstrate the funds had been returned to the proper client. (T-13, 14) The Respondent failed to provide records which clearly identified the funds and information to enable The Florida Bar to contact Ramelle Dinofer, who had moved to Georgia. (T-39) Respondent obtained a loan from another client to repay Ms. Dinofer in February 2002. (T-24) The information obtainable from the banks failed to show how the funds were returned to Ms. Dinofer, although she and her husband indicated they have received their funds as of April 15, 2003, the date of an affidavit they provided to respondent. (Respondent's exhibit A, T-50)

SUMMARY OF THE ARGUMENT

The sole issue is the appropriateness of the discipline recommended. The Bar seeks disbarment in this case wherein respondent was found to have misappropriated \$85,000.00 from his clients and failed to supply records to demonstrate how he disbursed the funds or when he repaid the funds to the clients. Respondent misappropriated

\$85,000.00 from his clients. Disbarment is the appropriate sanction under the Rules Regulating The Florida Bar, Florida Standards for Imposing Lawyer Sanctions and case law. The referee's recommendation of a three year suspension should be not be upheld because the report and record fail to show competent, substantial evidence warranting departure from Rule Regulating the Florida Bar 3-5.1(f).

ARGUMENT

Whether the referee's recommendation of a three year suspension should be upheld where no evidence of mitigation was offered to reduce the presumed sanction of disbarment.

This court has regularly acknowledged its responsibility to sanction attorneys for misconduct when a referee's recommendation when there is no reasonable basis in existing case law. The Florida Bar v. Corbin, 701 So. 2d 334 (Fla. 1997). The recommendation in this case of a three year suspension is not supported by the case law. Rule Regulating The Florida Bar 3-5.1(f) was changed to require attorneys found guilty of theft to present evidence to the referee to rebut the presumptive sanction of disbarment. Amendments to Rules Regulating The Florida Bar, 795 So. 2d 1 (Fla. 2001)

In The Florida Bar v. Massari, 832 So. 2d 701 (Fla. 2002), this Court held disbarment is appropriate for attorneys who use client's funds from settlement funds without authority. This Court found the overwhelming number of cases involving misuse of client funds have resulted in disbarment citing The Florida Bar v. Travis, 765 So. 2d 689, 691 (Fla. 2000). The court suggested the circumstances surrounding the misappropriation should be examined. Massari at 707.

The referee offered the respondent an opportunity to present evidence of mitigation after finding him guilty. The respondent offered the lack of discipline history, his pro bono activities and lack of client injury. The Florida Standard for Imposing Lawyers Sanctions clearly state the lack of a complaint from an injured client to complain shall not be considered in mitigation or aggravation.

9.4 Factors which are neither aggravating nor mitigating

The following factors should not be considered as either aggravating or mitigating: (f) failure of injured client to complain. Fla. Stand. for Imposing Law. Sancs. 9.4(f)

The referee found timely good faith effort to make restitution, although the record does not show when the client actually received her funds. The referee ruled that the respondent's version of events was simply not credible.

Mr. Spear, I guess I'm going to make findings at this point. And one of the findings I'm going to make

is your testimony's not credible. I don't think you've been straight with this court. I don't think you've been honest.

Your story has changed as time has gone on. And it's changed consistently. And even in front of me it has changed today. And it's disturbing.

Yet to show a paper trail here. \$85,000 just doesn't skip around. There's a paper trail out there that ain't here. And the explanations don't cut it. Because they keep changing and they're not credible. (T-91-92)

The record is without substantial evidence to establish that the respondent repaid the funds timely and the referee's ruling should be overturned as it is lacking in evidentiary support as required by this Court in The Florida Bar v. Hayden, 583 So. 2d 1016 (Fla. 1991).

The referee found in aggravation the respondent had substantial experience in the practice of law and had submitted false testimony, evidence or exhibited other deceptive practices during the proceeding. The aggravating factors should balance the mitigating factors found and this court should order disbarment as required by Rule Regulating the Florida Bar 3-5.1(f) and Fla. Stand. for Imposing Law. Sancs. 4.11. Quite simply, the respondent misappropriated \$85,000 from his client in December 2001 and had not returned the funds to the client in February 2002 when his conduct was reported by another attorney. The respondent at best returned the funds to his clients around April 15, 2002, some four months after receipt.

CONCLUSION

Disbarment is the appropriate sanction in this case. The respondent failed to present competent, substantial evidence to rebut the presumption that he should be disbarred for misappropriating \$85,000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original initial brief, along with seven copies, has been furnished by regular U.S. mail to The Honorable Thomas D. Hall, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and a true and correct copy of the foregoing initial brief was furnished via regular U.S. mail to Garry R. Spear, 20797 Cabrillo Way, Boca Raton, Florida 33428 and Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this ____ day of December 2003.

ERIC MONTEL TURNER

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

ERIC MONTEL TURNER