IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

MICHAEL HOWARD WOLF,

Respondent.
_____/

Supreme Court Case
No. SC04-1374

The Florida Bar File
No. 2002-51,204 (17G)

RESPONDENT'S INTIAL BRIEF

KEVIN P. TYNAN, #710822
RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

TABLE OF CONTENTS

Page(s)

TABLE OF CASES AND CITATIONS

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Michael Howard Wolf, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a March 1, 2005 Report of Referee that recommends a lawyer be suspended from the practice of law for three years.

In July 2004, The Florida Bar filed a three count complaint against the Respondent for conduct that occurred in 2001 and 2002. In Count I, the Bar relates certain trust accounting violations concerning the handling of one particular settlement for Vicki McLaughlin. Count II is a more generalized trust accounting issue wherein it is alleged that certain trust monies were deposited into the Respondent's operating account. Finally, in Count III of the Bar's compliant, the Respondent is charged with a variety of trust account record keeping and procedures violations as a result of these deposits to the operating account.

At the outset of the trial the Respondent acknowledged that he had violated the rules plead in the Bar's complaint but disputed that he had intentionally converted client monies to his own use. After hearing testimony from the Bar's auditor, William Luongo, from the Respondent and from the Respondent's employee, Deborah Carter, it was the Referee's determination that while the Respondent had violated certain provisions of the Rules Regulating The Florida Bar, "he did so without the requisite intent." RR 7.

This particular proceeding began with a grievance filed by Vicki McLaughlin ("McLaughlin"). Prior to October 9, 2001, the Respondent

successfully concluded a settlement on behalf of a client, Vicki McLaughlin ("McLaughlin") and received a $10,000.00 settlement draft on her behalf. RR2. On or about October 16, 2001, McLaughlin was provided with a $4,624.20 check made payable to her for her settlement proceeds. McLauhglin picked up her settlement check and attempted to cash same at the Respondent's bank but was unable to do so as there were insufficient funds in the bank to clear such check. RR2. While this check was never formally presented and dishonored, the bank teller informed McLauhglin that there was not enough money in the account to fully pay the check. Immediately upon being notified that the settlement proceeds check had not been paid, the Respondent went to his bank secured the correct amount of cash and personally delivered same to McLaughlin. RR3.

Notwithstanding that she had been immediately made whole; McLaughlin filed the instant grievance that resulted in an audit being performed on Respondents trust and operating accounts. The audit revealed that the McLaughlin settlement draft was mistakenly deposited into the Respondent's operating account, rather than his trust account. RR2-3. Deborah Carter, who was the Respondent's legal secretary with duties that included bookkeeping and making bank deposits, testified that she made the deposit in question and that she mistakenly deposited this money into the wrong account. The Bar's auditor testified that the account was overdrawn by $732.34 at the time the McLaughlin deposit was made.

If a lawyer deposits trust monies into an operating account, all of the trust accounting rules now apply to that operating account. The Referee made a specific finding that by depositing the McLaughlin settlement into his operating account and by not keeping all of the client's portion of the settlement "in trust" that there was a shortage in the operating account [1] and that such shortage was caused by the Respondent's use of client monies for purposes other than which they were entrusted. RR3. However, the Referee specifically found that the Respondent's actions, while violative of the particular Rules Regulating The Florida Bar set forth in her Report, were not an intentional misappropriation of client funds. RR7.

Counts II and III of the Bar's Complaint are also founded on the audit of the Respondent's various bank accounts. In Count II the Bar asserts and proves that five other client settlements (other than McLaughlin's) were deposited into the Respondent's operating account during the two years that were audited by the Bar. At the time of the foregoing deposits, the Respondent was experiencing overdrafts in his operating account and that portions of these deposits may have been applied to those overdrafts. RR4. The Referee noted that it was the Respondent's position that his employee, who also testified at trial, that mistakenly made these deposits in the wrong account. RR5. Nonetheless as he was the attorney supervising this nonlawyer employee, the Respondent was responsible for this activity. Thus, the

[1] Approximately $1,200.00 RR3.

Referee found the Respondent had unintentionally applied client monies for purposes other than their entrustment and found him guilty of various trust account rule violations. RR4 & 7.

The misconduct alleged and proved in Count III was also occasioned by the deposit of client funds into the Respondent's operating account. For auditing and compliance purposes when a lawyer deposits trust monies into an operating account all of the record keeping and trust account procedures must be followed. In the case at hand the Respondent did not follow any of the required trust accounting procedures and failed to follow all of the minimum trust accounting record keeping requirements. RR5-6. The particular rule violations are set forth on page 7 of the Referee's Report.

As was noted above, the Respondent admitted to the various rule violations at the outset of the trial with the only real contested issue being whether or not the Respondent's use of client monies for a purpose other than their entrustment was intentional. The Referee clearly found that such misuse was unintentional. RR7.

Having decided the most crucial factual element in the Respondents' favor, the Referee next made her sanction recommendation. After considering multiple mitigating factors and several aggravating factors the Referee made her recommendation that the Respondent be suspended from the practice of law for three (3) years and that upon reinstatement he be required to take and pass the

ethics portion of the bar examination. The Respondent believes that on the facts of this case a three year suspension is excessive and therefore appeals the Referee's sanction recommendation.

SUMMARY OF THE ARGUMENT

Based upon a client's complaint that she could not cash her settlement check on the day it was issued to her[2], the Bar conducted a compliance audit of all of the Respondent's bank accounts (trust and operating). The audit discovered that the lawyer had inappropriately deposited client settlement checks into his operating account, rather than his trust account and that on occasion there were small "shortages" in the operating account that indicated that client trust monies were misused. The Respondent admitted these errors and established at trial that these misdirected deposits were the result of unintentional errors by his bookkeeper.

After considering the various mitigating and aggravating factors the Referee entered her recommendation that the Respondent be suspended from the practice of law for three years. It is the Respondent's position that this sanction recommendation is not consistent with the relevant case law and precedent of this Court and that such sanction is unduly harsh for the unintentional misuse of a small amount of client funds.

[2] The grievance was filed even though the client was fully paid the next day.

ARGUMENT

I. A THREE YEAR SUSPENSION FROM THE PRACTICE OF LAW IS AN INAPPROPIATE SANCTION FOR A LAWYER WHO UNINTENTIONALLY PLACES CLIENT MONIES INTO HIS OPERATING ACCOUNT, RATHER THAN HIS TRUST ACCOUNT.

The only issue on appeal is the appropriateness of the Referee's recommended sanction and in particular the appropriate length of the suspension that should be handed down by this Court. This Court has consistently held that it has a broader discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. The Florida Bar v. Thomas, 698 So. 2d 530 (Fla. 1997).

The Referee has found, and the Respondent has admitted, that on six distinct occasions during 2001 and 2002, a check that should have been deposited into his trust account was instead mistakenly deposited into his operating account and that on some of these occasions these client monies were used for purposes other than their entrustment. The Bar has not asserted that any client is owed money as of the time of the filing of its complaint or that the Respondent failed to promptly cover any shortages created by the deposit of these trust monies into his operating account. Thus, this case is more about potential harm than actual harm to clients.

Prior to addressing the issue of sanction, it is important to review the mitigation and aggravation present in this case. First, in terms of aggravation the

Referee found four aggravating factors. RR7. They were (from the Standards for Imposing Lawyer Sanctions, Standard 9.22):

a. prior disciplinary offenses (a December 6, 2001 public reprimand with one year of probation);

b. dishonest or selfish motive;[3]

c. a pattern of misconduct referenced by the referee as "repeated overdraft coverages;"[4]

d. substantial experience in the practice of law (admitted May 31, 1977).

On the other side of the coin the Referee found the following mitigating factors from the Standards for Imposing Lawyer Sanctions, Standard 9.32:

a. timely good faith effort to rectify consequences of his actions by making restitution of all matters referenced in the Bar's complaint prior to intervention by the Bar;

b. personal or emotional problems as, at the time of the events at issue, the Respondent was under the care of a psychiatrist for, among other things, depression and was also under Florida Lawyer's Assistance, Inc., contract;

c. "unreasonable delay not caused by the Respondent and demonstrated prejudice in the delay"[5] as this matter has been pending against the Respondent since March of 2002;

---

[3] This finding is inconsistent with the Referee's finding that the Respondent's actions concerning the misdirected deposits were unintentional.

[4] This comment refers to the fact that the operating account, but not his trust account, had multiple NSF checks and overdraft charges. See RR at page 2.

[5] RR7.

d. Interim rehabilitation has occurred in the Respondents trust accounting practices;

e. full and free disclosure to the Bar and cooperative attitude toward proceedings.

On balance there is substantially more persuasive mitigation, especially in light of the fact that the Respondent covered all shortages well before any audit by the Bar, that clients and third parties received the funds they were entitled to receive and in recognition of the need for better trust accounting record keeping practices, the retention of a CPA to review his books. RR2.

This Court distinguishes between intentional misuse of client monies and the negligent handling of trust monies. In fact, "this Court's case law suggests a clear distinction between cases where the lawyer's conduct is deliberate or intentional and cases where the lawyer acts in a negligent or grossly negligent manner. The Florida Bar v. Weiss, 585 So.2d 1051, 1053 (Fla. 1991). Depending upon the scale of the problem and the aggravation and mitigation present in the case, the sanction for negligent misuse of client monies could be as low as a public reprimand or a ninety day suspension and in certain more extreme cases a rehabilitative suspension has been ordered. In The Florida Bar v. Hosner, 513 So. 2d 1057 (Fla. 1987), a public reprimand plus trust accounting probation was given to a lawyer for commingling and three months of shortages in a trust account. A somewhat similar fact pattern is found in The Florida Bar v. Lumley, 517 So. 2d

13 (Fla. 1987). In Lumley, the Court noted that "at times there were deficits in the accounts of money held in trust" but that in every instance the accused lawyer "restored the balance in the account in time to meet his obligations" whereby no clients "suffered any loss or delay in the disbursement of funds." In this case, the Respondent mistakenly deposited client funds into an operating account but made all required payments to client with McLaughlin, the complainant, being paid as soon as the Respondent was informed of the problem.

In The Florida Bar v. Burke, 517 So. 2d 684 (Fla. 1988), the lawyer was suspended for ninety days for the negligent misuse of client funds and that a second case of the same type of misconduct by the same lawyer approximately three years later resulted in a ninety one day suspension from the practice of law. The Florida Bar v. Burke, 578 So. 2d 1099 (Fla. 1991).[6] There are also several cases where unintentional misuse of client trust funds resulted in a six month suspension from the practice of law. See Weiss; The Florida Bar v. Barbone, 679 So. 2d 1179 (Fla. 1996); The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). Also see The Florida Bar v. Fine, 607 So. 2d 416 (Fla. 1992) wherein the lawyer received a ninety day suspension for making a series of transactions by moving

[6] Burke, among other things, deposited a $150,000.00 settlement draft into his personal account.

funds from his trust account to his operating account, which funds belonged to an estate.

The Weiss opinion is much more egregious than the facts of this case. In Weiss, the lawyer was found guilty of gross negligence in the handling of his trust account, with no resulting financial injury to a client and 28 years of practice with no prior discipline. Id. at 1052-1053. In Weiss the lawyer was suspended for six months and the Referee is recommending a three year suspension.

Even more interesting are the several cases wherein a lawyer was suspended on fact patterns with significant violations. For example, a lawyer received a two year suspension for making eighty two unidentified transfers from trust to cover operating account shortages, with a specific finding that this constituted the intentional misuse of client funds. The Florida Bar v. Mason, 826 So. 2d 985 (Fla. 2002). The lawyer in The Florida Bar v. Wolf, 605 So. 2d 461 (Fla. 1992), was also suspended for two years on significant intentional misuse of trust monies.

One could also contrast this case with The Florida Bar v. Hartman, 519 So. 2d 606 (Fla. 1988). The Referee, in Hartman, in recommending a one year suspension, found that the misuse of client funds " . . . were without intent, occurred during a one and a half year period of emotional instability, and were due in part to drug and alcohol addiction." Id. at 608. The Court after considering, the foregoing as well as other misconduct (neglect, conflict of interest and assisting in

an usurious loan transaction) decided that a two year suspension from the practice of law was the correct sanction. In the case at hand, there are no other types of misconduct like a usurious loan matter which would warrant a stern sanction by itself.

Based upon the foregoing analysis it is evident that the Referee's recommended sanction is not warranted on the facts of this case. In fact the Referee's recommended three year suspension is even more severe than that handed down for intentional misuse of client funds. A careful review of the appropriate precedent leads to the conclusion that a thirty day suspension, coupled with three years of trust accounting probation is a more appropriate sanction under the facts of this case.

CONCLUSION

The Respondent in this case admitted that on six distinct occasions monies that should have been deposited into his trust account were mistakenly deposited into his operating account and that some portion of these deposits were not initially used for their intended entrustment. However, each matter was fully restituted prior to the audit in this case. While lawyers have been publicly reprimanded for this type of misconduct, the Respondent understands that some aggravation is necessary due to his prior public reprimand and suggests that a thirty day

suspension from the practice of law meets the precepts of lawyer sanctions as set forth in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970).

WHEREFORE the Respondent, Michael Howard Wolf, respectfully requests that the Court reject the Referee's sanction recommendation and instead impose a thirty day suspension from the practice of law, coupled with an appropriate three year term of trust accounting probation and grant any other relief that this Court deems reasonable and just.

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

By: _____
KEVIN P. TYNAN, ESQ.
TFB No. 710822

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via hand delivery on this ____ day of July, 2005 to Michael David Soifer, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and via U.S. mail to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief 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 McAfee.

_____

KEVIN P. TYNAN