IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ELIZABETH MARTINEZ-GENOVA,

Respondent.
_____/

Supreme Court Case
No. SC04-2365

The Florida Bar File
Nos. 2003-70,374(11D)
2004-70,316(11D)
2005-70,067(11D)
2005-70,269(11D)

The Florida Bar's Reply Brief

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SYMBOLS AND REFERENCES

For the purpose of this Reply Brief, The Florida Bar will be referred to as The Florida Bar, the Bar, or TFB. Elizabeth Martinez-Genova will be referred to as either Respondent or R. Other persons will be referred to by their respective surnames.

References to the transcript of the final hearing will be set forth as T and page number. References to the Report of Referee will be set forth as ROR and page number.

ARGUMENT I

THE REFEREE ERRED BY FAILING TO DISBAR THE RESPONDENT FOR MISAPPROPRIATING THIRD-PARTY FUNDS.

The Respondent's attitude throughout the trial and Answer Brief is best illustrated by her statement, "Lawyers are obliged to exercise the same judgment in taking on a customer as any other businessperson, but that is all." (Answer Brief at 15). The Respondent's premise is contrary to that of our profession. "The single most important concern of this Court in defining and regulating the practice of law is the protection of the public from incompetent, unethical, and irresponsible representation." The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980). See The Florida Bar v. Dancu, 490 So. 2d 40, 41 (Fla. 1986). The practice of law is a privilege and not a right. See R. Reg. Fla. Bar 3-1.1.

> Some may consider it "unfortunate" that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple business acumen and not to be held responsible under the high standards of our profession. It is not often, if ever, that this is the case. **In a sense, "an attorney is an attorney is an attorney", much as the military officer remains "an officer and a gentleman" at all time . . . to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing.**

The Florida Bar v. Bennett, 276 So. 2d 481, 482 (Fla. 1973) (emphasis added).

The public must be protected and be able to have confidence in the legal profession.

As previously mentioned in The Florida Bar's Initial Brief and the Referee's Report, the Respondent blindly accepted third-party funds and blindly disbursed them.[1] The Respondent attempts to shift blame and minimize her behavior.[2] After hearing the evidence, the Referee found that the "Respondent **willfully** ignored her responsibilities as an attorney during the period in which she misappropriated money from third-parties . . . ." (ROR at 12) (emphasis added).[3] Additionally, the Referee found that although the Respondent appeared to have diminished capacity based on her drug addiction, the Respondent, nevertheless,

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[1] The Referee, the Bar and even Respondent relied on Branch Staff Auditor, Carlos J. Ruga's expert opinion. (T. at 181-184, 208-211, 212-216, 224-225, ROR at 10). The Referee found that Respondent misappropriated money entrusted to her by third parties. (ROR at 10).

[2] The Respondent shifts the blame to Wyckle and states that Solares could not read English and relied on Wyckle's statements. (Answer Brief at 10). However, Mr. Solares testified that several different people, including his partner—a signatory to the agreement—explained the loan commitment agreement to him. (T. at 96, TFB Ex. 2). Moreover, the letters and agreement were translated for Solares. (T. at 100). Accordingly, the Respondent's characterization of the facts, that "Solares could not read English," is both incomplete and misleading. Additionally, the Respondent must take responsibility for any letters received by Solares with her signature. (T. at 581, 586, 590).

[3] Although the Respondent argues that she received only a three percent fee from Wyckle (Answer Brief at 12), that is contrary to the Referee's Findings of Fact. (ROR at 11-14). In fact, the Referee found that it was "unclear exactly how much of money [sic] the Respondent retained for herself, but it is clear that the third-party funds were not being used for their intended purpose." (ROR at 14).

knew that what she was doing was wrong and her actions were willful. (ROR at 12).[4]

The Respondent in her Answer Brief states that The Florida Bar relies and urges this Court to disbar the Respondent based only on "Wyckle's advance fee scheme." (Answer Brief at 19-20).[5] This argument is overly simplistic and inaccurate. The Report of Referee is replete with facts that support disbarment and, as argued by The Florida Bar in its initial brief, disbarment is the appropriate sanction.[6] The Referee reviewed all of the evidence and concluded that the

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[4] It is unclear whether the Referee relied on the doctrine of "willful blindness;" on circumstantial evidence; or on both. Irrespective, the Respondent never challenged the Referee's findings of fact and The Florida Bar is only appealing the discipline recommended. Accordingly, the Respondent's arguments regarding guilt are of no moment.

[5] The Respondent, in her summary of the argument, provides an inappropriate explanation for an "advance fee" scheme. In the absence of any objection at trial or other challenge at that time, this attempt to revisit the factual finding is untimely. Additionally, the Respondent's definition is unsupported by any expert opinion or any other legitimate authority and should, therefore, be rejected. (Answer Brief at 16-17).

[6] As The Florida Bar argues in its initial brief, the appropriate discipline in this case is disbarment, rather than the three-year suspension recommended by the Referee. Disbarment has been recognized as the presumptive discipline for misuse of client or third-party funds. See The Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996); The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990). To overcome the presumption, the attorney's evidence of mitigation has to substantially outweigh the seriousness of the violation and the aggravating factors. See Tillman, 682 So. 2d at 542; The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992); Shuminer 567 So. 2d at 430. Despite the Respondent's mitigation, the Respondent's behavior (the Respondent's felony drug cases, the Respondent's participation in the theft of

Respondent's misappropriation of third-party funds was done knowingly and willfully. (ROR at 12).

The Respondent further argues that The Florida Bar is urging the Court to announce a new standard for lawyers with respect to how much investigation of a client an attorney must perform in order to avoid being disciplined based upon "willful blindness." (Answer Brief at 20). Rather, the doctrine of willful blindness should not only apply in an attorney's investigation of her clients but also where an attorney deliberately ignores every significant fact regarding her responsibility to safeguard third-party funds entrusted to her. The Respondent's attempt to narrow the application of the doctrine of willful blindness to an attorney's responsibility to investigate her client is a distortion of The Florida Bar's argument which bases the application of this doctrine on all of the facts in the Report of Referee.

The Respondent argues that she asked Wyckle if he was doing anything illegal, specifically anything related to illicit drugs or money laundering. (Answer Brief at 21). Regrettably, this attitude is at the root of the Respondent's behavior: How can reliance upon a one word answer to a single perfunctory question comply with her responsibility to safeguard third-party funds?

Additionally, the Respondent attempts to distinguish Wetzler v. State, 455 So. 2d 511 (Fla. 1st DCA 1984) by stating that the court in Wetzler limited the

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third-party funds, and her conduct involving dishonesty, fraud and deceit) does not outweigh the presumption of disbarment.

application of "willfull blindness" to "constructive possession." (Answer Brief at 22). The Respondent's contention that willful blindness should only be applied to "constructive possession" militates in favor of applying this standard to this case. In fact, the money was under her exclusive control—in her bank account. Moreover, irrespective of her denial of knowledge of an agreement, its existence was confirmed in letters signed by her and her responsibility to investigate the circumstances surrounding the release of third-party funds is undeniable.[7] The concept of willful blindness is used in both civil, See, Chanel v. Italian Activewear of Florida, 931 F. 2d 1472 (11th Cir. 1991); Levi Strauss & Co. v. Diaz, 778 F. Supp. 1206 (S.D. Fla. 1991), and criminal, See, Hale v. State, 838 So. 2d 1185 (Fla. 5th DCA 2003); Wetzler v. State, 455 So. 2d 511 (Fla. 1st DCA 1984); U.S. v. Callahan, 588 F. 2d 1078 (5th Cir. 1979), and has been extended in some jurisdictions to attorney discipline, See, In re Carlson, 802 A. 2d 341 (D.C. App. 2002); In the Matter of Freimark, 702 A. 2d 1286 (N.J. 1997); In re DiLieto, 665 A. 2d 1094 (N.J. 1995); In the Matter of Irizarry, 661 A. 2d 275 (N.J. 1995); In re Woiccak's Case, 561 A. 2d 1049 (N.H. 1989); In re Shevin, 517 A. 2d 852 (N.J. 1986). (TFB's Initial Brief p. 33).

The Florida Bar does not disregard the Methodology relied upon by the drafters of Florida's Standards for Imposing Lawyer Sanctions relied upon.

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[7] The Florida Bar concedes that it misspoke in The Florida Bar's Initial Brief, Wetzler does not weave the concept of willfull blindness into civil law.

(Answer Brief at 24). In fact, the opposite is true. See Florida's Standards for Imposing Lawyer Sanctions I (B). The Sanctions Committee relied upon other jurisdictions that issued opinions for guidance (from 1974-1984), reviewing a variety of discipline cases in eight other jurisdictions. See id. Those jurisdictions include New Jersey and the District of Columbia which extended the concept of willful blindness to attorney discipline.[8] See id. See also Freimark, 702 A. 2d at 1286; Irizarry, 661 A. 2d at 275; Shevin, 517 A. 2d at 852; DiLieto, 665 A. 2d at 1094; Carlson, 802 A. 2d at 341.

In her Answer Brief, the Respondent relies heavily on The Florida Bar v. Behrman, 658 So. 2d 95 (Fla. 1995) for the proposition that misappropriation of this "type" should result in a 90-day suspension. However, the facts of Behrman are distinguishable. Behrman agreed to act as an escrow agent for Hunter, with whom he shared space, and pursuant to his instructions, disbursed funds. See id. at 96. Behrman saw and relied upon contracts Hunter showed him prior to disbursing the funds. See id. Because Behrman was unsophisticated in loan

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[8] To provide support for this approach, the Sanctions Committee has offered as much specific data and guidance as possible from reported cases. Thus, with regard to each category of misconduct, the report provides the following:

- Discussion of what types of sanctions have been imposed for similar misconduct in reported cases;
- Discussion of policy reasons which are articulated in reported cases to support such sanctions; and,
- Finally, a recommendation as to the level of sanction imposed for the given misconduct, absent aggravating or mitigating circumstances.

transactions, he relied on Hunter's expertise. See id. Unlike Behrman, the Respondent was experienced in dealing with escrow funds.

More important than the factual distinctions, the referee in Behrman specifically found that Behrman was not guilty of the rules that dealt with dishonesty and fraud. See id. Additionally, the referee found that Behrman did not act criminally or fraudulently. See id. The referee also found Behrman not guilty of the following Rules Regulating The Florida Bar: 3-4.3, 3-4.4, 4-8.1(b), 4-8.4(a)(b) and (c). See id.

Therefore, notwithstanding the Respondent's argument, Behrman cannot be "directly on point." It is not even close. In Count I of the case at bar, the Referee specifically found that Respondent was guilty of violating, in addition to many other rules, Rule 4-8.4(c) (misconduct involving dishonesty, fraud, deceit or misrepresentation). Additionally, in Behrman, the referee was mindful of the fact that Behrman was 79 years old and consequently probably near the end of his law career in addition to his limited experience practicing law, lack of disciplinary record, and military service. See id. Thus, given the facts in Behrman, the referee recommended and this Court imposed a 90-day suspension *nunc pro tunc.* The Bar did not appeal that recommendation.

The differences between the referees' findings in Behrman and the case at bar are completely inapposite, and the reason why Behrman does not control in

this matter. Specifically, the Referee in the instant case found that the Respondent's conduct was willfull and with knowledge. There is no such finding in Behrman. In this case, the Respondent's entire legal career has been fraught with deceit and misrepresentation – the Respondent was not forthright in her Bar application and she continuously used drugs throughout her legal career which ultimately resulted in three felony drug related arrests and misappropriation of third-party funds. In Behrman, there were no aggravating factors mentioned. See id. In the instant case, the Referee found four aggravators – the Respondent had a selfish motive, a pattern of misconduct, multiple offenses, and actual harm to third parties. Based on the numerous distinguishing factors together with the egregious behavior of the Respondent, Behrman is not applicable.

Thelength and depth of Respondent's egregious misconduct, which started as early as her Bar application and continued, unabated, throughout her career, ending only upon the filing of a Bar complaint against her, cries out for disbarment. The mitigating factors found by the Referee fall far short of supporting a lesser sanction.

CONCLUSION

The Florida Bar respectfully requests this Honorable Court reject the Referee's recommended discipline and disbar Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Reply was forwarded via Federal Express to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Nancy Cayford Wear, Attorney for Respondent, 1234 South Dixie Highway, Suite 337, Miami, Florida 33146, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this 1st day of March, 2006.

Vivian Maria Reyes

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CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that the Initial Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

Vivian Maria Reyes

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