IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

MARK ENRIQUE ROUSSO, and
LEONARDO ADRIAN ROTH,

Respondents.

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Supreme Court Case
Nos. SC11-15 and SC11-16

The Florida Bar File
Nos. 2011-70,598(11A)
2011-70,408(11A)

AMENDED REPORT OF REFEREE

SUMMARY OF PROCEEDINGS:

The undersigned Referee, appointed pursuant to Rule 3-5.2(g) of the Rules Regulating the Florida Bar, generated a Report of Referee on June 1, 2011. Thereafter, the Respondents' filed a Motion for Reconsideration/Clarification, for which hearing occurred on Wednesday, June 22, 2011. Upon reconsideration of evidence at the original hearing, the law, and argument of counsel, the undersigned Referee submits this Amended Report of Referee.

The following attorneys appeared as counsel for the parties:

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For the Respondents:

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FINDINGS OF FACT:

Jurisdictional Statement:

Respondents are members of the Florida Bar, and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

Narrative Summary of Case and Facts:

Coincident to the attorney/client relationship is the requirement that money held by an attorney in trust remains secure. Client confidence must be preserved.

100's of millions of dollars passed through the trust account of Leonardo Adrian Roth, and Mark Enrique Rousso ("Respondents"). The parties agree that by the end of 2008 the measure of trust account imbalance was roughly $4.38 million. The Respondents claim that Fernando Horigian, the firm's non-lawyer bookkeeper ("bookkeeper"), embezzled the $4.38 million. No clear and convincing evidence establishes that Respondents took or had any direct benefit from this $4.38 million. However, it is noteworthy that when deficiencies were discovered, the Respondents endeavored to honor every known client liability for trust account funds.

Respondent Roth first learned of trust account under-funding some time in April of 2008 but did not fully comprehend the cause and scope of the problem until a few months later.

Respondent Rousso came to know of the trust account under-funding some time in December of 2008.

From then until the end of that year the Respondents reacted. The Florida Bar protests, however, that the Respondents' reaction was too little, too late. The Respondents explain that they:

1) hired outside counsel;

2) hired an outside accountant and conducted an informal audit;

3) funded the trust account deficit from many sources;

4) contacted the police, and cooperated with the ensuing investigation; and,

5) explained the situation by telephone to the Florida Bar via the "hotline."

Inquiry goes to the source of funds which were used to cover verifiable claims, as contended by the Respondents. Trust account deficits were covered by the firm malpractice insurer, from credit lines, from personal funds, from funds borrowed from family, others, and from money borrowed from a client, Hattim Kais Yordi ("Yordi").

Respondent Roth solicited Yordi for a personal loan[1]. Yordi traded a portion of his trust account credit for a promissory note amounting to over $231 thousand. It happens that the Respondents have defaulted on the referenced promissory note and a lawsuit is pending[2].

The firm has disbanded. The Respondents testify that they are insolvent.

As to the bookkeeper - he and his family fled to Argentina - whereabouts unknown.

The Florida Bar ("Petitioner") has not proven that Respondents were directly involved in

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[1] Respondent Rousso did not solicit for or procure this loan to cover the trust account shortfall, but he did benefit by the swap out of a promissory note for the trust account liability.

[2] The original Referee Report referenced Roberto Ferraciolli, who loaned Respondents $600 thousand for infusion into the trust upon a promissory note, personal guarantees, and other collateral security for repayment. Mr. Ferraciolli was not a current client at the time and he had the benefit of independent counsel for this transaction. The undersigned Referee finds that there was no breach of attorney conduct as outlined by the Rules Regulating the Florida Bar with

the theft of client money from the trust fund. However, the Respondents's conduct still falls short on several other Rules of Professional Conduct.

I. TRUST RECORDS AND PROCEDURES

The minimum standards with regard to maintenance of trust accounts are set forth in Rule 5-1.2(b) and (c), Rules Regulating the Florida Bar (hereafter, any reference to a "Rule" relates to the Rules Regulating the Florida Bar). Respondents have not met the specified standards set forth below.

There is clear and convincing evidence that the Respondents failed to:

1. Examine endorsed checks to ensure against possible forgery.
2. Prepare and maintain memorandum to support the legitimate disbursement of trust funds to Respondents's interests or business concerns. Disbursements occurred at a time when the account could not cover client liabilities.
3. Prepare and maintain a separate file or ledger for each client or matter showing individual receipts, disbursements, or transfers and any unexpended balance.
4. Cause a monthly reconciliation of the trust account to be made so that it could be compared to the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons therefor.

The absconding bookkeeper sits in the "empty chair." Respondents argue that the criminal acts of the bookkeeper could not be anticipated or thwarted.

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respect to Mr. Ferraciolli.

While Respondents' argument might hold for an isolated and recent conversion of trust funds, the shear size of the $4.38 million dollar deficit proves that this bookkeeper had been embezzling for many months, if not years. One could hypothecate that a prosperous trend of increased receipts over disbursals enabled the firm to honor client liabilities to trust funds, even though the bookkeeper was syphoning funds as a matter of course over a period of time. But, emplacement and adherence of minimum standards would have safeguarded against embezzlement. In theory, this course of theft would thereby have been exposed and thwarted before damage could extend beyond the second month.

The ultimate responsibility for trust fund accounts vests with the lawyer. Lawyer responsibility for safekeeping of trust account funds cannot divest to any non-lawyer employee of the firm. A misappropriation and conversion by office staff does not relieve the lawyer from utilization of at least the minimum standards with respect to his or her trust account. Even so, it is important to distinguish between a misappropriation of funds by Respondents, as Petitioner contends, and opposed to a Respondents's failure to safeguard against embezzlement.

II. TRUST ACCOUNT; COMMINGLING

Trust accounts are reserved for client funds related to lawyer representation and should not be used as a repository for the lawyer's own property. Rule 5-1.1(a)(1). Recall that the Respondents covered trust deficits from proceeds related to a claim against the firm malpractice insurer, from credit lines, from personal funds, from funds borrowed from family, and others, and from money borrowed from a client. All of these sources are personal to the Respondents and these types of deposits into the trust account amounts to commingling.

The criminal action of the bookkeeper created a dilemma for Respondents. An attorney has a duty to protect the property of his client and also an obligation to avoid commingling of funds in a trust account. The labor of resolving this conflict falls to the undersigned referee.

The decision to fund the trust account with personal funds did not offend the basic principles underlying the commingling proscription. The Respondents decision was founded on a sense of personal honor to make right the wrong wrought by the bookkeeper. See Preamble: A Lawyer's Responsibilities, Rules Regulating the Florida Bar. Therefore, there were justifications for funding the trust account from sources that were not directly related to client representation.

However, other concerns remain. The Respondents:

1) fresh money, deposited from new business, was used to satisfy past due client liabilities;
2) decided when specific trust creditors were paid and from what source;
3) procured loan money from a client to fund the trust account deficit.

These concerns are addressed below.

III. CONFLICT OF INTEREST; CURRENT CLIENTS

As previously discussed, trust accounts are supposed to be the exclusive repository for client money. An attorney must sequester personal money from client money. It happens that in times after April of 2008, the Respondents infused money other than client funds into the trust.

In these times, Respondents made decisions as to who received disbursements from the trust account, and when. In consequence, certain trust payees benefitted by

Respondents's preference for early payment. Other payees had to wait longer. Conflict of interest issues arise when Respondents favor clients for which Respondents had an interest; or when Respondents favor fragile accounts over clients who were more patient; or when Respondents payout those clients who protest the loudest; or when Respondents channel clients who would, or would not, be paid by the pending malpractice insurance claim. Evidence at the final hearing on this thread was thin.

But, there was galling evidence that Respondents distributed earned trust money to the firm's operating account ahead of clients. No client should ever have cause to question the order of disbursal from an underfunded trust account. Clearly, the specter of conflict of interest existed.

As already stated, some clients received trust funds sooner or later. For other clients, Respondents covered client trust account liabilities from non-trust account sources; again, sooner or later. And then there was Yordi, whose trust account credit was swapped out for a promissory note. Despite a conflict of interest between Respondents and their clients as to how and when clients would receive preference in payment, the Respondents continued to represent them.

The general rule is that representation should cease whenever a conflict of interest arises. However, cessation of representation is not inevitable.

Despite a conflict of interest the Respondent may continue to represent these clients provided that the affected clients give their informed consent. Awkward as it may, the purest course for the Respondents would be to inform affected clients that the bookkeeper embezzled their money, but that the Respondents plan was to cover losses, and humbly ask

for time. Rule 4-1.7(b)(4). Upon evidence submitted it appears that the Respondents failed to show that the bulk of clients were advised on the premises or otherwise provided their informed consent.

Even so, evidence submitted supports the proposition that every trust account client has received his due or a promissory note in lieu of said trust account client liability. This counts as a mitigator. There was no way to please everyone equally. Whatever remedial action taken the Respondents may have taken could have been viewed critically by some.

IV. CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

Recall that Yordi, traded a portion of his trust account credit for a promissory note. Here lies a conflict of interest between the lawyer and his client.

Ordinarily, parties to a business negotiation are adverse and at arms length with each other. Each is responsible for due diligence. Parties to negotiations have no duty to advise on whether the deal is fair to the other. *Caveat emptor* is the general rule

The attorney/client relationship necessitates an exception to the general rule. A lawyer, as a negotiating party with a client for a loan, is a lawyer first. Lawyers have advantages. They possess legal skills and training beyond those of their clients. They benefit by client expectation of loyalty and consequent trust. These advantages create the possibility that lawyers, in business transactions with their clients, will overreach. The Rules address the concern. Lawyers ought not enter into a business transactions with their clients unless the requirements of Rule 4-1.8(a) are met. These follow:

(1) the transaction and terms on which the lawyer acquires the interest are fair

and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Clearly, Respondent Roth procured the Yordi loan. Both Respondents benefitted by the Yordi loan. Neither Respondent transmitted in writing that:

a) funds from outside sources were needed to cover embezzling from the trust account;

b) the measure of trust account imbalance was unknown (the investigation was still ongoing. Respondents covered deficits as they emerged);

c) there was a risk that the firm might not survive the calamity, and consequently, a risk going to whether the Respondents could even pay back any loan;

d) Yordi ought to engage an independent lawyer for legal advise on the transaction; and,

e) the loan could not consummate unless the clients gave their informed consent.

V. MISCONDUCT

The final accusation asserts misconduct as prescribed by Rule 4-8.4(c). Petitioners contend that Respondents engaged in conduct that involving dishonesty, fraud, deceit, or misrepresentation. (Hereafter conduct involving dishonesty, fraud, deceit, or misrepresentation shall simply be referred to as "'Rule 4-8.4(c) misconduct.'")

In the conflict of interest accusations the Respondents breached an affirmative duty to disclose true conditions and attempt to obtain informed consent. As this is an affirmative duty, the failure of Respondents to disclose true conditions was tantamount to a "Rule 4-8.4(c) misconduct," in that the breach gave clients a false impression that all was alright. All was not right. While "Rule 4-8.4(c) misconduct" applies, this type of misconduct is subsumed under the conflict of interest counts.

The "Rule 4-8.4(c) misconduct" does not apply with respect to the trust account shortages. The bookkeeper alone caused those deficits. Nor does it apply to the trust account commingling accusation or to the accusation that Respondents fell short of minimum standards with respect to record keeping and procedures to insure that trust accounts remain in balance. Those transgressions do not involve omitted statements on the circumstances.

It was dishonest, fraudulent, deceitful, and a type of misrepresentation, for Respondents to continue representing clients, and to continue to take their money into the trust account, at a time that Respondents knew that the trust account was seriously underfunded. As well, it was a "Rule 4-8.4(c) misconduct" for Respondents to take new money into the trust account to pay older client liabilities with knowledge that such action was only a delay tactic. Eventually, an unfunded payout would be due on the new money.

It was a “Rule 4-8.4(c) misconduct” to engage in business transactions with a client at a time when there was a possibility – a possibility that was realized – that it would be difficult if not impossible to repay the debt owed to Yordi.

<u>RECOMMENDATION AS TO GUILT</u>:

I recommend that the Respondents be found not guilty as to Rule 5-1.1 (Trust account; commingling).

The Respondents should be found guilty as to Rule 5-1.2 (Trust accounting records and procedures), and as to Rule 4-1.7 (Conflict of interest; current clients), and as to Rule 4-1.8 (Conflict of interest; prohibited and other transactions), and as to Rule 4-8.4(c) (Conduct involving dishonesty, fraud, deceit, or misrepresentation).

<u>CONSIDERATIONS FOR IMPOSING LAWYER SANCTIONS</u>:

It is not enough that the Respondents trusted their bookkeeper. The Respondents breached an affirmative duty to safeguard trust account funds by emplacement of at least minimum standards for keeping records and adherence to procedures to account for any shortfall of client money. Even so, an act of omission in this context is so much more benign then an act of commission. Respondents cannot abdicate, by delegation to the bookkeeper, the ultimate responsibility for trust account maintenance, and they must bear the consequence of any avoidable transgression. Misplaced reliance with the bookkeeper is no excuse for failing to put in place minimum trust account safeguards, as prescribed by the Rules.

The size of the trust fund shortfall is an aggravator. Were it not for the portion covered by the firm’s malpractice insurance carrier, and another portion covered with personal funds deposited by the Respondents, the potential injury to clients could have

tallied to roughly $4.38 million. The undersigned Referee is mindful that the Respondents have extended themselves to financial ruin in an effort to make right the wrong done by the bookkeeper. Accordingly, to the credit of the Respondents, efforts to cover client trust account liabilities counts as a mitigator.

The Respondents are not precise when they say that the entire $4.38 million trust deficit was covered. Loan money, amounting to over $231 thousand, from client Yordi, was swapped into the trust to cover trust creditors, and now Respondents are in litigation for default of that loan.

This loan represents the most serious breach of conduct. The undersigned Referee factors in that Respondent Roth did not know the measure of loss when he solicited Yordi for the loan. Further, it is presumed that Roth had good intentions, and confidence, that the firm would be able to pay back this loan the agreements were entered into.

It must be kept in mind that the bookkeeper was the initiator. His embezzlement caused the injuries that followed. This led to conduct that amounted to conflict of interest and "Rule 4-8.4(c) misconduct" but the motive remained: to make clients whole.

Even so, the Respondents bear ultimate responsibility for professional conduct as outlined in the Rules Regulating the Florida Bar and set forth above. For those lapses, an appropriate sanction must be imposed.

I have considered Standards 4.12,4.32, 6.12, some mitigators of 9.32, and 7.2 of the Lawyer Sanction Standards prior to recommendation of discipline.

RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

Based on the foregoing findings of fact, I recommend that the Respondent Roth be suspended from the practice of law for a period of 15 months; and further recommend that

Respondent Rousso be suspended from the practice of law for a period of 12 months[3]. It is further recommended that the time for suspension for each Respondent relate back to November 8th, 2010, when Respondents were suspended pursuant to Supreme Court Orders of Emergency Suspension. It is further recommended that as a condition for reinstatement as attorneys in The Florida Bar, should the Respondents be inclined, the Respondents must show evidence of full satisfaction and release of Yordi's claim herein referenced, with each Respondent responsible half the claim.

STATEMENT OF COSTS AND RECOMMENATION AS TO THE MANNER IN WHICH COSTS SHOULD BE TAXED:

Hearing was conducted on an appropriate award for Payment of Cost. A separate Order Granting the Florida Bar's Request for Payment of Costs is submitted and incorporated herein by reference.

DATED this ______ day of June, 2011.

Hon. Edward Newman, Referee

Copies furnished to:
Kenneth L. Marvin, Staff Counsel
Daniela Rosett, Bar Counsel
Arlene Kalish Sankel, Chief Branch Discipline Counsel

[3] The original Report of Referee recommended a 30 month suspension for each Respondent. That has been reduced because upon reconsideration the $600 thousand loan to Ferraciolli does not amount to an ethical violation under the rules. The differential of sanction (15 months for Respondent Roth and 12 for Rousso) relates to the finding that even though both Respondents benefitted by the Yordi loan is was Roth who solicited and procured the loan.

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