IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JEREMY W. ALTERS,

Respondent.

_____/

Supreme Court Case
No. SC14-100

The Florida Bar File
No. 2012-70,199 (11P)

SUPPLEMENTAL REPLY BRIEF

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This is a Garden Variety Trust Account Misappropriation Case

At all times relevant, Respondent's law firm was underfunded, never profitable, in severe financial distress, and Respondent as controlling shareholder, was unwilling to make the difficult financial decisions necessary to scale back his firm's expenses. In order to keep the firm afloat, there was no alternative but to violate the sanctity of the trust account.[1]

While Respondent and the Referee contend otherwise, at its core, this is a "garden variety" trust account misappropriation case.

Undisputed Facts

The following undisputed facts, which were largely uncovered during the course of the Bar's so-called "frivolous" investigation subsequent to the emergency suspension hearing, speak to the gravity of Respondent's misconduct:

- At all times relevant, Respondent was the majority shareholder and/or maintained "51% voting rights/share for all decisions in the firm." (TFB Ex. 22).

- Respondent's firm was not profitable in any year from its inception in 2007 through the end of 2010. (Tr. 2151:11-2152:4).

[1] At the emergency suspension hearing, Respondent testified, "Now, very interestingly, and this hasn't been brought up by anybody, but the money that was in trust at that time was mainly for liens that we were fighting against Medicaid and Medicare. . . . It wasn't going to be paid to a client tomorrow. And that's not an excuse by any stretch of the imagination, but it's context for what was going on." (TFB Ex. 53 – 264:13 – 265:3).

- On February 9, 2010, Respondent was aware that there was a deficit in excess of $1,000,000 in his firm's trust account that was caused by multiple transfers. (TFB Ex. 53 - 259:4-6; 264:3-12; Tr. 3769:5-10)(Index #43 - Respondent's Answer and Affirmative Defenses, paras. 12-13).

  The end of the month trust account shortage in February 2010 was $1,002,049 and in February 2011, thirteen months later, it had actually increased to $1,018,436. (Tr. 2476:11-24).

- Subsequent to February 2010, there were twenty-five improper transfers from Respondent's trust account totaling $800,474.32. (TFB Ex. 30). The first subsequent improper transfer occurred on March 10, 2010. On that day, Respondent received an email from a Bank of Miami representative advising him of an overdrawn position in his firm's operating account. (TFB Ex. 33; Tr. 2363:6-2365:10).

  During the relevant period, Respondent testified that he wouldn't doubt that overdrawn positions occurred on an almost daily basis and that there may have been 1,000 or 2,000 overdrawn positions in the operating account. Yet, he testified that he didn't see any relation between this issue and the trust account shortage. (Tr. 3884:14-3886:2).

- The financial controller for the Searcy Denney law firm ("Searcy firm") testified that after meeting with Respondent in June of 2010, it was his opinion that the firm's financial condition was dire and Respondent agreed with him. (Tr. 150:5 – 12; 150:22-152:15; 155:22-156:6). Respondent testified that he told the Searcy firm and others that his firm was financially broke and that the situation was desperate. (TFB Ex. 7; Tr. 3918:22 – 3919:5; 3924:7-11).

- Respondent testified that Kimberly Boldt's ("Boldt") role as the firm's managing partner ended on or prior to June 22, 2010. (TFB Ex. 25; Tr. 3845:20 – 3846:13; 3847:14-25; 3851:2-18). After Boldt's

management of the firm undeniably ceased, there were eight improper transfers totaling $280,000. (TFB Ex. 30; Tr. 3035:17-3036:9).

- Respondent fired Marc Salpeter ("Salpeter") just prior to Thanksgiving of 2010. At that time, Salpeter advised Respondent that "the trust account was way upside down." (TFB Ex. 53 – 225:14-226:1; Tr. 3934:22-3935:5; 3935:21-3936:10; 3937:25-3938:2; 3939:7-14).

  On December 7, 2010, Respondent authorized and executed a trust account check utilizing $169,058.40 of one client's funds to pay another. (TFB Ex. 47; Tr. 2730:2-2742:24).

- During the period from February 9, 2010 (when Respondent admitted he first learned of the improper transfers) through December 31, 2010, Respondent received approximately $1,182,993 from his firm. (TFB Ex. 40).[2] During this period, Boldt only received $147,403. (TFB Ex. 41).

  Respondent presented no evidence, nor did the Bar uncover any evidence, that Salpeter received any financial and/or other type of benefit from the improper transfers. In addition, Salpeter's testimony confirmed this. (Tr. 425:1-15).

As evidenced by the above undisputed facts, which are but a sampling of those uncovered during the Bar's investigation subsequent to the emergency suspension hearing, Respondent's repeated assertions that the Bar should not be awarded its

[2] On the second page of a November 14, 2011 letter from Respondent's counsel to the Bar, it stated, "The mere fact that Mr. Alters received income from the firm during the subject time period does not and should not suggest any impropriety. Further, the amount of income he received in 2010 was completely consistent with the income he had derived previously." (Said letter is included within Resp't Cost Composite Ex. A.)

costs (and that he should be awarded his), due to purported prosecutorial abuse,[3] are quite simply without merit.

The Referee Found Respondent Guilty of Serious Rule Violations

The Referee found Respondent guilty of violating rules 4-1.15 and 5-1.1(b). These findings evidence significant misconduct, warranting serious discipline, payment of the Bar's costs[4] and denial of Respondent's costs. Respondent has gone to great lengths in his attempts to make the guilt findings in this case appear innocuous. Essentially, he has tried to "whitewash" these findings to make them appear benign, but that couldn't be further from the truth.

At his emergency suspension hearing, Respondent's assessment of where he stood after the January and February 2010 improper transfers was: "I've got a partner who's a disaster in terms of her personal life and needs to figure it out, and I've got this trust account problem and don't have the money to fix it." (TFB Ex.53-265:13-16).

As controlling shareholder, Respondent was the only person in a position to implement the comprehensive internal control measures that would have prevented

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[3] See Respondent's Supplemental Answer Brief, at 15, 19, 23, 32 for some examples of these claims.

[4] The Bar seeks recovery of its appellate costs as well which have not yet been determined. *See The Florida Bar v. Martinez-Genova*, 959 So.2d 241, 249 (Fla. 2007).

the twenty-five improper transfers that occurred after February 2010. Respondent implemented no safeguards after purportedly first discovering the shortages, after he admitted Boldt was no longer the managing partner, or even after Salpeter left the firm. The trust account improprieties continued unabated after each of these events.

In fact, Respondent, "[A]dmitted that he did not take affirmative steps to prevent a recurrence of the problems created by Kimberly Boldt, instead continuing to blindly trust his partner and bookkeeper that the problems would not recur." (Emphasis supplied.)(Response in Opposition to Bar's Motion to Tax Costs, at 3).[5]

Considering all that occurred in January and February 2010, Respondent's failure to take measures to safeguard his trust account is unconscionable.

There is No Basis for The Award of Respondent's Costs

At no time during these proceedings has either Respondent or the Referee cited to any bar disciplinary case law supporting an award of a respondent's costs when the bar has proven rule violations.

[5] Respondent filed this on December 13, 2016 as reflected on this Court's docket. This filing is not reflected on either the Index to Pleadings or Second Index to Pleadings filed by the Referee.

In *The Florida Bar v. Williams*, 734 So.2d 417 (Fla.1999), the Referee ruled that the respondent was not guilty of any rule violations, but awarded the Bar half of its costs. The respondent sought review of the award of the Bar's costs and the Supreme Court held that, since the respondent was not found guilty of any rule violations, the Bar was not entitled to any of its costs. The Court stated, "The Bar does not cite, nor has our research revealed, any bar discipline cases in which this Court has awarded costs to the nonprevailing party." (Emphasis supplied.) *Williams*, 734 So.2d at 420.

In re Clark, 293 P.3d 1033, 1036 (Or. 2012), the Supreme Court of Oregon stated that, "in disciplinary matters, an accused prevails when disciplinary charges are dismissed in their entirety; the Bar is the prevailing party in all other cases." (Emphasis supplied.)

Contrary to Respondent's assertion, the Bar did not need to file an objection to Respondent's costs motion. The Bar was the only prevailing party in this case. As Respondent was found to be a misbehaving member of the Bar, it was an abuse of discretion for the Referee to assess Respondent's costs against members of the Bar who have not misbehaved. *See The Florida Bar v. Rousso*, 117 So.3d 756, 768 (Fla.2013) citing *The Florida Bar v. Lechtner*, 666 So. 2d 892, 894-95 (Fla.1996).

The January and February 2010 Transfers

In support of the Referee's costs rulings, Respondent argues that there was overwhelming evidence of his innocence in regard to the January and February 2010 improper transfers.

The record is devoid of Boldt knowingly authorizing any improper transfers. The testimony of Respondent and Bruce Rogow confirms that she made mistakes and only authorized Salpeter to transfer funds to pay bills. (TFB Ex. 53-373:6-13; Tr. 3646:5-10; 3770:5-8; 3771:20-24)(Index #43 - Respondent's Answer and Affirmative Defenses, para. 12). There is absolutely no evidence that Boldt knowingly authorized Salpeter to make a single improper transfer from the trust account.

While the Referee did not find his testimony credible, Salpeter testified that Respondent was aware of and directed him to make each and every improper transfer in 2010. (Tr. 331:13-18; 343:6-10; 450:13-20; 706:5-9).

CONCLUSION

Essentially, Respondent's defenses to the Bar's case are that:

1) He was very busy;

2) He encountered emotional and other burdens related to his mother's cancer diagnosis;

3) He went through a divorce;

4) For a period of time, he gave another lawyer management responsibility;

5) He was ill for a few months;

6) He disagreed with the Bar's interpretation of the Rules Regulating The Florida Bar;[6] and

7) His decision not to report the firm's trust account violations was made with good intentions.

The ultimate issue is whether a controlling shareholder who allowed a deficit in excess of $1,000,000 to exist in his firm's trust account for more than a year (with the exception of one month); who allowed said deficit to increase subsequent to his purported first discovery; who personally received substantial funds from improper trust account transfers; who covered up the issue for many months; and who was found guilty of two serious trust account violations should be relieved of responsibility for payment of the Bar's costs and should be allowed to recover his costs.

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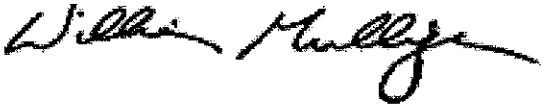
[6] "[I]'ve got this trust account problem and I don't have the money to fix it. I put in every penny I had. So my mission at that moment was to get that money back in that account. And there was only one way to do it. And I know the Bar would like me to report it and shut down. Well, it doesn't work that way in this world." (TFB Ex. 53 – 265:15-21).

Respectfully submitted,



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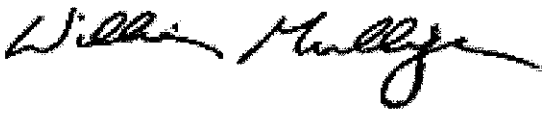
CERTIFICATE OF SERVICE

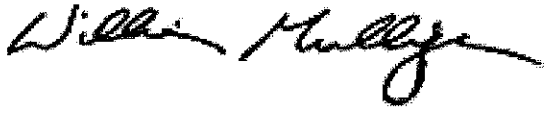
I certify that this document has been e-filed using the E-filing Portal with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida; with copies provided via email using the E-filing Portal to Jeremy W. Alters, c/o Andrew Scott Berman, Esq. at aberman@ybkglaw.com and mherrera@ybkglaw.com; and to Adria E. Quintela, Staff Counsel, The Florida Bar, at aquintel@flabar.org, on this 2nd day of March, 2018.



William Mulligan, Bar Counsel

CERTIFICATE OF TYPE, SIZE, 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 this brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.



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