

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,)
Complainant)
v.)
JOHN P. FITZGERALD)
Respondent)

CONFIDENTIAL
TFB FILE NOS 15E82F11 &
15D83F06
SUPREME COURT NO 65,336

FILED
SID J. WHITE
SEP 12 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk *pb*

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, hearings were held on January 17, 1985 and on August 15, 1985. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to the Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:
for the Florida Bar David M. Barnovitz
for the Respondent Terence J. Watterson

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged:

After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As to Count 1

That the Respondent admits to the complainant's allegations that he received \$18,000 cash from the Molinas, his clients, for the purpose of safeguarding their money pending the resolution of Respondent's representation of them relative to a federal grand jury investigation for which he also

received a \$500 retainer fee. Respondent further admits to retaining said \$18,000 cash in his office file drawer without depositing same in a bank or savings & loan association, which complainant alleges to be a violation of Disciplinary Rule 9-102(A), DR9-102(B)(3) for failure to maintain complete records of said monies and render appropriate accounts to his client and Integration Rule 11.02(4)(C) in that minimum trust accounting records were not maintained by Respondent relative to his receipt of the Molina's cash. Respondent asserts the Molinas wanted said monies held by him without the necessity of bank records of deposit, which the Molinas denied. Disagreement thereafter followed between Respondent and his clients over Respondent's retention of a \$10,000 fee from said cash monies.

As to Count 2

That the Respondent admits retaining from the Molina's \$18,000 deposit with him the sum of \$10,000 as a fee pursuant to bills presented to the Molinas for his services without depositing said \$10,000 first in a bank or savings & loan account. Complainant alleges such constitutes a violation of Disciplinary Rule 9-102(A)(2) in as much as the \$10,000 fee was in dispute and therefore under said Rule such disputed portion shall not be withdrawn from a depository until the dispute is finally resolved.

As to Count 3

That the Respondent in his representation of the seller of a condominium unit to the buyer at title closing represented to the buyer that there were certain outstanding liens which Respondent would pay and fully discharge from buyer's purchase proceeds and from certain other funds held by Respondent. The settlement statement recited a \$40,000 first mortgage payoff, a warranty deed was delivered reciting said land to be free of all encumbrances except taxes subsequent to 1981 and thereafter

Respondent, as attorney agent for Lawyers' Title Guaranty Fund, prepared and issued to buyer an owner's title insurance policy which disclosed no liens or encumbrances affecting title to the condo unit except for post-1982 taxes. Respondent did not pay off the \$40,000 mortgage and did not satisfy and discharge various other liens against the condo unit, in fact the \$40,000 mortgage was the subject of a foreclosure law suit at the time of the title closing. Respondent admitted knowledge that there were insufficient funds to discharge liens at the time of issuing the title policy but believed there would be funds coming from the seller in order to pay off all liens. Said liens were all subsequently paid off by the title insurer.

The Bar contends that such actions by Respondent violated Disciplinary Rules 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation) and DR 7-102(A)(5) (in his representation of a client a lawyer shall not knowingly make a false statement of law or fact).

III. Recommendations as to whether or not the Respondent should be found guilty:

As to Count 1

I recommend that the Respondent be found guilty of violating DR9-102(A), DR9-102(B)(3) and Integration Rule 11.02(4)(C).

As to Count 2

I recommend that the Respondent be found not guilty of violating DR9-102(A)(2) since said provision provides for an exception to the depository requirements of DR9-102(A) which Respondent does not qualify for since he was in violation by not initially placing the \$18,000 in a depository.

As to Count 3

I recommend that the Respondent be found guilty of violating

DR1-102(A)(4) and DR7-102(A)(5) in that his false statements and misrepresentations cannot be justified by his alleged lack of intent to defraud or harm nor upon the fact that Lawyers' Title Guaranty Fund eventually enabled the buyer to obtain title to the condo unit without encumbrances.

IV. Recommendation as to Disciplinary measures to be applied:

I recommend that the Respondent be suspended from the practice of law for a period of 30 days with automatic reinstatement at the end of period of suspension as provided in Rule 11.10(4).

V. Personal History and Past Disciplinary Record:

After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 11.06(9)(a)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age:	39 years
Date admitted to Bar:	1975
Prior disciplinary convictions and disciplinary measures imposed therein:	None
Other personal data:	None

VI. Statement of costs and manner in which cost should be taxed:

I find the following costs were reasonably incurred by the Florida Bar:

A. Grievance Committee level costs

1. Administrative costs	\$ 150.00
2. Court Reporter costs	1143.13

B. Referee level costs

1. Administrative costs	150.00
2. Transcript costs	1023.50
3. Copies	52.00
4. Witness Expenses	687.25
5. Court Reporter costs	50.00
TOTAL ITEMIZED COSTS	\$3205.88

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of the Florida Bar.

DATED this 9 day of September, 1985.


Referee

Copies to:

David M. Barnovitz, Bar Counsel

Terrence J. Watterson

Staff Counsel, Florida Bar, Tallahassee