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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

v.

SHALLE STEPHEN FINE,
Respondent.

Supreme Court Case
Case No. 76,584

_____ /

On Petition for Review

Initial Brief of Complainant

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, the Complainant, will be referred to as either "The Florida Bar" or "the Bar".

STEPHEN SHALLE FINE, the Respondent, will be referred to as "Respondent" of "Mr. Fine".

Abbreviations in this brief are as follows:

"RR" will denote the report of referee, which the referee identified as "Findings of Facts and Recommendations of Referee".

"T-6/7/91-Page—" denotes the transcript of Proceedings taken on June 7, 1991 and the page number of the transcript,

STATEMENT OF THE CASE

The Complaint in this case was filed an September 11, 1990. On September 25, 1990, J. Leonard Fleet, Circuit Judge, Seventeenth Judicial Circuit, was appointed Referee in these proceedings.

On June 7, 1991, a Joint PreTrial Stipulation was filed with the Referee. (T. 6/7/91 page 3). A PreTrial Hearing was conducted on February 15, 1991 and a Final Hearing on May 10, 1991.

"Findings of Facts and Recommendations of Referee" were filed in the Supreme Court, on October 7, 1991. (Appendix Exhibit "A").

The Referee recommends the Respondent be found guilty of violating the following rules:

Rule 5-1.1 (Rules Regulating Trust Accounts)

Rule 4-1.15 (Rules of Professional Conduct)

Rule 3-4.3 (Rules of Discipline)

Moreover, the Referee found Respondent not guilty of Rule 4-8.4(c) of the Rules of Professional Conduct. (RR 8).

In Addition to the above, the Referee recommends a 90 day Suspension and that Respondent be required to pass the ethics portion of the Florida Bar Examination and that he pay all costs of these proceedings. (RR 11-12).

STATEMENT OF FACTS

Jerry Mosca died intestate leaving a widow and two children as sole beneficiaries of his estate. Respondent served as Personal Representative for the estate of Jerry Mosca from October, 1981 through August 31, 1988. He performed this service without fee or other compensation.

On January 23, 1987, Respondent received a check from Mr. D. Schroeder payable to the estate of Anthony Mosca, in the amount of \$9,386.13. Anthony Mosca was Jerry Mosca's father, who died about ten years ago. Jerry Mosca was the heir of Anthony.

On January 23, 1987, Respondent transferred the \$9,386.13 into a bank check from Barnett Bank payable to Shalle Stephen Fine and deposited it into his trust account at United National Bank of Miami. (RR 2-3). On the same date, he issued a check from his trust account to United National Bank of Miami in the amount of \$7,250.00, payable to himself. With this check he purchased a cashier's check from United National Bank of Miami in the amount of \$7,250.00, payable to himself. He then deposited the cashier's check into his operating account at Commercial Bank and Trust Company. (RR 3).

On January 29, 1987, Respondent issued a trust account check payable to himself in the amount of \$1,200.00. On the same date he deposited that check into his operating account. (RR 3). The withdrawal of the \$7,250.00 and \$1,200.00 from the trust account, reduced the net balance of Respondent's trust account to the sum of \$1,257.08. (RR 4).

On or about April or May, 1 88, the conservator of the estate of Jerry Mosca asked the Respondent questions concerning the whereabouts for the \$9,386.13 that was sent to him by Mr. Schroeder. The Respondent told the conservator the funds were in an interest bearing account. (Joint PreTrial Stipulation, Paragraph 14). On or about May 13, 1988, Respondent deposited into his account at Shearson Lehman Brothers the sum of \$10,116.53. On the same date, he obtained from Shearson Lehman Brothers a check for \$10,116.53, payable to Shalle Stephen Fine, trustee. He then delivered said check to the conservator.

On August 31, 1988, the estate of Jerry Mosca was closed, the accounts were **approved, and** Respondent was discharged by the Court. The funds were distributed, there were no shortages in any account and no client last funds. (RR 5, Pages 1-5, Appendix A and Joint PreTrial Stipulation). (See the report of referee, which is identified as Findings of Facts and Recommendations of Referee). Appendix Exhibit A.

SUMMARY OF ARGUMENT

It is The Bar's Position that the Referee's findings that there was no mens rea or bad intent on the part of the Respondent and that the Respondent did not violate Rule 4-8.4 (c), is clearly erroneous and without support in the evidence. The factual situation shows by clear and convincing evidence that Respondent's conduct was in violation of Rule 4-8.4(c) (Dishonesty, fraud, deceit or misrepresentation).

Moreover, The Florida Bar contends that the Referee's recommendation for a 90 day suspension plus probation is *too* lenient, considering the serious nature of the violations. In addition, a suspension for three years is more appropriate than the recommended discipline by the Referee.

ARGUMENT

I

THE REFEREE'S FINDING THAT RESPONDENT
WAS NOT GUILTY OF VIOLATING RULE 4-8.4(C)
(CONDUCT INVOLVING DISHONESTY, FRAUD,
DECEIT OR MISREPRESENTATION) WAS CLEARLY
ERRONEOUS.

The Referee stated, "There is no evidence in the record before your Referee of any bad intent on the part of Respondent. Your Referee recommends a finding of not guilty **as** to the allegations Respondent violated Rule 4-8.4(c) of the Rules of Professional Conduct". (RR 7-8).

The Florida Bar recognizes that the Referee's "findings should be upheld unless clearly erroneous or without support in the evidence". The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). However, this court has reversed "findings of fact by Referee, when the findings were clearly erroneous or without support in the evidence". The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983), The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981), The Florida Bar v. Abney, 279 So.2d 834 (Fla. 1973). In the case sub judice, the Referee's findings of fact were correct, except for his finding that there was no bad or illegal intent and no mens rea on the part of the Respondent, and his finding no violation of Rule 4-8.4(c) of **the** Rules of Professional Conduct, (RR 7-8). In this regard, the Referee's findings were clearly erroneous and were without support in the evidence. The Florida Bar is also aware that in disciplinary proceedings, the Referee's findings are entitled to the same presumptions of correctness as the judgment of a trial of fact in Civil Proceedings, Rule 3-7.6(k)(1), Rules of

Discipline. Nevertheless, it is the Bar's position that the record clearly and convincingly shows that the Respondent's intentions were "illegal", "bad" and did involve "mens rea". (RR 7-8).

A careful reading of the Report of Referee (Findings of Facts and Recommendations of Referee), the Joint PreTrial Stipulation and the transcript, proves the Referee's findings were clearly erroneous and were without support in the evidence. In Fact, the report submitted by the Referee is contradictory in certain parts and would lead the reader to believe that his findings do show "mens rea" and bad intentions. For example, in the last paragraph on page 7, the Referee states, "There is no evidence in the record before your referee of any bad intent on the part of Respondent". However, this conflicts with the following comments by the Referee: See next to last paragraph of page 6, where the Referee states, "Respondent has offered no plausible explanation to your Referee as to why he engaged in the machinations above described in reference to the Schroeder funds". (RR 6).

First paragraph on page 7 of the referee's report:

Your Referee finds there was absolutely no justification, in law or in fact for Respondent having transferred from his trust account the funds received from Mr. Schroeder, which transfer resulted in the deposit of said funds into Respondent's operating account and the payment of expenses unrelated to the purpose for which the funds were received. (RR 7).

First paragraph on page 8 of the referee's report:

Without a doubt, the manner in which Respondent manipulated the funds from Mr. Schroeder indicates a conscious desire on the part of Respondent to obfuscate and/or cover up what he recognized to have been improper utilization of funds of the Mosca estate. Such machinations constitute circumstantial evidence of, at the least, minor misconduct and, at the most, blatant violations of both the spirit **and** the express letter of the rules relating to the regulation of lawyer's trust

accounts and clients' assets received by an attorney in a trust capacity. (RR 8).

In the opinion of the Bar, the foregoing excerpts from the referee's report, show mens rea on the part of the Respondent. A review of the facts clearly and convincingly show that the Respondent improperly used funds, the property of an estate, for his own purposes. In addition, it appears obvious that the manner of manipulating these funds was done for the purpose of obfuscating the improper use of those funds. (RR 8). After reading the above-mentioned excerpts from the Report of Referee, it is a mystery to the Bar, how the Referee could come to the conclusion that the Respondent was not guilty of dishonesty, fraud, deceit or misrepresentation. Accordingly, the Bar contends that the Referee's findings that Respondent was not guilty of Rule 4-8.4(c), was clearly erroneous and without support in the evidence.

Although the Referee found the Respondent not guilty of violating 4-8.4 (c) (dishonesty, fraud, deceit of misrepresentation), he did find the Respondent guilty of violating Rule 3-4.3 of the Rules of Discipline. [RR 5 & 8]. This rule states, inter alia, "The commission by a lawyer of any act which is unlawful or contrary to honesty, and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise...., may constitute a cause for discipline". (Underscoring supplied for emphasis). When the Respondent placed the \$9,386.13 he received from Mr. D. Schroeder into his trust account (RR 2-3), the Rules Regulating Trust Accounts governed those funds. When he improperly removed those funds from his trust account and said funds were deposited into his operating account,

(RR 3), he violated Rule 5-1.1 of the Rules Regulating Trust Accounts. Also, **this** constituted dishonesty, fraud, deceit or misrepresentation.

The Bar respectfully submits that the referee's findings that there was no mens rea, no bad intentions and no violation of Rule 4-8.4(c), are clearly erroneous and without support in the evidence. The Bar contends that the machinations of moving the funds from the trust account in a circuitous manner, was done for the purpose of confusing and covering up what Mr. Fine recognized to have been improper utilization of funds of the Mosca estate. (RR 8). When the conservator asked Mr. Fine about the funds he had received from Mr. D. Schroeder, he exchanged a check for \$10,116.53 for another check for the **same** amount, **from his** stock broker, Shearson Lehman Brothers. The check from Shearson Lehman Brothers was payable to the order of the Respondent, as trustee. (T. 6/7/91 31-33). This was obviously done to lead the conservator to believe the funds were always in an interest bearing account at Shearson Lehman Brothers.

It is clear and convincing that the manner in which the aforementioned funds were handled by Mr. Fine, constituted a premeditated plan to cover up the misuse of trust funds. Mr. Fine never deposited the funds he received from Mr. Schroeder into an estate account. The funds were placed into his trust account. Then, by circuitous routing, the funds went into Mr. Fine's operating account.

Although Mr. Fine was a personal representative, he was not authorized to commingle or misuse the funds he received on behalf

of the estate. Moreover, even though Mr. Fine was not acting **as** an attorney, "lawyers are necessarily held to **a** higher standard of conduct in business dealings than are nonlawyers". The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973) **and** The Florida Bar v. Hosner, 520 So.2d 567 (Fla. 1988). **As** a personal representative and a lawyer, Mr. Fine was acting in **a** fiduciary capacity. He had a duty to safeguard the funds entrusted to him. **When** he willfully used these funds for his own purpose, he violated **Rule 4-8.4 (c)** **and** in our view, the referee's findings that Mr. **Fine did not** violate that rule, was clearly erroneous and without support **in the** evidence.

ARGUMENT

II

A THREE YEAR SUSPENSION IS MORE APPROPRIATE THAN THE 90 DAY SUSPENSION RECOMMENDED BY THE REFEREE.

In the Case sub judice, the referee recommended the Respondent be suspended for a period of ninety days and that he be required to pass the ethics portion of The Florida Bar Examination, plus payment of costs. (RR 12). In attorney discipline cases, the Supreme Court is not bound by the Referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). The Florida Bar contends that a three year suspension is more appropriate than a ninety day suspension, in the case sub judice. Although the Referee found that there was no "bad intentions" on the part of the Respondent, this Court has suspended attorneys for misuse of client's funds without intent. The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988). Hartman was suspended for two years, even though the "Respondent's violations...were without intent but were attributable to emotional instability resulting from marital difficulties, and the concomitant use of drugs and alcohol". The Florida Bar v. Hartman, 519 So.2d 609, 608, (Fla. 1988). In the case sub judice, Mr. Fine was not having drug or alcohol problems and he was not emotionally unstable. The Referee's own words indicate a conflict with his finding of "no bad intent". For example, on page 11 of the Referee's Report, it states:

"Regardless of the mitigating circumstances, the seriousness

of intentional misappropriation (or misapplication) of client property cannot, and should not, be ignored". Also, the Referee states: "Everything in the record...leads to the inescapable conclusion the defalcation now presented for review is an isolated instance of violation of the Rules of Discipline". (Underscoring supplied for emphasis). (RR 11).

On page 10 of the Referee's Report, he states:

Nonetheless, the record herein reveals Respondent knowingly utilized trust account funds for purposes outside the authority granted by virtue of the deposit, with him by Mr. Schroeder of the funds due the beneficiaries.

It is apparent, by the Referee's own words, that he believed there was a "defalcation" of funds and that there was **an** "intentional misappropriation or misapplication of **funds**". However, the Referee also believed "the defalcation" was now presented for review is an isolated instance...". (RR 11).

The Florida Bar v. Hartman, supra held that a two year suspension was appropriate in a case involving misuse of client **funds**, where there was "no bad intentions". However, the factual situation in the case sub judice does not show a lack of "mens rea". On the contrary, there is only one conclusion that can be made by reading the record in this **case**, and that is, "Without a doubt, the manner in which Respondent manipulated the funds from Mr. Schroeder indicates a conscious desire on the part of Respondent to Obfuscate and/or cover **up** what he recognized to have been improper utilization of funds of the Mosca Estate ". (RR 8).

Accordingly, the following **cases** should be considered by this Court:

1. In The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991), this Court recommended a three year suspension, where McShirley converted funds to his own use. In the McShirley case there were mitigating factors, similar to the case at hand, **i.e.** (1) absence of prior disciplinary record; (2) good character or reputation; (3) remorse; (4) restitution before the Bar knew of the defalcation; (5) client was not harmed and cooperative attitude toward the disciplinary proceedings.

In the McShirley case, **this** Court stated, inter alia, "the intentional misappropriation of client property remains a most serious offense".

2. In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), this Court **stated** that, "Misuse of client's funds **is one of the** most serious offenses". Breed was suspended for two years. However, this Court stated:

We give notice to the legal profession of this state that henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client is injured.

3. In The Florida Bar v. Roth, 471 So.2d 290 (Fla. 1985), Mr. Roth was suspended for three years. Mr. Roth served as attorney and administrator of an estate. He commingled, misappropriated and converted to his own use estate funds and insurance proceeds. He was suspended for three years, despite evidence of restitution, cooperation, pro bono work, etc.

4. In The Florida Bar v. Shuminer, 567 So.2d 30 (Fla. 1990). Mr. Shuminer was disbarred for misappropriation of funds, despite mitigating factors, **i.e.**: no prior discipline record, mentally impaired due to addiction, cooperation with the Bar, good

reputation, remorse, etc.

In The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988), this court found gross negligence in the management of a trust account. Even though there was no willful misappropriation Whigham was suspended for three years. In the case at hand, the Bar believes there was a willful misappropriation.

Although the Respondent was acting as a Personal Representative rather as an attorney, the law clearly states: "lawyers are necessarily held to a higher standard of conduct in business dealings than are nonlawyers". The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973); The Florida Bar v. Hosner, 520 So.2d 567 (Fla. 1988). Also see Rule 3-4.3, Rules of Discipline, where it states, inter alia:

The commission by a lawyer of any act which is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relationships as an attorney or otherwise...may constitute a cause for discipline.

A personal representative acts in a fiduciary capacity and when an attorney violates the fiduciary relationship, by misusing funds of an estate, it is a serious breach of ethics, It is the Bar's view that Respondent's conduct was unlawful **and** it was contrary to honesty and justice. Moreover, it did seriously adversely **reflect** on the Respondent's fitness to practice law.

It is the Bar's view that the placing of trust funds into Respondent's operating account and payment of expenses unrelated to the purpose for which the funds were received, (RR 7), constitutes criminal conduct as described in Rule 5.12, Florida Standards for Imposing Lawyer Sanctions. Accordingly, a suspension for three years is more appropriate than the discipline recommended by the Referee.

CONCLUSION

WHEREFORE, The Florida Bar requests this Court to affirm the Referee's findings, except for those portions where the **Referee** recommends Mr. Fine be found not guilty of violating Rule 4-8.4 (c) (Conduct involving dishonesty, fraud, deceit or misrepresentation).

FURTHERMORE, The Florida Bar requests this Court to disapprove the Referee's recommendations concerning discipline and to order a suspension from the practice of law for three years.

IN ADDITION, it is requested that the Respondent be required to pay \$1,841.83 far costs. See affidavit concerning costs, Appendix Exhibit B.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 8, 1992 the original **and** seven copies of the foregoing Initial Brief of The Florida Bar was mailed via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida, 32399-1927 and that **true** copies were mailed to the following:

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REPORT OF REFEREE (Findings of Facts and Recommendations of Referee)	Exhibit A
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