

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case Nos. SC97000
SC99-11

v.

TFB File Nos. 1998-01,009(02)
1999-00,384(02)
1999-00,633(02)
1999-00,900(02)
1999-00,905(02)
&1999-00,570(02)

MARK HALLER ZILBERBERG,

Respondent.

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On November 12, 1999, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in Supreme Court Case No. SC97000. Service upon Mr. Zilberberg was accomplished in accordance with Rule 3-7.11, Rules Regulating The Florida Bar. On December 6, 1999, The Florida Bar filed another Complaint and Request for Admissions which was assigned Supreme Court Case No.

SC 99-11. Mr. Zilberberg was also properly served with a copy of these documents. Both cases were consolidated by Order dated January 31, 2000, upon written Motion of The Bar. On February 19, 2000, The Florida Bar filed a Motion for Summary Judgment as to both cases, alleging that Mr. Zilberberg had failed to file any responses to the Complaints or Requests for Admission. The Motion for Summary Judgment was scheduled for a hearing on April 20, 2000. On April 19, 2000, The Florida Bar filed a Motion to Abate based upon Mr. Zilberberg's tender of a Petition For Disciplinary Resignation. An Order of Abatement was entered on May 1, 2000. A hearing on the Motion for Summary Judgment was again noticed for July 19, 2000. On June 5, 2000, The Florida Bar filed a Motion to Stay Proceedings pending the Supreme Court's acceptance or denial of Mr. Zilberberg's Petition for Disciplinary Resignation. On January 16, 2001, The Supreme Court denied Mr. Zilberberg's Petition and notified this Referee of said denial. On February 15, 2001, The Florida Bar filed a Motion to Lift Stay and Dissolve Abatement. That motion was granted by Order dated February 21, 2001. A hearing on the Motion for Summary Judgment was set for May 9, 2001. On May 8, 2001, Respondent sent to the Referee and The Florida Bar his own Affidavit and an "Answer of Respondent". A hearing was held on May 9, 2001, The Florida Bar being represented by Mr. Edward Iturralde, and Mr. Zilberberg, representing himself, appeared via telephone. Summary Judgment was

granted as to both cases and the referee heard argument from both parties as to the appropriate level of discipline. All of the aforementioned pleadings, responses thereto, Orders, exhibits received in evidence and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Summary Judgment. The Florida Bar's Motion for Summary Judgment was based upon Rules 1.510 and 1.370 of the Florida Rules of Civil Procedure. The Civil Rules of Procedure are applicable unless in conflict with a Rule Regulating The Florida Bar. See Rule 3-7.6(e)(1), Rules Regulating The Florida Bar. The Bar alleged in their Motion that more than 45 days had past from service of the Complaint and Request for Admission and Respondent had not filed a response. Mr. Zilberberg did not, in fact, file any responsive pleading for more than 17 months. The Referee finds that the affidavit and Answer of Respondent should not prevent a finding of Summary Judgment because the purported Answer to the Complaint consists of six paragraphs which do not correspond to either of the two Complaints and Respondent filed no

Answer to the Requests for Admissions. This Referee further finds that the Affidavit should not be considered by the Referee in opposition to the Motion for Summary Judgment for failing to comply with the requirements of Rule 1.510, Rules of Civil Procedure. Affidavits in opposition to a Motion for Summary Judgment must serve the opposing party by mail five days prior to the hearing or by delivering the affidavits to opposing party no later than 5:00 p.m. two business days prior to the hearing. Mr. Zilberberg faxed his documents to the opposing party and the Referee late in the afternoon the day immediately prior to the hearing. Said hearing had been set more than two months in advance. Mr. Zilberberg's failure to comply with the applicable rules, the amount of time that has elapsed since service of the Complaints and Requests for Admissions, and Mr. Zilberberg's failure to answer either of the Requests for Admissions, leads the Referee to find that the allegations in the Request for Admissions, which essentially mirror those in the Complaints, are deemed admitted. Because no factual issue remained, the Referee granted Summary Judgment and heard argument as to the appropriate level of discipline. The Referee accepted both the Affidavit and Answer of Respondent into evidence for consideration in mitigation of discipline.

C. Narrative Summary Of Cases.

1. In Case Number SC97000 there are five counts plead, each corresponding to a TFB File Number, as follows:

In Count I, TFB File No. 98-01009-02, on or prior to March 5, 1998, Respondent, while suspended from practicing law in the state of Florida, contacted Assistant State Attorney Dana Plummer regarding deficiencies Respondent discovered in reviewing his trust account. Respondent stated that he had discovered that his secretary had taken the money. Plummer counseled Respondent to report said deficiencies to The Florida Bar, which he did. Respondent contacted two members of the Second Judicial Circuit Grievance Committee and informed them of the trust account discrepancies, which lead to an audit of Respondent's trust account and trust accounting procedures for the period beginning January 1, 1996 through March 31, 1998. Respondent met with an investigator of The Florida Bar and produced records. A subpoena for additional records was issued and served upon Respondent on April 20, 1998. Respondent was unable to produce complete records responsive to said subpoena, which made it necessary for The Bar to subpoena records from Zilberberg's bank and attempt to reconstruct the trust accounting records. The results of the audit established that Respondent did not maintain the following trust accounting records: cash receipts and disbursements journal, individual client ledgers,

monthly reconciliations of bank accounts and monthly comparisons of reconciled bank balance to total of individual client ledgers; and that bank statements, cancelled checks and deposit slips were missing for seventeen months of the twenty-seven month audit period. Respondent was provided with reconstructed records by The Florida Bar Staff Auditor and was asked to produce copies of settlement statements for eight specified trust account clients. Respondent produced what materials he had, but did not produce all materials requested. The audit disclosed that a shortage existed in Respondent's trust account for the entire twenty-seven month period of the audit, ranging from \$262.49 to \$15,313.50, and that the shortage as of the end of the audit period, March 31, 1998, amounted to \$9,006.07. The audit further disclosed that, as of March 31, 1998, six months beyond the effective date of Respondent's suspension, there were undisbursed balances in client trust ledger accounts because the account was frozen by his former wife's attorney in an attempt to collect those proceeds, with positive balances totaling \$12,042.49, negative balances totaling \$9,006.07 and an actual balance of \$3,036.66. By reason of the foregoing, Respondent violated Rules 3-4.8, 4-8.4(g), 5-1.1, 5-1.2 and 5-1.2(f) of the Rules Regulating The Florida Bar.

In Count II, TFB File No. 99-00384-02, Respondent represented Jessica Baldwin for a personal injury cause of action arising out of a motor vehicle accident

of November 1, 1996, which Respondent settled on a date thought to be prior to November, 1997. Respondent retained approximately \$500.00 of the settlement proceeds in his trust account to be disbursed to the client's medical providers but was unable to do so because the funds remained in the frozen account. When required to respond to the aforesaid complaint, Respondent failed to respond in writing, although he did communicate with The Florida Bar by telephone, until the matter was set for review before the Grievance Committee. By reason of the foregoing, Respondent violated Rules 4-8.4(g), 5-1.1 and 5-1.2 of the Rules Regulating The Florida Bar.

In Count III, TFB File No. 99-00633-02, it is alleged that on March 23, 1998, while a suspended member of The Florida Bar, and having never been admitted to the State Bar of Georgia, Respondent filed a Notice of Appearance, Plea and Demand for Discovery in a matter styled *City of Albany vs. Reba Dyes*, then pending in the State Court of Dougherty County, State of Georgia, case number 97-SR 10780, in which he was previously admitted as counsel. In an undated pleading filed in the aforesaid matter on June 10, 1998, Respondent entered into a Joint Motion for Continuance as counsel for the defendant, Reba Dyes. On August 16, 1998, Respondent filed an Agreed Motion for Continuance and Motion for Leave to Withdraw in the aforesaid matter setting forth as his reason for withdrawing the fact that he has moved his

practice and left the practice of law, but failing to disclose to the Georgia court that he was a suspended member of The Florida Bar. On August 24, 1998, Respondent stated to Georgia Assistant District Attorney, Jennifer A. J. Green, that there was an order permitting Respondent to appear in the aforesaid matter pro hac vice. Judge Salter denied that any such order had been entered. Respondent then admitted that he was a suspended member of The Florida Bar. When required to respond to the aforesaid complaint, Respondent failed to respond in writing, although he discussed the matter with The Florida Bar by telephone. By reason of the foregoing, Respondent violated Rules 3-6.1, 4-5.5 and 4-8.4(g) of the Rules Regulating The Florida Bar.

In Count IV, TFB File No. 99-00900-02, at the time of his suspension effective September 22, 1997, Respondent was required to provide a copy of the suspension order to all his existing clients and to then file an affidavit of compliance with The Florida Bar. At the time of said suspension Respondent represented one Doug Mathis. Respondent met with Doug Mathis and orally informed him of the suspension. Respondent failed to list Mr. Mathis on the "List of Clients Notified", attached to his affidavit of compliance. When required to respond to the aforesaid complaint, Respondent failed to respond in writing although he communicated with The Florida Bar by telephone. By reason of the foregoing, Respondent violated Rules

3-5.1 and 4-8.4(g), of the Rules Regulating The Florida Bar.

In Count V, TFB File No. 99-00905-02, on and prior to January 31, 1997, Respondent represented one Doug Mathis with respect to a Worker's Compensation claim. On January 14, 1997, defense counsel noticed the deposition of one Charles H. Wingo, M. D., to be taken on January 31, 1997. Respondent appeared late for the aforesaid deposition, and was unable to conduct cross examination, although he spoke with Dr. Wingo. Respondent obtained the Judge's permission for a rehearing. He was then suspended from The Florida Bar and was unable to proceed further. When required to respond to the aforesaid complaint, Respondent failed to respond in writing until the matter was set for review before the Grievance Committee. By reason of the foregoing, Respondent violated Rules 4-1.1, 4-1.3, 4-1.4 and 4-8.4(g), of the Rules Regulating The Florida Bar.

2. In Case Number SC1999-11, TFB No. 99-00570(02), which is consolidated with Case Number SC97000, Respondent was suspended from the practice of law in the state of Florida by order of the Supreme Court effective September 22, 1997, and has remained suspended at all times material hereto. During the months of October and November, 1998, Respondent assisted in the settlement of the personal injury claims of one Edwin Peacock, a client of John Michael Carlson

(Carlson), also a member of The Florida Bar. Respondent's fiancée' was employed by Mr. Carlson. While Respondent and Carlson had filed the necessary notices pertaining to employment of a suspended or disbarred lawyer with The Florida Bar in January, 1997, Carlson then filed a Notice of Termination of said relationship, dated May 12, 1998. Respondent and Carlson did not, thereafter, up to and including the dates of Respondent's participation in the settlement of the Peacock claims, file any renewed notice of employment or quarterly reports with The Florida Bar, as required by Rule 3-6.1, Rules Regulating The Florida Bar. By reason of the foregoing, Respondent violated Rule 3-6.1, Rules Regulating The Florida Bar.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating Rules 3-5.1, 3-6.1, 4-1.1, 4-1.3, 4-1.4, 4-5.5, 4-8.4(g), 5-1.1, 5-1.2, and 4-8.4(g), of the Rules Regulating The Florida Bar.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

- A. Disbarment from the practice of law in Florida,

- B. Payment of The Florida Bar's costs in these proceedings.
- C. Restitution payable to his clients as determined by the Florida Bar's Auditor, with pro rata payments payable to those clients in the amount listed in Exhibit A, attached hereto. The pro rata amounts shall be paid by Respondent out of the funds remaining in his trust account to the listed clients within 30 days of the order accepting this Report. The remaining balance owed to the listed clients shall be paid within one year of the order. Respondent must submit proof of payment of restitution to the Bar's headquarters office in Tallahassee.

V. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following:

- A. Personal History of Respondent:

Age: 46 years old

Date admitted to the Bar: September 21, 1989

B. Aggravating Factors:

The Referee finds that the following aggravating and mitigating factors as listed in Florida Standard for Imposing Lawyer Sanctions apply in this case.

9.22 (a) prior record: Respondent received a private reprimand in Supreme Court Case No. 67,465 (TFB File No. 07C84C59), by order of the Supreme Court of Florida dated February 25, 1986.

Respondent received a public reprimand with one year probation in Supreme Court Case No. 71,056 (TFB File No. 87-21942-02) by order of the Supreme Court dated October 12, 1989.

Respondent received a one year suspension with one year probation in Supreme Court Case No. 82,918 (TFB File Nos. 92-00379-02, 91-01274-02, 92-00141-02 and 92-00294-02) by order of the Supreme Court of Florida dated August 21, 1997.

Respondent received a thirty (30) day suspension with eighteen (18) months probation in Supreme Court Case Nos. 85,701 and 86,161 (TFB File Nos. 94-00886-02 and 95-00370-02), to run concurrently with the suspension ordered in Case No. 82,918, by order of the Supreme Court of Florida dated January 8, 1998.

Respondent received a one year suspension in Supreme Court Case No. 91,994 (TFB File No. 98-00429-02), to run consecutively from the conclusion of the one year

suspension period ordered in Case No. 82,918, by order of the Supreme Court of Florida dated February 25, 1999.

- (c) a pattern of misconduct;
- (d) multiple offenses; and,
- (i) substantial experience in the practice of law.

C. Mitigating Factors:

- 9.32 (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct; and
 - (l) remorse.

The Referee weighed these aggravating and mitigating factors and considered the Standards for Imposing Lawyer Sanctions, specifically 4.1 Failure to Preserve the Client's Property, 7.0 Violations of Other Duties Owed as a Professional, and 8.0 Prior Discipline Orders. The Referee also considered the cases cited by The Florida Bar which supported a recommendation of disbarment, including: The Florida Bar v. Travis, 765 So.2d 689 (Fla. 2000), The Florida Bar v. Williams, 604 So.2d 447 (Fla. 1992), The Florida Bar v. Solomon, 589 So.2d 286 (Fla. 1991), The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982), The Florida Bar v. Ross, 732 So.2d 1037 (Fla. 1998), and The Florida Bar v. Greene, 589 So.2d 281 (Fla. 1991).

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

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

| | | |
|----|------------------------|---------------|
| 1. | Administrative Costs | \$ 750.00 |
| 2. | Court Reporter Fees | 95.00 |
| 3. | Investigative Expenses | 69.60 |
| 4. | Photocopies | <u>393.30</u> |

TOTAL \$ 1,307.90

It is recommended that such costs be charged to 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 _____ day of _____, 2001.

James Roy Bean
Circuit Judge/Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32301, and that copies were mailed by regular U.S. Mail to JOHN A. BOGGS, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; EDWARD ITURRALDE, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and MARK HALLER ZILBERBERG, Respondent, at the address he provided at the time of Final Hearing 58 Mohican Trail, Crawfordville, Florida 32327, on this _____ day of _____, 2001.

Judicial Assistant to Judge Bean

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