

**IN THE SUPREME COURT OF FLORIDA
(Before a Referee)**

THE FLORIDA BAR,

Complainant,

v.

MARTIN RALPH MALLINGER,

Respondent.

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**Supreme Court Case
No. SC09-38**

**The Florida Bar File
No. 2008-50,374(15A)**

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

The Florida Bar filed its formal Complaint in this cause on January 9, 2009. Thereafter, the undersigned was appointed to preside as referee, by order of the Chief Judge of the Seventeenth Judicial Circuit. The parties have presented to me a Conditional Guilty Plea for Consent Judgment, which has been approved by The Florida Bar Board of Governors' designated reviewer. After due deliberation, I have determined to recommend that respondent's Conditional Guilty Plea for Consent Judgment be approved, for the reasons set forth herein. The pleadings and all other papers filed in this cause, which are forwarded to the Supreme Court of Florida with this report, constitute the entire record.

During the course of these proceedings, respondent was represented by Kevin P. Tynan and The Florida Bar was represented by Alan Anthony Pascal.

II. FINDINGS OF FACT:

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

B. Narrative Summary: The Florida Bar received a complaint from City National Bank of Florida. The bank representative was concerned about what he perceived to be suspicious transactions involving the respondent. Respondent had a valid durable power of attorney on behalf of Ms. Trude Rabl. Ms. Rabl was a close life long family friend of respondent who passed away. Respondent was also a named beneficiary and personal representative under her will. Both the power of attorney and the will were prepared by other counsel. Prior to her passing, Ms. Rabl had requested the Respondent to close out certain certificates of deposit belonging to her and to distribute the proceeds of these certificates to the Respondent and his children. Respondent was fully authorized to close out these accounts prior to Ms. Rabl's death. While the process to close these accounts began predeath, due to the banking delay in processing the redemptions, the bank issued cashier's checks to close the accounts post Ms. Rabl's passing. The Respondent deposited these checks into a personal joint account he shared with Ms. Rabl, which account had been established by her many years prior to her passing. Unfortunately, the Respondent was distraught with Ms. Rabl's death, was

tending to her funeral arrangements and did not carefully consider the ramifications of the date on the check when depositing same.

Even though there was no proof found that respondent improperly took these funds, these checks were endorsed and deposited by respondent as “power of attorney” 2 days after Ms. Rabl’s death. Since these checks were issued post death, solely by operation of law, these proceeds should have been probated and distributed to all beneficiaries despite Ms. Rabl’s pre-death instructions to the Respondent. In mitigation, respondent paid to the probate estate all monies due to the other beneficiaries that were initially deposited into the joint account after Ms. Rabl’s death. All beneficiaries, including the respondent, have received their monetary share of these additional funds.

III. RECOMMENDATION AS TO GUILT:

By the conduct set forth above, I find that respondent has violated the following Rules Regulating Fla. Bar: 3-4.2 [Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline.]; 3-4.3 [The commission by a lawyer of an act that 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, whether committed within or outside the state of Florida and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.]; 4-8.4(a) [A lawyer shall not violate or

attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.]; and 4-8.4(d)(1) [A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice ...].

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that respondent be found guilty of misconduct justifying bar discipline, and that he receive a public reprimand, to be administered by The Florida Bar's Board of Governors.

Respondent should also be required to pay The Florida Bar's reasonable costs in this matter, as set forth in The Florida Bar's affidavit of costs. I also recommend that statutory interest be applied to this cost judgment, should respondent fail to satisfy it immediately. Pursuant to R. Regulating Fla. Bar 1-3.6 and unless otherwise deferred by the Board of Governors of The Florida Bar, respondent will be deemed delinquent and declared ineligible to practice law, if he fails to pay this cost judgment within 30 days of it being final.

I am satisfied that the imposition of a public reprimand, and payment of The Florida Bar's costs are elements of an appropriate sanction, under applicable law. Attorney discipline must protect the public from unethical conduct and have a deterrent effect, while still being fair to respondents. The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970). I have based this conclusion upon my review of

applicable case law as well as the Florida Standards for Imposing Lawyer Sanctions. In The Florida Bar v. Cocalis, 959 So.2d 163 (Fla. 2007), respondent's failure to advise opposing counsel that he improperly received medical records from a treating physician warranted a public reprimand as conduct contrary to honesty and justice as a violation of 3-4.3. In The Florida Bar v. Bosse, 689 So.2d 268 (Fla. 1997), respondent's actions of taking cost awards and applying them for his own purposes rather than paying an expert warranted a public reprimand as violations of 3-4.3 and 4-8.4(c).

Section 4.13 of the Florida Standards for Imposing Sanctions states "public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." Also, Standard Section 7.3 states "public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system."

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

Prior to recommending discipline, and pursuant to R. Regulating Fla. Bar 3-7.6, I considered the following:

A. Personal History of Respondent:

Age: 52

Date admitted to The Florida Bar: October 28, 1982

B. Aggravating Factors:

9.22 (i) substantial experience in the practice of law.

C. Mitigating Factors:

9.32(a) absence of a prior disciplinary record;

9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

9.32(l) remorse.

D. Prior Discipline: None

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

I find that The Florida Bar has incurred reasonable costs in the matter and that same should be assessed against the respondent, as follows:

A. Grievance Committee Level Costs:

1. Court Reporter Costs	\$-0-
2. Bar Counsel Travel Costs	\$-0-

B. Referee Level Costs:

1. Court Reporter Costs	\$-0-
2. Bar Counsel Travel Costs	\$-0-

C. Administrative Fee	\$1,250.00
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D. Miscellaneous Costs:

1. Investigator Costs	\$-0-
2. Witness Fees	\$-0-
3. Copy Costs	\$-0-
4. Telephone Charges	\$-0-

TOTAL ITEMIZED COSTS:

\$1,250.00

It is recommended such costs be charged to respondent and interest at the statutory rate shall accrue and should such cost judgment not be satisfied within 30 days of said judgment becoming final, respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

Dated this ____8__ day of ____July_____, 2009.

STACY M. ROSS, 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 32399-1927, and that copies were mailed by regular U.S. mail to the following: STAFF COUNSEL, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; and ALAN ANTHONY PASCAL, Bar Counsel, The Florida Bar, Lake Shore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323; and to KEVIN P. TYNAN, respondent's counsel, 8142 North University Drive, Tamarac, Florida 33321, on this ____9____ day of ____July_____, 2009.

STACY M. ROSS, REFEREE