

IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,

Complainant,

v

CASE NO. SC09-1081

TFB NO. 2009-10,916 (20B)

GARY JOHN HAUSLER

Respondent.

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REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed a referee to conduct disciplinary proceedings according to Rule 3.7.6, Rules Regulating the Florida Bar, the following proceedings occurred:

On or about May 21, 2009, this Court entered an order suspending Respondent from the practice of law on an emergency basis based on the Respondent's conduct regarding the disbursement of funds from his trust account without the authority of his clients for the personal use and benefit of the Respondent.

On June 2, 2009, the Twentieth Judicial Circuit Grievance Committee "B" found probable cause that the Respondent had violated Rule 4-1.15 and Rule 4-8.4(b) of the Florida Rules of Professional Conduct.

On June 10, 2009, the Florida Bar filed a complaint that the Respondent had violated Rule 4-1.15 and Rule 4-8.4(b) of the Florida Rules of Professional Conduct and should be appropriately disciplined.

On June 15, 2009, Respondent filed an answer to the complaint and asserted an affirmative defense which included the following:

1. In late December 2008, Respondent suffered a stroke.
2. While Respondent was attempting to recover from the stroke, he was harassed by a creditor.
3. Respondent is under the care of two physicians and is on a dozen medications for high blood pressure, diabetes and other chemical imbalances.
4. On January 1, 2009, Respondent signed a promissory note in favor of the Kaplans in the amount of \$80,000.00 .
5. If Respondent is suspended from the practice of law, he will not be able to pay the Kaplans the \$80,000.00.

On July 17, 2009, after the Referee received the order requiring him to hold a hearing and issue a report, the Referee participated in a telephone conference call with Mr. Lovell and Respondent. The parties agreed to the date, time and location for the final hearing of Tuesday, September 8, 2009 at 9:00 a.m. at the Manatee County Judicial Center, in Bradenton, Florida.

On July 21, 2009, Mr. Lovell sent a notice of the September 8, 2009 final hearing to the Referee and Respondent.

On September 2, 2009, at 10:30 a.m., the Referee held a telephone conference call with Mr. Lovell and Respondent as a pretrial conference for the final hearing scheduled for Tuesday, September 8, 2009 at 9:00 a.m. During the call, both Mr. Lovell and Respondent indicated that they would be at the hearing on September 8, 2009. Respondent indicated that he might have an issue with his eyesight which might affect his attendance at the hearing however during the conference call, the Referee told Respondent to contact his office if a medical reason would affect his attendance at the hearing.

On Tuesday, September 8, 2009, at 9:10 a.m. a final hearing was held in this matter. The hearing was delayed because the Respondent had not appeared. Prior to the hearing being started, the Referee tried to call Respondent by telephone since Respondent failed to appear and failed to notify the Referee that he would not be appearing. The Florida Bar presented the testimony of Sandra Kaplan and introduced documents supporting her testimony. The following documents were admitted into evidence: A copy of a negotiated check in the amount of \$80,000.00 from the Kaplans to Respondent's Trust Account; a copy of a letter from Respondent to the Kaplans attorney with a promissory note from Respondent to the Kaplans; a copy of a certificated copy of the death certificate of Barbara Mae

Rattigan; and a copy of the deposition of Respondent taken August 18, 2009. The Florida Bar presented arguments to the Referee on why the recommendation should be disbarment for Respondent.

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.

B. Narrative Summary of Case:

Since 1978, Respondent has been an attorney licensed by The Florida Bar. His principal place of business has been in Marco Island, Florida since he began practicing law.

Alan G. Kaplan and Sandra Kaplan (“Kaplans”) met the Respondent in 2004 after their attorney, Jamie Greusel referred them to the Respondent for advice on a bankruptcy matter. Apparently, Respondent performed some legal services for the Kaplans in 2004 and thereafter for several years.

Since 2005, Respondent and the Kaplans began a series of personal transactions in which Respondent became the debtor and the Kaplans became his creditor on certain personal loans. The Respondent also encouraged the Kaplans to loan money to some of the Respondent’s clients.

In the transaction which led to the complaint by The Florida Bar, prior to December 18, 2008, the Respondent convinced the Kaplans to make a loan for \$80,000.00 to a lady by the name of Barbara Rattigan, a neighbor of the Respondent in Marco Island, Florida. Respondent told the Kaplans that Ms. Rattigan needed the money for expenses associated with her entering a nursing home. Respondent told the Kaplans that he would have the \$80,000.00 loan to Ms. Rattigan evidenced by a promissory note and secured by a first mortgage on Ms. Rattigan's home located at 2500 Kings Lake Blvd., Naples, Florida. Respondent assured the Kaplans that as soon as Ms. Rattigan's home was sold, the \$80,000.00 would be repaid to them with interest. On December 18, 2008, Ms. Kaplan issued a check in the amount of \$80,000.00 payable to "Gary J. Hausler Trust Account" and delivered it to Respondent. Respondent deposited the check into his trust account on December 19, 2008.

The Kaplans never received a promissory note and mortgage from Ms. Rattigan and continued to ask Respondent for those documents. Finally, on January 25, 2009, Respondent admitted to the Kaplans that Ms. Rattigan had actually died on December 15, 2008 and \$80,000.00 was not used for Ms. Rattigan's benefit. Respondent also admitted that he had taken the \$80,000.00 and used it to satisfy one of his personal creditors. The Kaplans did not authorize the

Respondent to issue a check in the amount of \$80,000.00 from his trust account to himself or one of his creditors.

At some point, the Kaplans received a promissory note (“Note”) dated January 1, 2009 from Respondent. The terms of the promissory note provide that the Respondent agreed to pay to the Kaplans principal in the amount of \$80,000.00 and interest in the amount of \$8,000.00 for a total balance due of \$88,000.00 on or before January 1, 2010. The Kaplans did not know anything about the Note and did not negotiate the terms of the Note with Respondent.

On May 1, 2009, the Kaplans received a copy of a letter that Respondent had mailed to the Kaplans attorney, Ms. Greusel, admitting that he had used the \$80,000.00 they sent him to be deposited into his trust account to pay a personal loan owed to a client, Antone C. Mendes.

III. RECOMMENDATIONS AS TO GUILT

I recommend that Respondent be found guilty of violating Rules 4-1.15, 4-8.4 and 5-1.1.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures and be disciplined by disbarment.

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 the Respondent:

1. Date of Birth: October 25, 1950.

2. Employment: Since 1987, the Respondent has been practicing law out of Marco, Island, Florida.

3. Date admitted to the Florida Bar: 1978

B. Medical History: The Respondent alleges in his answer and stated in a deposition that he suffered a stroke in December 2008 and was hospitalized. The Respondent also alleges that he has high blood pressure and is Type II Diabetes.

C. Duties Violated:

1. The duties violated by Respondent to his clients. Respondent violated the duty of preserving the Kaplans property, by issuing a check in the amount of \$80,000.00 to himself and/or his creditors. The Respondent violated the duty of maintaining the Kaplans confidence, by misrepresenting facts about Ms. Rattigan and why he wanted the \$80,000.00 and then continuing the deceit after the Kaplans became suspicious. The Respondent violated avoiding conflicts which would impair Respondent's judgment by becoming personally obligated and

indebted to the Kaplans on many other personal loans. The Respondent violated his duty to be honest and trustworthy to the Kaplans by inducing them into giving him \$80,000.00 and then continuing the deceit after the Kaplans became suspicious.

2. The duties violated by Respondent to the public. By converting the Kaplans property to his own benefit and use, Respondent committed the crime of conversion against the Kaplans and the citizens of the State of Florida. This crime adversely reflects on Respondent's duty as a lawyer for honesty, trustworthiness, or fitness as a lawyer in other respects.

3. The duties violated by the Respondent to the legal system. No comment.

4. The duties violated by the Respondent as a professional. Respondent violated the duty of honesty, trustworthiness, or fitness as a lawyer in other respects when he induced the Kaplans to issue him a check for \$80,000.00, used the check for his own benefit and use and initially misrepresented and denied to the Kaplans that he converted the money to his own use until he was caught.

D. The potential or actual injury caused by the Respondent's Misconduct: The Respondent's misconduct has caused the Kaplans to have a monetary loss of \$80,000.00 plus interest for the money that he converted to his own personal use.

E. The Existence of aggravating or mitigating circumstances:

1. Aggravators

a. Dishonest or selfish motive. Respondent's pattern of misconduct, conflict of interest and creation of debt against the Kaplans preceded the transaction which is the subject of this case. The Respondent was dishonest in misrepresenting why he wanted to borrow the \$80,000.00 from the Kaplans and shows that his motive was for a selfish reason.

b. Pattern of Misconduct. Respondent began has a pattern of misconduct against the Kaplans for several years when he changed his business relationship with them and became personally liable to the Kaplans, thereby creating a conflict of interest which impaired his judgment. That change in the relationship also encouraged Respondent to induce the Kaplans to assist him with financing for Respondent's clients. This course of action led to the transaction which is the subject of the complaint in this action in which Respondent blended his rationale for borrowing money from the Kaplans. Respondent represented that he was assisting a client who needed funds when the truth was that he needed the funds to pay off a creditor.

Other Transactions Between Respondent and Kaplans:

Since 2005, Respondent and the Kaplans began a series of personal transactions in which Respondent was the debtor and the Kaplans were his creditors. In each of these transactions, the Kaplans wrote a check made

payable to Respondent's Trust Account. On February 28, 2005, the Kaplans personally loaned \$300,000.00 to Respondent for Respondent to purchase a condominium (Villa Napoli # 5211) in Naples, Florida. To evidence the transaction, Respondent executed and delivered a promissory note and mortgage to the Kaplans. On March 15, 2006, the Kaplans loaned \$303,625.00 to Respondent for Respondent to purchase a house in Henderson, Nevada. To evidence the transaction, Respondent executed and delivered a promissory note and mortgage to the Kaplans. On April 27, 2006, the Kaplans personally loaned \$200,000.00 to Respondent for Respondent to purchase a condominium (Villa Napoleon # 4110) in Naples, Florida. To evidence the transaction, Respondent executed and delivered a promissory note and mortgage to the Kaplans. On January 5, 2007, the Kaplans personally loaned \$175,000.00 to Respondent to be secured by a second mortgage on Respondent's residence located at 2496 Kings Lake Blvd., Naples, Florida. To evidence the transaction, Respondent executed and delivered a promissory note and mortgage to the Kaplans, however the mortgage turned out to be a third mortgage. On November 1, 2007, Respondent asked if he could borrow \$50,000.00 and secure it with a mortgage on a house in Henderson, Nevada. The Kaplans declined but Respondent persuaded the Kaplans to loan him the \$50,000.00 to be secured by a second mortgage on his parent's house in Naples, Florida. Respondent executed and delivered a promissory note and mortgage to

the Kaplans, however the mortgage was never recorded. All of the loans are now in default and there is pending litigation between the Kaplans and the Respondent.

Transactions between Respondent, clients and the Kaplans:

Since 2005, Respondent also persuaded the Kaplans to become involved in some transactions involving his clients. In each transaction, the Kaplans wrote a check made payable to Gary J. Hausler's Trust Account. On October 7, 2005, the Kaplans loaned \$525,000.00 to Giuseppe Loduca secured by a mortgage on a restaurant. The loan was satisfied in full on November 21, 2007. On July 9, 2008, the Kaplans loaned \$55,000.00 to Janneau and were supposed to receive a promissory note. The Kaplans never received any documentation however the loan was satisfied in full on September 9, 2008.

c. Substantial experience in the practice of law. The Respondent has been a member of the District of Columbia Bar and New York Bar since 1976.

2. Mitigation

a. Absence of prior disciplinary record. There does not appear to be any prior disciplinary record on the Respondent.

b. Personal or emotional problems. The Respondent suffered a stroke in December 2008 and was hospitalized. The Respondent also has high blood pressure and is Type II Diabetes.

c. Timely good faith effort to make restitution or to rectify consequences of misconduct. At some point in time, the Respondent sent the Kaplans a promissory note to compensate the Kaplans, however the Respondent did not negotiate the terms with the Kaplans. On May 1, 2009, the Respondent mailed a letter to the Kaplans attorney about resolving the misconduct and making restitution to the Kaplans. The Respondent has not however made any restitution to the Kaplans.

d. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. The Referee is not aware whether the Respondent provided full and free disclosure to the disciplinary board or had a cooperative attitude toward the proceedings.

e. Physical or mental disability or impairment. The Respondent suffered a stroke in December 2008.

f. Remorse. The Respondent states in the letter to the Kaplans attorney that he was wrong to borrow the \$80,000.00 from the Kaplans and recognizes that his conduct was against the rules of The Florida Bar. The Respondent did not however apologize to the Kaplans for his conduct.

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

I find the following costs were submitted to the Court in the form of an affidavit by The Florida Bar and found to be reasonably incurred by The Florida Bar supported by substantial competent evidence.

A. Referee Level

1. Administrative costs pursuant to Rule 3-7.6(q)(1)(I)	\$1,250.00
2. Court Reporter's Fees	\$ 181.75
3. Bar Counsel Travel	\$ 177.10
4. Bar Investigative Costs	\$ 576.90
5. Bar Expenses (Tracer search)	\$ 18.25
Subtotal	\$2,204.00

B. Manner of Payment

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this _____ day of September, 2009

Gilbert A. Smith, Jr.
Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing report has been sent: by certified mail to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32301; by email to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, e-file@flcourts.org; and that copies were mailed by regular U.S. Mail to Kenneth Lawrence Martin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street., Tallahassee, Florida 32399-2300; Troy Matthew Lovell, Bar Counsel, The Florida Bar, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607-1496; and Gary John Hausler, 2496 Kings Lake Boulevard, Naples, Florida 34112, on this _____ day of September, 2009.

Gilbert A. Smith Jr./Referee