

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Supreme Court Case No. SC12-92

v.

TFB No. 2011-00,486(4A)

RAYMOND EDMUND MAKOWSKI,

Respondent.

_____ /

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

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

On January 18, 2012, The Florida Bar filed its Complaint in this matter. On January 27, 2012, this Referee was appointed. On February 17, 2012, The Florida Bar filed its Motion for Default which this Court has granted. Consequently, by his default, Respondent has admitted all of the well-pled factual allegations in the Bar's Complaint.

All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence, and this Report of Referee 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, albeit suspended for contempt in SC10-1363, but otherwise subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary of Case.

The Trust

1. Edwina B. Shutterly had been Respondent's client for many years.
2. On or about May 15, 2000, Respondent prepared, and Ms. Shutterly executed, the Edwina B. Shutterly Living Trust.
3. Ms. Shutterly named herself as Trustee.
4. Ms. Shutterly also named her daughter, Barbara Anne Flanagan, as the sole beneficiary of the Trust.
5. Ms. Shutterly appointed Richard W. Planck, her nephew, as her disability trustee and as successor trustee to replace her upon her death.
6. In addition, Ms. Shutterly named Jerry Tighe and Respondent as successor trustees in the event Mr. Planck could not serve.
7. On or about April 6, 2005, Ms. Shutterly executed an Amendment to the Trust removing Richard W. Planck as Trustee and appointing Tighe and Respondent as co-Trustees.

8. In January 2006, Ms. Shutterly died.
9. In December 2006, Barbara Anne Flanagan (Ms. Shutterly's daughter and the sole beneficiary) died.
10. Mrs. Flanagan's daughter, Cara A. Flanagan, the sole surviving descendent, now became the sole beneficiary of the trust.
11. Pursuant to the terms of the Trust, if Mrs. Flanagan died before complete distribution of the Trust's assets, then the Trustees, upon Mrs. Flanagan's death, were to have terminated the Trust and remitted all assets to the beneficiary – Ms. Cara A. Flanagan.
12. However, Respondent failed to notify Ms. Flanagan of this provision and to terminate the Trust and distribute the assets as directed.
13. From 2006 through 2009, Ms. Flanagan repeatedly requested that Respondent provide her with accountings.
14. Respondent failed to comply with Ms. Flanagan's numerous requests.
15. As a result of Respondent's repeated failures to comply, Ms. Flanagan retained attorney Rodney McIntyre in January 2010, to request accountings from Respondent.
16. Attorney McIntyre contacted co-Trustee Tighe who told him that Respondent handled everything regarding the Trust's finances.

17. On or about January 15, 2010, McIntyre contacted Respondent who claimed that his computer had crashed in the fall of 2009 and he would have to recreate the Trust records as they had all been destroyed.

18. Respondent also told McIntyre that Ms. Flanagan was not the beneficiary of the Trust but that Ms. Shutterly had executed another amendment to the Trust wherein she removed Ms. Flanagan as beneficiary and replaced her with a charitable organization.

19. McIntyre asked Respondent to provide a copy of that amendment, together with any current bank statements, the amount in the accounts, and the location of the Trust assets.

20. Despite repeated requests by McIntyre for an accounting and proof of Respondent's claim that Ms. Flanagan was not the Trust beneficiary, the only documentation Respondent provided was a letter dated January 19, 2010, with a copy of the first amendment appointing Tighe and Respondent as co-Trustees.

21. Respondent failed to provide any amendment or other documentation showing that Ms. Flanagan was not the beneficiary of the Trust.

22. Respondent also failed to provide any documents regarding the finances of the Trust.

23. On or about January 26, 2010, Ms. Flanagan again requested that Respondent comply with her request for a full accounting and the location of the Trust funds.

24. Again, Respondent failed to comply.

25. On February 11, 2010, Ms. Flanagan formally requested, pursuant to applicable law, that Respondent account for his actions as Trustee.

26. Respondent failed to respond.

27. On February 17th, Ms. Flanagan again requested an accounting and asked for a meeting with both Respondent and Tighe.

28. On February 22, 2010, Respondent faxed to McIntyre a copy of an unsigned accounting report showing only the checking account activity of the Trust from January 2009 through December 2009.

29. By reason of the foregoing, Respondent violated the directives of the Trust by repeatedly failing to provide an accounting to Ms. Flanagan.

30. On or about March 2, 2010, Ms. Flanagan, pursuant to the Trust, terminated and removed Respondent and Tighe as co-Trustees.

31. On or about March 12, 2010, Ms. Flanagan requested that Respondent forward all Trust documents, records, financial and otherwise, and copies of all tax returns involving the Trust.

32. Respondent, yet again, failed to comply.

33. As a result, on March 30, 2010, the court appointed Thomas McLeod as successor trustee.

34. Ms. Flanagan discovered that Respondent failed to file income tax returns for the Trust from 2006 through 2009 -- the entire time he had served as a trustee.

The House

35. Meanwhile, Ms. Flanagan and her mother resided at 3635 Cooper Circle East until her mother's death in 2006.

36. The home was originally owned by her father, Thomas E. Flanagan.

37. Mr. Flanagan died intestate in 1987 and at the time of his death, his house was titled solely in his name.

38. Therefore, the house passed to Mrs. Flanagan (his wife), Ms. Flanagan (his daughter), and a son from a previous marriage.

39. Respondent filed a Petition for Administration of Mr. Flanagan's estate in 1989 incorrectly identifying the beneficiaries.

40. Respondent failed to file a Petition for Summary Administration to Determine Homestead and Heirs at Law.

41. In 1990, Respondent filed a Petition for Order Authorizing Conveyance purportedly to transfer Mr. Flanagan's son's interest in the house to Mrs. Flanagan.

42. On September 1, 2000, Ms. Shutterly loaned her daughter, Mrs. Flanagan, \$60,682.10 and took a note and mortgage against the Cooper Circle property.

43. Respondent prepared that note and mortgage.

44. As previously noted, Mrs. Flanagan died in December 2006.

45. Respondent informed Ms. Flanagan, upon the death of her mother in 2006, that she now owned the property.

46. On September 1, 2009, Respondent prepared a Warranty Deed for Ms. Flanagan to execute regarding the real property at 3635 Cooper Circle East.

47. Respondent represented to Ms. Flanagan that if she were to execute the Warranty Deed in favor of the Trust, then the loan, previously given to her mother, would be forgiven by the Trust.

48. Respondent neglected to inform Ms. Flanagan that the loan, in fact, was held individually by Edwina Shutterly before her death and therefore belonged to the Edwina Shutterly Estate and not the Trust.

49. Even in the event that the loan was held by the Trust, Ms. Flanagan was the sole beneficiary of both the Trust and the Estate and therefore would simply be repaying herself either way.

50. Additionally, Ms. Flanagan never owned Copper Circle because at the time of Thomas E. Flanagan's death, Mrs. Flanagan had a 50% interest in Copper

Circle, Ms. Flanagan had a 25% interest, and John Flanagan (the son from a previous marriage) had a 25% interest. The heirs already had title and did not need a deed from anyone. For John Flanagan to convey his interest, he would have to convey by Quit Claim Deed.

51. Ms. Flanagan did as Respondent asked, however, and executed the Warranty Deed believing that the loan would be forgiven.

52. Respondent then proceeded to spend over \$23,000 of the Trust's funds refurbishing the Cooper Circle property.

53. Respondent did not properly probate the estate of Edwina Shutterly and misrepresented to Ms. Flanagan her ownership of the Cooper Circle property and the true ownership of the note and mortgage.

The Bar's Investigation

54. As a result of Respondent's foregoing misfeasance and malfeasance, Ms. Flanagan filed a Bar grievance.

55. The Bar has asked Respondent numerous times to produce records and to answer questions concerning the Trust.

56. Respondent has steadfastly refused to provide any information whatsoever.

57. As a result, the Bar was forced to subpoena Respondent's bank to produce the Trust records.

58. Once received, Bill Lowe, Branch Auditor for the Tallahassee Branch of The Florida Bar, audited the Edwina Shutterly Living Trust. A copy of Mr. Lowe's Audit Report is attached hereto as Exhibit "A."

59. As a result of the audit, Mr. Lowe found that during the period that Respondent served as a co-Trustee to the Shutterly Trust, he received \$72,061.63 in fees.

60. Tighe, who is not an attorney and therefore not subject to the Bar's jurisdiction, received \$62,613.67.

61. The total received by the co-Trustees represents over 43% of the trust income during their tenure.

62. Meanwhile, Ms. Flanagan, the actual and sole beneficiary of the Trust received only \$145,085.30.

63. Mr. Lowe also found that Respondent did nothing more than pay the beneficiary's bills.

64. Thus, Mr. Lowe concluded that Respondent performed no real services that could possibly justify payments to himself which he deposited via direct deposit into his account.

65. In addition, on two occasions, involving three separate checks, respondent caused the Trust account to be overdrawn.

66. Each check resulted in an overdraft fee being charged with one check being returned unsatisfied.

67. Although Respondent initially covered the one check that the bank returned, as soon as there was money in the Trust account, he reimbursed himself not only the amount of the check, but an additional \$250.

68. Further, Respondent did not pay the overdraft fees but allowed those charges to be borne by the Trust.

III. RECOMMENDATIONS AS TO GUILT

By reason of the foregoing, I find that Respondent has violated the following Rules Regulating The Florida Bar: 3-4.3 (misconduct); 4-4.1 (truthfulness in statements to others); 4-8.4(a) (an attorney shall not violate/attempt to violate the Rules of Professional Conduct); 4-8.4(b) (an attorney shall not a commit a criminal act) and 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation).

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

Florida Standards For Imposing Lawyer Discipline	
4.5 LACK OF COMPETENCE	4.51 Disbarment is appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures and the lawyer's conduct causes injury or potential injury to a client.
4.6 LACK OF CANDOR	4.61 Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client.
5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY	5.11 Disbarment is appropriate when: (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law.
7.0 VIOLATIONS OF OTHER DUTIES OWED AS A PROFESSIONAL	7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
9.0 AGGRAVATION	(a) prior disciplinary offenses; provided that after 7 or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct shall not be considered as an aggravating factor; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (g) refusal to acknowledge wrongful nature of conduct; (i) substantial experience in the practice of law.

V. CASE LAW

I considered the following case law prior to recommending discipline:

DISCIPLINE CASE-LAW	
<i>Elser v. Law Offices of James M. Russ, P.A.</i> , 679 So. 2d 309 (Fla. 5th DCA 1996)	Attorneys have an ethical duty to their clients to charge fair and reasonable fees regardless of how an attorney words a fee agreement. Specifically, an attorney owes his or her client a duty to only charge the client for those hours that are reasonably necessary to perform the legal services under the contract.
<i>The Florida Bar v. Mitchell</i> , 385 So. 2d 96 (Fla. 1980)	Evidence supported Referee's recommendation that respondent be found guilty of 11 instances of violating the Code of Professional Responsibility and complete disregard of responsibilities of lawyer and as officer of court, resulting in serious harm to public, without any known mitigating reasons, warrants disbarment.
<i>The Florida Bar v. Benchimol</i> , 681 So. 2d 663 (Fla. 1996)	Misappropriation of client trust funds, misappropriation of law firm funds, commingling of client and firm funds with personal funds, and a pattern of dishonesty and misrepresentation warrant disbarment.
<i>The Florida Bar v. Horowitz</i> , 697 So. 2d 78 (Fla. 1997)	Attorney's claimed clinical depression did not sufficiently mitigate his pattern of neglecting clients and failing to respond to communications from the Bar to warrant a sanction less than disbarment.
<i>The Florida Bar v. Tillman</i> , 682 So. 2d 542 (Fla. 1998)	Attorney's misappropriation of client funds, commingling of client and personal funds, and failure to follow rules for trust accounting warranted disbarment.
<i>The Florida Bar v. Blunt</i> , 564 So. 2d 129 (Fla. 1990)	Neglect of legal matters, improper trust accounting and misuse of client funds warrant disbarment in view of abandonment of practice and disappearance without notice to clients.
<i>The Florida Bar v. Travis</i> , 765 So. 2d 689 (Fla. 2000)	The presumption of disbarment for misusing client funds is exceptionally weighty when the attorney's misuse is intentional rather than the result of neglect or inadvertence.
<i>The Florida Bar v. Korones</i> , 752 So. 2d 586 (Fla. 2000)	Attorney's misappropriation of funds from estate warranted disbarment for five years.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend, as I have in Respondent's other recently tried case, that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. Respondent should be **PERMANENTLY DISBARRED** based on the numerous and exceedingly significant violations found in this case and in his other case. After repeated efforts to obtain Respondent's explanation of the foregoing circumstances, Respondent has repeatedly rebuffed all of the Bar's attempts to fully understand these circumstances going so far as failing to respond to the instant Complaint; and,

B. Payment of the Bar's costs in this matter.

VII. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following personal history of Respondent:

Age: 67

Date admitted to the Bar: May 10, 1974

Prior Discipline: As previously noted, Respondent is currently indefinitely suspended for his contempt of the Supreme Court in SC10-1363 by order dated September 14, 2010. Prior to that, also in 2010, Respondent was admonished for professional misconduct in SC08-1550. Finally, Respondent was admonished by the Grievance Committee for professional misconduct in 1993. The court acknowledges that this prior discipline is outside the seven-years mentioned in Standard 9.0(a) so the court has not considered this particular discipline in aggravation but nevertheless notes its existence for the record.

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

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

Administrative Costs	\$1,250.00
Bar Counsel Costs	\$110.37
<u>Copy Costs</u>	<u>\$36.40</u>
TOTAL	\$1,396.77

I recommend that such costs be charged to Respondent and that interest at the statutory rate shall accrue and that should such cost judgment not be satisfied within thirty 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 _____ day of February, 2012.

ALEXANDER R. CHRISTINE Jr., Referee
4010 Lewis Speedway Ste 250
Saint Augustine, FL 32084-8637

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 Respondent at his record Bar address of PO Box 551174, Jacksonville, FL 32255-1174, Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and Carlos Alberto Leon, Bar Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this _____ day of February, 2012.

Alexander R. Christine Jr., Referee

Thomas D. Hall, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927