IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
SEP 9 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk

THE FLORIDA BAR,

Complainant,

vs.

KENNETH E. PADGETT,

Respondent.
_____/

CASE NO. 65,653
1983C55 (Walter J. Scatt)
1984C05 (Wilhelmina Wainwright)
1984C29 (The Florida Bar)
1984C49 (The Florida Bar)

COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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SUMMARY OF ARGUMENT

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SUMMARY OF ARGUMENT

The Referee has recommended the Respondent be suspended for thirty (30) days and placed on probation for two (2) years, where he has recommended findings of guilt in three (3) different cases. The Referee's recommended discipline is erroneous, unjustified and simply inadequate.

In the Wainwright case, the Referee found that the Respondent had consistently disregarded his client's interests in a DUI case. Respondent failed to appear on her original trial date and did not provide written information to the court regarding negotiations made with the Assistant State Attorney. His lack of action resulted in his client's bond being revoked and her subsequent incarceration.

The second case involved several violations involving his trust accounts. The Referee recommended a finding of guilt where Respondent blatantly commingled funds for both personal and client affairs. He was also improperly handling trust funds with respect to bouncing trust checks, resulting in at least one significant delay in transferring a substantial amount in a real estate matter and using the trust account as his own investment account. His account records were completely inadequate rendering it impossible to determine the extent of actual shortages at any given

time. The Referee noted that Respondent handled his account in the manner he did because it was more convenient.

In the final case Respondent was found in possession of contraband of less than 20 grams of marijuana which was seized by Deputy Sheriffs during a search of Respondent's condominium.

The Florida Bar believes that a thirty (30) day suspension followed by two (2) years of probation and costs is erroneously inadequate and unjustified due to the nature and quantity of violations. The most egregious matter, that of mishandling his trust account, should warrant a significant suspension requiring proof of rehabilitation by itself based on case law involving similar misconduct. When coupled with the neglect causing prejudice to the client and the possession of a small amount of contraband, it becomes clear that the appropriate discipline is that recommended by the Board of Governors, a six (6) month suspension with rehabilitation required prior to reinstatement and payment of costs in this proceeding currently totalling ($1,463.29).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Summary of Argument has been furnished, by regular U.S. mail, to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing Summary of Argument has been furnished, by regular U.S. mail, to Joe M. Mitchell, Jr., Counsel for Respondent, 111 Scott Street, Melbourne, Florida, 32901; and a copy of the foregoing Summary of Argument has been furnished, by ordinary U.S. mail, to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 16th day of September, 1985.

DAVID G. McGUNEGLE
Bar Counsel

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STATEMENT OF THE CASE

This case is comprised of four counts. Count I (1983C55) involves Walter J. Gatti who complained to The Florida Bar in April 1983 and Count II (1984C05) involves Wilhelmina Wainwright who complained in July 1983. Counts III (1984C29) and IV (1984C49) were initiated by The Florida Bar. A Grievance Committee hearing was held on January 18, 1984 on the first two counts, resulting in findings of probable cause. Respondent executed a Stipulation and Consent to Finding of Probable Cause in Counts III and IV on March 8 and July 3, 1984, respectively. The Bar's complaint was filed with this Court on July 26, 1984. The Honorable J. William Woodson, Circuit Court judge in the Eighteenth Judicial Circuit, was appointed referee. Hearings were held March 19, 1985 and June 11, 1985. The referee's report was thereafter forwarded to this court on June 19, 1985.

In his report, the referee made several recommendations as to possible violations of the Integration Rule and Disciplinary Rules of The Florida Bar's Code of Professional Responsibility. In Count I (1983C55), the referee

recommends findings of not guilty of violating Integration Rule 11.02(3)(a) for conduct contrary to honesty, justice or good morals and Disciplinary Rules 1-102(A)(4) for engaging in conduct involving deceit and misrepresentation, 1-102(A)(6) for other misconduct reflecting adversely on his fitness to practice law and 7-102(A)(5) for knowingly making a false statement of fact.

In Count II (1984C05), he recommends findings of guilty of violating Disciplinary Rules 1-102(A)(6) for engaging in other misconduct reflecting adversely on his fitness to practice law and 6-101(A)(3) for neglecting a legal matter entrusted to him. In Count III (1984C29), he recommends findings of guilt of violating Integration Rule 11.02(4) for improper handling of trust funds and 11.02(4)(c) with its corresponding Bylaw for improper trust account record keeping, Disciplinary rules 1-102(A)(6) for engaging in other misconduct adversely reflecting on his fitness to practice law, 9-102(A) for commingling personal and trust funds, 9-102(B)(3) for failing to maintain complete trust account records and 9-102(B)(4) for failing to promptly deliver trust funds of a client upon demand. He recommends findings of not guilty of violating Integration Rule

11.02(3)(a) for conduct contrary to honesty, justice or good morals and 1-102(A)(4) for conduct involving dishonesty, fraud, deceit and misrepresentation. In Count IV (1984C29) he recommends a finding of guilt of violating 1-102(A)(6) for engaging in other misconduct adversely reflecting on his fitness to practice law. He further recommends findings of not guilty of violating Integration Rule 11.02(3)(a) for conduct contrary to honesty, justice and good morals as well as 1-102(A)(3) for engaging in illegal conduct involving moral turpitude.

As discipline, the referee recommends the respondent be suspended for a period of thirty (30) days, be placed on probation for two years and pay costs totalling $1,463.29. At their August 1985 meeting, the Board of Governors of The Florida Bar considered the referee's report and recommendations. The Board approved the referee's findings of fact and recommendations of guilt but voted to appeal the referee's recommended discipline as erroneous and unjustified given respondent's actions. Instead, the Board of Governors of The Florida Bar seeks review by this Court and urges it to adopt a discipline of suspension for at least six (6) months with proof of rehabilitation required prior

to reinstatement with a public opinion order and tax costs now totalling $1,463.29 with interest accruing at the legal rate beginning thirty days after this Court's order becomes final.

The Bar's petition for review was filed on August 12, 1985 along with a Motion for Extension of Time to file this brief. The Court granted The Florida Bar until September 9, 1985 to serve this brief.

POINT INVOLVED ON APPEAL

WHETHER REFEREE'S RECOMMENDED 30 DAY SUSPENSION FOLLOWED BY TWO YEARS PROBATION AND PAYMENT OF COSTS IS ERRONEOUS AND UNJUSTIFIED IN THIS MATTER INVOLVING RECOMMENDED FINDINGS OF GUILTY IN THREE SEPARATE CASES AND WHETHER THE BOARD OF GOVERNORS RECOMMENDED SIX MONTH SUSPENSION WITH PROOF OF REHABILITATION PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS THE APPROPRIATE DISCIPLINE.

STATEMENT OF THE FACTS

Count I - 1983C55. The referee recommends respondent be found not guilty of the charges in Count I. The Board concurred and no statement of facts is necessary.

Count II - 1984C05. Wilhelmina Wainwright of Starke, Florida was arrested twice and charged with DUI in St. Lucie County, Florida in April 1983. Upon the suggestion of her brother, she retained respondent in lieu of the public defender's office. He was paid $250.00 of a $1,000.00 fee. Respondent filed his notice of appearance and other papers on May 25, 1983. In the meantime, trial had been set for June 14, 1983. Ms. Wainwright received two letters from the Public Defender's Office advising her of the trial date and the need for her to be present. Around June 1, 1983, she contacted respondent's law office and was advised by the secretary that everything had been taken care of and that she did not have to be in court on June 14, 1983. Respondent also spoke with her brother at about the same time and advised him similarly. Prior to the trial date, respondent filed no motion for continuance. He did enter into plea negotiations with the State whereby his client would plead

guilty to the last DUI charge in exchange for dismissal of the prior one. His client was to receive a $1,000.00 fine and it was respondent's desire to have the case continued until August or September to enable his client to raise the money.

Neither Ms. Wainwright nor respondent appeared at the June 14, 1983 trial and respondent had filed nothing notifying the court of any plea agreement with the State. Accordingly, the judge revoked her bond.

On July 5, 1983 respondent sent a letter to the judge enclosing a copy of his notice of intent to enter a plea. He further advised the judge the State had agreed to continue the case until the end of August or September. He indicated he thought the court had been informed of the agreement and that was the reason he had not filed a pleading sooner. He indicated they requested the court continue the case until the first of September and he would waive speedy trial on behalf of his client.

Respondent did not inquire as to whether the bond had been revoked and a warrant issued for his client's arrest

although he called the judge's office and spoke to his secretary prior to his July letter. He also did not contact the clerk or opposing counsel.

On July 11, 1984 the bondsman telephoned Ms. Wainwright in Starke and later drove from Ft. Pierce to her home. Meanwhile, Mr. Wainwright telephoned respondent's office and was advised matters were under control and progressing. When he later called Ms. Wainwright, he discovered the bondsman was there. Mr. Wainwright explained to the bondsman that he had been advised by respondent everything was proper and she had not needed to appear at the June hearing. Ms. Wainwright was returned by the bondsman to Ft. Pierce that same day. The next day respondent was informed his client was in jail. He made efforts to secure her release through another bondsman without success until at least the following day. Meanwhile, Circuit Judge Sanders of the Eighth Judicial Circuit was contacted by his priest regarding Ms. Wainwright's predicament. The judge contacted respondent's office twice but was unable to speak with respondent or have him return the telephone call. He then called the county judge's office, made them aware of the situation and Ms.

Wainwright was released on her own recognizance at approximately 5:00 p.m. on July 14, 1983.

By letter dated July 27, 1983, Ms. Wainwright informed respondent his services were no longer desired. At that time, another hearing was scheduled for August 24, 1983, which Ms. Wainwright attended. Respondent contacted the court in an attempt to withdraw from the case prior to the hearing but such request was denied. The hearing was subsequently cancelled because respondent failed to appear although he was still attorney of record. Her case was subsequently handled by the Public Defender's Office.

The referee noted that it was respondent's failure to file a written pleading and his apparent reliance on the Assistant State Attorney to present his position to the judge that resulted in his client's bond being revoked and her subsequent incarceration. He further noted that respondent did not make adequate inquiry to the court, clerk, or opposing counsel as to whether the judge had agreed to the arrangement or did anything with respect to her bond following the June 14th hearing and her subsequent pick-up by the bondsman on July 11, 1983.

Count III - 1984C29. During 1982 and 1983 respondent maintained a trust account at the Beach Bank of Vero Beach. The account experienced several overdraft and insufficient funds problems in 1983. A check drawn in March 1983 payable to Tomac, Inc. in the amount of $41,906.95 was returned for insufficient funds and subsequently made good. A check dated July 20, 1983 payable to Corporate Investment Company for $51,929.66 was also returned for insufficient funds and respondent issued a new check dated August 11, 1983 for the same amount which was also returned due to insufficient funds. This overdrew the trust account almost $46,000.00 for that day at the bank. It was subsequently made good along with an interest payment for approximately two months. Another check for $10,182.62 was returned for insufficient funds in October 1983, overdrawing the account by over $14,000.00. On October 24, 1983, a trust check for over $14,000.00 was returned which caused an overdraw of slightly more than $300.00. In November 1983 respondent's trust account was overdrawn by almost $12,000.00 due to a $12,000.00 check being returned for insufficient funds. In December 1983 respondent's trust account was in an overdraft status on several days.

From March through October of 1983 checks were drawn on the trust account for more than $131,500.00 payable to respondent's personal accounts with E. F. Hutton and/or Merrill Lynch brokerage firms. During 1983 there were nine instruments drawn on E.F. Hutton payable to the trust account in the amount of $143,779.79. There was one Merrill Lynch check payable to the trust account for $12,840.52. The referee noted respondent stated at the final hearing he realized it was wrong to use his account for these transactions but the money was his own and it was done as a matter of convenience since this bank cleared checks faster.

During 1983 respondent utilized the trust account to handle client affairs, personal affairs, office expenses, rent, insurance, secretarial salaries, alimony, child support and food payments. The referee specifically found respondent had engaged in commingling violative of the rules. He further noted no clients complained about lack of funds other than Corporate Investment Company which was denied its funds for about two months.

Respondent's trust account records were utterly inadequate. His records consisted of a checkbook, cancelled

checks with bank statements and a client ledger book with only three active client ledgers. Deposit slips did not reflect the source of funds and check stubs did not identify the recipient or reason for payment. Respondent did not maintain a disbursements journal showing date, check number, payee, client and amount nor a receipts journal. He did not maintain the minimally required quarterly reconciliations and, his internal records were wholly insufficient to allow preparation of a reconciliation. The referee specifically noted respondent's trust account record keeping was completely inadequate to comply with minimum trust account record keeping requirements.

Count IV - 1984C49. In January 1984, a search was made of respondent's condominium by two Indian River County deputies. They discovered and seized less than 20 grams of marijuana, from vials with cocaine residue, a bag with 4 1/2 capsules of diazepam, assorted paraphernalia and small measuring scales. The referee noted respondent asserts he has a prescription for diazepam, he was not aware of the presence of the cocaine residue and the marijuana was not his own.

The respondent was cooperative throughout the Bar investigation.

ARGUMENT

THE REFEREE'S RECOMMENDED 30 DAY SUSPENSION FOLLOWED BY TWO YEAR'S PROBATION IS ERRONEOUS AND UNJUSTIFIED IN THIS MATTER WHERE RECOMMENDATIONS OF GUILTY HAVE BEEN MADE IN THREE SEPARATE CASES AND THE BOARD OF GOVERNORS RECOMMENDED SUSPENSION FOR SIX MONTHS WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS THE APPROPRIATE DISCIPLINE.

The referee has recommended the respondent be suspended for 30 days and thereafter be placed on probation for two years. He further recommends respondent pay the costs now totalling $1,463.29. The referee made recommendations for findings of guilty in three of four cases in this consolidated matter. He recommends he be found guilty of neglecting his client's affairs in the Wainwright case (Count II) for failing to have her or himself appear at her original DUI trial date on June 14, 1983. He had worked out a preliminary arrangement with the assistant state attorney, but did not file anything in writing. The Judge revoked her bond and almost a month later on July 11, 1983 she was returned to Ft. Pierce by the

bondsman from Starke in north Florida where she resided and jailed for a few days. In the intervening weeks, the respondent failed to follow up to determine what had actually happened at that hearing although he had conversation with the Judge's office and sent a letter dated July 5, 1983 enclosing a copy of his notice of intent to enter a plea and advising him of the arrangement he had with the State. The referee noted that the respondent failed to file a written pleading prior to the June 14, 1983 hearing and mistakenly relied upon the State to present his position. Moreover, he failed to make any adequate inquiry to the court, the clerk, or opposing counsel as to what had happened at that hearing. His inactions resulted in the client's bond being revoked and her subsequent incarceration, and constituted a consistent disregard for his client's interests.

In Count III, Case 1984C29 the referee found that respondent experienced continuous overdraft and insufficient fund problems in 1983. One check for almost $41,906.95 payable to Tomac, Inc. was returned for insufficient funds and subsequently made good. A second check dated July 20, 1983 and payable to Corporate Investment Company for over $51,929.66 was also returned for insufficient funds. The

check he issued to replace that check dated August 11, 1983 in the same amount was also returned due to insufficient funds. It was later made good with another check including accrued interest. However, the monies were due for approximately two months. Further, when the second check was returned for insufficient funds on August 16, 1983 it overdrew respondent's trust account almost $46,000 for that day. Throughout the rest of the year, there were additional checks returned on respondent's trust account for insufficient funds and the account was in an overdraft status on several occasions.

The respondent used this trust account as his personal investment account. From March through October 1983 checks were drawn on the trust account for over $131,500.00 payable to his personal accounts with E. F. Hutton and/or Merrill Lynch brokerage firms. During that year there were nine instruments drawn on E. F. Hutton payable to the trust account for almost $144,000 and one from Merrill Lynch for almost $13,000. When asked at final hearing why he was utilizing this account since he maintained other accounts at other banks, respondent stated:

Answer: "Dave, it was just laziness and stupidity. My main account was over in town. It was easier, you know, when you are, when you are doing business you have a, an account with more than one bank for lines of credit, whatever purposes you have. I happen to have my personal account in town. This was practically right next door. It was just stupidity and laziness. It was easier to send a secretary next door than it was to have her going out of her way and go into town.

I knew it was wrong. I did it and I acknowledged it to the Colonel the first day he walked into my office. It was wrong." (Transcript March 19, 1985 hearing pages 101 and 102).

When asked about the account being in an overdraft status at the end of 1983, the respondent stated:

Answer: "What it was, Dave, the reason I was running them through the trust account was that for some reason this bank was clearing checks faster. I should have just moved my regular account over there, my personal account over there. This bank was clearing checks faster. I could get a check

through my trust account due to the high volume, I guess I was running through there of other transactions. And E. F. Hutton is right next door to the right of my office. The bank is right next door to the left of my office. And I could get an E. F. Hutton check and put it in there. It was wrong.

As far as being overdrawn, basically I think that was more of a--there were alot of uncollected--in other words, even though they were clearing faster, it still took some times a week to ten days to clear a check." (T. March 19, 1985 - Hearing pages 102-103)

In 1983 the respondent also utilized the trust account to handle client affairs, personal affairs, office expenses, rent, insurance, secretarial salaries, alimony, child support and food payments. The commingling was totally blatant.

Finally, his trust account records were simply inadequate and incomplete. They consisted of a checkbook, cancelled checks with bank statements and a client ledger book with only three active client ledgers. The check stubs did not

adequately identify recipient or reason for the payments. He did not have a disbursements journal showing date, check number, payee, client and amount nor a receipts journal. He had not maintained the minimally required quarterly reconciliations of his internal trust account records to the bank records as was then required. In fact, his internal records were so woefully lacking no actual reconciliation attempt could be made.

The referee recommended the respondent be found guilty of commingling, improper handling of trust funds with respect to the bounced trust checks, using the account as his own investment account, for delaying the transfer of funds due to insufficient funds in the account, particularly with respect to the Corporate Investment Company. He also noted that it had been done with apparent disregard for the rules on trust account handling and record keeping because it was more convenient. Respondent's records were so inadequate it was impossible to discern whether a client was deprived of any funds for a period of time. However, there were several times when the account was insufficient to honor obligations due to it actually being overdrawn. Fortunately, no clients actually complained.

Finally, the referee recommended that the respondent be found guilty of possessing contraband and specifically a quantity of less than 20 grams of marijuana which was seized in a search of his condominium. Respondent asserted he was unaware of the presence of cocaine residue also found and that he had a prescription for the diazepam. After making all of the foregoing findings, the referee recommends respondent be suspended for merely 30 days and placed on probation with no substantive conditions for two years. The Board of Governors of the Florida Bar submits that the recommendation is simply erroneous and unjustified given the multiplicity of matters he has been found guilty of and his cavalier disregard for the rules on handling trust accounts and their record keeping.

The issue is the measure of discipline. Certainly the most egregious matter is that of his mishandling of his trust account and its record keeping. It is bad enough to co-mmingle, but to knowingly do so because it is simply more convenient is inexcusable and outrageous. Moreover, to run deficits as was done here on several occasions placed his clients at risk and caused several checks to bounce.

Clearly, Corporate Investment Company had to wait two months for $51,929.66 due to two bounced checks, albeit the respondent did pay them interest for the shortage period. However, his utter disregard for the rules in this instance alone warrants suspension requiring proof of rehabilitation. In The Florida Bar v. Bryan 396 So.2nd 165 (Fla. 1981) an attorney was suspended for six months with proof of rehabilitation required for wrongfully withholding over $10,000 for at least six months after demand and more than three months after the complaint was filed with The Florida Bar. The client suffered no economic loss. That respondent also had deficiencies in his trust account and had improperly maintained his trust records. Mr. Bryan indicated he had not consciously intended to misappropriate his client's money pleading that there had been a dispute over the amount of his fee and he delayed the remission of the money out of anger, spite and frustration. He also suffered from health problems.

A six month suspension was also meted out in The Florida Bar v. Welty 382 So.2d 1220 (Fla. 1980) where there were substantial deficits in the trust account extending over a two year period at times amounting to over $24,000. He

plead lack of knowledge of the rules, made repayment and fully cooperated. In that case, no client ultimately lost funds although there was one delay. In an older case, the The Florida Bar v. Hirsch 342 So.2nd 970 (Fla. 1977) an attorney was suspended for ninety days with automatic reinstatement recommended where he had misused approximately $3,300 of his client's money for some months and repaid it after they complained to The Florida Bar. Corporate Investment Company did not actually complain to The Florida Bar, but did have to wait for approximately two months.

Of course, there are many cases dealing with the mishandling of trust funds where the discipline is almost always a long term suspension or disbarment where there is evidence of misappropriation. A more difficult area is where the mishandling of monies delays the transfer for several weeks and/or where no client actually suffers any loss even though there has been misuse. In The Florida Bar v. Moxley 462 So.2d 814 (Fla. 1985), this court suspended an attorney for sixty days and placed him on three years probation where he utilized the same checking account for both client trust funds and an independent business venture. On occasion he advanced funds from this trust account to other accounts for

both business and law practice purposes before having received deposits to cover same. The record indicates the attorney had run up shortages within the account to over $20,000 at times but ultimately cleared same and totally cooperated with The Florida Bar. Emphasis was placed on Welty, supra, in the Moxley opinion. The majority distinguished between causing a client to suffer delay in receiving their monies due to the shortages in the trust account and where no clients were inconvenienced. They also noted the situation was closer to that in The Florida Bar v. Horner 356 So.2d 292 (Fla. 1978) which was cited in the Welty opinion as a technical violation of the trust accounting rules without willful intent calling for a public reprimand. Horner had collected funds for his friend and client and deposited them into his trust account. He attempted to settle and make disposition without success several times, but was told to use whatever money was necessary pending settlement which he did. When the client died, the widow demanded an accounting and payment in full of all sums collected. Horner then attempted to settle with her for his fees rather than provide an accounting or full repayment. The key here for the referee in finding a

technical violation was the knowledge and consent of his then deceased client.

Justice Ehrlich, in his dissent joined by Justice Alderman found no difference between the Welty and Moxley cases. He pointed out Mr. Welty maintained throughout that shortfalls originally occurred without his knowledge because of his incompetent record keeping while Mr. Moxley had intentionally done what he did. In this instance, there has been a delay of at least two months causing the respondent to ultimately make repayment along with interest. Moreover, the respondent knew the way he was handling or mishandling his trust account was wrong, even if more convenient. Taking the majority view in Moxley, this case is closer to Welty than Moxley or Horner. The mishandling was deliberate; checks were returned for insufficient funds, causing at least one significant delay in transferring trust funds; and the record keeping was so abysmal the degree of shortages could not be ascertained. Mr. Moxley at least had good records and no clients out funds even though there was deliberate misuse of trust funds. Moreover, the Bar submits that there should be no difference between the way this

account was handled and the problems encountered in Welty, let alone Moxley. As stated in the dissent:

> "The degree of departure from the ethical canons of the profession, not the degree of loss sustained by the client, should determine the appropriate discipline". Moxley, supra, at 817.

Another very recent case is The Florida Bar v. Bartlett 462 So.2d 1087 (Fla. 1985). In that instance, Bartlett maintained two trust accounts. He commingled funds within the accounts and inadequately maintained records in behalf of clients. He further paid out a small amount when he did not have sufficient funds on hand for that particular client and allowed one account to contain $1,550 less at one point than should have been. He also had at least two overdraft periods. He was simply not maintaining his records in accordance with the minimum standards. The Court suspended him for 30 days and directed him to attend a complete seminar on trust accounting with a certificate of compliance. The main difference in the present case is the shear amount of deliberate commingling and other mishandling within this respondent's trust account done for convenience, the bounced checks, the two month delay with the almost $52,000 and the abysmal records.

The respondent's activities in this count alone should warrant a suspension for six months with proof of rehabilitation required as recommended by the Board of Governors. His misconduct is not that dissimilar from The Florida Bar v. Whitlock 426 So.2d 955 (Fla. 1982). He improperly withheld $2500 for almost a year. His trust account encountered shortages approximating $20,000 due to improper record keeping and misuse of the money which were promptly made up when the Bar intervened. He also had overdrafts, was commingling and had inadequate staff supervision for part of the time. He was suspended for three years with proof of rehabilitation. Note that Justice Alderman dissented and would have disbarred the respondent for his activities which included not only mishandling his trust account and making unauthorized withdrawals, but by grossly neglecting the real estate closing which he had been hired to accomplish. Considering Welty, supra/ Bryan, supra/ and Whitlock, supra, a six month suspension is the minimal appropriate discipline notwithstanding, the great weight recorded a referee's recommendation. Moxley, supra, P. 816. That recommendation is erroneous and unjustified here.

In addition, we have the finding of neglect causing his client to be jailed as well as the separate finding of possession of a small amount of contraband. Neglect cases have often resulted in reprimands standing by themselves. See Welty, supra, at page 1223. Combined with other matters, a suspension is usually appropriate. See e.g. The Florida Bar v. Davis 446 So.2d 1072 (Fla. 1984). He was suspended for three months with automatic reinstatement for neglecting one legal matter entrusted to him and for having inadequate and improper trust accounting procedures. Taken together, the recommended findings of guilty on three counts simply warrant much more than the referee recommended and call for a suspension with proof of rehabilitation.

This court has stated in the past where there are a series of lesser acts of misconduct the aggregate becomes serious misconduct warranting more severe discipline. The Florida Bar v. Abrams 402 So.2d 1150 (Fla. 1981) and The Florida Bar v. Brigman 307 So.2d 161 (Fla. 1975). In the latter case, the attorney accepted representation with estate beneficiaries while he also advised the personal representative with whom they had a controversy without the knowledge of those clients; accepted a fee to do a divorce, did nothing

and refused to discuss it with the clients; received funds in a real estate closing and refused to account for them for several months; and accepted a representation of an accident case for out-of-state clients and failed to communicate with them. The Court indicated that although the acts individually were not of great magnitude, they constituted a serious breach of ethics in the aggregate and suspended the respondent for six months with proof of rehabilitation required prior to reinstatement. The referee also noted Brigman's absolute failure to cooperate. The multiple matters are here although this respondent was cooperative through out the case. On the other hand, the Bar submits the way he handled his trust account knowing it was improper is major misconduct, particularly where his activities resulted in delay in transferring almost $52,000 over several weeks and his records were so completely inadequate no determination of whether other clients were out funds for any particular period of time was possible. It is noted no clients did complain.

This court has found the area of improper use of trust accounts to be the most troublesome area of discipline and has issued its sternest disciplines where misuse of funds

was present. Over the years the rules on trust accounting and reporting through the dues statement have gotten increasingly tighter in an effort to insure all attorneys follow them and are able to account promptly for those funds entrusted to them. It is not excusable to be ignorant of the rules let alone to simply disregard them for one's own convenience as was done here. The Bar submits knowing disregard of the rules on trust account handling and record keeping, is major misconduct warranting a suspension requiring proof of rehabilitation. The Bar agrees with the dissent in Moxley Supra. Combining it with other acts of misconduct, makes the collective breach more flagrant further underscoring the need for proof of rehabilitation.

There is no question as to what happened in this case. The issue is what discipline is appropriate. The purpose of discipline has been addressed by this court on several occasions with the most recent being that in The Florida Bar v. Lord 433 So.2d 983 (Fla. 1983) at page 986. Discipline should serve three purposes. It must be fair to society, both protecting it from unethical conduct and not deny the public the services of a qualified lawyer due to an unduly harsh penalty. Clearly, this court has determined through

its series of changes to the rules on trust account record keeping and reporting that the public needs protection from an attorney who will not handle his trust account or records in accordance with the rules let alone one who misuses the money. They also need protection from one who knowingly disregards the rules. Although this respondent may be a qualified attorney, the Bar would submit that the growth of The Florida Bar over the last decade in this state has severely undermined the argument about depriving the public of a qualified lawyer. In any event, the suspension for six months with proof of rehabilitation required is not an unduly harsh penalty given respondent's deliberate actions.

Second, the judgment must be fair to the respondent to punish the breach and encourage rehabilitation and reform. The Florida Bar submits that that is the exact purpose behind the recommendation for proof of rehabilitation. It is necessary given the prior case law and the activities here. Finally, the disciplinary judgment must be severe enough to deter others who might be prone or tempted to become involved in similar violations. The Board of Governors of the Florida Bar would urge this purpose be underscored. The deliberate disregard for the rules on

trust account handling and record keeping simply because it is more convenient demands a suspension requiring proof of rehabilitation and adding separate areas of misconduct highlights the need. The Board of Governors of The Florida Bar submits that members of The Florida Bar simply must be made to understand that if they do not handle their trust accounts properly let alone deliberately mismanage them, they will be disciplined severely. The referee's recommended thirty days suspension and two years probation simply will not deter others. It should not stand as the appropriate discipline which is that recommended by the Board of Governors a six month suspension with proof of rehabilitation required prior to reinstatement and payment of costs in this proceeding currently totalling $1,463.29.

CONCLUSION

Wherefore, The Board of Governors of The Florida Bar respectfully prays this Honorable Court will review the referee's report and recommendations; approve the findings of fact and recommendation of guilt; but reject his recommended discipline of a thirty day suspension followed by a two year's unsupervised probation and order instead in an appropriate opinion that he be suspended for a period of six months with proof of rehabilitation required prior to reinstatement as recommended by the Board of Governors and pay costs in these proceedings currently totalling $1,463.29.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Brief in Support of Petition for Review has been furnished, by the Federal Express Corporation, to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Complainant's Brief in Support of Petition for Review has been furnished, by regular U.S. Mail, to Joe M. Mitchell, Jr., Counsel for Respondent, 111 Scott Street, Melbourne, Florida 32901; and a copy of the foregoing Complainant's Brief in Support of Petition for Review has been furnished, by regular U.S. Mail, to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 on this the 6Th day of September, 1985.

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Branch Staff Counsel