IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

KENNETH E. PADGETT,

Respondent.
_____/

CASE NO. 65,653

1983C55 (Walter J. Gatti)
1984C05 (Wilhelmina Wainwright)
1984C29 (The Florida Bar)
1984C49 (The Florida Bar)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, hearings were held on March 19, 1985 and June 12, 1985. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to the Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: David G. McGunegle

For the Respondent: Joe M. Mitchell, Jr.

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged: After considering all of the pleadings and evidence before me, pertinent portions of which are commented on below, I find generally as to all matters that the respondent, Kenneth E. Padgett, is, and at all times hereinafter mentioned, was, a member of The Florida Bar and subject to the

jurisdiction and Disciplinary Rules of the Supreme Court of Florida. He practiced law in Vero Beach, Indian River County, Florida. Many of the facts to all counts were stipulated to by the parties.

As to Count I

(1983C55 - Walter J. Gatti)

I find specifically that:

1. Along with Charles Sullivan, respondent represented Mrs. Walter J. Gatti in her dissolution of marriage action which she filed against her husband in late 1979. Her case progressed and ultimately the dissolution was entered in 1981. Respondent and Mr. Sullivan were awarded attorney's fees of $22,500.00 on August 3, 1981. This order was appealed and the decision affirmed in April, 1982. On May 19, 1982, Mr. Gatti's attorney filed a motion to set aside the order awarding attorney's fees, appraiser's fees and accountant's fees on a basis of newly discovered evidence having to do with a ruling of the Department of Professional Regulation against the accountant. On September 3, 1982 the judge entered a partial final judgment for attorney's fees for $22,500.00 plus interest. The second appeal was taken and denied in December, 1982. Respondent thereafter collected his attorney's fees plus interest from counsel for opposing party but not without some unpleasantness in 1983.

2. In settlement negotiations, the respondent had sent a letter dated July 23, 1981 to Mr. Gatti's attorney stating in part "We would be willing to settle the attorney's fee question

for the total sum of $20,000.00. This fee should be paid from one of Mr. Gatti's companies, so as to allow an income tax deduction to Mr. Gatti for the fees." I note respondent did not make the suggestion to his own client but to the attorney for opposing counsel. Furthermore, expert testimony was adduced at final hearing indicating there were circumstances under which such advice was not improper.

3. During the appellate process, respondent engaged in several attempts to collect the attorney's fees without success. There was a supersedeas bond taken out with respect to the first appeal. Although a separate bond was not taken out for the second and the first bond remained in effect, there was controversy over whether it applied. Respondent attempted an unsuccessful garnishment action against Mr. Gatti and also contacted the bonding company several times without success. However, he never did actually file an action against the bonding company. There was a hearing before the undersigned referee in his capacity as a circuit judge in Brevard County on February 18, 1983 on the husband's motion to dismiss the writ of garnishment. Respondent participated by telephone and essentially argued there was no bond posted for the second appeal whereas the wife's attorney argued the bond still applied. At one point in the hearing, respondent stated they were filing a separate lawsuit against the bonding company and at another that suit was pending although service had not been obtained. In fact the respondent never filed action against the bonding company. Respondent stated at final hearing in this cause that due to the litigiousness of the situation his mouth had preceded his mind

and that he had not attempted to intentionally mislead the court. This referee specifically notes that the litigation was heated and does not consider respondent's statements to have been intentional misrepresentations. They also were not material to disposition of the hearing.

As to Count II

(1984C05 - Wilhelmina Wainwright)

I find specifically that:

1. Wilhelmina Wainwright resides in Starke, Florida. She was arrested twice and charged with DUI in St. Lucie County, Florida in April, 1983. Initial representation was by the Public Defender's Office. She retained the respondent at the suggestion of her brother. He was paid by the family and other sources $250.00 of a $1,000.00 fee.

2. Respondent filed his notice of appearance and other papers on May 25, 1983. Meanwhile, Ms. Wainwright's trial had been set for June 14, 1983. She received letters dated May 20, 1983 and May 26, 1983 from the Public Defender's Office advising her of the trial date and the need for her to be present.

3. Prior to the trial date, the respondent filed no motion for continuance in his client's case. However, 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

respondent wished to have the case continued until August or September to enable his client to raise the money.

4. On or about June 1, 1983, Ms. Wainwright called respondent's office and spoke to his secretary. She advised her that everything had been taken care of and that Ms. Wainwright did not have to be in court on June 14, 1983. Respondent also spoke to her brother at about the same time and gave him the same information.

5. Ms. Wainwright failed to appear on June 14, 1983 for trial. Respondent also failed to appear and filed nothing notifying the court of any plea agreement with the State. The judge revoked her bond at that time. On July 5, 1983, the 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 so his client could raise the fine money. He indicated he thought the court had been informed of the agreement and that was the reason he had not filed a pleading sooner. Finally, 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.

6. Respondent did not make inquiries 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. On July 11, 1983, the bondsman called Ms. Wainwright in Starke and later drove from Ft. Pierce to her

home the same day. Meanwhile, Mr. Wainwright phoned respondent's office who advised him matters were under control and progressing well. When he later called Ms. Wainwright he discovered the bondsman was there. He talked to the latter and advised him respondent said everything was proper and that she had not needed to appear in the earlier hearing. She was returned by the bondsman to Ft. Pierce that same day.

7. On July 12, 1984 respondent was made aware by Mr. Wainwright and Ms. Wainwright that she was in jail in Ft. Pierce. Thereafter, he made efforts to secure her release through another bondsman without success until at least the next day. Circuit Judge Sanders of the Eighth Judicial Circuit was contacted regarding Ms. Wainwright's problems by his priest. He contacted the respondent's office twice but was unable to speak to the respondent or have him return the telephone calls. He then called the county judge's office and made them aware of her plight and she was released on her own recognizance at approximately 5:00 p.m. on July 14, 1983.

8. By letter dated July 27, 1983, Ms. Wainwright advised respondent his services were no longer wanted. At that time another hearing was scheduled for August 24, 1983, which she attended. Prior to that hearing, respondent contacted the court in an attempt to withdraw from the case which the court denied. The August 24, 1983 hearing was cancelled because respondent again failed to attend although he was still attorney of record. Her case was subsequently handled by the Public Defender's Office and disposed of that fall.

9. I do note respondent's failure to file a written pleading and apparent reliance on the Assistant State Attorney to present his position to the judge resulted in his client's bond being revoked and her subsequent jailing. From the June 14, 1983 hearing and her subsequent pick-up by the bondsman on July 11, 1983, respondent made no adequate inquiry to the court, the clerk or opposing counsel as to whether the judge had agreed to the arrangement or done anything with respect to her bond. This was respondent's responsibility and not carried out.

As to Count III

(1984C29 - The Florida Bar)

I find specifically that:

1. Respondent maintained a trust account at the Beach Bank of Vero Beach in 1982 and 1983. He had other bank accounts in banks in town and not on the beach side. A check dated March, 1983 payable to Tomac, Inc. in the amount of $41,906.95 drawn on the trust account was returned for insufficient funds. It was subsequently made good. Respondent drew a check dated July 20, 1983 payable to Corporate Investment Company for $51,929.66 which was also returned for insufficient funds. Respondent issued a new check dated August 11, 1983 in the same amount which was returned for insufficient funds on August 16, 1983 and which overdrew respondent's trust account almost $46,000.00 for that day. Respondent had a check for $20,182.62 returned for insufficient funds on October 14, 1983, which overdrew the account by over $14,000.00. On October 24, 1983, a trust account check for over $14,000.00 was returned overdrawing the account

slightly over $300.00. On November 28, 1983, respondent's trust account was overdrawn by almost $12,000.00 due to a check of $12,000.00 being returned for insufficient funds. In December, 1983, respondent's trust account continued in an overdraft status until December 8, 1983. It also went into an overdraft status on December 13 and December 28, 1983.

2. From March, 1983 through October of the same year 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 with most going to the former. However, 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. Respondent stated at the final hearing that he realized it was wrong to use his account for these transactions but that the money was his own and done as a matter of convenience since this bank cleared checks faster.

3. Throughout at least 1983 the respondent utilized the trust account to handle his client affairs, his own personal affairs, office expenses, rent, insurance, secretarial salaries, alimony, child support and food payments. I specifically find that his actions in this regard as well as utilizing the trust account as a base of his investment operations constitutes commingling violative of the rules. I note there are no clients complaining for lack of funds other than Corporate Investment Company which was out its funds on a closing for about two months.

4. Respondent's trust account records consisted of his checkbook, cancelled checks with bank statements and a client ledger book with only three active client ledgers. Respondent's bank deposit slips did not reflect the source of the funds. His check stubs did not adequately identify recipient or the reason for the payments. Respondent did not have a disbursements journal showing date, check number, payee, client and amount nor a receipts journal. Respondent has not maintained the minimally required quarterly reconciliations of his internal trust account records to the bank records. In fact, his internal records were wholly insufficient from which a reconciliation could be made. Respondent's trust account recordkeeping was completely inadequate to comport with the minimum trust account recordkeeping requirements.

As to Count IV

(1984C49 - The Florida Bar)

I find specifically that:

1. On January 19, 1984 respondent's father and Judge Graham W. Stikelether had discussion with the respondent relative to his Bar and personal problems. Thereafter, a search was made of the respondent's condominium by two Indian River County deputies. They discovered and seized less than 20 grams of marijuana, four vials with cocaine residue, a bag with four-and-one-half capsules of diazepam, assorted paraphernalia and a small measuring scales. Respondent asserts he has a prescription for the diazepam and he was unaware of the presence of the cocaine residue and that the marijuana was not his own.

III. Recommendations as to Whether or Not the Respondent Should be Found Guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence:

As to Count I

(1983C55)

I recommend the respondent be found not guilty and specifically that he be found not guilty of violating Rule 11.02(3)(a) for conduct contrary to honesty, justice or good morals. I further recommend he be found not guilty of violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(4) for engaging in conduct involving deceit and misrepresentation, 1-102(A)(6) for other misconduct reflecting adversely on his fitness and 7-102(A)(5) for knowingly making a false statement of fact.

I make my recommendation specifically finding that respondent's misstatement to the court was done in the heat of battle and not an intentional misstatement. In effect, he put his mouth in gear before his mind. I further do not find the statement he made in his letter to opposing counsel to be illegal conduct and impermissible under the rules particularly when there are circumstances under which such advice is valid. However, had he so advised his own client I would have been inclined to a different recommendation.

As to Count II

(1984C05)

I recommend the respondent be found guilty and specifically that he be found guilty of violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(6) for engaging in other misconduct reflecting adversely on his fitness to practice law, and specifically 6-101(A)(3) for neglecting a legal matter entrusted to him. This recommendation is predicated on respondent's mistaken reliance on another to present a matter to the judge and thereafter taking no steps to ascertain whether the judge had accepted the bargain or, what had happened at the hearing on June 14, 1983. I specifically find he had a duty to follow-up after that hearing either with opposing counsel, the judge or the clerk to determine what had happened and; that his failure to do so ultimately resulted in his client's jailing. His laxness in this regard constitutes a consistent disregard for his client's interest.

As to Count III

I recommend the respondent be found guilty and specifically he be found guilty of violating Rule 11.02(4) for improper handling of trust funds with respect to the bounced trust checks and using his trust account for his investment account and commingling, 11.02(4)(c) and corresponding Bylaw for improper trust account recordkeeping. I also recommend he be found guilty of violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(6) for engaging in other misconduct that reflects adversely on his fitness to practice law for his misuse of his trust account, 9-102(A) for commingling, 9-102(B)(3) for failure to maintain complete trust account records and 9-102(B)(4) for delaying the

transfer of funds due to insufficient funds in the trust account and particularly with respect to the Corporate Investment Company checks and the other improper use of the trust funds. In making this recommendation I specifically note that respondent's handling of his account was done with an apparent disregard for the rules on trust account recordkeeping and the handling of accounts. In fact, the respondent stated that he used this account for his investment ventures, knowing that it was wrong but that it was simply more convenient to use this account since the bank cleared his checks faster. His records are so inadequate that it is impossible to discern whether any clients were deprived of funds although there were several times when the account was insufficient to honor obligations due to its actually being overdrawn. However, none of his clients have ever complained about losing any funds.

I do also recommend that respondent be found not guilty of violating Rule 11.02(3)(a) for conduct contrary to honesty, justice or good morals and Disciplinary Rule 1-102(A) for conduct involving fraud, deceit, misrepresentation and dishonesty.

As to Count IV

(1984C49)

I recommend the respondent be found guilty and specifically he be found guilty of violating Disciplinary Rule 1-102(A)(6) for engaging in other conduct that adversely reflects on his fitness to practice law by being in possession of marijuana. I recommend the respondent be found not guilty of violating Rule 11.02(3)(a) for conduct contrary to honesty, justice and good morals as well as Disciplinary Rule 1-102(A)(3) for engaging in illegal conduct involving moral turpitude.

IV. Recommendation as to Disciplinary Measures to be applied:

I recommend the respondent be suspended for a period of thirty (30) days. I further recommend that he be placed on probation for a period of two (2) years.

V. Personal History and Past Disciplinary Record: After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 11.06(9)(a)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 38
Date admitted to Bar: November, 1972
Prior Disciplinary Convictions and Disciplinary Measures Imposed Therein: Not applicable.
Other personal data: The respondent is divorced and has two minor children.

VI. Statement of Costs and Manner in Which Costs Should be Taxed: I find the following costs were reasonablyl incurred by The Florida Bar.

A.	Grievance Committee Level Costs	
	1. Administrative Costs	$ 150.00
	2. Transcript of Grievance Committee Hearing held 1/18/84	362.52
	3. Copies of Bank Records of The Beach Bank of Vero Beach	517.00
B.	Referee Level Costs	
	1. Administrative Costs	150.00
	2. Transcript of Referee Hearing held 3/19/85	358.15
	3. Bar Counsel's 3/19/85 Travel Costs	81.91
C.	Miscellaneous Costs	
	1. Long Distance Telephone Expenses	23.71
	CURRENT TOTAL	$1,463.29

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the 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 19 day of June, 1985.

The Honorable J. William Woodson,
Referee

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