IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

KENNETH E. PADGETT,

Respondent.

_____/

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

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF THE CASE

Respondent does not take issue with the Complainant's Statement of the Case in its Brief and therefore makes no Statement of the Case.

POINT INVOLVED ON APPEAL

Whether, in this matter involving three (3) separate cases, the Referee's recommended thirty (30) day suspension followed by two (2) years probation and payment of costs is within the discretion accorded the Referee and therefore not erroneous or unjustified.

STATEMENT OF THE FACTS

Respondent takes no issue with the Statement of Facts as set forth by the Complainant and therefore does not make a Statement of Facts.

SUMMARY OF ARGUMENT

There is no question of fact involved in this case. The issue is the appropriate measure of discipline. The Referee has recommended the Respondent be suspended for thirty (30) days and placed on probation for two (2) years. The factors in this case warrant an affirmation of the referee's recommendation as being just and sufficient on the facts.

The Referee recommended findings of guilt in three(3) different cases. The most serious offense for which the Respondent was found guilty was for violations dealing with his trust accounts. The referee found him guilty of commingling & improper handling of trust funds with respect to bouncing trust checks and he was also cited for using the account as his own investment account.

The Respondent submits that because no clients were injured in any economic manner whatsoever, that the recommendation discipline is not erroneous. The trust account was handled in such a manner only for convenience. There was never an intentional embezzlement nor was there ever any willful intent to defraud a client. All other violations for which respondent was found guilty are minor infractions for which the Court would have in all likelihood only reprimanded the Respondent.

Additionally, Complainant has failed to carry his

appellant burden pursuant to Rule No. 11.09 of the Integration Rule of the Florida Bar. [The burden was on the Complainant to demonstrate that the Respondent's report was erroneous, unlawful or unjustified.]

The colloray to this rule is that the Referee is the fact finder and his report should be accorded great weight. He is in the best position to judge the character, demeanor and credibility of the witnesses.

Therefore, based on these factors and case law, the Respondent's violations warrants an affirmation of and an increased deference to the recommendations of the referee. The appropriate discipline is the referee's recommended thirty (30) day suspension followed by two (2) years probation. The referee's report should not be tampered with.

ARGUMENT

THE REFEREE'S RECOMMENDED THIRTY (30) DAY SUSPENSION FOLLOWED BY TWO (2) YEARS PROBATION AND PAYMENT OF COSTS IS WITHIN THE DISCRETION ACCORDED THE REFEREE AND IS CORRECT AND JUSTIFIED AND IS THE THE APPROPRIATE DISCIPLINE.

The referee in the instant case recommended that the respondent be found guilty of commingling and improper handling of trust funds with respect to the bounced trust checks, using the account as his own investment account and for delaying the transfer of funds due to the insufficient funds in the account. This referee has recommended the Respondent be suspended for thirty (30) days and thereafter be placed on probation for two (2) years. He has also recommended the Respondent pay the cost now totaling $1,1463.29. The Complainant has approved the referee's findings of fact and recommendations of guilt, but rejects his recommended thirty (30) days suspension and two (2) years probation and feels it should not stand as the appropriate discipline.

This court's review of referee's reports in disciplinary proceedings is governed by the Florida Bar Integration Rule Art XI. On review of the report of a referee' "the burden shall be on the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified." Art. XI, Rule 11.09(3)(e). The factor which is determinative in this request for review is that the Complainant has failed to carry its appellant burden

pursuant to Rule No. 11.Ø9 of the Integration Rule of the Florida Bar.

There is no question of fact involved in this case. The issue is the appropriate measure of discipline. The factors in this case warrant an affirmation of the referee's recommendation as being just and sufficient on the facts. The most serious violation for which the referee found the Respondent guilty was his commingling of funds. The Respondent requests this court to note that this inquiry was not instigated by a clients complaint. Even though the Respondent used his trust account as his personal investment account, no clients were hurt nor were any clients complaining. The fact that no client complained is of significance and was even noted by Bar Counsel in its brief.

Additionally, the referee did not find the Respondent guilty of misuse, but only guilty of commingling. His use of the account for these transactions was wrong, but the referee acknowledges that it was his own money and done only as a matter of convenience. There was never an intentional embezzlement and no clients were deprived of trust fund on a permanent basis. Full restitution has been made by the Respondent to all trust accounts and the clients have suffered no monetary damage whatsoever. Admittedly Respondent commingled and used the clients funds, however, testimony

clearly indicates that while such acts are a technical violation of the rule, there was never any willful intention to defraud the client. Respondent requests the court note that from the outset of this case the Respondent has appreciated the seriousness of the misconduct charged and has had a good grasp of the severity of his short commings. He has freely admitted his wrong. Additionally, Respondent requests the court note that from the outset of this case the Respondent has fully cooperated with the Florida Bar.

The corollary to Rule No. 11.Ø9(3)(e) is the settled principle, often stated in these proceedings, that the fact finder and his report should be accorded great weight. See 4 Fla. Jur..2d, Attorneys At Law - 89. Because of his training and experience in handling matters of this kind, a judicial officer is selected as referee. He is chosen owing allegiance to neither side, to act as an unbiased arbitrator, digesting the facts presented in each individual case and making considered judgments in light of the evidence before him. The referee in the instant case is not only an experienced and highly respected Circuit Judge, but he is accustomed to evaluating the evidence presented by adverse parties and subsequently issuing an equitable ruling. The referee is in the best position to judge the character, demeanor and credibility of the witness's and to determine the relative

worth of the proffered testimony. In the Florida Bar v. Hirsch, 359 So.2d 856, (Fla. 1978), the court stated this rule as follows:

> "Fact finding responsibility is disciplinary proceedings is imposed on the referee. His findings should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968)" The Supreme Court reiterated this position in The Florida Bar v. Abramson, 199 So.2d 457 (Fla. 1967).
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> "The referee had the material advantage of having the witness before him in evaluating the evidence in this cause. Neither this court no the Board of Governors is in the same position to judge the truthfulness, the candor or lack of candor, manner of replying to questions or the many other intangible things that occur in the arena of such a trial. Evidentiary findings and conclusions of the tries of fact where supported by legally sufficient evidence should not be lightly set aside by those possessing the power of review..." Abramson at 460.

The Complainant in order to prevail in this review must establish that the referee's determinations are erroneous, unlawful or unjustified. The Complainant takes no issue with the referee's findings and recommendations of guilt as erroneous or illegal but does consider the recommended discipline unjustified and erroneous. Taking all facts into consideration it is clear the referee's decision is with in the bounds of his discretion. There is no case which is factually on "all fours" with the case at bar and in light of this it is

inconceivable to the undersigned how the referees recommendation exceeds his discretion thereby being unjustified and erroneous. The Complainant in his brief initially relies upon the Florida Bar v. Bryan, 396 So.2d 165 (Fla. 1981). Respondent is, however, confused by Complainant's reliance on this case given the factual distinctions. In Bryan, the client was demanding payment from the attorney and the attorney was ignoring his demands. The attorney did not make restitution to the client for at least six (6) months after demand. It took Bryan, more than three (3) months after the filing of the complaint by the Florida Bar to fully reimburse his client. Respondent is uncertain of the point sought to be made by this analogy of the Bryan case to the case at bar. This case reveals a complaining client with demonstrable financial injury. This is simply not the case here.

In light of the factual distinctions involved Complainants reliance on the Florida Bar v. Hirsch, 342 So.2d 976 (Fla. 1977),is also misplaced. In the Hirsch case, trust money was entrusted to the attorney to pay off an obligation owed by his client to a Tallahassee bank. The attorney dissipated the trust proceeds and repeatedly avoided the clients demands for performance. The client then retained other counsel who made demands on the attorney to remedy the situation he had created. The attorney finally resolved the

situation but significantly this was not done until a complaint was made to the Florida Bar. Again, this case involves a situation where a client was injured by the attorneys maleficence and was complaining to both attorney and the Florida Bar.

Complainant also cites the Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985), where this Court suspended an attorney for sixty (60) days and placed him on three (3) years probation for utilizing the same checking account for both client trust funds and independent business ventures.

In the Moxley opinion emphasis is placed upon the Florida Bar v. Weltz, 382 So.2d 1220 (Fla. 1980) where an attorney was suspended for six (6) months with proof of rehabilitation required for running deficit in the trust account extending over a two (2) year period amounting to over $24,000.00. In this particular case there were complaining clients who were reimbursed after commencement of the bar proceedings.

Although in the Moxley opinion emphasis was placed on Weltz, the court noted that the Moxley situation fell somewhere between Weltz and the Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978). Complainant even states in his brief that the Court feels that the Moxley situation was more analogous to the Horner case than it was to the Weltz situation. Yet, the

Complainant urges that the case at bar is not analogous to the Moxley case but rather should be looked at in the light of the Weltz opinion. The Respondent urges that such is not the case. If one were to look closely one would find that the case at bar is very similar to the Moxley case. In fact, just as Moxley fell between Horner and Weltz, so does this case fall somewhat above the Horner situation as well as below that involved in Moxley. This case is better analogized to Moxley or Horner that to Weltz.

In Weltz there were complaining clients who were not reimbursed until after commencement of the Bar Proceeding. In the case at hand we have no such delay not do we have any complaining clients. There was only one significant delay in transferring of trust funds. Respondent submits that the facts and special circumstances of the instant case render it more analogous to the Moxley situation. Just as there was never an intentional embezzlement in Moxley, there was never such an embezzlement in the case at hand. No clients in either case were deprived of trust funds on a permanent basis. The use of the money in both cases was for improper purposes, but repayment allowed them to make up the deficit. This should be a mitigating factor. In both cases the improper handling of funds was not due to any willful or evil intent to defraud anyone. All loses were also made up well in advance of the Bar

inquiry.

Respondent submits that the facts and circumstances of the instant case render it more analogous to The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981) and The Florida Bar v. Holmes, 353 So.2d 85 (Fla. 1977). These cases deal with technical but not willful violations by attorneys in the handling of their trust funds. The referee in both cases recommend the punishment of a public reprimand combined with a period of probation. The Supreme Court affirmed the referee's recommendation. Although a public reprimand is not warranted in the instant case, these cases are useful to demonstrate that just as a public reprimand is too lax of a punishment, so is a six (6) month suspension with proof of rehabilitation too severe.

The Complainant insists that taken together, the recommended findings of guilty on three (3) counts warrants a more severe discipline than the referee's recommendation. The Respondent submits that there is no basis for this assertion. True, there are multiple matters involved here but the Respondent urges the court to note that notwithstanding Count III, Count II and IV are very minor infractions. The Respondent's mistaken reliance on the State Attorney to present his position combined with Count IV involving the seizure of dizopam, cocaine residue and marijuana are lesser acts of

misconduct and although aggravated with Count III, they do not warrant more severe discipline. It is important to realize that the referee even noted that the Respondent asserted he had a prescription for dizopam and was not aware of the cocaine residue nor was the marijuana his own, these are mitigating factors and by no means warrant a more severe discipline.

In weighing the proper discipline to be assessed on the facts of this case, the Court must be mindful of three (3) purposes of Bar Discipline. "The courts judgment must be fair both to the public and to the accused attorney, it must be sufficient to punish a breath of ethics and at the same time encourage reformation, finally, it must be sever enough to deter others who might tend to engage in similar violations." The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970.

The Respondent submits that the referee's recommended thirty (30) day suspension and probation meets the above requirements. Mostly, the deterrance to others will only be if this court grants the Referee's recommendation so that they too will come forward and cooperate with the Bar when such a problem exists and not to hide or rectify their wrong doings. The discipline recommended by the referee is fair to society and will only deny them a qualified attorney for a short period of time. The recommendation is fair to the public and yet severe enough to deter others who might exercise offend. There is no justification for any harsher disciplinary actions against the Respondent.

CONCLUSION

The Respondent request that the Court carefully consider the facts involved in this case and the lack of any true precedent because of these facts. No client complained, no client was hurt in any economic manner whatsoever. Respondent also cooperated fully with the Complainants investigation. Respondent submits that the factors of this case warrants an affirmance of and an increased deferrence to the recommendations of this referee who was in the best possible position to properly weigh the equities involved. Under the prevailing and controlling case law, the referee's report should not be tampered with unless it is unjustified or erroneous which it is most definitely not in the case at bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the orginial and seven copies of the foregoing Rrespondent's Reply Brief in Opposition to Complainant's Brief in Support of Petition For Review has been furnished by U. S. Mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Respondent's Brief has been furnished by U. S. Mail to John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida, 32301; and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301; and David G. McGungle, Bar Counsel, The Florida Bar, 605 E. Robinson Street, Suite 610, Orlando, Florida, 32801 on this 27 day of September, 1985.

KENNETH E. PADGETT