IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JAMES C. BURKE,

Respondent.
_____/

SUPREME COURT CASE NO. 66,640

(TFB CASE NO. 11H84124)

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ON PETITION FOR REVIEW OF
REPORT OF REFEREE IN A DISCIPLINARY PROCEEDING

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# ANSWER BRIEF OF COMPLAINANT


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## INTRODUCTION

In this brief, THE FLORIDA BAR will be referred to as "The Florida Bar", "the Bar" or "complainant".

James C. Burke will be referred to as the "Respondent" or "Mr. Burke".

Other parties or witnesses will be referred to by their respective names:

Abbreviations utilized in this brief are as follows:

T = Refers to Transcript of Proceedings, i.e., T.24 means page 24 of the transcript.

RR = Refers to Report of Referee, followed by page number, i.e., RR.2 means Page 2 of Report of Referee.

## STATEMENT OF THE CASE

The Complaint and Request for Admissions in this case were filed on February 28, 1985 and the Honorable Patricia W. Cocalis was appointed as Referee on March 20, 1985.

On May 1, 1985, Respondent filed a Motion for a Stay of All Proceedings and the Maintenance of Confidentiality. The Referee granted a stay until June 17, 1985. On that date, Respondent filed an Answer, Response to Request for Admissions and a Motion Attacking Sufficiency of Complaint.

Hearings were held before the Referee on the following dates: January 16, 1986; February 19, 1986 and March 24, 1986. On July 22, 1986, the Referee sent letters to Respondent's counsel and to Bar Counsel inviting them to submit within fifteen days, memorandums concerning discipline. Bar Counsel responded on August 6, 1986. Respondent's counsel contacted the Referee in August and October, saying recommendations would be forwarded. However, the Referee never received a memorandum on discipline from Respondent's counsel (RR 1).

On or about January 15, 1987, the Report of Referee was filed. The Referee found that Mr. Burke violated Disciplinary Rule 9-102(B)(3) and (4) and Florida Bar Integration Rule, article XI, Rule 11.02(4). In addition, the Referee found that Mr. Burke did not violate Disciplinary Rule 1-102(A)(4) and (6), of the Code of Professional Responsibility.

The report was considered by the Board of Governors of The Florida Bar at its meeting which ended March 21, 1987 and both counsel were informed that any Petition for Review should be filed on or before April 6, 1987.

On or about April 1, 1987, Respondent filed another Motion for Continuance, which was granted until June 22, 1987. On or about June 25, 1987, Respondent again filed a Motion for Continuance which was granted until July 21, 1987. On July 22, 1987, The Florida Bar received copies of Respondent's Petition for Review and the Initial Brief of Respondent.

## STATEMENT OF THE FACTS

On October 6, 1983, pursuant to a court order, the Clerk of the Court issued a check payable to James C. Burke, attorney for Janet Ivette Alvarez, in the amount of $8,380.60. Although Mr. Burke cashed the check on the day he received it, he did not put the funds into his trust account (RR. 1, T. 24, 25, 29 and Bar Composite Exhibit 4). Even though Mr. Burke cashed the check on October 6, 1983 (T. 29, Composite EX 4), he told his clients on November 3, 1983, they had to wait 90-days before they could receive their money (T. 77, 99 and 100). After waiting the 90-days, Mr. Burke told his clients there was a 3% discrepancy in the check (which had already been cashed by Mr. Burke) and that he had to investigate the matter, (T. 78, 97-102). At this time, the clients did not know that Mr. Burke had previously cashed the check, (T. 79-102).

On March 27, 1984, Mr. Burke issued a trust account check to his clients for $6,567.35, the amount due them. However, the check was not honored, due to insufficient funds. The check was again deposited, but it was again returned for insufficient funds (RR. 2, T. 42-43 and Bar Exhibit 8). Nevertheless, Mr. Burke did pay his clients the amount due ($6,567.35) on August 7, 1984, the date of the grievance committee hearing. This payment was made by a cashiers check (T. 49 and RR. 2).

## SUMMARY OF ARGUMENT

Failure of Respondent's former counsel to submit a memorandum on discipline to the Referee, is not unfair to the Respondent, especially where the former counsel was given the opportunity to submit the memorandum. Moreover, the former counsel did introduce mitigating matters into evidence and the Referee apparently considered them when considering her recommendations concerning discipline.

It was not improper for Bar Counsel to state in his memorandum concerning discipline, that Respondent committed an "unauthorized conversion," even though the Referee found the Respondent not guilty of dishonesty, fraud, deceit or misrepresentation. This is true because the Referee also found the Respondent guilty of Florida Bar Integration Rule 11.02(4).

The factual situation indicates that Respondent's misconduct was so egregious, that the Referee's recommendations should be approved. In addition, the Bar Counsel was not improperly aggressive.

## ARGUMENT

### I. THE REFEREE'S RECOMMENDATIONS AS TO DISCIPLINE SHOULD BE APPROVED

Although the Respondent does not contest the major findings of facts by the Referee, he has submitted reasons why the Referee's recommendations as to discipline should not be approved. Accordingly, the Respondent "requests review soley on the issue of discipline imposed," (Initial Brief of Respondent, page 7).

The Respondent, on pages 1, 2 and 8 of his Initial Brief, points out to the Court that his former counsel did not submit a memorandum concerning discipline. He further states on page 81, "the Court should consider whether the consequence (the penalty) of the Respondent's former counsel's absence of input into the penalty process is fair to the Respondent."

The Florida Bar cannot determine by the record whether or not the failure to submit a memorandum concerning discipline, was due to the neglect of respondent's former counsel, the Respondent, or both of them. Also, Respondent refers to matters outside the record on pages 2 and 3 of his Initial Brief, and the Bar cannot comment, as there is nothing in the record concerning the conversations between the respondent and his former counsel.

Nevertheless, the mitigating matters were included in the Initial Brief of Respondent and are now before this Court. Moreover, although a memorandum on discipline was not submitted by the Respondent, the mitigating factors were presented to the Referee and she did comment on some of them in

the Report of Referee, (RR. 4). Therefore, the Bar submits that the failure of the Respondent or his former Bar Counsel to submit a memorandum on discipline is not unfair to the Respondent, especially when counsel for Respondent was given the opportunity to submit the memorandum, (RR. 1). If there was a break down in communications between the former counsel and the respondent, it should not result in a change in the recommended discipline, considering the clear and convincing evidence that was accepted into evidence and the serious nature of the violations.

Respondent complains that Bar Counsel's recommendations for discipline were adopted, even though Bar Counsel's memorandum concerning discipline included allegations which had been specifically dismissed by the Referee, "including the assertion that despite the Referee's finding to the contrary, 'unauthorized conversion occurred'". (Initial Brief of Respondent, Page 5). The Florida Bar contends the foregoing allegations by the Respondent are without merit. While the Referee did find the Respondent not guilty of violating Disciplinary Rule 1-102(A)(4), (dishonesty, fraud, deceit or misrepresentation) she did find him guilty of violating inter alia, Florida Bar Integration Rule, article XI, Rule 11.02(4), (RR. 3), which states, in part:

> Trust funds and fees. Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or set off for attorney fees, and a refusal to account for and deliver over such property and money upon demand shall be deemed a conversion, (underscoring for emphasis).

A "conversion" occurs when a person who has a right to possession of property demands its return and the demand is not or cannot be met. Shelby Mutual Insurance Co. v. Crain Press, Inc., 481 So.2d 501 (Fla. 2d DCA 1985). It is obvious that Mr. Burke committed a "conversion" as he refused to properly account for and deliver the money due his clients upon demand, (T. 76-87, Bar Ex. 11 and RR. 3).

It is the Bar's view that a lawyer can convert money or property because of neglect rather than dishonesty. In The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986), Mr. Neely was found guilty of violating Florida Bar Integration Rule, art. XI, Rule 11.02(4). However, "The Referee found the Respondent guilty of gross neglect in the management of the trust account, but expressly found no proof of dishonesty....". Accordingly, the Bar's comment concerning "conversion," in its memorandum on discipline, was fair comment.

It is the contention of the Bar that each case should be considered on its own merits and its factual situation. In the case at hand, the factual situation as pertains to Mr. Burke's conduct was so egregious that the Referee's recommendations are not too harsh. While the Referee found the Respondent not guilty of dishonesty, fraud, deceit or misrepresentation, it is the Bar's view that the Respondent should have known that he was dealing improperly with his client's funds, even if he did not intentionally plan to perpetuate a fraud.

Also, the clients were injured, as they were deprived of their money for ten months (RR. 3). Certainly, the Respondent should have known that he was dealing improperly with his client's funds when he cashed the check on October 6, 1983 and he did not deposit the proceeds in his trust account (T. 25, 29, Bar Composite EX 4 and RR. 1).

Although Mr. Burke cashed the check from the registry of the Court on October 6, 1983 (T. 24-25), he did not pay his clients the amount due them ($6,567.35) until August 7, 1984, the date of the first hearing of the grievance committee. Also, this payment was not made by trust account check but by a cashier's check (T. 49, lines 18-25).

Despite the fact that Mr. Burke cashed the check on October 6, 1983 (T. 29, Composite EX 4), he told his clients, on November 3, 1983, that they had to wait 90 days before they could receive the money due them. (T. 77, 99, 100). Mr. Burke should have known that he already cashed the check and there was no need to tell his clients that they would have to wait 90 days for their money.

After waiting approximately 90 days, the clients again asked for their money. However, Mr. Burke told them there was a discrepancy of 3% in the check and that he had to go back and investigate the matter, (T. 78, 97-102). During this time, the clients did not know that Mr. Burke had cashed the check, (T. 79, 102).

While the Referee believed Mr. Burke was not guilty of dishonesty, fraud, deceit or misrepresentation, the facts in this case clearly show that Mr. Burke displayed a reckless

disregard of the consequences as affecting the welfare of his clients. While this may not be a violation of DR 1-102(A)(4), it is an aggravating factor which should be considered by the Court.

While the Bar realizes there have been cases where lawyers have been disciplined with less than a three month suspension, for failing to maintain minimum trust accounting procedures, the factual situation in the case at hand is aggravating enough to warrant approval of the Referee's recommendations.

In The Florida Bar v. Neely, 488 So.2d 535, the attorney was suspended for sixty-days and placed on probation for two years, where his trust accounting problems were caused by gross negligence rather than by dishonesty. In the Neely case, "the client suffered no harm from Respondent's actions". However, in the case at hand, the clients were harmed, as they were deprived of their money for a period of ten months, (RR. 3).

In The Florida Bar v. Ragano, 403 So. 2d 40, (Fla. 1981), this Court approved a three month suspension followed by a two year period of probation where an attorney deposited trust money in an account not clearly labeled and designated a trust account. In the case at hand, Mr. Burke did not deposit the proceeds of the check he received from the Clerk of the Court into his trust account, (T. 25, lines 1-9). The Referee stated, "Mr. Burke believes that some of the money was put into his office account and some retained in cash, but knows he did not put any into his trust account," (RR. 1).

In The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981), an attorney plead guilty to two violations of Disciplinary Rules 9-102 and Florida Bar Integration Rule 11.02(4), without admitting any criminal guilt whatsoever. He was suspended for two years.

In the case of The Florida Bar v. Padgett, 481 So.2d 919 (Fla. 1986) the Respondent was found guilty inter alia, of violating Disciplinary Rule 9-102(A), and (B) (3), and (4) (commingling, failing to maintain complete trust account records, and delaying the transfer of funds) as well as article XI, Rule 11.02(4) of The Florida Bar Integration Rule. In the Padgett case, supra, this Court stated, in part:

> Attorneys owe a fiduciary duty to their clients, and the trust accounting rules exist to insure that attorneys line up to the high standards expected of them. To knowingly commingle funds merely for convenience is outrageous, and we will not tolerate it.

In the case sub judice, the Respondent violated the trust accounting rule [Fla. Bar Integration Rule, art. XI, Rule 11.02(4), (RR 3)], and he commingled the clients' funds with his own. See the bottom of Page 1 of the Report of Referee, where the Referee states: "Mr. Burke believes that some of the money was put into his office account and some retained in cash."

In the Padgett case, supra, the Respondent was suspended for six months, even though no clients had been injured financially. In the case sub judice, Mr. Burke's clients were injured financially, (RR. 3).

The Supreme Court of Florida, in the case of The Florida Bar v. Ruskin, 126 So.2d 142 (Fla. 1961), stated:

> Few breaches of ethics are as serious as commingling of a client's funds and the use thereof for the lawyer's private purposes. The funds of a client in the custody of his lawyer should be guarded and protected as securely as if the same were in the custody of the communities strongest financial institution. The relationships between a lawyer and a client is of the highest degree of integrity and fidelity. In handling his client's money the lawyer should guard it with much greater diligence and caution than he does his own.

In the case at hand, the check received by the Clerk of the Court was not put in his trust account, (RR. 1). In effect, it was commingled with his own funds. "Mr. Burke believes that some of the money was put into his office account and some retained in cash", (RR. 1).

When Mr. Burke failed to account for and deliver the money to his clients, upon demand, he did commit a "conversion" (RR. 3). Despite the Referee's finding that Disciplinary Rule 1-102(A)(4) was not violated, a "conversion" can be committed by gross neglect, The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986).

It is apparent that when the funds of Mr. Burke's clients came into his possession, he did not guard or protect them in a manner expected of a member of The Florida Bar.

In The Florida Bar v. Hunt, 441 So.2d 618 (Fla. 1983), "The Referee found that Respondent had failed to properly supervise the bookkeeping on his trust account: Although Respondent was not shown to have personally converted client funds, his gross neglect of his trust account has caused equally serious harm to the public." In the Hunt case, Mr. Hunt was disbarred. However, there was cumulative misconduct in that case.

The Florida Bar submits that the discipline recommended by the Referee is not too severe, as Mr. Burke will be automatically reinstated after the ninety day suspension and payment of $687.09 to his former clients. While the Bar wants to be fair to Mr. Burke, due regard must be given to the public interest. Moreover, the members of the legal profession must be made aware that Mr. Burke's actions in this case cannot be tolerated.

## II. BAR COUNSEL WAS NOT IMPROPERLY AGGRESSIVE

The Initial Brief of Respondent implies, in several places, that the Bar Counsel was improperly aggressive, as follows:

1) Bar Counsel, as support for discipline, made allegations which had been specifically dismissed by the Referee, including the assertion, that despite Referee finding to the contrary, that Mr. Burke made an "unauthorized conversion".

This allegation is refuted in the previous portion of this brief, on pages 7 & 8. However, in brief, a lawyer can be guilty of a "conversion", even though he is not guilty of dishonesty, fraud, deceit, or misrepresentation, see The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986), where Mr. Neely was found guilty of violating Florida Bar Integration Rule, article XI, Rule 11.02(4), even though there was no proof of dishonesty.

2) Respondent states, "The Bar's Counsel also asserted that the Respondent manifested a reckless disregard of the consequences as affecting the money of his clients", although the allegations in the complaint had been proven not to have been substantiated, (Initial Brief of Respondent, Page 9).

The Bar, in its memorandum on discipline, on page 4, did state that "Mr. Burke displayed a reckless disregard for the welfare of his clients". It is the Bar's contention that its allegations were correct. In The Florida Bar v. Neely, supra, the respondent was found guilty of violating Florida Bar Integration Rule, art. XI, Rule 11.02(4), despite the Referee saying there was no proof of dishonesty. Also, the Referee in the Neely case, supra, found the Respondent guilty of gross neglect, even though there was no evidence of dishonesty.

In the case at hand, the Referee did not state there was no gross negligence. On the contrary, the facts indicate that Mr. Burke did display a reckless disregard for the welfare of his clients.

3) The Respondent, on Page 10 of his brief, states:

> The Bar has aggressively sought to portray Respondent as a dishonest person long after the Referee rejected such allegations. From the very inception of the Complaint, its Counsel has continuously sought to open these proceedings to the public even though the complaint contained serious allegations which the evidence did not support. This was done even through the Bar was obviously aware of the political and business consequences to the Respondent.

The Bar invites this Honorable Court to read page 12, beginning on Line 9, to page 14, of the transcript, and determine for itself if Bar Counsel acted unfairly in the matter concerning confidentiality. Please note the statement of Bar Counsel, on page 13, lines 16-23, of the transcript, and determine if Bar Counsel was overly aggressive or unreasonable, to wit:

> Mr. Gross: Of course my personal feelings are not always the same as my official feelings, that the policy of the Bar is that we should ask that confidentiality be waived after the 20 day period from the Complaint being filed, unless the Respondent can convince the Referee that it be for the public good to remain confidential.

The Respondent stated in his brief, at page 11: "Equally important to this proceeding, was the Bar's stipulation that the Respondent's reputation for truth and veracity is good (R. 242, 243)."

The foregoing stipulation was that if Thomas Gustafson were present at the hearing, he would testify, inter alia, that James C. Burke's reputation for truth and veracity is good, (T. 241-243). The way the statement was written in the Respondent's brief, it could create the impression that The Florida Bar was stating that Respondent's reputation for truth and veracity is good. The Bar is not saying the statement in the brief was made to mislead this Court, but it is merely pointing out that the stipulation was concerning the testimony of Mr. Gustafson and not The Florida Bar.

In closing this section of the brief, the Bar respectfully points out that Florida Bar Integration Rule, 11.06(4), states: "Bar Counsel shall make such investigation as in his opinion is necessary and shall prepare and prosecute with utmost diligence any case assigned to him". (underscoring supplied for emphasis).

Based upon the above, it is apparent that the Bar Counsel was not improperly aggressive, but merely prosecuted

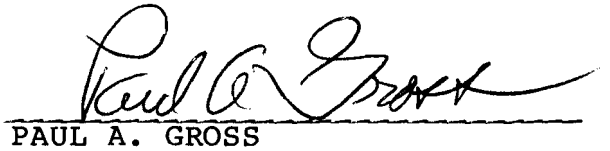
this case with utmost diligence, as he was required to do by The Florida Bar Integration Rule and Rule 3-7.5(f) of The Rules Regulating The Florida Bar and Florida Bar Integration Rule, article XI, Rule 11.06(4).

## CONCLUSION

The factual situations in this case were so egregious, that the recommendations of the Referee should be approved. Accordingly, The Florida Bar recommends the following discipline:

That James C. Burke be suspended from the practice of law in Florida for a period of ninety days. That he pay Janet and Ivette Alvarez interest at the rate of 12% per year for the ten month period during which they were deprived of the use of their $6,567.35, to wit: Six Hundred Eighty Seven Dollars and Nine cents ($687.09). Mr. Burke should not be reinstated after the ninety day suspension, until this amount has been paid. The Florida Bar be paid for the costs it incurred in these proceedings, which amount to One Thousand Nine Hundred Four dollars and Forty-Nine Cents ($1,904.49).

Respectfully submitted,



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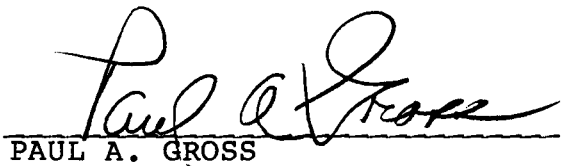
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6TH day of August, 1987 a true copy of the foregoing Answer Brief of Complainant was furnished by mail to Respondent's attorney, Joel E. Maxwell, Esq., 7290 West 2nd Lane, Hialeah, Florida 33014 and to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida.



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