

IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,
Complainant,
vs.
JOHN A. BARLEY,
Respondent.

FILED
812 JUN 21 1988
JUN 21 1988
CLERK, SUPREME COURT
By _____
CASE NO. 86-701

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, the following proceedings occurred:

A hearing was held in the above matter and a ruling by letter issued to counsel of record on February 25, 1988. Since that time, the undersigned has received and considered the written arguments of all parties as to appropriate discipline, and the Respondent's Motion For Reconsideration.

II. FINDINGS OF FACT:

The complaint in this cause arose from the representation of Mrs. Mary [REDACTED] by the Respondent in divorce proceedings initiated by her husband, in 1980, post-judgment proceedings, and representation in matters related thereto. One of the provisions of the property settlement agreement entered into by the parties on September 24, 1981, and approved by the court, provided that among other things, Mrs. [REDACTED] would receive a lump-sum cash settlement of \$250,000.00. It further provided that of this sum, \$200,000.00 was to be placed in a trust fund, with the appointment of three trustees, for the benefit of Mrs. [REDACTED]'s financial security. The remaining \$50,000.00 was to be

used by Mrs. [REDACTED] to pay outstanding debts and attorney's fees. Several months later, the Respondent drafted a trust document in accordance with the property settlement agreement. The trust agreement is dated and reflects acknowledgements by the parties on September 25, 1981, one day after entry of the Final Judgment and execution of the property settlement agreement. However, it was apparently drafted and executed several months after the date reflected. Contrary to the property settlement agreement the Respondent named himself as sole trustee of the trust. Before the trust option was actually drafted, the Respondent requested Mrs. [REDACTED] to loan him a sum of money from the \$200,000.00 trust principal. Mrs. [REDACTED] consented to this and loaned him a total of \$47,500.00. They made an oral agreement that the loans would be short-term and would carry the highest interest rate available on the financial market. At the time of the loans, no written evidence of the debt was made and no security was provided.

Mrs. [REDACTED] former husband died in an accident in July, 1982. Following that, Mrs. [REDACTED] requested the Respondent to bring an enforcement action against the estate and to obtain a modification of the Final Judgment based upon her former husband's failure to make full financial disclosure at the time of the divorce. For his services in that matter, the Respondent requested a fee of \$100.00 per hour plus one-third of all sums recovered in excess of the amount due under the original property settlement agreement. Mrs. [REDACTED] objected to both an hourly rate and a contingency fee and the Respondent subsequently agreed in writing to reduce the contingency fee by any amount to which he was entitled under the hourly fee arrangements. Mrs. [REDACTED] agreed to this arrangement and assumed that the Respondent would be paid at the conclusion of the case, as he had been in the divorce action. However, during the course of the representation, the Respondent began to make withdrawals for his attorney's fees from Mrs. [REDACTED]'s trust, of which he was the sole trustee. This was done without Mrs. [REDACTED]'s knowledge or consent and she was unaware of it until some time during the latter part of 1983 or the early part of 1984. During this time, Mrs. [REDACTED]'s trust developed liquidity problems, part of which would not have resulted except from the

Respondent's withdrawal of attorney's fees. Consequently, Mrs. [REDACTED] was forced to obtain a loan from Barnett Bank in the amount of \$18,000.00 to provide sufficient liquidity. During this process, the Respondent assisted her in preparing a financial statement for the bank. However, the financial statement failed to reflect the loan from Mrs. [REDACTED] to the Respondent in the amount of \$47,500.00.

In September, 1983, Mrs. [REDACTED] settled with her former husband's estate for the additional sum of \$185,000.00. The Respondent deducted from this settlement, attorney's fees for himself in the total amount of \$62,307.00. Of this amount, he presented Mrs. [REDACTED] an accounting for hourly fees in the amount of \$40,630.00 and a contingency fee of \$21,677.00. Mrs. [REDACTED] again objected to the Respondent charging both a contingency fee and an hourly fee. Having obtained no satisfaction from the Respondent, Mrs. [REDACTED] subsequently discharged him as her attorney during the Fall of 1983. Following this, she demanded written evidence of the loans which she had made to him in the principal amount of \$47,500.00. The Respondent then drafted three separate notes evidencing the debts, and back-dated them to January and February of 1982. All three loans provided for interest at the rate of 12% per annum, with a 90-day grace period. The principal was due in 1991. None of the notes provided for payment of attorney's fees in the event of default. The terms of these notes were contrary to Mrs. [REDACTED] agreement. On February 16, 1984, Mrs. [REDACTED] demanded acceleration of the notes and eventually retained an attorney to collect the loans. Ultimately, a settlement was reached and the Respondent agreed to repay the notes on more favorable terms and to return the amount of the contingency fee. The notes have now been satisfied in full and the Respondent has satisfied all of his financial obligations to Mrs. [REDACTED].

At no time did the Respondent ever suggest or advise Mrs. [REDACTED] that she should seek the advice of independent counsel, and she did not do so, until the circumstances referred to above.

Interestingly enough, a complaint with The Florida Bar was not filed by Mrs. [REDACTED] but by her former husband's attorney. Mrs. [REDACTED] acknowledges that the Respondent has satisfied all of his obligations to

her. In fact, she has on occasion since that time employed the Respondent as her attorney in other matters.

III. Recommendations As To Whether The Respondent Should Be Found

Guilty:

I recommend that the respondent be found guilty of the following violations of the Code of Professional Responsibility:

Rule 1-102(A)(6)---(a lawyer shall not engage in conduct that adversely reflects on his fitness to practice law).

Rule 2-106(A)---(a lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee).

Rule 2-106(C)---(a lawyer shall not enter into an arrangement for, charge or collect a contingency fee in a domestic relations matter, the payment or amount of which is contingent upon the amount of alimony or support or property settlement in lieu thereof).

Rule 5-101(A)---(except with consent of client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interest).

Rule 5-104(A)---(a lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure).

Rule 9-102(B)(4)---(a lawyer shall promptly pay or deliver to the client, as requested by a client, the funds, securities, or other properties in possession of the lawyer which the client is entitled to receive).

I recommend that the respondent be found not guilty of violating the following rules under the Code of Professional Responsibility:

Rule 1-102(A)(4).
Rule 6-101(A)(1).
Rule 6-101(A)(3).
Rule 9-102(B)(3).

IV. Recommendation As To Disciplinary Measures To Be Applied:

I recommend that respondent be disciplined by:

(a) A period of suspension from the practice of law for sixty (60) days.

(b) Payment of costs in these proceedings.

In addition, I have considered the Respondent's good attitude and genuine desire to rectify his wrongs. I am convinced that a substantial part of his misconduct was done through ignorance. I also feel that it is unlikely that the Respondent will be guilty of misconduct in the future. Although the misconduct did not involve misappropriation of funds, and no intent to defraud, he is nevertheless guilty of such serious misconduct that a short period of suspension is warranted.

V. Personal History And Past Disciplinary Record:

Prior to recommending discipline pursuant to Article XI, Rule II.06(9)(a)(4), I considered the following personal history of the Respondent, to-wit:

Date admitted to the Bar: 1969

Prior Discipline: None

VI. Statement Of Costs And Manner In Which Costs Should Be Taxed:

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

Grievance Committee Level

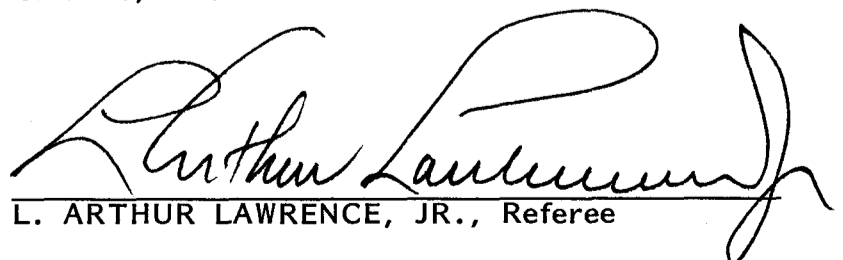
Administrative Costs, pursuant to Rule 3-7.5(k)(1), Rules of Discipline	\$ 150.00
Court Reporter and Transcripts	325.00
Bar Counsel	<u>00.00</u>
Subtotal	\$ 475.00

Referee Level

Administrative Costs, pursuant to Rule 3.7(k)(1), Rules of Discipline	\$ 150.00
Court Reporter and Transcripts	1,229.00
Bar Counsel Travel Expenses	53.60
Subtotal	<u>\$1,432.60</u>
TOTAL	\$1,907.60

It is recommended that such costs be taxed against the respondent and that interest at the statutory rate shall accrue and be payable beginning thirty (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 17th day of June, 1988.


L. ARTHUR LAWRENCE, JR., Referee

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