IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE

THE FLORIDA BAR,

Complainant,

Supreme Court Case Nos. 68,543, 68,856 and 68,869

v.

D. RICHARD HOLMES,

Respondent.
_____________________/

REFEREE'S REPORT

I. SUMMARY OF PROCEEDINGS:

Heretofore, by orders of the Supreme Court of Florida dated April 15, 1986 and June 5, 1986, I was appointed referee to determine all matters in the three (3) above referred to disciplinary proceedings. By instrument dated July 10, 1986, respondent tendered an unconditional guilty plea for consent judgment covering all three (3) proceedings which was presented to me for approval by petition dated July 14, 1986. Upon the August 5, 1986 return of the application for approval of the unconditional guilty plea for consent judgment, respondent filed a motion to withdraw such plea resulting in an adjourned hearing scheduled for August 25, 1986. At the August 25, 1986 hearing, respondent appeared in person and by his attorney, Thomas E. Kingcade, Esquire, and the bar appeared by David M. Barnovitz, Esquire, bar counsel.

As appears from the record of the August 25, 1986 hearing, the respondent, by ore tenus application, abandoned his motion to withdraw his unconditional guilty plea for consent judgment leaving such unconditional guilty plea and consent in full force and effect.

Respondent sought and was granted permission to file with the record, two (2) opinion letters dated March 21, 1986 and August 21, 1986 each authored by Myles L. Cooley, Ph.D., a psychologist with whom respondent consulted and an opinion from an attorney retained by respondent concerning the value of legal services allegedly rendered by respondent to Beacon Baptist Tabernacle, Inc., a party involved in case 68,869. In full appreciation of the bar's position that such documents are unsworn and not subject to cross-examination or rebuttal by the bar, I have determined to permit the filing thereof for the sole and limited purpose for which they were offered by the respondent, viz., to have

such documents of record for whatever purpose, if any, such documents may have should the respondent apply for readmission to The Florida Bar.

Upon considering the pleadings heretofore filed, the unconditional guilty plea for consent judgment and after hearing respondent, his attorney and bar counsel, and due deliberation having been had thereon, I have determined to recommend that the unconditional guilty plea for consent judgment be approved.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT FOR WHICH RESPONDENT IS CHARGED:

Based upon the bar's complaints and respondent's unconditional guilty plea wherein and whereby he admits each and every material allegation contained in such complaints, I find as fact, as follows:

1. With respect to all three (3) cases I find that respondent is, and at all times hereinafter mentioned, was (albeit suspended by order of this court in The Florida Bar v. Holmes, No. 68,751 (Fla. May 23, 1986) a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

With respect to case 68,543:

2. On or about December 19, 1983 respondent and Harvey J. Garod and/or Marla L. Garod (hereinafter called "Garod") entered into negotiations concerning the proposed sale by Garod to respondent of a certain townhouse owned by Garod in West Palm Beach, Florida.

3. At the time of such negotiations respondent represented to Garod that he would require approximately two (2) months to arrange his finances so as to place himself in a position to purchase the Garod townhouse.

4. The negotiations resulted in the execution by respondent and Garod on February 28, 1984 of a written contract prepared by respondent wherein and whereby Garod agreed to sell to respondent, who agreed to purchase the same, the Garod townhouse as aforesaid.

5. At the time of the parties' December, 1983 negotiations and upon execution of the February 28, 1984 written contract Garod made known to the respondent that Garod was relocating from Florida to New Hampshire and that Garod was relying upon the sale of the subject townhouse to respondent to produce funds which Garod required in order

to purchase housing at New Hampshire and help with living expenses thereat.

6. Between February 28, 1984 and mid-April, 1984 respondent represented to Garod that respondent had made application for the financing as provided for in paragraph thirteen (13) of the parties' February 28, 1984 contract and that respondent had been informed by the lending institution to which he had made application that the loan approval was certain and imminent.

7. Upon respondent's representations to Garod in mid-March, 1984 that respondent had made application for financing, that respondent had received assurance that loan approval was certain but that the lending institution was slow in loan processing, Garod, at respondent's specific instance and behest and based upon respondent's representations as hereinabove recited agreed to extend the contract closing date from April 1, 198 to mid-April, 1984.

8. Toward the end of March, 1984, respondent advised Garod that respondent would be unavailable during the first two (2) weeks in April, 1984 but that title could close immediately upon his return and encouraged Garod to contract to purchase a home at New Hampshire.

9. In reliance upon respondent's representations as hereinabove recited, Garod, on April 7, 1984, entered into a contract to purchase a residence at New Hampshire.

10. In mid-April, 1984, upon respondent's return, respondent represented to Garod that the lending institution to which he applied had failed to complete the loan processing and that, as a result thereof, the closing would have to be adjourned for approximately two (2) weeks.

11. Based upon respondent's representations as recited hereinabove, Garod, in or about April, 1984, applied for and received from a New Hampshire lending institution a loan commitment in connection with the Garod purchase of a New Hampshire residence which commitment extended to June 9, 1984 and was conditioned upon the Florida title closing of the transaction between respondent and Garod.

12. During the period covering approximately the last week of April, 1984 through the first two (2) weeks of May, 1984, Garod made repeated telephone calls to respondent to inquire about setting a title closing which calls respondent avoided and refused to return.

13. Within several days prior to May 18, 1984 respondent accepted a telephone call from Garod and represented to Garod that respondent's lending institution had all documentation necessary to approve respondent's application but that it was "dragging its feet" and had not yet committed to the financing respondent was seeking.

14. On May 25, 1984, in response to telephone and written inquiries by Garod, a representative of respondent's lending institution informed Garod that respondent had not, as of that date, made any application for a loan.

15. On June 20, 1984, respondent represented to Garod that respondent had made application for lending institution financing but had determined not to pursue such financing representing that the respondent had available private financing which was definite and certain.

16. Between June 20, 1984 and June 30, 1984 respondent represented to Garod's attorney that respondent's private financing had fallen through and that respondent had reapplied to his original lending institution for the requisite financing.

17. In truth and in fact, neither respondent nor anyone acting on his behalf, had ever made application for a loan in connection with the transaction with Garod from the date of the February 28, 1984 contract through June 27, 1984, inclusive.

18. On or about June 28, 1984 respondent, for the first time, made application for the subject loan but thereafter failed and refused to submit to the lending institution to which he applied, documents and other data requested by such lending institution, failing and refusing to meet with, talk to or correspond with representatives of such institution despite their repeated inquiries and attempts to communicate with respondent.

19. During the period between June 28, 1984 and October 18, 1984 when respondent's lending institution informed respondent that his loan request was denied due to his failure to complete the loan application, respondent represented to Garod on numerous occasions that he, respondent, had supplied to the lending institution everything that the institution had requested.

With respect to case 68,856:

20. In or about September, 1983, respondent entered into a business transaction, viz., the purchase of a residence owned by one Jeanette Goff (hereinafter called "Goff") purporting to represent Goff in such transaction.

21. The business transaction hereinabove referred to was eventually reduced to writing by agreement dated January 28, 1984 executed by respondent and Goff.

22. Respondent, as purchaser in such business transaction, had a different interest therein from that of his client, Goff, the seller in such transaction.

23. Goff, as respondent's client in such business transaction, expected respondent, her attorney, to exercise his professional judgment therein for Goff's protection.

24. Respondent never disclosed to his client, Goff, the nature and extent of the differing interests possessed by himself and his client in the subject business transaction and Goff never consented to respondent's position as both attorney and party to the transaction upon full disclosure.

25. Respondent applied to and secured from the Southeast Bank, N.A. a $41,250.00 purchase money mortgage loan in connection with his purchase of his client's, Goff's, residence.

26. The title and mortgage closing took place on March 14, 1984.

27. Goff was dissuaded from attending such closing by respondent who advised Goff that he would attend, represent and protect Goff's interests thereat.

28. At such closing attended by respondent but not by Goff, respondent received $19,401.29 in net proceeds from the $41,250.00 purchase money mortgage loan hereinabove.

29. Respondent deposited the $19,401.29 net proceeds to his clients' trust account on March 15, 1984 and thereafter, between March 17, 1984 and March 20, 1984 expended the entire $19,401.29 by issuing ten (10) trust account checks in various amounts including check #493 to respondent's order in the sum of $2,000.00 and check #499 to respondent's order in the sum of $3,083.34.

30. The appropriation by respondent of the $5,083.34, aforesaid, was without disclosure to or consent by his client, Goff.

31. Despite the fact that the contract called for full payment of the $55,000.00 purchase price upon closing, respondent advised his client, Goff, to accept the purchase price shortfall of $15,418.50, such shortfall created, in part by respondent's misappropriation of $5,083.34 as recited hereinabove in the form of an unsecured promissory note.

32. Although the title closing took place on March 14, 1984, respondent failed and refused to render an account of such closing to his client, Goff, despite repeated requests by Goff for an accounting and payment, until May 4, 1984 at which time respondent presented to Goff a closing statement.

33. Although advising his client, Goff, to accept a promissory note in place and stead of the cash payment required by the contract respondent never disclosed to or advised his client, Goff, to secure such promissory note with a mortgage covering the premises sold by Goff to respondent.

34. Having purported to represent Goff upon his purchase of her residence and having persuaded his client, Goff, to accept an unsecured promissory note in place and stead of the cash payment as provided in the contract of sale, respondent thereupon failed and refused to pay such promissory note necessitating the institution of litigation by Goff against him for collection of such promissory note.

35. Prior to and at the commencement of the litigation commenced by Goff to recover upon the promissory note as hereinabove recited, respondent represented Goff as personal representative in the administration of the estate of one Geneva Hupp, deceased.

36. After commencement of the promissory note litigation hereinabove referred to, respondent, in an effort to secure a setoff to his client's, Goff's, claim on the promissory note, made application for an award of legal fees for alleged extraordinary legal services rendered by him in his representation of Goff as personal representative in the Hupp estate.

37. In connection with his application for the award of legal fees for extraordinary services as hereinabove recited, respondent represented to the probate court having jurisdiction therein that he

rendered specific services as contained in a statement for legal services.

38. As a matter of fact respondent did not file certain pleadings that he listed in his statement for legal services rendered having failed to file an answer to a complaint in either one of the cases in which he claimed he did so file.

39. The court having jurisdiction over and which considered respondent's application for fees for alleged extraordinary legal services, in denying such application, specifically found that "the testimony indicated that attorney Holmes did not, in fact, file several of the pleadings that he listed to justify his fees for extraordinary service."

With respect to case 68,869

40. In or about May, 1983, respondent undertook representation of Paul E. Trefzer, Barbara Joan Trefzer and Paul E. Trefzer, III, hereinabove called "Trefzers", in connection with the purchase by the Trefzers of certain improved realty situate at Martin County, Florida.

41. Upon undertaking such representation, respondent represented to Trefzers that the subject realty was owned by Beacon Baptist Tabernacle, Inc., hereinafter called "Church", another of respondent's clients.

42. Representing both the Trefzers and the Church, respondent prepared a written contract of sale executed by the Trefzers on May 11, 1983 and by the Church on May 12, 1983 and thereafter prepared an addendum to such contract executed by both parties on October 31, 1983.

43. Between May 12, 1983 and November 15, 1983 the Trefzers entrusted to respondent sums totalling $185,000.00, the purchase price set forth in the contract of sale for the specific purpose of closing title in accordance with the terms and provisions of the contract of sale.

44. On July 5, 1983 the Trefzers, at respondent's special instance and request, paid to respondent the sum of $1,000.00 for attorney's fees and an additional $680.00 for a survey and on October 19, 1983, at respondent's request, paid an additional $300.00 to respondent for unspecified closing costs.

45. Respondent failed to deposit the $980.00 entrusted to him for survey and other closing costs to a trust account.

46. Respondent deposited the $185,000.00 entrusted to him to a separate trust account #008-169138 maintained at Southeast Bank, N.A., Riviera Beach Branch and thereafter appropriated therefrom to his own use and purposes the total sum of $61,700.00 without disclosure to or consent from either the Trefzers or the Church.

47. Respondent failed and refused to account to the Trefzers or to the Church for the $185,000.00 entrusted to respondent, as aforesaid, despite repeated demands for such accounting.

48. Respondent failed and refused to deliver over the $185,000.00 to the Church or to the Trefzers despite repeated demands therefor.

49. Prior to the execution of the contract of sale hereinabove referred to, the Church had sold a bond issue and in connection therewith had conveyed the realty which was the subject of the proposed sale to the Trefzers to a trustee who received such realty, in trust, pending the discharge by the Church of its bond obligations.

50. Respondent was aware of the bond issue, and of the conveyance to the trustee, as aforesaid, when he undertook representation of the Trefzers and the Church as hereinabove recited and agreed with the Church to attempt to discharge and satisfy all of the Church's bond obligations from the proceeds of the Church to Trefzer sale.

51. Subsequent to the execution of the Trefzer-Church contract respondent, in response to claims made by holders of eighteen (18) bonds which bonds were in the aggregate face amount of $21,500.00, paid from the $185,000.00 entrusted to him by the Trefzers, the sum of $32,613.42 in full satisfaction and discharge of the said eighteen (18) bonds.

52. Respondent did not disclose to the Trefzers the full nature and extent of the Church's bond issue and obligations incurred thereby but merely represented to the Trefzers that payment of such $32,613.42 would permit title to close in accordance with the Church-Trefzer contract of sale.

53. At the time respondent discharged the eighteen (18) bonds as aforesaid, there remained due and owing upon the Church's bond issue one hundred twenty-seven (127) bonds in the fact amount of $151,500.00 plus interest.

54. Upon withdrawing from representation of the Church, respondent delivered to the Church's successor attorney the sum of $104,000.00 from

the $185,000.00 entrusted to him by the Trefzers, representing to the Church that such $104,000.00 constituted the entire outstanding liability of the Church on account of the remaining one hundred twenty-seven (127) bonds.

55. In fact, at the time respondent turned over the $104,000.00 to the Church's successor attorney as hereinabove recited, respondent knew that such fund was insufficient to discharge the remaining one hundred twenty-seven (127) bonds.

56. Prior to turning over the $104,000.00 to the Church's successor attorney and representing that such sum was sufficient to discharge the Church's bond obligations and thereby permit title to close in accordance with the Church-Trefzer contract, respondent had directed inquiry to the holders of the one hundred twenty-seven (127) remaining bonds with the result that respondent: (a) was informed that holders of eighty-eight (88) such bonds would accept the face amount thereof, or, $117,000.00; (b) was informed that holders of nine (9) such bonds would accept face value thereof, or, $7,500.00 plus interest thereon; and (c) received no response from holders of thirty (30) such bonds in the fact amount of $27,000.00.

57. On or about July 29, 1982 respondent was retained by one Sydney A. Kraul, Jr., hereinafter called "Kraul", in connection with the administration of the estate of Kraul's deceased mother, Rae Lloyd Kraul upon a written retainer agreement providing for payment to respondent of a fee of 5% of the decedent's gross estate, plus court costs.

58. During the course of his representation of Kraul, as aforesaid, respondent came into possession of estate assets in the form of certificates of deposit totalling $21,200.00 which respondent deposited to his regular clients' trust account.

59. Respondent appropriated to his own use and purposes from the $21,200.00 aforesaid the sum of $16,200.00 without disclosure to Kraul, consent by Kraul and without application to or approval from the probate court having jurisdiction over the Kraul estate.

60. Respondent has failed and refused to account to Kraul regarding the $16,200.00 aforesaid and has failed and refused to deliver the said $16,200.00 to Kraul despite demands for such accounting and delivery.

61. Respondent has failed and refused to take the appropriate steps necessary to conclude the administration of the Kraul estate and has failed and refused to respond to inquiries by Kraul regarding the status of such estate.

62. On or about March 26, 1985 Norman Moody and Ann Moody, hereinafter called "Moodys", retained respondent to represent them in connection with a claim against the United States Internal Revenue Service.

63. Upon retaining respondent the Moodys paid to him on account of legal services to be rendered the sum of $1,500.00.

64. By failing and refusing to perform any legal services for which he was retained respondent's clients were precluded from seeking a refund from the Internal Revenue Service in the sum of $10,000.00 which claim of refund became precluded by virtue of a statute of limitations.

65. Heretofore, respondent agreed to represent one James P. Shepard, hereinafter called "Shepard" in connection with a claim to receive damages for property damage to a Winnebago vehicle owned by Shepard which was involved in an accident.

66. Respondent failed and refused to take any action to pursue Shepard's claim to recover for the property damage sustained by Shepard and failed and refused to respond to any inquiries by Shepard concerning the status of his case.

67. Heretofore on or about April 1, 1983 respondent was retained by one Thomas T. Thomas, hereinafter called "Thomas", for purposes of representing Thomas in connection with a tax matter.

68. Upon his acceptance of the Thomas case respondent requested and was paid a retainer in the sum of $200.00.

69. Thereafter respondent failed and refused to take any steps in connection with pursuing the Thomas tax matter and failed and refused to respond to numerous inquiries from Thomas regarding the status of the Thomas claim.

70. Respondent has failed and refused despite demand therefor to refund to Thomas the retainer paid by Thomas, as aforesaid, or to return to Thomas the papers entrusted to respondent by Thomas.

III. <u>RECOMMENDATIONS AS TO WHETHER OR NOT RESPONDENT SHOULD BE FOUND GUILTY</u>:

With respect to case 68,543 I recommend that respondent be found guilty of violating Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility which prohibits conduct by an attorney constituting dishonesty, fraud, deceit or misrepresentation.

With respect to case 68,856 I recommend that respondent be found guilty of violating the following rules:

Disciplinary Rule 5-104(A) of the Code of Professional Responsibility which provides that 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.

Disciplinary Rules 9-102(B)(1), Disciplinary Rule 9-102(B)(3) and Disciplinary Rule 9-102(B)(4) of the Code of Professional Responsibility which provides that an attorney shall promptly notify a client of the receipt of client funds, render appropriate accounts to his client regarding such funds and promptly pay to the client as requested by the client such funds in the possession of the attorney which the client is entitled to receive.

Integration Rule 11.02(4) which provides that money entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose; a refusal to account for and deliver over clients' money upon demand shall be deemed a conversion.

Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility which proscribes conduct by an attorney constituting dishonesty, fraud, deceit or misrepresentation.

Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility which provides that an attorney shall not engage in conduct that is prejudicial to the administration of justice.

Disciplinary Rule 1-102(A)(6) which provides that an attorney shall not engage in conduct which adversely reflects on his fitness to practice law.

With respect to case 68,869 I recommend that respondent be found guilty of violating the following rules:

Disciplinary Rule 9-102(A) of the Code of Professional Responsibility which provides that all client funds paid to a lawyer shall be deposited in one or more identifiable bank or savings and loan association accounts and no funds belonging to the lawyer shall be deposited therein.

Integration Rule 11.02(4) which provides that money entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose and refusal to account for and deliver such money upon demand shall be deemed a conversion.

Disciplinary Rule 9-102(B)(3) and Disciplinary Rule 9-102(B)(4) of the Code of Professional Responsibility which provide that a lawyer shall render appropriate accounts to his client regarding funds paid to such lawyer by a client and promptly pay to the client as requested by such client the funds in possession of the lawyer which the client is entitled to receive.

Integration Rule 11.02(3)(a) which proscribes conduct by an attorney contrary to honesty, justice and good morals.

Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility which proscribes conduct by an attorney constituting dishonesty, fraud, deceit or misrepresentation.

Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility which provides that an attorney shall not neglect a legal matter entrusted to him.

Disciplinary Rule 7-101(A)(2) of the Code of Professional Responsibility which provides that an attorney shall not intentionally fail to carry out a contract of employment entered into with a client for professional services.

Disciplinary Rule 7-101(A)(3) of the Code of Professional Responsibility which provides that an attorney shall not intentionally prejudice or damage his client during the course of his professional relationship.

Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility which provides that an attorney shall not engage in conduct that adversely reflects on his fitness to practice law.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend as discipline in this matter that the respondent be disbarred.

V. PERSONAL HISTORY:

Respondent is 45 years of age and was admitted to The Florida Bar on October 25, 1974.

VI. STATEMENT AS TO PAST DISCIPLINE:

Respondent was suspended from The Florida Bar pursuant to Fla. Bar Integr. Rule, article XI, Rule 11.10(6) in The Florida Bar v. Holmes, No. 68,751 (Fla. May 23, 1986). He has no other disciplinary history.

VII. STATEMENT OF COSTS OF THE PROCEEDINGS AND RECOMMENDATION:

Administrative Costs:	
Grievance Committee Level	
Case 68,543 ----------------$	150.00
Case 68,856 ----------------	150.00
Case 68,869 ----------------	150.00
Referee Level ----------------	150.00
Florida Bar Audit Costs ------------	2,595.93
Court Reporter Costs:	
Grievance Committee Level	
Case 68,543 ----------------	472.75
Case 68,856 ----------------	512.90
Case 68,869 ----------------	81.00
Referee Level ----------------	238.20
Subpoena Fees and Process Service ---	101.00
Copies (Fla. Bar Integr. Rule Bylaw 11.06(9)(b)) ----------------	198.00
TOTAL ------------------------------$	4,799.78

I recommend that such costs be taxed against the respondent.

RENDERED this 2 day of ~~September~~ Oct, 1986 at Fort Lauderdale, Broward County, Florida.

PATTI ENGLANDER HENNING, REFEREE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing referee's report was furnished to Thomas E. Kingcade, Esquire, attorney for respondent, 324 Datura Street, Suite 130, West Palm Beach, FL 33401 and to David M. Barnovitz, Assistant Staff Counsel, The Florida Bar, 915 Middle River Drive, Suite 602, Fort Lauderdale, FL 33304 by regular mail, on this 2 day of September, 1986.

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PATTI ENGLANDER HENNING