4-21

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JOE G. HOSNER,

Respondent.
_____/

Case No. 68,958

TFB No. 01-84N85

INITIAL BRIEF OF COMPLAINANT

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STATEMENT OF THE CASE

A formal complaint was filed by The Florida Bar in this matter on June 25, 1986. Respondent submitted a plea of guilty on November 10, 1986. Respondent and The Florida Bar submitted written arguments as to appropriate discipline. The Referee filed her Report and Recommendations on December 15, 1986, finding Respondent guilty as charged of violations of article XI, Rule 11.02(4) of the Integration Rule of The Florida Bar and the bylaws thereunder; and for violation of Disciplinary Rule 9-102(a) of the Code of Professional Responsibility of The Florida Bar. A Petition for Review was filed by Respondent on February 24, 1987, pursuant to Rule 3-7.6(c)(1), Rules of Discipline.

STATEMENT OF THE FACTS

On November 10, 1986, Respondent pled guilty to each and every allegation as stated in The Florida Bar's Complaint, reserving only the right to argue before the Referee the appropriate level of discipline to be imposed. No final hearing was requested or held. As a factual basis for Respondent's guilty plea, a sanitized version of the audit report prepared by The Florida Bar was attached to the guilty plea.

The audit report which forms the factual basis for the instant case indicates that an audit was performed by The Florida Bar Staff Auditor on two separate occasions, October of 1983 and March of 1984. A copy of the report is attached as an Appendix to Respondent's Initial Brief. Trust account records for Respondent's account labelled "Joe G. Hosner, P.A. Trust Account" (Account No. 752-888-1) at the West Florida Bank in Pensacola, were the subject of the audit. Results of the audit indicate that Respondent had failed in numerous respects to adhere to the trust accounting rules and procedures prescribed for attorneys' trust accounts. These violations were in the nature of both technical violations, such as failure to prepare monthly reconciliations, and more substantial violations, such as commingling and/or shortages.

The preliminary audit, performed in October of 1983, indicated shortages for five months, from March through September of 1983. After consultation with Respondent, and in coordination with

Respondent's Certified Public Accountant, these shortages were reclassified, resulting in shortages for three of the twelve months covered by the entire audit. However, the audit report indicates that Respondent borrowed considerable sums of money from three individuals in order to remedy the deficiencies in his trust account. One of these individuals, a client, apparently loaned Respondent in excess of $54,000. The audit report further revealed that Respondent disbursed to himself a fee in the amount of $1,928.00 on the same day that these funds were deposited, even where there was a two-day hold on the deposit. This disbursement against uncollected funds was for the benefit of Respondent and technically deprived the other clients having monies in Respondent's trust account until such time as the check covering the fee cleared.

The auditor noted that, although Respondent had been in substantial compliance for the period covering November 1983 through February 1984, that "because of the extensive violations for the earlier period, however, it is my opinion that Mr. Hosner was not in substantial compliance, overall, with the rules and procedures adopted by The Florida Bar for trust accounts." Audit Report at 6.

SUMMARY OF THE ARGUMENT

Respondent has been charged with, and pled guilty to, violation of trust accounting rules and procedures. These violations took place over a twelve-month period culminating in an audit by The Florida Bar. The Referee, in her report, specifically noted Respondent's argument in mitigation that no clients were harmed, that he took prompt corrective action, and that he enjoyed no benefit from the shortages. However, the Referee also noted the tremendous potential for client harm that existed due to Respondent's willful noncompliance with trust accounting rules. In written closing arguments to the Referee, The Florida Bar cited cases with facts similar to those in the instant case wherein suspensions had been ordered. The Referee considered these cases together with cases cited by the Respondent. The Referee was therefore apprised of this Court's previous pronouncements on the subject of trust accounting violations and ordered a ninety-day suspension together with probation. This recommendation is supported by case law, is not clearly erroneous as a matter of law, and therefore should be upheld by this Court.

Respondent's only argument regarding delay in this matter was an allusion to delay as a mitigating factor in Respondent's closing argument. No arguments were made nor evidence presented indicating harm or prejudice to Respondent. Any "delay" that may have occurred in this case does not rise to the level which should result in mitigation of the discipline ordered against Respondent.

ARGUMENT

THE DISCIPLINE OF NINETY DAYS ORDERED BY THE REFEREE IS AN APPROPRIATE LEVEL OF DISCIPLINE BASED ON THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT.

The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978) clearly states that the decision regarding the appropriate level of discipline is the sole province and responsibility of the Supreme Court of Florida. While there is no presumption of correctness surrounding the referee's recommendation of discipline, the burden on the party challenging the referee's recommendation is to demonstrate that the report is "erroneous, unlawful or unjustified." Rule 3-7.6(c)(5), Rules of Discipline. Based upon the cases cited to the Referee in written arguments, the recommended level of discipline in the instant case is neither erroneous, unlawful, or unjustified. As such, it should not be overturned by this Court.

In The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985), this Court considered a case very similarly factually to the case against Respondent. The referee in the Moxley case had recommended a public reprimand followed by a three-year period of probation. The Florida Bar petitioned for review and requested a minimum discipline of six months with proof of rehabilitation. The referee in Moxley noted that Moxley had fully cooperated by turning himself in to The Bar, and had instituted a new method of record keeping to ensure compliance with the trust accounting rules. Further, the referee

noted that there was never any intent to embezzle or defraud any client nor was any client hurt or complaining. Moxley at 815, f.n. 1.

While noting that a great deal of weight is given to the referee in such cases, this Court recommended in Moxley a suspension for a period of sixty days, together with probation. This Court stated that the imposition of the suspension against Moxley was not to be characterized as retribution but was for the purpose of clearly admonishing other attorneys regarding the necessity of faithfully following rules relating to clients' trust funds. Justice Erhlich, in a dissenting opinion, noted that had Moxley not been blessed with the fortuity of timing on the part of his clients, there would have been no characteristic to distinguish his behavior from that of the attorney in The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980). The attorney in Welty had been suspended for six months even where no client suffered a loss.

Respondent's conduct, while it does not rise to the level of the misconduct in Welty, is not dissimilar. Like Respondent, Welty also cooperated with The Bar in making the audit investigation, and freely admitted shortages. The factors which distinguish Welty from the instant case are the length of time during which the shortages occurred, the magnitude of the shortages themselves, and the fact that there was some delay in returning funds to Welty's clients. These distinguishing factors do not diminish Respondent's conduct to the level warranting merely a public reprimand. In The

Florida Bar v. Byron, 424 So.2d 748 (Fla. 1982), this Court suspended an attorney for three years for failure to keep accurate trust account records even where the attorney argued that his dereliction had been the result of sloppy record keeping due to alcoholism. In The Florida Bar v. Bartlett, 462 So.2d 1087 (Fla. 1985), the attorney was suspended for thirty days for commingling and improper record keeping.

Attorney misconduct related to clients' trust funds is one of the most serious types of misconduct considered by this Court. In Moxley, this Court noted: "we take a grim view of attorneys who fail to keep sacrosanct and inviolate their trust funds as required under these rules." Moxley at 814. In her report in the instant case, the Referee recognized the seriousness of the charges against Respondent, noting that her recommendation of a suspension of ninety days was "in keeping with the philosophy that trust accounting violations should be punished not only when direct financial harm is shown but also to deter willful noncompliance with the rules by adequately punishing wrongdoers." Referee's Report at 2.

In the Welty decision, this Court stated that "public reprimands should be reserved for such instances as isolated instances of neglect; or technical violations of trust accounting rules without willful intent." Welty at 1223 (citations omitted). Welty at 1223. This philosophy was reaffirmed in the Moxley decision wherein this Court specifically rejected a public reprimand for conduct very similar to that of Respondent's. The admitted

violations by Respondent go far beyond mere technical violations of trust accounting rules. The audit report which forms the factual basis for Respondent's plea of guilty indicates a knowing dispersal for a particular client exceeding the related receipts. Respondent also failed to prepare or retain quarterly trust account reconciliations. Respondent did more than simply fail to keep adequate records. He commingled his funds with those of clients, he disbursed on uncollected funds and he allowed shortages to exist in his trust account for a period of at least three months. These were not isolated instances, and go well beyond that which could be considered merely technical violations.

The American Bar Association has promulgated Standards for Imposing Lawyer Sanctions Black Letter Rules. It is the present policy of the Board of Governors of The Florida Bar to cite these Standards in all cases involving the discipline of attorneys. Section 4.12 of these Standards states that: "suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." In the instant case, Respondent clearly should have known that he was not dealing properly with his clients' property. The violations were extensive and took place over a period of approximately one year. As argued by The Bar, and noted by the Referee in this case, the potential for client harm was great. The audit report indicates that disbursement in excess of related receipts made for some clients resulted in the funds of other clients' funds being improperly used.

In her report, the Referee carefully noted mitigating factors which Respondent included in his argument. These factors were to the effect that no clients had been harmed, that he had taken prompt corrective action, and that he had enjoyed no benefits from any of the shortages which occurred.

The Referee did not find delay to be a mitigating factor. In fact, there is no mention of delay in the Referee's Report. Any delay that may have occurred falls far below the level of delay which occurred in The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970). In Randolph, this Court based its decision on the fact that six years had elapsed between the initial complaint and final action by the Board of Governors, and that during the six-year delay, the respondent had been subjected to an agonizing ordeal of investigations, charges, and hearings. Randolph at 638. Further, Randolph had "been subjected to the stigma of community suspicion and criticism." Randolph at 638. In the instant case, the period of time from the submission of the audit report until filing of the Referee's report was two years and eight months, considerably less than the six years involved in Randolph. Respondent has never argued or presented any evidence indicating that he was subjected to any stigma, suspicion, or criticism.

Finally, the recommended suspension of 90 days is in keeping with the purposes of discipline set forth in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). A suspension will be protective of the public, will encourage reformation and

rehabilitation, and is severe enough to deter others from similar misconduct. The importance of this last purpose, the deterrence of others from similar misconduct, was emphasized by this Court in Moxley. A public reprimand for such serious misconduct would not act as a deterrence to others, and would seriously undermine public confidence in the disciplinary process.

CONCLUSION

Arguments were made to the Referee below by both sides, and cases cited which dealt with similar facts situations. The Referee, after careful consideration of all the facts, mitigating factors and previous decisions, clearly and deliberately recommended a suspension from the practice of law for a period of ninety days together with a period of probation of three-years duration. Based upon the cases cited to the Referee and those cited herein, such a recommendation is not erroneous, unjustified or unlawful. It is a proper recommendation in keeping with this Court's past treatment of cases involving the improper handling of funds entrusted to an attorney by clients, and should therefore be upheld by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by certified mail # P 675 195 489, return receipt requested, to JOHN A. WEISS, Counsel for Respondent, at his record Bar address of Post Office Box 1167, Tallahassee, Florida 32302, this 27th day of March, 1987.

Susan V. Bloemendaal