

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
v.
WOODROW HARPER,
Respondent.

Case No: 69,053 (07B86C06)
69,054 (07B86C20)

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RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
POINT INVOLVED ON APPEAL	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
THE REFEREE'S RECOMMENDATION OF A THREE MONTH SUSPENSION WITH AUTOMATIC REINSTATEMENT TO BE FOLLOWED BY TWO YEARS PROBATION WITH VARIOUS CONDITIONS OF PROBATION IS THE APPROPRIATE SANCTION TO BE IMPOSED IN THIS CASE.	3
CONCLUSION	11

TABLE OF AUTHORITIES

	<u>PAGE NO.</u>
THE FLORIDA BAR v. ALFORD; 400 So.2d 458 (Fla. 1981)	7
THE FLORIDA BAR v. BARTLETT; 462 So.2d 1087 (Fla. 1985)	8
THE FLORIDA BAR v. BRYAN; 396 So.2d 165 (Fla. 1981)	9 & 10
THE FLORIDA BAR v. CHASE; 467 So.2d 983 (Fla. 1985)	7
THE FLORIDA BAR v. GARCIA; 485 So.2d 1254 (Fla. 1986)	7
THE FLORIDA BAR v. HESTON; 501 So.2d 597 (Fla. 1987)	8 & 9
THE FLORIDA BAR v. HIRSCH; 342 So.2d 970 (Fla. 1977)	10
THE FLORIDA BAR v. LORD; 433 So.2d 983 (Fla. 1983)	10
THE FLORIDA BAR v. McCAIN; 361 So.2d 700,708 (Fla. 1978)	4
THE FLORIDA BAR v. MOXLEY; 462 So.2d 814 (Fla. 1985)	8
THE FLORIDA BAR v. NEELY; 488 So.2d 535 (Fla. 1986)	8
THE FLORIDA BAR v. PAHULES; 233 So.2d 130 (Fla. 1970)	5 & 11
THE FLORIDA BAR v. PINCUS; 300 So.2d 16 (Fla. 1974)	11
THE FLORIDA BAR v. REESE; 263 So.2d 794 (Fla. 1972)	9
THE FLORIDA BAR v. TERRY; 333 So.2d 24 (Fla. 1976)	9
THE FLORIDA BAR v. THOMPSON; 500 So.2d 1335,1336 (Fla. 1986)	4 & 5
THE FLORIDA BAR v. WELTY; 382 So.2d 1220 (Fla. 1980)	9 & 10

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of case and facts set forth in the Bar's Initial Brief.

POINT ON APPEAL

WHETHER THE REFEREE'S RECOMMENDATION OF A THREE MONTH SUSPENSION WITH AUTOMATIC REINSTATEMENT TO BE FOLLOWED BY TWO YEARS PROBATION WITH VARIOUS CONDITIONS OF PROBATION IS THE APPROPRIATE SANCTION TO BE IMPOSED IN THIS CASE.

SUMMARY OF ARGUMENT

The Referee in these proceedings recommended a three month suspension with automatic reinstatement to be followed by two years probation. His recommendation should be upheld in light of the numerous mitigating factors present in this case and because the Referee had the opportunity to personally evaluate the Respondent's attitude and repentance relative his misconduct.

The Referee recommended a three month suspension for a relatively minor neglect case that, standing alone, would have warranted either a private or public reprimand.

The Referee also recommended a concurrent three month suspension for Respondent's trust accounting offenses. His recommendation is appropriate in light of the numerous mitigating factors involved. Among those factors are Respondent's lack of prior disciplinary sanctions, the fact that his misconduct took place over a relatively short period of time (about one year), the fact that no clients or other individuals were harmed by his misconduct and, finally, by Respondent's appreciation of his wrongdoing and his remorse for his actions. Furthermore, the Referee's provisions for probation guarantee no repeat of the misconduct.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF A THREE MONTH
SUSPENSION WITH AUTOMATIC REINSTATEMENT TO BE
FOLLOWED BY TWO YEARS PROBATION WITH VARIOUS
CONDITIONS OF PROBATION IS THE APPROPRIATE
SANCTION TO BE IMPOSED IN THIS CASE.

The only issue before this court is the propriety of the Referee's recommended discipline. Respondent acknowledges his wrongdoing and accepts the propriety of the Referee's recommended discipline, i.e., suspension from the practice of law for three months to be followed by two years suspension. The Referee's suggested discipline is stern. In a solo practice such as Respondent's, a three month suspension from practice, coupled with the notice of suspension that is required to be sent to all clients with matters pending [see Rule 3-5.1 (h) of the Rules Regulating The Florida Bar] means that Respondent's practice will be virtually eliminated by the end of the three month suspension.

As Appellant, The Florida Bar must demonstrate to this court that the Referee's recommended discipline is erroneous, unlawful, or unjustified. Rule 3-7.6 (c) (5). As the Bar's own cases demonstrate, the Referee's report falls within the parameters of disciplines previously imposed for offenses such as those committed by Respondent. Accordingly, they have not met their burden of showing the Referee's recommendation is erroneous.

The Respondent acknowledges that the Supreme Court's review of a Referee's recommended discipline is somewhat broader than its power to review the Referee's findings of fact. The Florida

Bar v. McCain, 361 So.2d 700, 708 (Fla. 1978). However, the Referee's suggested discipline should be given great weight by this court primarily because only the Referee has the opportunity to personally evaluate the Respondent during the disciplinary hearing and to subjectively determine the effect the proceeding is having on the accused lawyer. The Respondent's attitude towards his misconduct, and inherent within that attitude his remorse and repentance, is an important factor in determining the appropriate sanction to be meted out in a grievance. The Florida Bar v. Thompson, 500 So.2d 1335, 1336 (Fla. 1986).

In the case at hand, the Respondent has evinced a contrite and humble attitude together with an acknowledgement that he violated the code. Respondent admitted the allegations of the charges against him, thereby acknowledging and accepting his misconduct. He then apologized to the court for his misconduct at final hearing by stating:

You know, your Honor, I am very sorry that all this has happened. I wish it hadn't happened. . . . (TR 21).

Later at final hearing, the Respondent stated the following:

Your Honor, I would like to say that I am tremendously embarrassed by this episode. I certainly regret any inconvenience or problems that I have caused for the Bar and the Judiciary of the State of Florida. (TR 38).

Who is to say what went through the Referee's mind in determining the discipline he imposed. Certainly, a Respondent's contrite and humble attitude would be a material factor in

handing down a discipline. Thompson, supra.

At final hearing, Bar Counsel referred the Referee to The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970). In that case, on page 132, the court listed the three purposes of imposing discipline in grievance cases.

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in light violations.

The Referee's recommended discipline meets all three criteria listed in Pahules. First, and most importantly, it protects the public. Although no client lost funds as a result of Respondent's misconduct, the Referee still imposed a two year probation to follow on the heels of Respondent's suspension, the terms of which include monitoring of Respondent's trust account by the Bar. Such a discipline will insure that Respondent complies with the Bar's trust accounting rules and regulations.

Respondent hereby states to this court that he would have no objection to the court increasing the probation to three years.

Secondly, three months suspension from the practice of law for a solo practitioner such as Respondent is a devastating sanction. To increase that suspension by even one day, thereby requiring proof of rehabilitation before reinstatement, is a

discipline that would completely destroy this lawyer's small town practice. The Referee specifically considered the effect of a long term suspension on Respondent at final hearing. There he stated that in determining which discipline would be imposed, he would consider:

One, the public as a whole, and you have to look at an individual as an individual (TR 56).

The Referee then noted that in a small town such as St. Augustine:

Which is rather clannish as far as local attorneys are concerned, being an outsider that he would have built up that large of a practice. So financially whatever period of time, its going to be an extreme hardship. (TR 56)

The Referee then concluded his deliberations on discipline by stating that:

I think perhaps a year is rather harsh being, one, the first time. Now if it had been the second time. I believe in giving someone a bite one time, but the second time, then, I'll unload. (TR 57)

A review of the entire transcript of the entire hearing shows that the Referee evinced no sympathy towards Respondent and his wrongdoing. The Referee specifically stated that he would read the Bar's cited cases (TR 57). He took Respondent to task on several occasions and then imposed the discipline that he felt was appropriate. The Bar has not shown this court that the Referee's recommended discipline is erroneous, unlawful or

unjustified.

Were there not numerous mitigating factors involved in this case, a longer suspension might be justified. However, the mitigating factors are numerous and remove this case from the realm of those requiring proof of rehabilitation.

In case no. 69,053 (Davis), the Respondent held his client's file for six weeks and then returned the file together with a refund of fees paid (TR 25). At that time, there were still five days remaining to file a replevin action and the Respondent offered to file the action for his client if he so desired (TR 25) (the transcript erroneously described Mr. Inman, Respondent's counsel, as making this statement. In fact, this is a scrivener's error and Respondent made the statement). Respondent also offered to reimburse the client for any out-of-pocket losses that he might incur as a result of Respondent's six weeks delay. Respondent also acknowledged his wrongdoing (TR 17) and evinced remorse for his actions (TR 21).

As indicated by the cases cited by The Florida Bar, were this case standing alone, it would have received at most a public reprimand. See The Florida Bar v. Chase, 467 So.2d 983 (Fla. 1985) and The Florida Bar v. Alford, 400 So.2d 458 (Fla. 1981). In fact, this court has ordered public reprimands for neglect cases far worse than Respondent's. In The Florida Bar v. Garcia, 485 So.2d 1254 (Fla. 1986) a lawyer received a public reprimand for three different counts of neglect, for misrepresentation to his client and for trust account irregularities.

Respondent's misconduct regarding his trust account might, absent mitigation, warrant a long suspension as demanded by the Bar. However, the mitigating circumstances in this case make the sanction recommended by the Referee an appropriate one. The Bar acknowledges in its brief that lawyers have been disciplined less harshly than that suggested here for similar acts. In The Florida Bar v. Bartlett, 462 So.2d 1087 (Fla. 1985), a lawyer received a 30 day suspension for numerous trust account offenses including running a minus balance in his trust account for over 60 days and having shortages in his account of over \$1,500.00. In the instant case, the recommended suspension is three times longer than that in Bartlett.

As the Bar points out in its brief, in The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985), a lawyer received a 60 day suspension for an offense similar to that at hand. Mr. Moxley, as is the Respondent in the instant case, was a sole practitioner without prior disciplinary record. As pointed out by the Referee in that case, Mr. Moxley was "regretful, sorrowful, remorseful and embarrassed beyond measure by what he did" and, as here, "there was never any attempt to embezzle or defraud any client".

The discipline imposed in Moxley is a suspension for 30 days less than the Referee recommended in the case at bar.

The Referee's recommendation is also more harsh than discipline imposed in The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986) and in The Florida Bar v. Heston, 501 So.2d 597 (Fla. 1987). In Neely, the Respondent was guilty of various trust

account violations among which were insufficient funds to cover a \$2,948.00 trust account check sent to a client as payment for an insurance settlement. This court suspended Mr. Neely from practice for 60 days, notwithstanding the Referee's recommended six month suspension, and despite the fact that it was Mr. Neely's third appearance before the Supreme Court for disciplinary reasons (Mr. Neely received a 90 day suspension for self dealing and misrepresentation in 1979 and a public reprimand in 1982).

Respondent's offense is similar to Mr. Neely's. Neither lawyer intended to defraud a client and and both lawyers were extremely inattentive to their trust accounts. The material difference between the two cases is that Mr. Neely had been twice previously disciplined by the Supreme Court. Yet, he received only a 60 day suspension.

In Heston, the lawyer received a public reprimand and two years probation for trust account irregularities which included a trust account shortage of over \$7,300.00. Other cases in which lawyers received public reprimands for misusing trust funds are The Florida Bar v. Reese, 263 So.2d 794 (Fla. 1972) and The Florida Bar v. Terry, 333 So.2d 24 (Fla. 1976).

The Bar's reliance on such cases as The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980) is misplaced. Welty received a six month suspension for deficits in his trust account occurring over a two year period and at times amounting to over \$24,000.00. Id., 1224. Its reliance on The Florida Bar v. Bryan, 396 So.2d

165 (Fla. 1981) is likewise misplaced. In Bryan, restitution was not made until seven months after the defalcation and then it was only after the client filed a complaint with the Bar. The misconduct in the case at bar is not nearly as serious as that in Welty and in Bryan, and accordingly, the six month sentences imposed in those cases is simply not appropriate.

Respondent urges this court to limit his sanction to the maximum suspension available without proving rehabilitation in reinstatement proceedings. As this court is well aware, reinstatement proceedings take six months to one year to complete. In essence, increasing Respondent's suspension by only one day will, in effect, suspend him for a year. This is exactly the harsh sentence that the Referee wished to avoid in recommending a discipline (TR 56). The hardship that a discipline will impose on a lawyer is a proper element for a Referee to consider in recommending discipline. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

The Referee in these proceedings is a seasoned judge and he considered the case very carefully. His recommended discipline is consistent with those handed out in similar cases. His recommendation should be upheld by this court.

The primary purpose of these disciplinary proceedings is protection of the public. However, a secondary purpose is to "reclaim those who violate the rules of the profession." The Florida Bar v. Hirsch, 342 So.2d 970 (Fla. 1977). The discipline should not focus on retribution, but on rehabilitation. The

Florida Bar v. Pincus, 300 So.2d 16 (Fla. 1974).

Suspending Respondent from the practice of law for three months, coupled with two years probation (or three years if this court sees fit to so order) will insure Respondent's compliance with trust accounting rules while at the same time encouraging rehabilitation. Pahules, page 132. Respondent's misconduct occurred over a relatively short period of time and there is no reason to believe that it will reoccur. Respondent has taken the first important toward rehabilitation, i.e., recognition of his wrongdoing and remorse for his misconduct. Requiring Respondent to prove rehabilitation is nothing more than imposing an additional burden on him.

Respondent has cooperated with the Bar throughout this case, he accepts responsibility for his misconduct and acknowledges that a stern sanction is warranted. He asks this court to note that no client was harmed by his errors, that he promptly borrowed sufficient funds to make up the shortage in his account, and that he has no prior record.

Respondent has learned his lesson. A suspension of three months is a sufficiently stern punishment for the misconduct at bar.

CONCLUSION

Respondent asks this court to adopt the discipline recommended by the learned Referee in these disciplinary proceedings and to order suspension from the practice of law for three months with automatic reinstatement to be followed by

probation consistent with that recommended by the Referee.

RESPECTFULLY SUBMITTED,

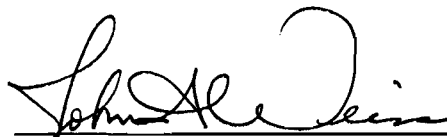


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was mailed to David G. McGunegle, Bar Counsel, The Florida Bar, 605 East Robinson Street, Suite 610, Orlando, Florida 32801 on this 1st day of June, 1987.



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