5.1

FILED

IN THE SUPREME COURT OF FLORIDA

1987

CLERK, SUPREME COURT

By _____ Deputy Clerk

THE FLORIDA BAR,

Complainant,

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

v.

WOODROW HARPER,

Respondent.

_____/

MAIN BRIEF OF THE FLORIDA BAR

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

and

DAVID G. MCGUNEGLE
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(305) 425-5424

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

References to the Transcript of Final Hearing on December 2, 1986 will be (T.). References to the Referee's Report will be (R.).

STATEMENT OF THE CASE

Case 69,053 involves a complaint by Ralph Davis which was received on July 29, 1985. Probable cause was found after hearing on April 11, 1986. The complaint was filed on July 16, 1986 and final hearing was held on both cases on December 2, 1986. In case 69,054, the complaint came in from attorney Judith Shine on December 13, 1985 and probable cause was waived in early April, 1986. That complaint was also filed on July 16, 1986 and final hearing held with the former case on December 2, 1986.

The referee's report covering both cases was filed by mail on January 14, 1987. As to case 69,053, the referee recommends the respondent be found guilty of violating the following disciplinary rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(4) for conduct involving deceit and misrepresentation, and 6-101(A)(3) for neglecting a legal matter. As discipline, he recommends respondent be suspended for three months with automatic reinstatement at the end of the period as was previously provided in Article XI, 11.10(4) and is now provided in Rule 3-5.1(e) of the Rules of Discipline.

With regard to Case 69,054, the referee recommends the respondent be found guilty of violating the following Rules in Article XI of the Integration Rule of The Florida Bar: 11.02(4)

for misusing trust funds for his own personal use and benefit and 11.02(4)(c) for improper trust account record keeping and mismanagement. He also recommends the respondent has violated the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(4) for conduct involving fraud, dishonesty, deceit and for knowingly utilizing trust funds for his own personal purposes, 9-102(A) for commingling funds, 9-102(A)(3) for inadequate trust account record keeping and 9-102(B)(4) for misusing trust funds for his own personal use and failing to tender trust funds upon demand. As discipline, the referee again recommends the respondent be suspended for a period of three months with automatic reinstatement at the end of the period which suspension is to run concurrently with the suspension in case 69,053. In addition, he recommends the respondent be placed on probation for a period of two years with supervision and semiannual audits of his trust account. Copies are to be filed with the Clerk of the Supreme Court of Florida and Staff Counsel of The Florida Bar.

Finally, the referee noted that The Florida Bar incurred $2,333.85 as reasonable costs in investigating and prosecuting the case.

The Board of Governors of The Florida Bar reviewed the referee's findings of fact and recommendations of guilt and discipline at their March, 1987 meeting. The Board voted to approve the referee's findings of fact and recommendations of guilt but to seek review of the recommended discipline as to both cases. In the opinion of the Board, the recommended discipline is erroneous and unjustified in this matter which involves the knowing misuse of trust funds over several months as well as separate neglect in another case and misrepresentation to the client. In the opinion of the Board, the appropriate discipline should be a suspension for a period of at least one year with proof of rehabilitation required prior to reinstatement, payment of costs and a two year period of probation with semiannual audits of the respondent's trust account to follow any subsequent reinstatement. These proceedings then commenced.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S RECOMMENDED THREE MONTHS SUSPENSIONS WITH AUTOMATIC REINSTATEMENT FOR BOTH CASES FOLLOWED BY A PERIOD OF TWO YEARS PROBATION WITH SEMIANNUAL AUDITS OF THE TRUST ACCOUNT IS ERRONEOUS AND UNJUSTIFIED AND; WHETHER THE BOARD OF GOVERNORS' RECOMMENDED SUSPENSION FOR A PERIOD OF ONE YEAR WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT COUPLED WITH A TWO YEAR PERIOD OF PROBATION FOLLOWING REINSTATEMENT AND PAYMENT OF COSTS IS THE APPROPRIATE MEASURE OF DISCIPLINE IN THIS PARTICULAR CASE.

STATEMENT OF THE FACTS

Case 69,053 (07B86C06)

On May 31, 1985, Ralph Davis retained the respondent to assist him in a dispute with AAA Auto Truck Service in St. Augustine relative to repairs and unauthorized storage charges after the garage manager determined they could not fix his truck. Respondent accepted the representation and was paid $100.00 to cover court costs and as a partial fee deposit. At that time, he telephoned the garage in Mr. Davis' presence and advised they would see them in court when negotiations were refused.

A few days later Mr. Davis telephoned the respondent who advised him that he had filed a case against AAA Auto Truck Service. Two or three weeks later Mr. Davis called respondent and advised him he had observed individuals in the garage taking parts off his truck. At that time, respondent either advised him that the sheriff would be serving papers and not to worry or to call the police. Sometime afterwards, Mr. Davis contacted the county court and determined no case had been filed in his behalf by respondent. He also visited the office and determined no action had been taken through viewing the file.

On July 11, 1985, Mr. Davis visited respondent's office where for the first time he was shown a copy of a letter addressed to him dated June 10, 1985 indicating respondent was too busy with other cases to handle this matter. See Exhibit A. Mr. Davis had not previously seen or heard about this letter. He demanded and received a refund of $100.00 at or about this time. Between June 10, 1985 and July 11, 1985, Mr. Davis had phoned respondent's office ten times and visited it a total of four times. Despite these telephone calls and visits, he was never advised by either the respondent or his sole secretary during that period that the letter had been sent indicating he was too busy.

Notwithstanding agreeing to represent Mr. Davis, respondent did nothing until his services were terminated after approximately six weeks even though the matter, as noted by the referee, required immediate attention (R. Case 69,053 para. 2). Moreover, he deliberately misrepresented to Mr. Davis on several occasions the status of his case and advised him suit had been filed when such was not the case. Mr. Davis subsequently employed other counsel who retrieved the truck for approximately $75.00. The vehicle was in an inoperable condition and later sold for junk. The letter was an obvious fabrication to justify respondent's inactivity. Mr. Davis was never advised until July

11, 1985 that respondent had "sent" him the letter stating he was too busy to handle his case. It simply was not done.

Case No. 69,054 (07B86C20)

Respondent entered a plea of guilty to this complaint. The Florida Bar reviewed his trust account following a complaint from a real estate transaction which closed on October 21, 1985. The period of the review was from January, 1984 through February, 1986. Respondent opened his trust account at the Atlantic Bank of Florida in St. Augustine on March 2, 1984 and improperly labeled it an escrow account. Respondent produced monthly bank statements from March 30, 1984 through December 31, 1985, deposit slips for the period May 1, 1984 through December 17, 1984, cancelled checks, a general reconciliation ledger dated September 31, 1984, and available client ledgers.

The records were unfortunately incomplete necessitating a reconstruction of client ledgers and a transaction journal to complete the review. Deposit records were incomplete and available records were not marked to reflect client matters for which they pertained in many instances. There was a similar lack of identity of client and matter for the issued checks and check stubs. A few checks were missing. The client ledgers did not

show all activities reflected by the deposit slips and checks. Furthermore, the required reconciliations were not being accomplished nor maintained during the period of the review.

In at least three instances in October, 1985, checks were returned marked insufficient funds. Additionally, the account was charged for ordered checkbooks with service charges totalling $180.47 for which there were no funds placed into the account to cover same. On one occasion, respondent issued a check to his secretary in the amount of $100.00. However, there was no client ledger card concerning the transaction. On two occasions, respondent drew checks to himself grouping fees from clients but the total amount of the checks was inconsistent with the amounts charged to the individual clients and the client cards did not reflect the total disbursements. For instance, check 295 was issued in the amount of $8,866.71, and was charged back to seven clients for a total of $6,575.72 leaving a $2,290.99 difference charged back to no client. Respondent also issued two checks to himself totalling $440.00 against an account code which contained no funds.

During 1985, respondent issued nineteen checks to himself totalling $27,650.00 without reflecting his internal account codes or client matters on the checks or recording the check

numbers and the amounts to client ledgers. On forty-eight occasions between September 7, 1984 and December 31, 1985, respondent issued checks against undeposited or uncollected funds and on one occasion when the account was actually overdrawn. Furthermore, he did not always deposit the total amount received into trust. On September 26, 1985, he deposited three items to three accounts totalling over $13,000.00. However, had netted out of the deposit $10,000.00 leaving a net deposit of slightly over $3,000.00.

The transactions which gave rise to the review was the purchase and sale of real estate in a development of a subdivision. Respondent represented Mr. Kazmierski who was the developer. The original purchaser, Mr. Whitstone, paid $3,200.00 into escrow to the respondent which was deposited into his trust account on March 19, 1985. By March 25, 1985, respondent's trust account contained less than the escrowed amount or $1,449.25. Over the next several months, the account often had less than $3,200.00. Checks then being drawn against the trust account included two checks to the respondent totalling $3,200.00 which debits and purposes are not reflected in the records. In fact, this $3,200.00 was drawn out within a few days of the original deposit (T. p. 30) Mr. Whitstone subsequently assigned his interest to Frank Upchurch, III, who closed the transaction on

October 21, 1985 with two checks to respondent totalling $26,109.00. These funds were deposited into the trust account the next day. However, the bank balance after the deposit of these funds at the end of the day was only $21,677.33 which was drawn down to $2,534.11 as of the end of October. The trust account was subsequently overdrawn on November 31, 1985 in the amount of $71.65. It became positive with credit memos several days later leaving a balance at the end of the year of $358.58. From the Upchurch deposit through November 19, 1985, respondent wrote at least four checks totalling $12,100.00 to himself or the office account for improper purposes. (T. pp. 33-34). When respondent's client checked with the bank and determined that they had not applied the Upchurch money to his construction loan, he contacted the bank's attorney. She had also received no funds from the Upchurch transaction. After contacting both Mr. Harper and Mr. Upchurch, she received on or about the same day an unsigned check dated November 20, 1985 drawn on respondent's trust account purportedly to cover the situation. The check was for $27,008.05 at a time when respondent's trust account balance was $39.86 and which was overdrawn the next day.

After being contacted by Mr. Upchurch, respondent borrowed some $30,000.00 in order to complete the transaction. Final review of the account showed total monies owed clients exceeded

the monies purportedly deposited in the account as determined from the available and reconstructed records. It also showed that while $1,446.65 was paid into the trust account from the office account there still was a negative balance according to the records of almost $160.00.

Respondent has knowingly misused trust funds for his own personal purposes and failed to maintain the trust account record keeping in substantial compliance with the minimum rules on trust accounting. As noted by the referee, the most serious breach was that the respondent on several occasions used substantial sums of money for his own personal use which monies were trust funds and not his own. (R. Case 69,054 para. 1)

SUMMARY OF ARGUMENT

The referee's recommended discipline of two concurrent ninety day suspensions followed by a period of two years probation with semiannual audits of the trust account is woefully inadequate wherein the respondent is both guilty of neglecting a legal matter entrusted to him and misrepresenting the status on several occasions to his client and, more importantly, where the respondent has improperly handled his trust account record keeping, commingled funds and knowingly misused substantial sums of trust funds on several occasions for his own personal purposes for whatever reasons. The proper discipline should be a suspension for at least a period of one year with proof of rehabilitation required prior to reinstatement and followed with a two year period of probation with semiannual audits of the trust account subsequent to any reinstatement and payment of costs to The Florida Bar. The case law in current years fully supports the Bar's position and does not support the referee's recommendations. Accordingly, this court should alter the recommended discipline to bring it in accordance with the current case law.

ARGUMENT

THE REFEREE'S RECOMMENDED THREE MONTHS SUSPENSIONS WITH AUTOMATIC REINSTATEMENT FOR BOTH CASES FOLLOWED BY A PERIOD OF TWO YEARS PROBATION WITH SEMIANNUAL AUDITS OF THE TRUST ACCOUNT IS ERRONEOUS AND UNJUSTIFIED AND THE BOARD OF GOVERNORS' RECOMMENDED SUSPENSION FOR A PERIOD OF ONE YEAR WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT COUPLED WITH A TWO YEAR PERIOD OF PROBATION FOLLOWING REINSTATEMENT AND PAYMENT OF COSTS IS THE APPROPRIATE MEASURE OF DISCIPLINE IN THIS PARTICULAR CASE.

The referee considered two separate cases. The first involved respondent's neglect of a legal matter and misrepresentation to his client of the case status on several occasions for an approximate six weeks period. Although the length of time he had the case is not long, he accepted a matter which needed immediate attention and did nothing except to take the retainer until he was terminated by the client. The referee rightly found that he had violated Disciplinary Rule 1-102(A)(4) for engaging in deceitful conduct and conduct involving misrepresentation, and Disciplinary Rule 6-101(A)(3) for neglecting a legal matter entrusted to him. The length of time a matter is entrusted to an attorney is not necessarily determinant of whether the neglect rule has been broken. Even more important is whether the

attorney has shown a consistent disregard for the case under the circumstances. In this instance, the attorney not only did nothing but actively misrepresented to the client on several occasions what was being accomplished. Further, he fabricated a letter dated June 10, 1987 which plainly was never dispatched. It was only drawn up in an effort to exculpate himself after the client found out nothing had been done. There were simply too many contacts between the client and respondent's office subsequent to the purported date of the letter for the client not to have been told had the letter been prepared and dispatched as claimed. Respondent and his sole secretary were the only ones with whom the client had contact between June 10, 1985 and July 11, 1985 which included four visits and ten telephone calls.

Past cases involving disciplines from short term matters and/or matters needing immediate attention include The Florida Bar v. Chase, 467 So.2d 983 (Fla. 1985). That individual received a public reprimand stemming from problems in a criminal case. See also, The Florida Bar v. Alford, 400 So.2d 458 (Fla. 1981). He was publicly reprimanded for failing to accomplish a change of custody in a timely manner where it was uncontested. Finally, see part of the factual situation, in The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). In this instance, the referee

recommends the respondent be suspended for three months with automatic reinstatement.

While the discipline recommended in the preceding case is entirely appropriate standing alone, the referee made a similar recommendation along with two years probation in case 69,054. Further, he recommends that the two suspensions run concurrent. It is this recommendation which is what makes the entire recommendation erroneous and unjustified given the case law and purpose of discipline in the State of Florida.

In this case, the respondent failed to maintain his trust account record keeping within substantial minimum compliance with the rules. In fact, his account had to be largely reconstructed when the audit was done. Moreover, he misused trust funds from the account on several occasions during the year 1985 until the account itself was overdrawn in November, 1985. When he first received the initial $3,200.00 deposit for his developer client, he wrote two checks within a few days for a total of the same amount without any adequate record keeping and which were used for his own personal purposes. Thereafter, the account held less than the required $3,200.00 in it on several occasions throughout 1985. When he closed the real estate transaction and received slightly over $26,000.00 from the purchaser on October 21, 1985,

he quickly ran the account balance down approximately $4,500.00 less than should have been in it by the end of the day. Thereafter, he drew it down to a little over $2,500.00 by the end of October. It went into an overdrawn status in November.

From the buyer's deposit, he wrote four checks totalling $12,100.00 to himself or the office account for admittedly improper purposes. When the monies failed to be forthcoming within a short period of time and he was contacted, he forwarded a check to the bank's attorney drawn on his trust account but which was unsigned and when the account contained less than $40.00. Fortunately, he was able to borrow approximately $30,000.00 in order to pay off the transaction. Meanwhile, his trust account had deteriorated into complete shambles at the end of 1985 and the internal records remained in a negative balance. The respondent plead guilty to this complaint.

Once again this Court is confronted with an attorney who for whatever reasons could not resist improperly utilizing other people's money for his own personal purposes without their knowledge. The question is whether a suspension with automatic reinstatement followed by a probationary period is the appropriate measure of discipline. The Bar submits the recommended discipline for both of these cases is erroneous, unjustified and

unwarranted given the developed case law. This respondent has no prior disciplinary history. However, his knowing invasion of the trust account and conversion of trust funds to his own personal purposes plainly warrant a suspension requiring proof of rehabilitation prior to reinstatement.

There are several cases in the recent past that clearly indicate this court deals harshly with cases involving misuse of trust funds whether or not the attorney has a prior disciplinary history. The reason is obvious. Clients have no other protection other than the faith and trust that their attorneys will strictly abide by the trust accounting rules and safeguard every penny of their money. When that trust is breached, it must be dealt with severely. See, e.g. The Florida Bar v. Kent, 484 So.2d 1230 (Fla. 1986), where the attorney was suspended for a period of three years with proof of rehabilitation required in a case which is not dissimilar. In that matter, he received a check for over $57,000.00 representing the balance due on a closing. Instead of using a portion of the funds to satisfy an outstanding mortgage, he placed those funds in his trust account and made monthly payments until the funds were exhausted and the mortgage went into default approximately fifteen months later. Default brought the situation to light the attorney borrowed over $33,000.00 to make right the situation within a few months. The

funds originally entrusted to Mr. Kent were used for his personal and business purposes. Note Justice Erlich would have disbarred him. In The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982), an attorney was suspended for three years with proof of rehabilitation required for mishandling trust funds and misusing for his own personal purposes several thousand dollars which funds were replaced once the accounts were audited. The record keeping was also very bad. Justice Alderman would have disbarred him.

Two year suspensions for misusing trust funds were handed out in The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982), The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981), and The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981). In each instance, substantial or complete restitution was made or the debt apparently forgiven as was done in the Morris case by his father. In each instance, the attorneys cooperated fully with The Florida Bar.

Suspensions of six months with proof of rehabilitation required prior to reinstatement were ordered by this Court in The Florida Bar v. Bryan, 396 So.2d 165 (Fla. 1981) and The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980). In both cases, the attorneys had failed to maintain their trust account record

keeping in accordance with the rules and misused substantial amount of monies for periods of time. In the Bryan case, he had misused for his own personal purposes $11,000.00 in estate funds for several months. Full restitution was made once it became known. In Welty, his handling of his trust account was so deficient that he had shortages over a two year period of upwards of $24,000.00. Full restitution was made in that case as well and that attorney maintained that the shortfalls originally occurred without his knowledge because of incompetent record keeping rather than intentional manipulation of trust funds.

In a more recent case an attorney was suspended for six months with proof of rehabilitation required prior to reinstatement for several counts of neglect and improper trust account record keeping including some minor misuse of a trust account. See, The Florida Bar v. Dykes, 469 So.2d 741, (Fla. 1985). See also, The Florida Bar Bar v. Padgett, 481 So.2d 919 (Fla. 1986), where the respondent was suspended for a period of six months with proof of rehabilitation required for knowingly commingling funds for convenience and where his record keeping was completely inadequate and insufficient. In that instance, respondent knew he was handling his trust account improperly and stated that he had done so as a matter of personal convenience. The Court found

his reasoning outrageous and dismissed his attempt to excuse his conduct since no client had been injured financially.

To be certain, there are cases involving mishandling of the trust account record keeping or trust funds which have resulted in disciplines not requiring proof of rehabilitation. Some fairly recent ones are The Florida Bar v. Bartlett, 462 So.2d 1087 (Fla. 1985) and The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985). In the Bartlett matter, the attorney was mishandling his accounts and did not maintain sufficient funds in one account to cover all client demands. At one point, it contained some $1,500.00 less than his trust obligations. Furthermore, the account was overdrawn at times. He was suspended for a period of thirty days and required to complete a seminar on trust accounting. The Florida Bar submits that Mr. Bartlett's misdeeds were much less egregious than those knowingly committed by this respondent. In the Moxley case, the attorney had utilized trust funds within his trust account to complete a building when he got into a cash flow problem. Prior to Bar involvement, he completely repaid these substantial monies back into the account and his records, in fact, convicted him. He was suspended for a period of sixty days and placed on three years probation. Justice Erlich dissented and would have required a six months suspension with proof of rehabilitation in a separate proceeding.

Justice Erlich aptly pointed out that Moxley had knowingly and intentionally violated the Code of Professional Responsibility. Further, he wrote:

> "The degree of departure from the ethical cannons of the profession, not the degree of loss sustained by the client, should determine the appropriate punishment. Otherwise the philosophy of Bar discipline is reduced to 'what the client does not know can't hurt the attorney'." At page 817.

Finally, two recent cases resulted in disbarments. In The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986), the attorney was disbarred for converting almost $200,000.00 from clients notwithstanding the fact that he was an admitted alcoholic during the time frame of the misappropriations and that he had sought and continued rehabilitation since the problem arose. The Court noted that the seriousness of that offense simply warranted disbarment. The Bar does not submit that it is analogous to this case but rather does point to the seriousness with which this Court views misappropriation cases. See also, The Florida Bar v. Pierce, 498 So.2d 431 (Fla. 1986). That attorney was disbarred on facts much less severe and more analogous to this case. In one action the respondent refused to return a check for $823.05 to cover closing costs in a transaction after the deal fell through. He returned one half of the money following a hearing on his motion to withdraw and eventually returned the remainder.

In a second matter, he was hired to initiate foreclosure proceedings on a home owned by a client. Although he made promises to the client and was paid a total of $502.00, he stalled filing the foreclosure for some nine months and failed to complete the foreclosure for another eight months causing the client to retain other counsel to do the job. Finally, the Court noted the referee found respondent had mishandled various trust accounts apparently due to problems with the IRS. There were several overdrafts and returns for insufficient funds. However, it appears the clients were repaid. He made no appearance in the disciplinary proceedings.

In all of the foregoing cases, it appears the respondents had no prior discipline which would ordinarily call for more severe discipline. The Bar submits that the cases do stand for the proposition that ordinarily a suspension requiring proof of rehabilitation will be ordered for cases involving misuse of trust funds let alone combined cases such as we have here.

This Court has reiterated the purpose of discipline on many occasions. See, e.g. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). It serves three purposes, first the judgment must be fair to society, to both protect the public from unethical conduct and at the same time not deprive the services of another

otherwise qualified lawyer. The public must be protected from attorneys who cannot resist the temptation to knowingly utilize substantial amounts of trust funds for their own personal purposes. Failure to treat these cases severely will erode the public's confidence in this Court's disciplinary system. Further, given the size of the Bar, the argument that the public is going to be denied an otherwise qualified lawyer seems to have been severely eroded over the last several years. Second, the judgment must be fair to the respondent. The discipline order must be sufficient to punish the breach and at the same time encourage reformation and rehabilitation. The recommended ninety day suspensions to run concurrently along with two year period of probation simply is not a sufficient discipline given the misdeeds and the case law. The Moxley case stands in stark contrast to the other cited cases and should not be utilized for adoption of the referee's recommended discipline. Reformation and rehabilitation can be encouraged and proven more readily through requiring a reinstatement proceeding to impress upon the respondent during the time of the suspension and the pendency of any reinstatement proceeding of the gravity of his transgressions. In his dissent in Kent, supra, Justice Erlich noted that respondent had met the statutory definition of theft. This one has as well. He knowingly converted trust funds for his own personal purposes. He should be required to prove his

rehabilitation after suspension for at least a year and then serve a two year period of probation with semiannual audits of his trust account. Finally, discipline ordered by this court must be severe enough to deter others who could be tempted or otherwise inclined to engage in similar misconduct.

Trust account discipline cases as well as those involving conduct prejudicial to the administration of justice merit the most severe disciplines this Court metes out. The reason for the latter is obvious since these cases strike at the very integrity of the judicial process. Misappropriation cases strike at the very heart of the attorney and client trust relationship. Money entrusted to an attorney must be handled with the utmost fidelity to the rules and, when breaches are discovered, must be dealt with severely. Each individual client and the public at large have the absolute right to expect no less if their faith in the system is to be maintained. The public's interest in a strong disciplinary program is noted in The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984). It is also noted by this referee at the final hearing (T. p. 38). The final argument at the hearing fairly well underscores the referee's apparent thinking in reaching his recommended discipline (T. pp. 45-58). See particularly pages 53-57.

The fact that this is respondent's first set of problems with the Bar seem to have been given particular consideration by the referee. As pointed out, the cases herein cited all involve apparent first time offenders. The Bar submits that the "one bite of the apple" approach has little justification in misappropriation cases, if any, and that it should be only that the respondent was not disbarred and rather suspended for a substantial period of time with proof of rehabilitation.

The Bar submits that for all of the foregoing reasons, this referee's recommended suspension for three months to run concurrently in both cases with automatic reinstatement followed by a two year period of probation is simply erroneous and unjustified given the misappropriation case. The Bar submits that he should be suspended for a period of at least one year with proof of rehabilitation required prior to reinstatement and placed on probation for a period of two years following any such reinstatement with semiannual audits of his trust account. Finally, he should be ordered to pay the costs of these proceedings currently totalling $2,333.85. To do less could send the wrong signal to the public and the members of The Florida Bar. The Board of Governor's recommended discipline is the more appropriate measure and should be adopted.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays that this honorable Court will review the referee's findings of fact and recommendations of guilt and discipline approve the findings of fact and recommendations of guilt but reject the recommended disciplines of two concurrent three months suspensions with automatic reinstatements to be followed by a period of two years probation with semiannual audits and instead impose discipline of a suspension for a period of at least one year with proof of rehabilitation required to be followed by a two year period of probation with semiannual audits of the trust account subsequent to any eventual reinstatement and tax costs against the respondent currently totalling $2,333.85 with interest at the statutory rate due and accruing thirty days subsequent to this Court's final order.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

and

DAVID G. MCGUNEGLE
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(305) 425-5424

BY: 
DAVID G. MCGUNEGLE
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Brief and accompanying Appendix has been furnished by ordinary U.S. mail to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301, a copy of the foregoing was mailed by ordinary U.S. mail to respondent, Woodrow F. Harper, P.O. Drawer 1420, 131 King Street, St. Augustine, Florida 32085-1420; and a copy by ordinary mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 6th day of April, 1987.

DAVID G. MCGUNEGLE
Bar Counsel