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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

CONFIDENTIAL

CASE NO. 69,539
TFB 06285H97

v.

JUSTIN R. LUMLEY,
Respondent.

THE FLORIDA BAR'S INITIAL BRIEF

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THE FLORIDA BAR'S ANSWER BRIEF

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STATEMENT OF THE FACTS

On May 1, 1985 respondent filed for Chapter 7 liquidating bankruptcy. (T.p13,14-16). Pursuant to Integration Rule 11.02(4)(c)(ii), in November of 1985 the Florida Bar Association audited respondent's trust account.

The audit disclosed that for a period of approximately twelve (12) months, from November 1984 to October 1985, respondent commingled his office operating account funds and personal funds with client trust account funds. (Florida Bar Composite Exhibit #1 (BAR#1), page three; T.p9,123-p10,14). During that period he repeatedly withdrew more from the trust account than the amount of non-trust funds therein, creating trust account deficits which reached as high as \$7,545.00. Respondent established a pattern of creating deficits, then reducing the deficit to a few hundred dollars or less by the end of most months. (TFB #1, p3).

Withdrawals from the trust account were usually made using an automatic teller card. (T.p10,119-p11,17). Respondent was aware he was utilizing client trust funds (T.p16,116-18), and testified that, in spite of his personal financial difficulties, he could have avoided this by borrowing money from his relatives. (T.p26,119-p27,12)

No clients were harmed by respondent's actions, (T.p4,l2), and respondent had no intention of permanently depriving any clients of monies rightfully belonging to them. (T.p4,l4-6).

STATEMENT OF THE CASE

On February 10, 1987 final hearing was held before the Honorable Thomas M. Gallen, Referee. Judge Gallen found respondent guilty of violating Integration Rule 11.02(4) and Florida Bar Disciplinary Rule 9-102(A) (T.p37,111-p38,13). The Florida Bar recommended a sixty (60) day suspension, that respondent be assessed costs, and that respondent be required to notify the Florida Bar upon once again having access to client trust funds, thereupon being audited quarterly by a Certified Public Accountant for a period of two (2) years at his own expense, and submitting those audits to the Florida Bar Association. (T.p.46, 4-13).

The referee recommended that respondent be privately reprimanded by the Board of Governors and that he be placed on probation for three (3) years, that if respondent returned to the private practice of law, he immediately notify The Florida Bar and arrange for his trust account to be audited quarterly by a certified public accountant for two (2) years at the expense of the respondent. Respondent was assessed all costs incurred by The Florida Bar in the action. (Report of Referee).

The Petitioner in this Petition for review is The Florida Bar and the Respondent is Justin R. Lumley. In this Opening Brief, each party will be referred to as they appeared before the

referee. Record references in this Opening Brief are to portions of the trial transcript, exhibits, and pleadings as they appear in the record.

The Bar petitions this court for review of the referee's recommendation of discipline.

SUMMARY OF ARGUMENT

Over a twelve (12) month period Respondent repeatedly utilized client trust monies for purposes other than those for which they were entrusted to him. Deficits in the client trust account reached as high as \$7,545.00.

The referee's recommendation that the respondent receive a private reprimand is an insufficient disciplinary sanction for his misconduct, even when coupled with the three (3) year probation, and quarterly audits of his trust accounts for a two (2) year period if he returns to private practice. A private reprimand in a case of prolonged and repeated misuse of client trust funds is inconsistent with case law.

In this petition for review The Florida Bar asks that the referee's recommendation for a private reprimand be disapproved and that a thirty (30) day suspension be ordered, coupled with two (2) years of quarterly audits of Respondent's trust accounts at respondent's expense if he returns to private practice, and payment of costs of this action.

ARGUMENT

A Private Reprimand is an Insufficient Sanction For a Knowing and Prolonged Misuse of Client Trust Funds

It is undisputed that respondent had major deficits in his client trust account during a period beginning approximately November 26, 1984 and continuing until October 1, 1985. During the one (1) year period, the deficit in the trust account vacillated frequently, reaching as high as \$7,545.62. The average of the lowest deficit during each of the twelve (12) months was approximately \$978.04, while the average for high deficits was \$3,407.61. (Bar #1, 3).

Respondent was aware there was a shortage in his trust account and that he was using client trust monies. He has stated that he was unaware of the extent of that use, though during the period of deficits, the trust account involved trust funds of only approximately six people. (T.p 8,118-21).

Respondent testified he could have borrowed enough money from his relatives to cover any deficits in the trust funds. (T.p26,119-p27,12). In spite of this alleged ability to borrow, and the concomitant knowledge that client funds were being used, during the period in which deficits existed respondent repeatedly withdrew cash from the commingled account through automatic teller machines. (Bar Exhibit 1, page 3).

Given the facts of the instant case, a private reprimand is insufficient. The Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978), is instructive. In Horner, the relationship between the

respondent and the client involved both an attorney-client relationship and a social relationship. The respondent, with the consent and knowledge of his client, commingled his own money with client trust money. He then used the client's funds with the client's permission. Even though the referee found that the violations were technical in nature and did not involve any willful intention to defraud or improperly use the client's monies, the respondent was publicly reprimanded in accordance with the recommendation of the referee. The Court noted that public reprimand should be reserved for such instances as technical violations of trust accounting rules without willful intent. The Respondent in Horner had been licensed to practice for fourteen (14) years and had received no other disciplinary actions nor record complaint concerning his professional conduct.

The instant case involves the use of client trust monies without the permission of the clients, with knowledge that client funds were been used, and covered an extended period of time. In spite of his financial plight, respondent could have avoided the misuse of client funds by obtaining a loan from his in-laws, but he failed to do so. While it appears that there was no intent to permanently deprive clients of their trust monies, the violations were clearly more than technical in nature and a public reprimand is an insufficient penalty.

In The Florida Bar v. Welty, 382 So.2d 1220, 1223-24 (Fla. 1980), the Court notes that a public reprimand should never be considered sufficient discipline in cases such as Welty. Welty involved deficits in a trust account extending over two (2) years

and amounting to over \$24,000.00. The respondent alleged that he was unaware of the specific state of his trust account until his bookkeeper advised him that his trust accounts were in a chaotic state, and that this created disbursement difficulties. He further stated that he had made all disbursements to clients as required and that he arranged a loan from his father which he used to balance his trust account. Citing State ex. rel. The Florida Bar v. Ruskin, 126 So.2d 142 (Fla. 1961) the Court noted that few breaches of ethics are as serious as use of the client's funds for the lawyer's private purposes. Welty, 382 So.2d at 1222. In Welty the respondent was suspended from The Florida Bar for a period of six (6) months and thereafter until he proved his rehabilitation, and thereafter placed on probation for a period of two (2) years.

While deficits in the instant case extended over a one (1) year period rather than the two (2) year period in Welty, and the amount misused was less, the principals of Welty are applicable. The fact that respondent was experiencing severe financial difficulties during the period in question, that he may have been unaware of the extent of the deficits, and that he was closing down his practice is not sufficient mitigation to warrant his receiving less than a short term suspension.

An example of mitigation being taken into consideration in a trust account case is provided by The Florida Bar v. Moxley, 462 So.2d 814, 816 (Fla. 1985). The Court notes that is important to consider the effect of the dereliction of duty on others, as well as the character of the wrongdoer and the likelihood of further

disciplinary violations. In Moxley, the respondent was engaged in the practice of law and in addition had a private business not connected with his law practice. He commingled his client trust funds and funds for the separate business venture, and on occasion advanced funds from the commingled account to other accounts both for business and law practice purposes, doing so before deposits were received to cover the expenditures from the trust account. The respondent in Moxley had been admitted to The Florida Bar for approximately fourteen (14) years, and was found by the referee to have lived an exemplary personal and professional life. It was further found that he was more than ordinarily involved in pro bono or legal aid work in organizations, that he was devoutly religious and had done numerous church related, private, and public good works. The respondent was remorseful and embarrassed by his actions, and in effect had turned himself in to the Bar Association. The referee also noted that there was never any intent to embezzle or defraud any client, no client was hurt nor were any clients complaining. The referee recommended a public reprimand plus three (3) years probation with certain conditions. The Supreme Court, however, believed suspension was appropriate, not so much in retribution against the respondent as to clearly admonish the Bar regarding the necessity to faithfully follow Integration Rule 11.02(4) and DR 1-102. Attorney Moxley was suspended for a period of sixty (60) days, placed on probation for three (3) years and as a condition of probation ordered to keep his trust books and records opened and accessible to The Florida Bar at all

reasonable times without notice, and to consent to authorized staff investigators of The Florida Bar examining any banking institutions' records of any of his trust accounts.

The instant case has some similarities to Moxley. The respondent has been an attorney for over twenty (20) years without a prior history of grievances, there is no indication that the respondent intended to permanently deprive any client of their money, no client suffered a loss by his conduct, and based on testimony by the respondent, the referee found that respondent was of good character.

However, unlike Moxley, the respondent did not turn himself in to The Bar when he became concerned about deficits in his trust account, and in fact deficits in the trust account continued even after respondent was notified by The Florida Bar of the intent to audit.

In The Florida Bar v. Frank J. Heston, Case No. 68,983, heard before The Supreme Court on January 29, 1987, the Supreme Court approved a conditional guilty plea for a public reprimand under the following basic facts. The respondent commingled personal and trust funds, had violated a number of technical trust accounting rules, and at least at one point had within his trust account a shortage of \$7,305.00. The amount of the deficit was made up as soon as the shortage was determined. The majority of the problems in the trust account resulted from poor supervision and poor record keeping. In addition to the public reprimand, respondent received a two (2) year period of probation and was required to submit an affidavit quarterly from a

certified public account stating that the respondent's trust account records had been reviewed and were in compliance with the Integration Rule and The Code of Professional Responsibility.

It does not appear from the per curiam affirmance that the respondent in Heston became aware of the deficit and then continued to make repeated withdrawals from the trust account, as in the instant case. Further, there is no indication that the deficit was as prolonged in Heston nor that it involved a repeated pattern of withdrawing monies from the trust account.

It is uncontroverted that Mr. Lumley was undergoing severe financial problems during the period of deficits. Rather than this being mitigating, it makes Mr. Lumley's misuse of trust funds an even more serious breach than had he been financially secure. Given his financial distress, it was especially critical that he insure that all client trust funds were in the trust account and available for disbursement to clients if the need arose.

In arguing for a private reprimand, respondent testified that he believes he would lose his job if he received a public reprimand or higher, since the corporation for which he works is a high profile corporation and concerned with its public image.

The public corporation has a right to know about the former conduct of its employee and to decide for itself whether that conduct precludes his continued employment by them. It should be noted that respondent is currently coordinating the acquisition of UHF stations for his employer and is responsible for wiring millions of dollars to seller's escrow accounts. (T.p32,121-25).

Any report making respondent's misconduct public could place it in the best possible light, thereby maintaining the principle that purposeful misuse of client trust money warrants suspension while at the same time reducing the probability that respondent will lose employment.

Wherefore, the Florida Bar ask that this Court disapprove the referee's recommended discipline, and in lieu thereof order that Respondent be suspended from the practice of law for thirty (30) days, be required to immediately notify the Florida Bar if he returns to private practice and to then for two (2) years submit quarterly audits of his trust account to the Florida Bar, and to pay the costs of this action.

CONCLUSION

For approximately one year Respondent repeatedly utilized clients' trust monies for unauthorized purposes. He knew he was misusing trust funds. A private or public reprimand is an insufficient discipline under the facts of this case.

WHEREFORE, the Florida Bar respectfully requests that this Honorable Court disapprove the referee's recommendation, and in lieu thereof suspend Respondent Justin R. Lumley from the practice of law for thirty (30) days, order that upon reentering private practice he notify the Florida Bar immediately and then for two (2) years submit to the Florida Bar quarterly audits of his trust account by a C.P.A., and that he pay the costs of this action.

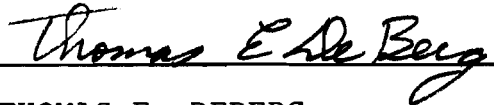
Respectfully submitted,



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AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Express Mail to JOHN A. WEISS, Attorney for Respondent, at Post Office Box 1167, Tallahassee, Florida, 32302, this 12th day of May, 1987.



THOMAS E. DEBERG