

IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR,
Complainant,

v.

JUSTIN R. LUMLEY,
Respondent.

CONFIDENTIAL

CASE NO. 69,539
TFB NO. 06C85H97

_____ /

THE FLORIDA BAR'S REPLY BRIEF

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COMPLAINANT'S REPLY

Respondent was found guilty of violating Idntegration Rule 11.02(4), which includes the mandate that money entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose. He clearly violated that mandate, and knowingly ran large deficits in his trust account for over a year, even though he had the ability to cover existing deficits and avoid incurring more. Even given the mitigation presented by respondent, the thirty day suspension requested by The Florida Bar is the minimum reasonable penalty for respondent's conduct.

Respondent argues that The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986) shows that occasionally misconduct such as that in the instance case merits only a private reprimand (Respondent's Answer Brief-(RA) 12). Mitchell was given a public reprimand for commingling and poor record keeping which stretched over a three year period, even though he had received a prior private reprimand in 1978 for the same or similar conduct. In the dissent, Justice Adkins reported that the 1978 private reprimand resulted from a charge involving trust account record keeping violations, which the grievance committee had found to be the result of ignorance of trust accounting procedures rather than willful misconduct. Further, the respondent was a criminal lawyer who did not handle trust funds.

Unlike Mitchell, respondent in the instant case has a very lengthy history of practice in the civil area. More importantly, far from there being mere violations of technical rules, respondent had deficits in his trust account reaching as high as

\$7,545.00 (Bar No. 1,3). Further, respondent was aware there was a shortage in his trust account and that he was using client trust monies (TR8, 118-21).

Respondent emphasizes that his conduct was not due to dishonesty (RA 14). In order to agree with his proposition, the Court would have to find that the use of client trust monies without the permission of the clients, with knowledge that client funds were being misused, and engaging in this pattern over an extended period of time are not dishonest.

Respondent suggests that the Court's prior numerous disciplines for trust account misconduct are sufficient to deter other lawyers, and publicly disciplining the respondent will not accomplish any more deterrence (RA 14). Certainly every lawyer who receives discipline for misconduct would prefer that deterrence would come from cases other than his own. Obviously prior discipline of others didn't prevent respondent's misuse of trust funds.

Respondent also states that a private reprimand should be given because there is a possibility that he might lose his job if he is publicly disciplined (TR 34; RA 11). It is reasonable to assume that every attorney who embarrasses his employer by receiving a public reprimand or a greater penalty faces the possibility that he will be discharged. The short term suspension requested by the Bar should not be precluded solely because of that possibility. The thirty day suspension requested is seen as a minimum penalty given the facts of this case, and takes into account the mitigation offered by respondent as well

as the burden on his employer should respondent be suspended. A thirty day suspension is clearly not excessive and harsh for the knowing misuse of client trust monies by a man with more than twenty years of experience in the profession, an individual who as a former judge and prosecutor clearly knew that what he was doing was wrong. He could have avoided trust money misuse by borrowing from his relatives to cover any shortages once they were discovered.

Respondent cites The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986), for the proposition that a suspension is not warranted for a first offense of trust accounting errors. The Florida Bar is not arguing otherwise. The crux of the instant case is that the respondent knowingly misused client trust monies over an extended period of time. The Court found in Neely that the violation was not intentional, but was the result of gross neglect (Id at 536). The record established numerous accounting errors in respondent's trust account and a failure by him to properly supervise the account.

Respondent suggests that The Florida Bar v. Heston, 501 So.2d 597 (Fla. 1987), indicates that the respondent should receive no more than a public reprimand and that the suspension requested by the Bar is not appropriate (RA 15). The Court noted in Heston that the majority of the problems in the trust account resulted from poor supervision and poor record keeping. When a shortage was discovered in the trust account, the amount of the shortage was deposited as soon as it was determined. In the instant case, respondent was aware that there were shortages in

the trust account but nevertheless did not cover those shortages for an extended period of time and in fact continued to intentionally misuse client funds.

Respondent points out that in The Florida Bar v. Reese, 263 So.2d 794 (Fla. 1972), a public reprimand was given to the respondent although he had converted \$780.00 from an estate and in addition had converted \$1,200.00 in a second transaction. In addition, he had repeatedly ignored demands that the money be delivered to clients, although he had made restitution prior to the recommendation of referee. Respondent notes that in spite of the fact that this was Mr. Reese's second disciplinary action, and he had failed to make restitution for five years in one case, the Court imposed a public reprimand. Further, respondent points out that Reese planned to leave private practice to seek a government job, and this as well as restitution was to be considered in mitigation. In Reese, all instances of commingling and/or conversion, including the conversion which resulted in the previous discipline, occurred at a time when the respondent was suffering from great personal financial hardship. The respondent's office had been padlocked by the Internal Revenue Service for a time, adding immeasurably to his difficulties in attempting to straighten out his already tangled affairs. (See also The Florida Bar v. Reese, 247 So.2d 718 (Fla. 1972)). In the instant case, in spite of the financial difficulties facing respondent, he testified that he would have been able to borrow money from his relatives to avoid utilizing client trust monies. Nevertheless, he intentionally used trust monies without client

permission and created trust account deficits.

In the Bar's brief, it was pointed out that respondent testified he could have avoided the misuse of client trust funds by obtaining a loan from his inlaws, but failed to do so. Respondent points out that this testimony related to securing funds in emergencies (RA 16). Hopefully respondent would not suggest to the Court that his being in a financial situation which led to knowing misuse of client trust funds did not constitute an emergency.

Respondent would distinguish The Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978), by pointing out that in the instant case the respondent was not charged with intentional wrong doing. In Horner, the referee points out that testimony clearly indicates that the use of client funds occurred with consent and knowledge of the respondent's client, and while such acts were technical violations of the rule, the referee failed to find any willful intention to defraud or improperly use the clients monies. In the instant case, The Florida Bar stipulated at final hearing that respondent had no intention of permanently depriving any clients of monies rightfully belonging to them (TR 4), but an extremely important portion of that stipulation is the word "permanently". Respondent intentionally used client funds for purposes other than those for which they were given to him.

Respondent cites The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), as well as several cases cited therein in which the court has given public reprimands for trust fund misconduct. Respondent suggests that these cases show that the appropriate

sanction for the respondent would at most be a public reprimand. Briefly, the cases can be distinguished from the instant case as follows:

The Florida Bar v. Austin, 259 So.2d 142 (Fla. 1972), respondent failed to transmit to his client \$1,315.00 until disciplinary action had been instituted. Respondent's law office had been padlocked by the Internal Revenue Service. There is no indication in the case, as reported, that he had misused the client's money.

The Florida Bar v. Pink, 236 So.2d 97 (Fla. 1970).

In Pink, the respondent received trust funds on behalf of clients in five separate cases and failed to properly account for the funds and disburse them according to his clients' directions. Respondent had changed from being a private practitioner to being an official of the Industrial Relations Commission. The referee found that the respondent failed to properly handle the funds, but did not find embezzlement or misappropriation of trust funds. There is no indication whether or not the trust account had deficits over an extended period of time as in the instant case.

The Florida Bar v. Novak, 313 So.2d 727 (Fla. 1974).

In Novak the respondent was reprimanded for preparing a will, in which he was to take possession of the clients assets, hold them in trust to pay client's bills and see that she was properly cared for. In addition,


the trust provided that the respondent could make personal loans to himself and invest the corpus of the trust monies as he saw fit. Respondent received a public reprimand. This is clearly distinguishable from the instant case since there was no misuse of client monies without client authorization or knowledge, nor an indication that there was a deficit in the client trust account.

The recommendation by the Bar that respondent be suspended for thirty days takes into account all of the mitigation cited by respondent in his arguments for a private reprimand. In the absence of these mitigating factors, intentional misuse of client funds coupled with numerous technical violations of trust accounting rules would warrant far more than a thirty day suspension.

CONCLUSION

In light of the facts in the instant case and the extensive mitigation offered by respondent, The Florida Bar requests that respondent, Justin R. Lumley, be suspended from the practice of law for thirty days; that he be required upon reentering private practice to notify The Florida Bar immediately and then for a two year period submit to The Florida Bar quarterly audits of his trust account by a CPA; and that he be required to pay the costs of this action.

Respectfully submitted,


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