

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Petitioner,

Case No. 70,042
TFB #87-25-993-13D
(formerly 13D87H52)

v.

ROGER E. WHIGHAM,
Respondent.

CLERK OF THE SUPREME COURT

By _____
Deputy Clerk

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THE FLORIDA BAR'S OPENING BRIEF

DAVID R. RISTOFF
Branch Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, Florida 33607
(813) 875-9821

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as the "The Florida Bar". The appellee, Roger E. Whigham, will be referred to as the respondent. "TR" will denote the transcript of the Final Hearing before the Referee. "R" will refer to the record.

STATEMENT OF THE FACTS AND OF THE CASE

Respondent has been previously disciplined for the commingling of trust funds with personal funds, having overdrafts, trust account shortages, and incomplete records. Respondent received a public reprimand and was placed on probation for one year. As a condition of his probation, respondent was required to submit quarterly trust account reconciliations and an annual audit. The Florida Bar v. Whigham, 476 So.2d 666 (Fla. 1985). Respondent failed to submit the required quarterly reconciliations in February and April of 1986. (R- Complaint, paragraph seven (7)). In addition, on or about July 26, 1986, The Florida Bar was advised that respondent had a shortage in his trust account. (R- Complaint, paragraph two (2)).

Pedro J. Pizarro, Branch Staff Auditor for The Florida Bar audited respondent's trust account for the period of October 1, 1984 through October 31, 1986, which included the period of time respondent was on probation. The audit revealed the following:

- (1) bank statements reflected overdrafts on several occasions;
- (2) checks were stamped "returned NSF";
- (3) there were mathematical errors on client ledger cards;
- (4) monthly trust account reconciliations were not produced for inspection as required;
- (5) respondent kept approximately \$619.00 to \$753.00 of his personal funds in his client trust account, which sum exceeds the reasonable amount permitted to cover bank charges; and
- (6) there was a shortage in his trust account as of June 30, 1986 in the amount of \$51,235.60. Respondent made restitution for part

of the shortage, and as a result, the shortage was reduced to \$24,261.45 as of October 31, 1986. (R- Complaint, paragraph four (4)).

The Florida Bar filed a Complaint against respondent charging him with violating The Florida Bar Integration Rule, article XI, Rule 11.02(4) (money or property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose); DR 9-102(A) (commingling lawyer's funds in trust account); Bylaws Section 11.02(4)(c) 2.d. (no documentary support was provided for certain disbursements from the trust account as required); Bylaws Section 11.02(4)(c)2.e. (cash receipts and disbursements journal in many instances did not contain the identification of the client and/or the reason for which the funds were received or disbursed, as required); Bylaws Section 11.02(4)(c)2.f. (information ledger cards not in compliance); Bylaws Section 11.02(4)(c)3(i) (bank reconciliations not in compliance with the requirements); Bylaws Section 11.02(4)(c)3.a.(ii) (monthly comparisons not prepared); Bylaws Section 11.02(4)(c)3.b (annual listings were not prepared and/or produced for inspection); and Rule 11.02(4)(b) (certain ledger cards were not preserved for six years and/or produced for inspection) (R- Complaint, paragraph ten (10)).

At the final hearing, on July 17, 1987, respondent admitted to each and every allegation of the Complaint. (TR p.4, L. 6-7). Both parties stipulated that no client complained to The Florida

Bar concerning misappropriation or losses. (TR p.4, L. 14-17). The referee found respondent guilty and recommended that he be suspended from the practice of law for three years, required to make restitution, if any, to clients, and that upon reinstatement the respondent be barred from having a trust account. (R- Report of Referee, paragraph IV).

The Florida Bar Board of Governors reviewed the Report of Referee and voted to seek disbarment in this matter.

SUMMARY OF ARGUMENT

Respondent commingled trust funds with his personal funds; created overdrafts, and trust account shortages; and failed to comply with the requirements adopted by The Florida Bar for trust accounts. These violations occurred after he had been publicly reprimanded by this Court and during his probation for the same type of misconduct. The Florida Bar v. Whigham, 476 So.2d 666 (Fla. 1985). In addition, respondent violated the conditions of his probation by failing to submit quarterly reconciliations to The Florida Bar as required by the above decision of this Court.

Respondent's actions herein warrant a more severe discipline than the referee's recommended three-year suspension. The referee's recommendation in this case is neither consistent with the case law nor does it achieve the purposes for which disciplinary measures are ordered by this Court.

Therefore, The Florida Bar respectfully requests that this Court reject the referee's recommendation of a three-year suspension and enter an Order disbaring the respondent from the practice of law.

ISSUE

WHETHER OF NOT RESPONDENT'S MISAPPROPRIATION OF TRUST FUNDS WARRANTS MORE THAN A THREE-YEAR SUSPENSION GIVEN THAT THE MISCONDUCT WAS COMMITTED WHILE THE RESPONDENT WAS ON PROBATION FOR THE SAME TYPE OF OFFENSE.

ARGUMENT

A three-year suspension is an inappropriate discipline for misappropriating trust funds especially in view of the fact that respondent was on probation for the same type of offense when the misconduct occurred.

In The Florida Bar v. Roger E. Whigham, 476 So.2d 666 (Fla. 1985), this Court publicly reprimanded respondent and placed him on probation for one year. The probation was conditioned upon respondent's submission of quarterly trust account reconciliations, and an annual audit to The Florida Bar during the period of probation.

In the instant case, respondent misappropriated trust funds, created overdrafts and trust account shortages, and failed to maintain complete trust account records during the period between October 11, 1984 and October 31, 1986. Additionally, respondent violated his probation by failing to submit quarterly reconciliations to The Florida Bar for February and April 1986 as required by this Court.

This Court has dealt severely with this type of misconduct. In The Florida Bar vs. Sidney Poller, 203 So.2d 323 (Fla. 1967), the Supreme Court approved a recommendation of disbarment for

misappropriation of trust funds. In POLLER, The Florida Bar charged that the respondent had misappropriated trust funds in the amount of \$15,921.02. The referee found respondent guilty as charged, and further found that respondent's outlook for rehabilitation appeared dim based on previous disciplinary violations concerning the misuse of trust funds.

In this case, The Florida Bar charged the respondent with misappropriating trust funds resulting in a shortage of \$51,235.60, excluding restitution. Respondent, admitted to each and every allegation in the Complaint, yet, the referee recommended a three-year suspension. The referee's recommendation in the instant case is inconsistent with Poller. Like Poller, respondent has a prior disciplinary record for the same type of offense. However, even more aggravating, respondent's present misconduct occurred while he was on probation for his prior misconduct.

This Court has consistently held that a second offense of a given type misconduct warrants an even more severe discipline. In The Florida Bar v. Louis Vernell, 374 So.2d 473 (Fla. 1979), the referee recommended that respondent receive a private reprimand for Count I (willfully failing to file tax returns); a public reprimand for Count II (neglecting a legal matter); and a public reprimand for Count III (conflict of interest). The Bar took the position that because of respondent's prior disciplinary record, a more severe discipline would be appropriate. The Supreme Court agreed with the Bar, and stated, "This Court deals

more severely with cumulative misconduct than with isolated misconduct". Id at 476.

In the instant case, respondent has a prior disciplinary record for the same type of offense and was on probation at the time his present misconduct occurred. The referee has recommended respondent receive a three-year suspension. The Bar, however, seeks that respondent be disbarred in light of his present cumulative misconduct, his past disciplinary record for the same offense, and the fact that he violated his probation.

There are numerous cases that support the premise that prior misconduct and cumulative misconduct are relevant and decisive factors in considering the appropriate discipline. In The Florida Bar v. James D. Welch, 309 So.2d 537 (Fla. 1975), this Court adopted the recommendation of the referee and stated, "misappropriation of a client's funds warrants disbarment, particularly when the attorney has a prior disciplinary history involving the same type offense". Id at 537. In WELCH, respondent had been previously disbarred in 1965 for the same type of offense. In The Florida Bar v. Remus C. E. Allen, 361 So.2d 163 (Fla. 1978), Allen had been previously suspended for mishandling clients' trust funds. The referee considered respondent's past disciplinary record and recommended disbarment. The Supreme Court agreed with the referee's recommendation of disbarment.

In this case, the respondent misappropriated trust funds thereby creating shortages in his trust account. (TR p.8, L. 7-12). In addition, his records were not in substantial compliance with the requirements of The Florida Bar. (TR p.7, L. 15-17). In The Florida Bar v. John B. Mattingly, 342 So.2d 508 (Fla. 1977), the referee found Mattingly guilty of mishandling trust funds and recommended disbarment. In MATTINGLY, respondent admitted to having shortages in his trust account and admitted that at one period of time he owed one of his clients over \$100,000.00; however, respondent insisted that the irregularities in the trust account arose due to an unsatisfactory bookkeeping system; he was not willfully concealing anything from his clients; and his conduct in improperly handling the trust funds were not due to any willful or evil intent to defraud anyone. Id. at 509.

In this case, respondent has misappropriated and used trust funds for purposes other than the specific purpose for which they were intended. (TR p.7, L. 18-20). Respondent's counsel argued that the irregularities in his trust account arose due to an unsatisfactory bookkeeping system; that he was not willfully concealing anything from his clients; and that he was not trying to defraud anyone. (TR p.50, L. 13-20)

While none of respondent's clients complained about any loss of money in the instant case, the referee considered that to be a mitigating factor. However, in The Florida Bar v. Ernest M. Breed, 378 So.2d 783 (Fla. 1979), the Supreme Court gave notice

to the legal profession of this state that henceforth it would not be reluctant to disbar an attorney for misappropriating trust funds even though no client is injured. In BREED, respondent commingled his funds with those of his clients, in addition to misusing and misappropriating clients' funds in a situation where no one suffered any loss. In the instant case, respondent commingled his personal funds with clients' trust funds and misappropriated trust funds in a situation where no one complained as to any loss. However, in BREED, this Court gave notice to the legal profession that it would not be reluctant to disbar an attorney even when there has been no loss. Id at 785. Therefore, the Bar respectfully submits to this Court the respondent's misconduct in the instant case warrants disbarment.

In The Florida Bar v. Frederick O. Leopold, 399 So.2d 978 (Fla. 1981), the referee recommended respondent be suspended for two years subject to certain conditions. The Bar petitioned for review objecting to the suspension and argued that disbarment was the appropriate discipline. Leopold misappropriated funds from his clients' trust account for his personal use and commingled his private funds with his trust account funds. Leopold repaid all misappropriated funds except approximately \$1,700.00. Leopold received a private reprimand in 1966, and a public reprimand in 1975. This Court related, "Considering this prior misconduct with his present reprehensible misconduct - one of the most serious offenses a lawyer can commit - in determining the

appropriate discipline, we agree with The Florida Bar that disbarment is warranted". Id at 979.

In this case, respondent has admitted to misappropriating funds from clients' trust accounts resulting in shortages; commingling personal funds with trust funds; and failing to maintain complete trust account records required by The Florida Bar. (TR p.4, 1.4-5), and (R- Report of Referee). The referee has recommended a three-year suspension with certain conditions. The Bar has petitioned for review objecting to the proposed suspension, and argues that disbarment is the appropriate discipline.

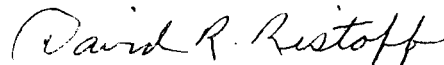
CONCLUSION

Respondent commingled and misappropriated trust funds thereby creating shortages and overdrafts in his trust account. In addition, he failed to maintain complete trust account records in keeping with the minimum requirements of The Florida Bar.

The referee's recommended three-year suspension is inappropriate inasmuch as respondent was on probation for the same type of offense at the time his present misconduct occurred. Respondent violated the conditions of his probation by failing to submit his quarterly reconciliations in February and April of 1986 to The Florida Bar. Respondent's continuing pattern of cumulative misconduct involving misappropriation of trust funds coupled with his past disciplinary record for the same type of offense warrants disbarment.

WHEREFORE, Petitioner respectfully requests that this Court reject the referee's recommendation of suspension and enter an order disbarring the respondent, ROGER E. WHIGHAM, from the practice of law.

Respectfully submitted,



DAVID R. RISTOFF
Branch Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, FL 33607
(813) 875-9821

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Opening Brief has been furnished to Harry M. Hobbs, attorney for Roger E. Whigham, at his record Bar address of 725 East Kennedy Boulevard, Tampa, Florida 33602; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 600 Apalachee Parkway, Tallahassee, Florida 32301-8226, this 16th day of October, 1987.

David R. Ristoff

DAVID R. RISTOFF