

047

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.

_____ /

RESPONDENT, ROGER E. WHIGHAM'S BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
SYMBOLS AND REFERENCES.....	iii
STATEMENT OF FACTS AND CASE.....	1
SUMMARY OF ARGUMENT.....	4,5
ISSUE.....	6
ARGUMENT.....	7,8,9, 10,11
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	13

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>The Florida Bar v. Fields</u> 7 482 So. 2nd 1354 (Fla. 1986)	
<u>The Florida Bar v. Lipman</u> 7 497 So. 2nd 1165 (Fla. 1986)	
<u>The Florida Bar v. Lord</u> 7,10 422 So. 2nd 983 (Fla. 1983)	
<u>The Florida Bar v. Whigham</u> 10 476 So.2nd 666 (Fla. 1985)	

SYMBOLS AND REFERENCES

The Appellee will be referred to as the Respondent. The transcript of the final hearing will be referred to as "TR" and "R" will refer to the record.

STATEMENT OF FACT AND CASE

The Respondent admitted the allegations of the Complaint (TR-4).

The Referee found the 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.

The Florida Bar admitted and stipulated that no one has ever made any complaint to the Florida Bar that they have lost money as a result of the Trust Bank account being overdrawn (TR-4).

The Florida Bar by way of explanation produced the auditor for The Florida Bar, Pedro J. Pizarro, who testified before the referee (TR-4-38).

The auditor testified that the Respondent furnished the records for the auditor (TR-7). His conclusion was as follows:

"Q. Can you tell the court, what results you found through your conducting that audit?

A. Mainly, my conclusion was that the records were not in substantial compliance with the requirements of the Florida Bar. For those accounts, or for Trust Accounts, and mainly because those funds had been used for purposes other than the specific purpose for which they were given to Mr. Whigham (TR-7)."

* * * * *

and he further testified;

"A. Okay. There were references in the, you see at the end of my audit, Mr. Whigham gave me some additional records as I explained to you later or in the letter including some revised ledger cards for some cases. Coquina was one of those cases. In those ledger cards, there were indications that payments have been made to the client for those amount by cashier's checks. I was not able to confirm, I just accepted that Mr. Whigham, what he was saying and I am saying that the shortage now has been reduced by those payments. Those payments were not effected by the Trust Account. He might have effected the purchase of those cashier's checks from his funds or General Account to reduce the amounts owed to Coquina and those other clients.

Q. And that would have been effected outside of the Trust Account but, marked in the books and records of the Trust Account?

A. Yes sir. It would have been paid out of the Trust Account -- "

(TR-29,30)

* * * * *

Since September 8, 1986, the Trust Account has been frozen (TR-35). There have been no withdrawals from the account (TR-35). The account balance as of September 8, 1986 was \$5,101.09 (TR-32).

No client has complained or demanded any of these funds.

The Respondent produced these three witnesses:

Lois Ayers (TR-39)

Albert Ayers (TR-44)

Geraldine Delisi (TR-42)

Mr. and Mrs. Ayers names were mentioned in the audit report

as being entitled to money from the Trust Account. Mrs. Delisi was connected with Coquina Shores.

Coquina Shores according to the auditor was entitled to money from the Trust Account and that the money had been paid outside the Trust Account.

The Ayer's testified that funds were deposited with the Respondent but they never lost any money (TR-40).

Geraldine Delisi testified that a detailed accounting was given to her by the Respondent with regard to Coquina Shores that was satisfactory and Coquina Shores was paid by cashier's check in the amount of \$5,343.00 (TR-43).

SUMMARY OF ARGUMENT

The findings of guilt and recommendation of the referee should be upheld unless erroneous or without support in the record.

There is evidence and support by the record of the Referee's recommendation of punishment of a three year suspension.

The undisputed testimony of The Florida Bar auditor was that the Respondent furnished him with all the Trust Account records and the testimony of the three clients was that they had received all monies due and had received a detailed accounting.

The referee's statement as follows amounts to a Finding of Fact: (TR-53,54)

"I am very happy basically, that Mr. Whigham has seen to it that no client has suffered any loss from his Trust Account problems. That is a great relief to the Court and I am sure to the Supreme Court. The fact that lawyers have lost clients funds, that brings the Bar into great disrepute has gotten so that many people don't trust lawyers anymore like they used to. So, they have a good reason to feel that way.

So, fortunately, Mr. Whigham has not been the source of any financial embarrassment or calamity or crisis to any of his clients in this way for which I am very relieved. What I am going to do is to read this report and read these cases and then I will make my recommendation. I appreciate the fact that Mr. Hobbs and Mr. Whigham have stipulated to complaint. I also appreciate your position in recommending that your client receive, if I understand it correctly, the recommendation would be suspension from the practice of law for a period of three years and that he be allowed to make application for re-instatement on the condition that he

not be allowed to utilize a Trust Account in the future when he begins to practice law again, do I understand your position correctly?"

"MR. HOBBS: That is correct, Your Honor."

This finding of fact justifies the punishment.

The Respondent did not keep his Trust Account in proper order. However, he has cooperated with the auditor, and protected his clients from any damage.

The penalty protects the public from unethical conduct, yet does not deny the public the services of a qualified lawyer.

The penalty is fair to the Respondent. The penalty is severe enough to deter others. The economical burden and the disruption of his law practice for three years would deter anyone from failing to maintain accurate Trust Account records.

ISSUE

Is the Referee's recommendation of a three year suspension supported by the facts in the record?

ARGUMENT

The findings and recommendation of the Referee will be upheld unless clearly erroneous or without support in evidence.

The Florida Bar v. Fields , 482 So. 2nd 1354, (Fla. 1986).

The Florida Bar v. Lipman, 497 So. 2nd 1165, (Fla. 1986).

In the case of The Florida Bar v. Lord, 433 So. 2nd 983, (Fla. 1983), this court gave the following guidelines for punishment.

" Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: 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 like violations."

The three year suspension, plus the denial of the Respondent having a Trust Account does accomplish the above purposes.

This punishment is supported by the record.

The Referee observed that no client complained as to being unusual (TR-51). The Referee further stated:

" I am very happy basically, that Mr. Whigham has seen to it that no client has suffered any loss from his Trust Account.

That is a great relief to the Court and I am sure to the Supreme Court. The fact that lawyers have lost clients funds, that brings the Bar into great disrepute has gotten

so that many people don't trust lawyers anymore like they used to. So, they have a good reason to feel that way.

So, fortunately, Mr. Whigham has not been the source of any financial embarrassment or calamity or crisis to any of his clients in this way for which I am very greatly relieved."

(TR-53,54)

* * * * *

The auditors for The Florida Bar testified that the records were furnished by the Respondent (TR-7). The auditor further testified:

"MR. HOBBS: And then it says Heirs, nine twenty-six, cash, that's cashier's check for five thousand dollars (\$5,000) what were those or how did those things come about?

A. Okay. There were references in the, you see at the end of my audit, Mr. Whigham gave me some additional records as I explained to you later or in the letter including some revised ledger cards for some cases. Coquina was one of those cases. In those ledger cards, there were indications that payments have been made to the client for those amounts by cashier's checks. I was not able to confirm, I just accepted that Mr. Whigham, what he was saying and I am saying that the shortage now has been reduced by those payments. Those payments were not effected by the Trust Account. He might have effected the purchase of those cashier's checks from his funds or the General Account to reduce the amounts owed to Coquina and those other clients."

Q. And that would have been effected outside of the Trust Account but, marked in the books and records of the Trust Accounts?

A. Yes sir. It would have been paid out of the Trust Account -- "

(TR-29)

* * * * *

As of September 8, 1986 the date the Trust Account was frozen, the balance has remained \$5,101.09 (TR-32). No client has demanded money or complained of the loss or shortage of money. The Respondent produced three witnesses that were clients of the Respondent:

Lois Ayers (TR-39)

Albert Ayers (TR-44)

Geraldine Delisi (TR-42)

Geraldine Delisi was connected with Coquina Shores, she testified that the Respondent gave a detailed and satisfactory accounting (TR-43) as to Coquina Shores. She further testified that Coquina Shores was paid \$5,343.00 by cashier's check (TR-43).

Lois Ayers and Albert Ayers both testified that they had known the Respondent for over 20 years. The Respondent had represented her and their corporation and they had no problems (TR-40).

All of the facts and evidence demonstrated that the Respondent could not and did not handle his trust account properly; that he was out of balance and overdrawn. This was a continuation of his problem when in 1984 his trust account records were not proper (TR-21).

However, the Respondent has demonstrated that he had no

intention of abandoning his clients and/or his Trust account.

He gave the auditors all of his records (TR-29), protected his clients from any financial concerns or money losses (TR-30).

His conduct even though wrong and a violation of The Code of Ethics, has not resulted in harm or damage to his clients or the public. He has had the courage to admit his mistake and cooperated with The Florida Bar auditor and protected his clients from any resulting damage.

The punishment of disbarment in every case where there is are shortages in the Trust Account would take away the Referee's ability to hear the facts and follow the guidelines in The Florida Bar v. Lord, Supra. It would also take away the incentive of lawyer to correct his mistakes.

The Respondent, in The Florida Bar v. Whigham, 476 So.2nd 666, was publicly reprimanded and thus his present problem is an outgrowth of the original problem. It was not solved.

The Florida Bar auditor testified (TR-21);

"If I can explain further this audit started in October of 1984 and that amount is mainly a carry over of the shortage that existed in the previous audit."

The removal of the privilege of having a Trust Account would have been the proper solution in 1985.

The Respondent's problems have never involved the relationships of his legal work with his clients. His clients

testified they would still employ him as their attorney. He has never been accused of mistreating a client.

The recommended punishment is supported by the facts before the Referee.

CONCLUSION

The Referee heard the witnesses, considered the previous violation. The Referee's recommendation should be affirmed and accepted unless clearly erroneous and not supported by the facts in the record.

The facts, in the record, do support the recommendation of the Referee. The Respondent has made sure that no client was harmed. No client has complained to the Florida Bar. The Respondent has cooperated with the auditor. He has practiced law since October, 1960 without any problem related to legal services rendered to clients. These are sufficient facts to distinguish between disbarment and a three year suspension.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been furnished to David R. Ristoff, Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 600 Apalachee Parkway, Tallahassee, Florida 32301-8226, this 25th day of November, 1987.



HARRY M. HOBBS