IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE

THE FLORIDA BAR,

Complainant,

v.

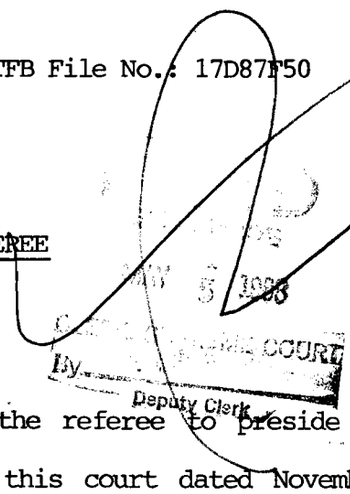
Supreme Court Case No.: 70,495

TERENCE T. O'MALLEY, SR.,

TFB File No.: 17D87F50

Respondent.
_____/

REPORT OF REFEREE



I. SUMMARY OF PROCEEDINGS:

The undersigned was appointed as the referee to preside in the above disciplinary action by order of this court dated November 10, 1987. The pleadings, notices, motions, orders and transcripts, all of which are forwarded to the Court with this report, together with any and all other documents heretofore filed with the Court, constitute the entire record in this case.

The respondent was represented by Nicholas R. Friedman, Esquire. The bar was represented by David M. Barnovitz, bar counsel.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:

After considering all of the pleadings and evidence before me, I find as follows:

A. Respondent is and at all times mentioned, was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida. (This allegation is recited at paragraph 1 of the bar's complaint and admitted in respondent's response to requests for admissions.)

B. On January 13, 1984 respondent entered into a written escrow agreement. (This allegation is recited in paragraph 2 of the bar's complaint and admitted by respondent in his response to requests for

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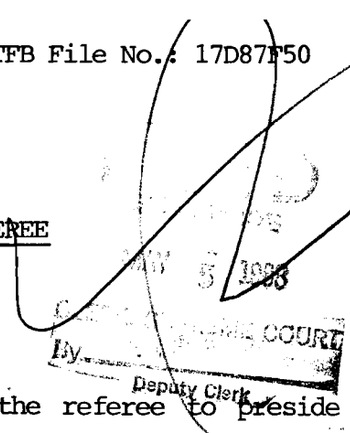

I. SUMMARY OF PROCEEDINGS:

The undersigned was appointed as the referee to preside in the

to him for the specific purposes expressed in such escrow agreement, $57,500.00 in cash and the specific gold and silver items described in schedule A forming a part of the escrow agreement admitted as the bar's exhibit 1 in evidence. (This allegation is recited in paragraph 3 of the bar's complaint and admitted by respondent in his responses to requests for admissions.)

D. On January 13, 1984, respondent placed the $57,500.00 in cash and the items of gold and silver enumerated in the escrow agreement in a safe deposit box maintained by him at NCNB National Bank of Florida. (This allegation is recited in paragraph 4 of the bar's complaint and admitted by respondent in his responses to requests for admissions.)

E. On January 13, 1984, the same date respondent entered into the escrow agreement (bar's exhibit 1 in evidence), respondent entered the safe deposit box above referred to, removed the $57,500.00 in cash therefrom and, using such cash, purchased seven (7) cashier's checks. (This allegation is a portion of the allegation appearing at paragraph 5 of the bar's complaint and the portion of such allegation herein recited was admitted by respondent in paragraph 8 of his answer.)

F. On or about January 13, 1984 respondent delivered the seven (7) cashier's checks to his client, Pioneer Bonding and Insurance Agency, Inc. (This allegation is a portion of the allegation appearing in paragraph 6 of the bar's complaint. Respondent admitted to this portion of the bar's allegation by paragraph 8 of his answer. The cashiers' checks were admitted in evidence as the bar's exhibit 2.)

G. At a date subsequent to January 13, 1984, contrary to the express terms and provision of the escrow agreement (bar's exhibit 1 in evidence), respondent removed all of the gold and silver items above referred to from the NCNB safe deposit box and thereafter did not keep such items in any safe deposit box anywhere. (This allegation appears at paragraph 7 of the bar's complaint and was admitted by respondent in paragraph 9 of his answer.)

H. At the time respondent removed the $57,500.00 in cash from the NCNB safe deposit box and used such cash for the purchase of the

and the items of gold and silver enumerated in the escrow agreement in a safe deposit box maintained by him at NCNB National Bank of Florida. (This allegation is recited in paragraph 4 of the bar's complaint and admitted by respondent in his responses to requests for admissions.)

E. On January 13, 1984, the same date respondent entered into the escrow agreement (bar's exhibit 1 in evidence), respondent entered the

vacated or negated. (This allegation appears at paragraph 8 of the bar's complaint and was conceded by respondent to be probably true in his responses to requests for admissions. The bar established this allegation by reading respondent's unequivocal admission to the truth thereof appearing in his sworn testimony before grievance committee "17D".)

I. At the time respondent removed the $57,500.00 in cash from the NCNB safe deposit box and used such cash for purchase of the cashiers' checks (bar's exhibit 2 in evidence), respondent knew that the appearance bond issued by American Druggist Insurance Company had not been estreated. (This allegation appears at paragraph 9 of the bar's complaint and was conceded to be probably true in respondent's responses to requests for admissions. The bar established the truth of such allegation by reading respondent's admission to the truth thereof appearing in his sworn testimony given to grievance committee "17D".)

J. At the time respondent removed the gold and silver items from the NCNB safe deposit box, respondent knew that American Druggist Insurance Company had not been discharged as surety on the appearance bond it issued in the Kersten case above referred to and knew that such bond had not been vacated or negated. (This allegation appears at paragraph 10 of the bar's complaint and was conceded to be probably true in respondent's responses to requests for admissions. The bar established the truth of this allegation by reading into the record respondent's unqualified admission to the truth thereof appearing in sworn testimony given by him to grievance committee "17D".)

K. At the time respondent removed the gold and silver items from the NCNB safe deposit box, respondent knew that the appearance bond issued by American Druggist Insurance Company had not been estreated. (This allegation appears at paragraph 11 of the bar's complaint and was conceded to be probably true in respondent's responses to requests for admissions. The bar established this allegation by reading into the record respondent's unqualified admission to the truth thereof appearing in his sworn testimony given to grievance committee "17D".)

I. At the time respondent removed the $57,500.00 in cash from the NCNB safe deposit box and used such cash for purchase of the cashiers' checks (bar's exhibit 2 in evidence), respondent knew that the appearance bond issued by American Druggist Insurance Company had not been estreated. (This allegation appears at paragraph 9 of the bar's complaint and was conceded to be probably true in respondent's responses to requests for admissions. The bar established the truth of such

allegation appears at paragraph 12 of the bar's complaint and was conceded to be probably true by respondent in his responses to requests for admissions. The bar established the truth of such allegation by reading into the record respondent's unqualified admission to the truth thereof in sworn testimony given by respondent before grievance committee "17D".)

M. In or about September, 1985 respondent was furnished with a certified copy of an order discharging American Druggist Insurance Company as surety in the Kersten case hereinabove referred to. (This allegation appears at paragraph 13 of the bar's complaint and was admitted by respondent in his responses to requests for admissions.)

N. In or about September, 1985, after respondent knew that American Druggist Insurance Company had been discharged as surety in the Kersten case, demand was made upon respondent that he forthwith return to Sam D. Pendino, Esquire the $57,500.00 in cash and the items of silver and gold specified in the January 13, 1984 escrow agreement (bar's exhibit 1 in evidence). (This allegation appears at paragraph 14 of the bar's complaint and was admitted by respondent in his responses to requests for admissions.)

O. The said Sam D. Pendino, Esquire thereafter made numerous demands upon respondent that he deliver to him the $57,500.00 in cash and items of gold and silver specified in the January 13, 1984 escrow agreement (bar's exhibit 1 in evidence). (This allegation appears at paragraph 15 of the bar's complaint and was admitted by respondent in his responses to requests for admission.)

P. Respondent failed and refused to account for and deliver the $57,500.00 in cash and items of gold and silver specified in the January 13, 1984 escrow agreement (bar's exhibit 1 in evidence) or any of such cash or gold and silver items to the said Sam D. Pendino necessitating the institution of a litigation commenced in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida entitled Sam D. Pendino, plaintiff v. Terence T. O'Malley, Sr., et al, defendants, case number 85-23606CL. (This allegation appears at committee "17D".)

M. In or about September, 1985 respondent was furnished with a certified copy of an order discharging American Druggist Insurance Company as surety in the Kersten case hereinabove referred to. (This allegation appears at paragraph 13 of the bar's complaint and was admitted by respondent in his responses to requests for admissions.)

N. In or about September, 1985, after respondent knew that

for and deliver the cash and gold and silver items and insisted upon the institution of the subject litigation.)

Q. In the litigation hereinabove referred to, respondent was deposed on November 26, 1985 and testified under oath as follows:

Q. Where is the collateral now?
A. The collateral is in my possession.

Q. It is being held where?
A. In my possession.

Q. Did you remove any of the cash or the gold and silver from the box?
A. Only when I closed out the account of the safety deposit box.

Q. Have you turned over cash - Have you given us possession of any of the cash, or gold or silver?
A. I believe I have already answered that question.

Q. How about answering it one more time?
A. Collateral is in my possession.

Q. Are you -- In terms of the location of the collateral, is anybody else, other than yourself, in possession of the collateral?
A. No. It's in my care, custody and control.

Q. You said you closed your safety deposit box with NCNB bank. Do you remember when that was?
A. No.

Q. Prior to that time, did you ever remove any of the collateral from the safety deposit box?
A. No. Only briefly.

Q. What collateral - Which part of the collateral?
A. I took a gold bar, a kruggerand, and a medallion - No, and a silver bar to a local -- I took one of each kind of metal over to a local coin dealer to ask if they were real because I didn't know, and I returned them.

Q. You put it back in the safety deposit box?
A. Absolutely.

Q. Did you ever remove anything from the safety deposit box?
A. No. Well, nothing that relates to this law suit. There were other documents in that safety deposit box.

Q. Have you ever turned over any of the collateral to Mr. Aubuchon?
A. No.

Q. Excuse me?
A. No.

Q. And you are saying that you never turned it over to anybody? You have kept it yourself?
A. I think I have already answered that question.

Q. I am correct?
A. Pardon me?

Q. I am saying that?
A. In my possession.

Q. Did you remove any of the cash or the gold and silver from the box?
A. Only when I closed out the account of the safety deposit box.

Q. Have you turned over cash - Have you given us possession of any of the cash, or gold or silver?
A. I believe I have already answered that question.

Q. How about answering it one more time?
A. Collateral is in my possession.

(This allegation appears at paragraph 17 of the bar's complaint and was admitted by respondent in his responses to requests for admissions. In addition, the entire transcript of respondent's November 26, 1985 deposition was received in evidence.)

R. In the same action as above referred to respondent was deposed and testified under oath on March 31, 1986 as follows:

Q. Alright. In your deposition of November 26th, you told me that the cash had never been out of your care, custody up until that point in time. That was a lie in that deposition?
A. I think I said care, custody or control and in an effort to protect my client, who had told me that when he finally was forced to return it by getting a copy, he would return it back to me, and in order not to be the last link in the chain of criminal prosecution of my client, Mr. Aubuchon, I considered that his comment to me to return it when required left it within my control, even though it was not physically in my custody.

Q. In your deposition of November 16th, I asked you if you had ever changed the form of any of the collateral and you said no. That was incorrect as well?
A. Ever change the form?

Q. Yes, cash checks for one?
A. Cash the cashier checks. I guess I was incorrect technically.

(This allegation appears at paragraph 18 of the bar's complaint and was admitted by respondent in his responses to requests for admissions.)

II. RECOMMENDATIONS AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY:

I make the following recommendations with respect to the violations charged by the bar:

A. By removing the cash, gold and silver from the safe deposit box contrary to the express provisions of the January 13, 1984 escrow agreement and by applying the cash to a purpose other than that for which such cash was entrusted to him and by failing and refusing to account for and deliver over the money and other property entrusted to him upon demand after American Druggist Insurance Company had been discharged as surety in the Kersten case, respondent violated Fla. Bar Integr. Rule, article XI, Rule 11.02(4) which provides that money or other property entrusted to an attorney for a specific purpose is held and testified under oath on March 31, 1986 as follows:

Q. Alright. In your deposition of November 26th, you told me that the cash had never been out of your care, custody up until that point in time. That was a lie in that deposition?
A. I think I said care, custody or control and in an effort to protect my client, who had told me that when he finally was forced to return it by getting a copy, he would return it back to me, and in order not to be the last link in the chain of criminal prosecution of my client, Mr. Aubuchon, I considered that his comment to me to return it when required left it within my control, even though it was not physically in my custody.

Q. In your deposition of November 16th, I asked you if you

B. By testifying under oath that as of November 26, 1985 the collateral entrusted to him pursuant to the terms and provisions of the January 13, 1984 escrow agreement was then in his possession when in fact it was not, and by testifying that he had never turned over any of the collateral to Mr. Aubuchon when in fact he had diverted the $57,500.00 in cash entrusted to him to Mr. Aubuchon, respondent testified falsely under oath and thereby violated Fla. Bar Integr. Rule, article XI, Rule 11.02(3)(a) which provides that the commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, constitutes a cause for discipline and respondent thereby also violated Disciplinary Rules 1-102(A)(3), 1-102(A)(4) and 1-102(A)(6) of the Code of Professional Responsibility which provide that a lawyer shall not engage in illegal conduct involving moral turpitude, that he shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation and that he shall not engage in any other conduct that adversely reflects on his fitness to practice law.

III. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that as discipline for the violations hereinabove enumerated respondent be

SEE ATTACHED

IV. PERSONAL HISTORY:

Respondent was admitted to The Florida Bar on September 19, 1981 testified falsely under oath and thereby violated Fla. Bar Integr. Rule, article XI, Rule 11.02(3)(a) which provides that the commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, constitutes a cause for discipline and respondent thereby also violated Disciplinary Rules 1-102(A)(3), 1-102(A)(4) and 1-102(A)(6) of the Code of Professional Responsibility which provide

V. STATEMENT AS TO PAST DISCIPLINE:

Respondent received a private reprimand for a conflict violation in The Florida Bar Case No. 82-03,378.

VI. STATEMENT OF COSTS OF THE PROCEEDING AND RECOMMENDATIONS:

The costs of these proceedings were as follows:

Administrative Costs:

Grievance Committee Level	$ 150.00
Referee Level	150.00

Court Reporter Costs:

Grievance Committee Level	448.25
Referee Level	688.30
Witness Fees (Sam D. Pendino)	204.64
TOTAL	$ 1,641.19

I recommend that such costs be taxed against the respondent.

RENDERED this 28 day of April, 1988 at Miami, FL.

Steve Levine
STEVEN D. LEVINE
Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing report of referee was sent to Nicholas R. Friedman, attorney for respondent, Suite 1700, New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132, and to David M. Barnovitz, Assistant Staff Counsel, The Florida Bar, Cypress Financial Center, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, FL 33309 by regular mail on this 28 day of April, 1988.

Steve Levine
STEVEN D. LEVINE
Referee

Administrative Costs:

Grievance Committee Level	$ 150.00
Referee Level	150.00

Court Reporter Costs:

Grievance Committee Level	448.25
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Witness Fees (Sam D. Pendino)	204.64
TOTAL	$ 1,641.19

III. RECOMMENDATIONS

In determining the appropriate sanction(s), a referee must consider and weigh (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating circumstances.

In this case, the duties violated are fundamental. There are perhaps no more important responsibilities of a lawyer than to preserve property entrusted to him or her and to testify honestly and forthrightly in litigation proceedings.

I am convinced, however, that the Respondent did not act with bad intent or to directly benefit himself. Respondent turned the escrow cash and precious metals over to the surety company because he mistakenly believed it was part of some oral agreement between the parties and because he thought it may have been required by law, despite the clear language of the escrow contract. Respondent's testimony in deposition was an attempt by him to protect a client or former client. His answers were intended to be evasive or narrow, but they were in fact misleading and false. Respondent did not benefit financially from his actions, and his motives were not dishonest or selfish.

There are mitigating circumstances regarding Respondent's conduct as well. There was mention at trial that Respondent was experiencing marital difficulties at the time, and had a serious alcohol problem. Although it was after litigation was brought against him, Respondent eventually paid nearly seventy thousand dollars as aggravating or mitigating circumstances.

In this case, the duties violated are fundamental. There are perhaps no more important responsibilities of a lawyer than to preserve property entrusted to him or her and to testify honestly and forthrightly in litigation proceedings.

hearing that Respondent has a good reputation for honesty. Additionally, the Respondent has shown remorse as well as recognition of the wrongfulness of his behavior.

The only evidence of any injury caused by Respondent's misconduct consisted of Sam Pendino's testimony about his anxiety over the inability to gain return of the collateral, and his fear that the client would hold Pendino responsible rather than Respondent. No evidence was presented of actual financial loss to anyone. Nonetheless, I am mindful of the great potential for serious injury to the public from these types of violations.

Recommendations found in Florida's Standards for Imposing Lawyer Sanctions are also influential in reaching an appropriate recommendation. Several standards seem applicable to the factual situation presented here. Standard 4.12 states that suspension is proper when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. Standard 4.62 indicates that suspension is appropriate when a lawyer knowingly deceives a client and causes injury or potential injury. Standard 5.13 provides for a public reprimand when a lawyer knowingly engages in conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on his ability to practice law. Finally, Standard 6.13 calls for suspension when an attorney knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.

Based on the foregoing considerations, and on similar

misconduct consisted of Sam Pendino's testimony about his anxiety over the inability to gain return of the collateral, and his fear that the client would hold Pendino responsible rather than Respondent. No evidence was presented of actual financial loss to anyone. Nonetheless, I am mindful of the great potential for serious injury to the public from these types of violations.

That Respondent be placed on two years probation under the supervision of a member of The Florida Bar, and that as conditions of probation, the Respondent:

1. be suspended from the practice of law for ninety (90) days,

2. successfully complete an ethics course taught at an ABA approved law school,

3. take and pass the ethics portion of The Florida Bar exam,

4. participate in and successfully complete an alcohol rehabilitation program such as Alcoholics Anonymous or Florida Lawyers Assistance, Inc., and

5. pay the costs of this disciplinary proceeding.

days,

2. successfully complete an ethics course taught at an ABA approved law school,

3. take and pass the ethics portion of The Florida Bar exam,