

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,
vs.
DAVID E. DESERIO,
Respondent.

CONFIDENTIAL
Case No. 70,587
TFB No. 86-16-337(06A)
(formerly 06A86H11)
and
TFB No. 86-16-390(06A)
(formerly 06A86H12)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to article XI of the Integration Rule of The Florida Bar, and Rule 3-7.5 Rules of Discipline, a final hearing was held on October 15, 1987. The enclosed pleadings, orders, transcripts and exhibits are forwarded to The Supreme Court of Florida with this report, and constitute the record in this case.

The following attorneys appeared as counsel for the parties.

For The Florida Bar: Bonnie L. Mahon
For the Respondent: Scott K. Tozian

II. Findings of fact as to each item of misconduct of which the respondent is charged: After considering all the pleadings and the evidence before me, I find the following:

COUNT 1
TFB NO. 86-16337(06A)
(formerly 06A86H11)

In about April, 1984, the respondent met with [REDACTED] a client, and Dwight Wheeler, to discuss the purchase of twenty-one (21) producing oil wells in Texas. The aforementioned parties agreed to invest in the oil venture in Texas. It was agreed that Mr. [REDACTED] was to invest \$500,000.00 which was to be the down payment on the purchase of the oil wells.

In an effort to raise the \$500,000.00 down payment, Mr. [REDACTED] mortgaged a piece of property which he owned in Pasco County, Florida, for \$450,000.00. Mr. [REDACTED] paid respondent the sum of \$2,500.00 to handle the closing on the \$450,000.00 mortgage. Respondent received a check for \$450,000.00 from the mortgage company and placed said sum into his trust account. Respondent paid all closing costs on the \$450,000.00 out of the money he placed in his trust account. After paying all closing costs, the sum of \$275,267.93 of Mr. [REDACTED]'s money remained in respondent's trust account. The respondent was instructed by Mr. [REDACTED] to disburse the remaining trust funds as follows:

a. \$234,325.00 was to be paid by the respondent to Mr. Wheeler as a portion of the \$500,000.00 down payment towards the purchase of the oil wells in Texas.

b. \$40,500.00 was to remain in the respondent's trust account and the respondent was to pay six (6) monthly interest payments of \$6,750.00 each on the \$450,000.00 mortgage.

c. \$442.93 was to be utilized by respondent to travel to Texas to deliver to D. C. Wheeler a check in the amount of

\$234,325.00 and to protect Mr. [REDACTED]'s interest in the venture by verifying the existence of a contract with Austin Oil for the purchase of the oil wells.

I find that the respondent did not pay Dwight Wheeler the sum of \$234,325.00 as was instructed by Mr. [REDACTED]. Instead, on June 27, 1984, the respondent withdrew \$233,325.00 of Mr. [REDACTED]'s money from his trust account and purchased two Park Bank cashiers checks. One cashiers check was made payable to D.C. Wheeler in the amount of \$210,825.00 and the other check was made payable to Park Bank of Florida in the amount of \$22,500.00. At the Final Hearing, the respondent testified that the \$22,500.00 cashier's check was issued to Park Bank of Florida for the purpose of paying a bank loan of respondent's wife.

After purchasing the aforementioned cashiers checks, the respondent traveled to Texas and delivered to Mr. Wheeler the cashiers check for \$210,825.00 which was \$23,500.00 less than he was suppose to pay to Mr. Wheeler per Mr. [REDACTED]'s instructions. After arriving in Texas, the respondent informed Mr. Wheeler that he had a cashiers check for \$210,825.00 rather than \$234,825.00 due to the fact that Mr. [REDACTED] owed him \$23,500.00 and had authorized him to reduce said amount from the \$234,825.00 net proceeds of the mortgage. Mr. Wheeler accepted the cashiers check for \$210,825.00 but acknowledged receiving the sum of \$234,325.00.

I find that Mr. [REDACTED] did not authorize respondent to take \$23,500.00 from the \$234,325.00 entrusted to the respondent.

As to the \$40,500.00 entrusted to respondent to pay six (6) monthly interest payments on the \$450,000.00 mortgage, I find that the respondent made three (3) interest payments of \$6,700.00 however, he did not pay the remaining three (3) interest payments of \$6,700.00 each for a total of \$20,250.00. The respondent testified at the final hearing in this cause that he did not pay \$20,250.00 worth of interest payments on Mr. [REDACTED]'s \$450,000.00 mortgage, due to the following reasons:

- a. D. C. Wheeler sent respondent a \$20,000.00 check.
- b. Respondent attested that the \$20,000.00 was to be paid to Mr. [REDACTED] so that he could pay certain expenses at The Phone Book.
- c. Respondent deposited D. C. Wheeler's \$20,000.00 check into his trust account. Shortly thereafter, respondent issued a \$20,000.00 trust check to Mr. [REDACTED] as per Mr. Wheeler's instructions.
- d. Mr. [REDACTED] cashed the respondent's trust check for \$20,000.00.
- e. D. C. Wheeler's check for \$20,000.00 bounced and since Mr. [REDACTED] had already cashed respondent's check, a deficit of \$20,000.00 existed in respondent's trust account.
- f. Respondent testified he was financially unable to reimburse his trust account the \$20,000.00.

At the Final Hearing, respondent testified that he did not represent either Mr. Wheeler or Mr. [REDACTED] in regards to The Phone Book. When asked if he was involved with Mr. Wheeler and Mr. [REDACTED] in The Phone Book, respondent replied,

"There was a contract that was drawn up, and I don't remember whether I drew it or not, but I may have been mentioned in there, potentially having some right to The Phone Book.

I believe Mr. Wheeler had a right and Mr. [REDACTED] had a right I don't even remember, but I'm sure there was some mention of me in there having a position there, because I didn't represent either one of them".

Based on the aforementioned testimony of respondent, I find that respondent utilized a minimum of \$20,000.00 of client trust monies for his own purpose and not for the purpose in which the money was entrusted to him.

As to the \$442.93 in respondent's trust account, I find that respondent used said money to travel to Texas however, once respondent arrived in Texas, he failed to follow his client's instructions. Respondent was to deliver \$234,325.00 to D. C. Wheeler. Instead, respondent only delivered \$210,825.00. Further, respondent was to protect Mr. [REDACTED]'s interest in the venture by verifying the existence of a contract with Austin Oil. I find that the respondent failed to protect Mr. [REDACTED]'s interest in any way in that he did not verify the existence of a contract with Austin Oil. A Contract with Austin Oil did not exist and as a result, Mr. [REDACTED] lost his total investment in the oil venture.

I find that on December 17, 1984, respondent's trust account at Park Bank was closed when Park Bank charged off an overdraft of \$21,369.16. At the time the trust account was closed, there should have been a minimum of \$43,750.00 in respondent's trust account. This sum represents the \$23,500.00 which respondent failed to pay to D.C. Wheeler and the \$20,250.00 worth of interest payments respondent failed to pay to MacDill Columbus Corporation on behalf of Mr. [REDACTED]

I find that as of the date of the final hearing respondent had not reimbursed Mr. [REDACTED] the \$43,750.00 which respondent held in trust nor had he made any attempt whatsoever to repay said money.

Further, I find that the respondent failed to maintain the minimum trust accounting records required by The Florida Bar Integration Rule and The Florida Bar Bylaws.

COUNT II
TFB No. 86-19390-06A
(formerly 06A86H12)

The Florida Bar voluntarily dismissed Count II.

III. Recommendation as to whether or not the respondent should be found guilty: I recommend that the respondent be found guilty as to Count I, of the following violations of the Code of Professional Responsibility: Integration Rule 11.02(4) (Applying client trust funds to a purpose other than that which the monies were entrusted); Integration Rule 11.02(4)(b) (Failure to preserve his bank records for a period of not less than six (6) years); The Florida Bar Bylaws Section 11.02 (4)(c)2 (Failure to maintain minimum trust accounting records); Bylaws Section 11.02(4)2e (Failure to maintain separate cash receipts and disbursement journals, including columns for receipts and disbursement journals, transfers and account balance); Bylaws Section 11.02(4)(c)2f (Failure to maintain a separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements or transfers and any unexpended balance); Bylaws Section 11.02(4)(c)3a (Failure to reconcile trust account on monthly basis); Bylaws Section 11.02(4)(c)3b (Failure to maintain on an annual basis, a detailed listing identifying the balance of the unexpended trust money held for each client or matter); Bylaws Section 11.02(4)(c)3c (Failure to retain for at least six (6) years, reconciliations, comparisons and listings on trust accounts); Bylaws Section 11.02(4)(c)2b (Failure to maintain original or duplicate deposit slips in the case of currency or coin, and additional

cash receipt books); Bylaws Section 11.02(4)(c)2c (Failure to maintain original cancelled checks, all of which must be numbered consecutively); DR 1-102(A)(4) (Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); DR 1-102(A)(6) (Engaging in conduct that adversely reflects on his fitness law); and DR 9-102(A) (Failure to preserve identity of funds and property of a client).

VI. Recommendation as to disciplinary measures to be applied:
As to Count 1, I recommend that the respondent be disbarred from the practice of law and further that he be required to pay the cost of these proceedings.

V. Personal history and past disciplinary record: After a finding of guilt and prior to recommending discipline, pursuant to Integration Rule 11.06(9)(a)(4), and Rule 3-7.5(K)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

- (1) Age: 50
- (2) Date admitted to The Bar: 6/04/71
- (3) Past disciplinary record: TFB No. 06A82HA7-Private Reprimand administered before the Board of Governors.
- (4) Mitigating factors: None
- (5) Aggravating factors:
 - (a) Prior disciplinary offense;
 - (b) dishonesty or selfish motives;
 - (c) refusal to acknowledge wrongful nature of conduct;
 - (d) substantial experience in the practice of law; and
 - (e) indifference to making restitution.

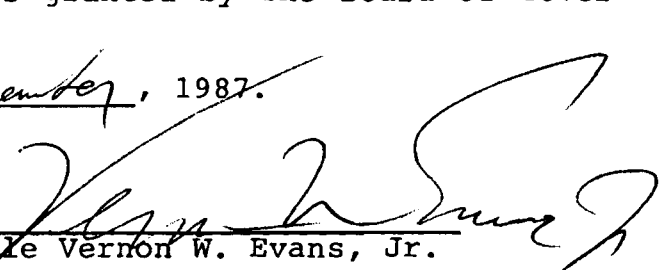
VI. Statement of Costs and manner in which costs should be taxed: I find the following costs were reasonably incurred by The Florida Bar.

COUNT 1
TFB No. 86-19390(06A)
(formerly 06A86H12)

| | |
|---------------------------------------|-------------------|
| A. Referee Level: | |
| Administrative Costs: | \$ 150.00 |
| Court Reporter: Appearance (10/15/87) | 120.00 |
| Transcript (10/15/87) | 465.70 |
| Appearance (11/13/87) | 30.00 |
| Transcript (11/13/87) | 67.83 |
| Assistant Staff Counsel Expenses | 26.60 |
| Staff Auditor Expenses | 5,437.15 |
| Staff Investigator Expenses | 1,089.90 |
| | |
| TOTAL COSTS | <u>\$7,387.18</u> |

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall be accrued and be payable beginning thirty (30) days after the judgment in this case becomes final unless a waiver is granted by The Board of Governors of The Florida Bar.

Dated this 15th day of December, 1987.



Honorable Vernon W. Evans, Jr.
Referee

cc: Scott K. Tozian, Counsel for Respondent
Bonnie L. Mahon, Assistant Staff Counsel
John T. Berry, Staff Counsel