

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

CONFIDENTIAL

CASE NO. 72,068
(TFB Case No. 88-30,069[05B])

THE FLORIDA BAR,

Complainant,

-VS-

TOM K. DOUGHERTY,

Respondent.

FILED
SEP 1 1988
CLERK OF THE SUPREME COURT
TALLAHASSEE, FLORIDA

REPORT OF REFEREE

I.

Summary of Proceedings

A Referee was appointed in this case by Order dated March 14, 1988. A motion hearing and case management conference was held on April 28, 1988. A non-jury trial was held on June 2, 1988. All of the Pleadings, Notices, Motions, Orders, Transcripts, and Exhibits (including those marked for identification only) are forwarded to the The Supreme Court of Florida with this report and they constitute the record in this case.

The following persons appeared as counsel for the parties:

For The Florida Bar - Jan K. Wichrowski
Bar Counsel

For the Respondent - George E. Hovis, Esquire

II.

Statement of the Case

The Florida Bar filed a three count complaint against Tom K. Dougherty alleging neglect on his part in performing his duties as a trustee, making improper investments with trust funds and failing to maintain his trust account in accordance with required trust accounting procedures.

The parties have entered into a stipulation as to many of the facts in the case and the stipulation was supplemented by testimony from the Respondent and by documentary evidence.

III.

Findings of Fact

Respondent is a member of The Florida Bar who has been practicing law for nearly sixteen years in Lake County. He is a sole practitioner with a general practice.

Sometime in 1978, Respondent began acting as a trustee under the Will of Louise Harris. Respondent had drafted the will at the request of the decedent and she requested him to be the trustee. The lifetime beneficiary of the trust was the decedent's sister, Ms. Pauline Zepp. The assets of the trust consisted of corporate stock.

The Florida Bar does not question Respondent's conduct from 1978 through 1985 although it appears that there were occasions when Ms. Zepp had difficulty communicating with

Respondent and that routine trustee duties were performed by Respondent's secretary.

In 1985, there was an acquisition of one of the trust's stocks and Respondent failed to tender the stock to the purchaser for reissue. The annual accounting failed to show the acquisition and it was prepared late.

During 1987, Respondent failed to return many of Ms. Zepp's telephone calls and he failed to tender quarterly payments in a timely manner. Payments that were made were incorrect in amount because Respondent failed to collect payments on certain trust investments. During 1986 and 1987, Respondent failed to prepare accountings timely and correctly.

In April 1986, Respondent received \$24,000.00 from the stock. The money was placed in a savings account. Respondent did not believe the stock market to be a good investment at that time so he awaited an opportunity to invest the money elsewhere.

A mortgage investment opportunity arose which involved a Mr. Heritage, who was one of Respondent's former clients. Respondent loaned Mr. Heritage \$9,000.00 in exchange for a note and mortgage bearing interest at 15%. This investment has proven to be a sound investment and Mr. Heritage has made all of the payments promptly.

In August 1986, Respondent made an investment of \$18,000.00 in Rocky Mountain Development Corporation. The principals in the corporation were Respondent's clients and Respondent was the president of the corporation. A mortgage

secured the investment but Respondent failed to record it for a little more than a year. The investment was at 13% interest and, until the money was reinvested by Respondent's successor, the trust received all that was due to it.

After complaint was made against Respondent, The Florida Bar reviewed his trust account. It was determined that Respondent failed to keep a journal. As a result it was difficult to determine whether or not Ms. Zepp received all of the money due to her. At one time the Harris Trust checking account was overdrawn by \$178.92 due to failure to bring the account balance forward. However, the Harris Trust Savings Account had over \$18,000.00 in it at the time.

It should be noted that Ms. Zepp was never represented by Respondent on any matter and that all money due to her has been paid. Furthermore, Respondent has accounted for all trust assets and they have been turned over to a successor trustee.

Respondent has been an active and respected member of his community for many years. In 1985 he was president of his Kiwanis Club and the Jaycees. He has performed fund raising activities for the Y.M.C.A. and the Little League. He is on the board of directors of his local hospital and public library. He represents pro bono the V.F.W. and the Pilot Club. He accepts indigent clients on a pro bono basis and he chaired the committee that organized the legal aid society in Lake County. He has provided services to the garden club, the Presbyterian Church, the South Lake Art League and the Minneola Elementary School

without charge. He has performed public service in the past as a member of the city planning and zoning commission and the Lake County Comprehensive Land Plan Advisory Committee.

Respondent admits that he has violated the rules governing the conduct of attorneys. The facts show that he is guilty of violating the following specific provisions of the Rules Regulating The Florida Bar:

A. Count I

Rule 1-102(A)(6) and Rule 4-1.3 - Respondent failed to act with reasonable diligence while trustee of the Harris Trust by failing to tender stock for exchange and by failing to provide accurate accountings in a timely manner.

B. Count II

Rule 1-102(A)(6) and Rule 4-1.3 - Respondent failed to record the Rocky Mountain Mortgage for over a year.

Rule 1-102(A)(6) and Rule 4-1.8 - Respondent entered into a business transaction with clients by entering into the Rocky Mountain investment without disclosure or consent.

C. Count III

Article XI, Rule 11.02(4) - Respondent failed to maintain minimum trust account records.

Respondent is not guilty of the other violations charged.

The violations which were committed by Respondent can be perceived as being in furtherance of a plan to convert or otherwise misuse trust assets while attempting to cover up such activities. They can also be perceived as identifying an otherwise honorable and capable lawyer who went through a slump, got negligent, procrastinated, and failed to return phone calls.

Careful observation of Respondent leads to the conclusion that the latter perception is accurate. There is no evidence that Respondent had any intention of misappropriating any of the money belonging to the Harris Trust. His naive appearance before the grievance committee without counsel and without adequate preparation while assuming that such an appearance would clear him of wrongdoing is most convincing in that regard. His candor and demeanor during the hearing on this case shows that he realizes his errors, he admits them and he has taken corrective steps to comply with the rules in the future.

The facts do not substantiate a conclusion that the two investments which are the subject of Count II resulted in misappropriation of trust funds. But for Respondent's status as a lawyer, the investments could have very well been authorized by the trust agreement. No evidence was submitted to the contrary. Respondent's misconduct did not result in, nor was it likely to result in, actual prejudice to the trust or its beneficiaries. There was no dishonesty, misrepresentation, deceit or fraud on the part of Respondent. No crime was committed and Respondent has never been disciplined prior to this case.

Respondent's relationship with Ms. Zepp was a fiduciary relationship, not an attorney-client relationship. And while he had a duty to keep Ms. Zepp informed, F.S. 737.303, there is no evidence that would indicate that Ms. Zepp was actually damaged by Respondent's failure to communicate to the extent she expected.

The Florida Bar has requested that Respondent be suspended from the practice of law for not less than sixty (60) days. The Florida Bar has cited the following authorities in support of the request:

The Florida Bar v. Wagner, 497 So.2d 238
(Fla. 1986)

The Florida Bar v. Padgett, 481 So.2d 919
(Fla. 1986)

The Florida Bar v. Moxley, 462 So.2d 814
(Fla. 1985)

These cases have been carefully reviewed and are all distinguishable. The conduct involved in each of the cases is considerably more serious than the conduct involved here. It is important to look at the offenses and the circumstances surrounding them but it is also important to consider the effect of the dereliction of the duty to others as well as the character of the wrongdoer and the likelihood of further disciplinary violations. The Florida Bar v. Moxley, *supra*. See also, The Florida Bar v. Aaron, 13 F.L.W. 443 (July 14, 1988).

Recommended Discipline

Respondent violated the rules without any evil or corrupt motive. Under the circumstances, suspension from the practice of law or a public reprimand would not accomplish any laudable purpose. This case meets the criteria for being treated as minor misconduct due to Respondent's lack of evil or corrupt motive, his otherwise honorable service both to his community and his profession, and his willingness to admit his violations

and to take appropriate steps to avoid further violations in the future.

The following disciplinary action is recommended:

1. Private reprimand before The Supreme Court or the Board of Governors.
2. Probation for a period of two years with the following conditions:
 - (a) satisfactory completion of a course of study on legal ethics approved by The Supreme Court;
 - (b) such supervision over Respondent's trust account as The Supreme Court may direct;
 - (c) reimbursement of The Florida Bar for costs in this case and cost of supervision;
 - (d) notification to The Florida Bar of any trust agreement wherein Respondent is named trustee.

Costs

The Florida Bar has submitted an affidavit of costs as follows:

1. Grievance Committee Level Costs:

a. Administrative Costs	150.00
b. Transcript Costs	423.85
c. Bar Counsel/Branch Staff Counsel Travel Costs	40.32
2. Referee Level Costs:

a. Administrative Costs	150.00
b. Transcript Costs	252.75
c. Bar Counsel/Branch Staff Counsel Travel Costs	41.98
3. Miscellaneous Costs:

Investigator Costs and Expenses	885.89
TOTAL ITEMIZED COSTS:	1,944.79

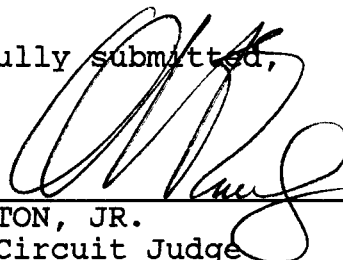
These costs are reasonable and were appropriately incurred during these proceedings. They should be taxed against Respondent.

Past Disciplinary Measures

There is no evidence that Respondent has ever been disciplined in the past.

DATED this 29 day of August, 1988.

Respectfully submitted,



O. H. EATON, JR.
Referee/Circuit Judge

Copies to:

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