

IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE

FILED

SID J. WHITE

APR 12 1991

THE FLORIDA BAR,

Complainant,

v.

DAVID A. GRAHAM,

Respondent.

Supreme Court Case No. _____
CLERK, SUPREME COURT

The Florida Bar File No. _____
90-50,821 (15A) By _____
Chief Deputy Clerk

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

The undersigned was appointed as referee to preside in the above disciplinary action by order of this court dated January 9, 1991. The pleadings, transcripts of hearings and all other papers filed with the undersigned, which are forwarded to the court with this report, constitute the entire record in this case.

Respondent appeared in person and by Scott K. Tozian, Esquire. The bar was represented by David M. Barnovitz, Assistant Staff Counsel.

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

After hearing all of the testimony and evidence presented to me, I find as follows with respect to each of the counts alleged in the bar's complaint:

AS TO ALL COUNTS

1. At all times hereinafter mentioned respondent was and is a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. Heretofore, by order of this court dated June 5, 1990, respondent was temporarily suspended from The Florida Bar.

AS TO COUNT I

3. Heretofore, respondent represented one Darrell Kramer, an infant (hereinafter referred to as "infant"), in connection with a claim to recover damages for injuries sustained by the infant as a result of having been struck in the eye by a projectile launched by a third party.

4. Respondent effected a settlement of the infant's claim and secured a court order dated June 19, 1989, approving such settlement. A copy of the order is attached to the bar's complaint as Exhibit 1.

5. In July 1989, respondent received the settlement proceeds as recited in the order (Exhibit 1) and deposited the same to his trust account.

6. Of the \$37,000.00 collected by respondent pursuant to the terms of the order (Exhibit 1), respondent received \$20,000.00 as and for his attorney's fee and costs as provided in such order, remitted an additional amount of \$3,500.00 to the infant's mother, claims to have paid from such proceeds \$762.32 in medical expenses on account of the infant and misappropriated the balance of \$12,737.68, which according to Michael Maquire, Esquire, substitute counsel for Darrell Kramer, has now been replaced.

AS TO COUNT II

7. By letter dated November 2, 1989, the bar requested that respondent specifically address the disposition of funds received by him relating to the infant's case. A copy of such letter is attached the bar's complaint as Exhibit 2.

8. By letter dated November 15, 1989, respondent responded to the bar, as follows:

The case of Donna Nardone is one involving an injury to her minor son. There was a settlement whereby a court approval was obtained. My fee was set at \$20,000.00 which is where the "traveler's checks" money came from. The rest of the money is being distributed for various medical bills, medical insurance reimbursement, payment of some itemized expenses of his mother and some emergency relief to the minor and his mother and half-sister due to the step-father leaving home. The balance will continue to be held in trust for the minor until his 18th birthday at which time further funds will go directly to him as part of a structured settlement.

9. Such representation was false when made and known by respondent to be false when made.

10. In truth and in fact, respondent had not continued to hold the settlement proceeds in trust as represented in his November, 1989 letter (Exhibit 2 of the complaint) but had misappropriated the same to his own uses and purposes.

COUNT III

11. On April 16, 1990, respondent testified, under oath, as follows:

Q. To what extent, sir, did you use funds earmarked to the Nardone settlement -- and I make reference to the Court's June 17, 1989, order -- out of trust?

A. Yes. I would say that it must be approximately \$13,000.

Q. Have you restored that \$13,000 to your trust account?

A. Yes.

Q. When?

A. Last week.

Q. Which trust account did you restore it to?

A. First Union.

Q. What's the source of the \$13,000?
Is that what you put in, \$13,000?

A. Yes.

Q. What was the source of that?

A. A loan.

12. Such sworn testimony was false when made by respondent and known by respondent to be false when made.

14. In truth and in fact, respondent had not restored the \$13,000.00 referred to in his testimony to his trust account at the time of his testimony as hereinabove recited.

AS TO COUNT IV

14. Notwithstanding the fact that the order compromising the infant's claim (Exhibit 1) directed payments to the infant's mother, Donna Nardone, "as guardian for" the infant, respondent thereafter did not establish a guardianship account for the infant until after his suspension nor conclude the representation of the infant.

15. Notwithstanding the order compromising the infant's claim (Exhibit 1 of the complaint) and the specific provisions thereof, respondent knowingly and deliberately made payments to the infant's mother outside of the guardianship without leave of court.

AS TO COUNT V

16. Heretofore respondent represented a client with the surname Seeger in connection with a claim by Seeger to recover damages for personal injuries sustained by Seeger in an accident.

17. As a result of a settlement in the Seeger case, respondent received settlement funds for the specific purpose of application to attorney's fees, payment to Seeger and payment to medical service providers.

18. As of August 31, 1989, respondent was obligated to pay from the Seeger settlement proceeds a physician's bill in the sum of \$3,210.00.

19. As of April 16, 1990, respondent was obligated to pay from the Seeger settlement proceeds on account of the same physician, the sum of \$1,400.00.

20. On April 16, 1990 respondent testified, under oath, with reference to the Seeger settlement, as follows:

Q. Did you have a contingent fee agreement with your clients?

A. Yes.

Q. What was the contingency?

A. Forty percent

Q. Have you disbursed all monies from that settlement?

A. Yes.

21. Such representation was false when made and known by respondent to be false when made.

22. In truth and in fact, respondent had not disbursed all monies from the Seeger settlement and was, as of the date of respondent's testimony, obligated in the Seeger matter to the extent of \$1,400.00 for payment of the physician's bill as hereinabove recited.

AS TO COUNT VI

23. Respondent misappropriated the Seeger funds received by him for the specific purpose of payment of the above referenced physician's bill applying such funds to respondent's own uses and purposes.

AS TO COUNT VII

24. Heretofore respondent maintained a certain bank account bearing #003140017 entitled "David A. Graham Attorney Trust - Master Account" at Banker's Trust Company of Florida, N.A. Such account shall hereinafter be referred to as "master account."

25. Respondent deposited to the master account funds entrusted to him for specific purposes by and on behalf of respondent's clients.

26. On July 26, 1989, check #010190 in the sum of \$795.00 issued by Merrill Lynch Realty, payable to respondent's wife, Lucy M. Graham, was deposited to respondent's master account.

27. Such \$795.00 Merrill Lynch Realty check was unrelated to respondent's practice of law.

28. On November 30, 1989, respondent deposited a check in the sum of \$350.00 from Inman representing attorney's fees.

29. On December 6, 1989 a check issued by Claude L. Duvoison in the sum of \$100.00 received by respondent as an attorney's fee was deposited by respondent to the master account.

30. On October 26, 1989 respondent issued from the master account check #255 to Robert Simmons in the sum of \$25,000.00 which check, when presented for payment on October 26, 1989, was dishonored for insufficient funds.

31. Upon redeposit of check #255, the same was cleared for payment on November 1, 1989 only after a \$30,000.00 deposit was made by respondent to the master account from proceeds of another client's accident claim (William Kemp).

32. In January, 1990 the following four (4) checks issued by respondent from his master account were dishonored for insufficient funds when presented for payment:

1. January 23, 1990 - Check #404
Lee County Clerk - \$6.00
2. January 24, 1990 - Check #405
Executive Coffee - \$100.00
3. January 24, 1990 - Check #406
The Florida Bar - \$42.00
4. January 24, 1990 - Check #409
City of West Palm Beach - \$88.46

33. The bank statement issued for respondent's master account for the month of January, 1990 reflects a month end overdraft balance in the sum of \$904.33, a copy of such statement is attached to the bar's complaint as Exhibit 3.

34. In February, 1990, the following ten (10) checks issued by respondent from his master account were dishonored for insufficient funds:

- January 19, 1990 - Check #401
Professional Reporting - \$45.00
- January 22, 1990 - Check #403
Kelly Gruber - Refund of Retainer - \$100.00
- January 24, 1990 - Check #405
Executive Coffee - \$100.00
- January 24, 1990 - Check #406
The Florida Bar - \$42.00
- January 24, 1990 - Check #407
Coastal Chemical - \$57.00

January 24, 1990 - Check #408
First Union - car payment (twice) - \$237.14

January 24, 1990 - Check #409
City of West Palm Beach - \$88.46

January 26, 1990 - Check #410
Marathon Oil Co. (twice) - \$7.72

January 29, 1990 - Check #412
Computer Support - \$137.80

January 30, 190 - Check #414
Bill Kemp - \$350.00

35. The master account reconciled balances when compared to client liabilities at months ends reflected the following shortages:

August 31, 1989 ---- \$12,852.93
September 30, 1989 - \$21,340.56
October 31, 1989 ---- \$29,013.80
November 30, 1989 -- \$18,868.64
December 31, 1989 -- \$18,059.80
January 31, 1990 ---- \$17,240.41

AS TO COUNT VIII

36. Heretofore respondent maintained a bank account numbered 130816502 entitled "David A. Graham Attorney At Law Trust Account" at First Union Bank of Florida. Such account shall hereinafter be referred to as "client trust fund."

37. On February 27, 1990 respondent deposited a check #1593 in the sum of \$1,100.00 from his operating account to his client trust fund.

38. The deposit of the operating account check number 1593 from respondent's operating account to his client trust fund, as aforesaid, was for the specific purpose of preventing his client trust fund from having an overdraft balance on February 28, 1990.

39. On February 26, 1990 respondent deposited to his client trust fund a check #1223 in the sum of \$250.00 issued by Ruby and John Hayes and received by respondent as attorney's fees.

40. The reconciled balances from respondent's master account and his client trust fund at months ends reflected the following shortages:

February 28, 1990 -	\$15,999.40
March 31, 1990 ----	\$16,043.49
April 30, 1990 -----	\$30,503.13
May 31, 1990 -----	\$30,025.25

AS TO COUNT IX

41. Heretofore, on or about June 19, 1990, respondent opened an account numbered 2210614601 entitled "David A. Graham Client Trust Account" at Southcoast Bank. Such account shall hereinafter be referred to as "second client trust account."

42. The reconciled balances from respondent's master account, client trust fund and second client trust account at months ends reflected the following shortages:

June 30, 1990 -	\$5,686.33
July 31, 1990 --	\$4,535.81

43. The reduction in shortages occurring in June, 1990 was created by the deposit by respondent to his second client trust account, a \$5,000.00 loan by the payment of client liabilities totalling \$10,548.42 by a friend of respondent and by respondent's retaining \$10,945.15 of fees received on closed cases in his second client trust account.

AS TO COUNT X

44. Respondent designated his wife, Lucy M. Graham, a non-attorney, as a signatory on the master account.

45. Respondent's wife issued twenty-four (24) checks from the master account for purposes having no nexus to respondent's law practice which checks totalled \$3,178.52.

46. At all times that respondent's wife issued such checks and each of such checks, the reconciled balances in the master account were shortages.

AS TO COUNT XI

47. Respondent failed to maintain the minimum trust accounting records mandated by Rule 5-1.2(b), Rules Regulating Trust Accounts with respect to the master account, client trust fund and second client trust account.

AS TO COUNT XII

48. Respondent failed to comply with the minimum trust accounting procedures mandated by Rule 5-1.2(c), Rules Regulating Trust Accounts with respect to the master account, client trust fund and second client trust account.

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

I recommend that the respondent be found to have committed the following violations:

1. By misappropriating funds entrusted to him for specific purposes, respondent violated Rules 3-4.2 and 3-4.3, Rules of Discipline, which provide, respectively, that violation of the Rules of Professional Conduct is a cause for discipline and the commission by a lawyer of any act which is unlawful or contrary to honesty and justice

may constitute a cause for discipline. Such misappropriations also constitute violations by respondent of Rules 4-1.15(a), (b) and (d), 4-8.4(a), (b) and (c), Rules of Professional Conduct which provide, respectively, that a lawyer shall hold in trust separate from the lawyer's own property funds in a lawyer's possession in connection with a representation, that a lawyer shall promptly deliver to the client any funds the client is entitled to receive, that a lawyer shall comply with the Rules Regulating Trust Accounts, that a lawyer shall not violate the Rules of Professional Conduct, that a lawyer shall not commit a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects, and that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Such misappropriations also constitute a violation of Rule 5-1.1, Rules Regulating Trust Accounts which provides that money entrusted to an attorney for a specific purpose must be applied only to that purpose.

2. By submitting his November 15, 1989 letter to The Florida Bar containing the misrepresentation recited therein as specified in paragraph of the findings of fact above recited, respondent violated Rules 4-8.1(a) and 4-8.4(c), Rules of Professional Conduct which provide, respectively, that a lawyer in connection with a disciplinary matter shall not knowingly make a false statement of material fact and that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such misrepresentation also constituted a violation by respondent of Rule 3-4.3, Rules of Discipline which proscribe the commission by a lawyer of any act which is unlawful or contrary to honesty and justice.

3. By making misrepresentations under oath as recited in Counts III and V of the bar's complaint, respondent violated Rule 3-4.3, Rules of Discipline which provides that the commission by a lawyer of any act which is unlawful or contrary to honesty and justice may constitute a cause for discipline. In addition, such misrepresentations under oath constitute violations by respondent of Rules 4-8.1(a) and 4-8.4(c), Rules of Professional Conduct, which provide, respectively, that a lawyer in connection with a disciplinary matter shall not knowingly make a false statement of material fact and that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

4. By failing to establish a guardianship account for the infant until after his suspension and failing to conclude the representation of the infant as recited in Count IV of the bar's complaint, respondent violated Rules 4-1.1 and 4-1.3, Rules of Professional Conduct, which provide, respectively, that a lawyer shall provide competent representation to a client and that a lawyer shall act with reasonable diligence and promptness in representing a client.

5. By permitting his wife to deposit funds to the master account and by respondent's deposits of legal fees to his various trust accounts, respondent violated Rule 4-1.15(a), Rules of Professional Conduct, which provides that in no event may a lawyer commingle client's funds with those of his or his firm.

IV. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that as a result of the violations as hereinabove enumerated, respondent be disbarred from the practice of law in Florida.

V. PERSONAL HISTORY:

Respondent is 46 years of age and has been a member of The Florida Bar since October, 1973.

VI. STATEMENT AS TO PAST DISCIPLINE:

Respondent has no disciplinary record.

VII. STATEMENT OF COSTS OF THE PROCEEDING AND RECOMMENDATIONS:

The costs of these proceedings were as follows:

Administrative Costs (Rule 3-7.5(k)(5) ---	\$ 500.00
Audit Costs:	
Auditor -----	
Bank Records -----	166.70
Process Service -----	72.00
Investigator -----	85.91
Subpoena Fees -----	30.00
Transcripts:	
Audit -----	139.60
Temporary Suspension -----	715.15
Final Hearing -----	<u>754.70</u>
<u>TOTAL</u> -----	\$2,464.06

I recommend that such costs be taxed against the respondent.

RENDERED this 10th day of April, 1991 at Okeechobee, FL.

William L. Hendry
WILLIAM L. HENDRY, REFEREE

cc: David M. Barnovitz, Bar Counsel
Scott K. Tozian, Esquire