IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

Leo Myers

Respondent.

_____/

Case Nos. 79,472,
79,557,
80,342,
80,503,

RESPONDENT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Answer Brief the respondent, Leo O. Myers, shall be referred to as the respondent.

The Florida Bar will be referred to as the Bar.

The transcript of the hearing before the Referee, dated 14 October 1992, shall be referred to as the transcript.

The report of the Referee, dated 30 December 1993 (sic), shall be referred to as the Referee's Report.

STATEMENT OF THE CASE

As to each of the allegations and complaints filed by the Bar, the respondent felt that it was in his best interest, due to the passage of time and due to his sincere desire not to further inconvience his clients, to not contest the matters before the Bar, and proceed to a dispositional hearing.

This fact is confirmed by the Bar counsel's opening statement, before the Referee, as found on page two (2) of the transcript where by Mr. McGunegle states "Your Honor, this is the disposition hearing as opposed to final evidentary hearing...".

The Bar presented a brief summary of each case to the Referee and the respondent was permitted to respond as to each matter, partly in defense of the complaint and partly towards mitigation of sentence.

The Bar did not prove, nor suggest, any deliberate wrong doing, however there is agreement that there was inadequate book-keeping as stated by the Bar counsel at pages 139 and 140 of the transcript where Mr. McGunegle states "The problem is records. Had he maintained the records, there wouldn't have been a problem in trying to figure out whose cash went to whom."

The respondent had no prior disciplinary record and cooperated with the Bar. This is confirmed by Bar counsel at page 124 of the transcript concerning mitigation of sentence, whereby Mr. McGunegle states "On mitigation, that that (sic) I can see is the absence of prior disciplinary record, which is under 9.32 and cooperation with the Florida Bar."

After a lengthy hearing the Referee adopted the disposition urged by the Bar counsel of six months and rejected the sentence urged by the counsel for the respondent, which was no suspension, or a mininum of ninty (90) days, therefore the ruling of the Referee was that the respondent should be suspended for a period of six months, prove rehabilitation, followed by a three year probation with the following conditions:

1. Completion of an ethics course within one year.
2. Completion of a law office management course.
3. Completion of a trust account managment course.
4. Submit quarterly caseload reports to the Bar.
5. Permit the Bar to review respondent's trust account, if any.
6. Costs to be paid by respondent.

The Referee also made a specific finding, in his report, that "Most of the misconduct occurred during a time that he was a sole practitioner. He has since associated with his father and is no longer maintaining his own trust account."

The respondent then learned that the Bar had a "Board of Governors" meeting, with no notice provided to the respondent, and that an appeal was underway by the Bar. The respondent then contacted Bar counsel in an attempt to agree on a sentence, rather than the filing of an appeal, but Bar counsel rejected any attempt to reach a settlement, and stated "that it is all up to the Court now".

The Bar filed its Petition for Review, basically asking for a greater sentence than the Bar argued before the Referee, the respondent filed a Motion to Dismiss, Responses, Replies, and Memorandum were filed and said Motion was denied by this honorable Court. The respondent now files this Answer Brief in due course.

STATEMENT OF THE FACTS

The following is brief summary of the facts surrounding each client.

A. Breazeale: This client did in fact provide the respondent with $2,000.00 to "negotiate a settlement", with the provision that the attorney fee to the respondent would be one half of any funds saved by way of settlement. Being a collection attorney, the respondent used different procedures to obtain a settlement from the creditor, one being frustation by the creditior. The respondent did not know that the client was also dealing with the creditor directly. Said funds were never used personally by the respondent and the respondent denies taking funds from his trust account as alleged by the Bar. In order to resolve the matter, and at the suggestion of the Bar, all the $2,000.00 was given to the creditor.

B. Motor Homes: As funds came into the hands of the respondent the creditor was in fact paid. After being contacted by the creditor that the business was sold and that the new management had no knowlege of being paid in full. A review of the respondent's records indicated that no records were kept of funds that were mailed in by debtor. The creditor/client has now been paid in full. The respondent denies any personal use of said funds.

C. Southern Bell: There was a dispute concerning the amount of costs, therefore the funds were not immediately forwarded to the client until an accounting could be had. In the process of closing out the respondent's trust account (due to a law office move from Jacksonville to Ocala), Cash was turned over to the respondent's attorney until the matter was resolved. Upon a written demand by the new attorney for Southern Bell, the amount due to the client was forwarded to the client, back in September of 1991, however said check has not been cashed as of this date (see Exhibit 3).

D. Markham Estate: This was a probate case that was not the respondent's case, however, when a Mr. Lewis visited the law office to learn of why he had not received a "corrected deed" to his property, the respondent relied on the representations of his secretary that the matter would be resolved within thirty (30) days. Said matter was not resolved in the time limit and Mr. Lewis, not a client, filed a complaint with the Bar. The closing was held by a Georgia attorney where the property was located. Upon the attorney responsible for the case returned from vacation the matter was resolved promptly and Mr. Lewis received his deed.

E. Guardian Ad Litem Matter: The respondent filed a motion to terminate supervision of HRS, however an earlier disk had been used, when the Guardian Ad Litem was not a party, and said Guardian Ad Litem was not noticed of the Motion on the Certificate of Service. Upon the respondent being notified by HRS that there was an error, the Amended Motion to Terminate Supervision was filed with notice to the Guardian was filed. The matter was not brought to the Court's attention because the matter was before the Bar, and the respondent had been told, in person, that in three months the matter would end and that custody of the client's minor child would remain with her mother (respondent's client). The HRS attorney filed the complaint with the Bar. There was no deliberate wrong doing by the respondent and the incident was based on oversight.

F. Daymon: This case involved a pawn broker. The firm's client purchased stolen goods. He was advised to accept the State's offer of three years, however, he insisted on trial. At the trial he was found guilty and subsequently sentenced to ten years. Mr. Daymon, at first wanted to file bankruptcy, but when he was charged with the criminal matter, he and his wife was informed that the funds he paid would apply to the criminal matter and no bankruptcy would be filed until the results of the trial were known. Mr. Daymon still owes over $2,000.00

for his trial and no funds were available to file for Bankruptcy. His wife had not come in to discuss the matter. Neither has the respondent received any notice or correspondence from Mr. Daymon concenring the status of his various legal matters. Mr. Daymon was informed by the respondent that he did not have sufficient funds for an appeal and that there were no sufficient grounds for an appeal. Mr. Daymon was referred to the Public Defender's Office, whereupon his sentence remained the same after disposition of his appeal. The decision was affirmed (see Exhibit 4).

G. Bryant: This is an incident where the respondent relied on the services of his secretary to insure that the husband would be served. The case was not worked, as it was difficult for the client to come to the office due to her work schedule, therefore it was dismissed by the Court for lack of prosecution. The secretary did not put the "dismissal date" on the office calander and diverted the correspondence from the Court. Upon the respondent learning of the problem, the Court file was reviewed, a new suit was filed, at respondent's costs, and the dissolution of marriage has been granted and the client continues to use the firm for other legal matters.

H. Williamson: This was a case where the respondent did everthing that was promised. The bankruptcy was filed in sufficient time to stop the foreclosure action. The clients were told, on more than one occassion, not to worry as the matter was under control. Copies of all pleadings was provided to the secretary to forward to the clients, but obviously said secretary, no longer associated with the office, failed to forward said copies. At any rate, the respondent assisted the clients obtain a new attorney. Their house was eventually saved and their bankruptcy completed as their debts have been discharged.

I. Juresh: In this case the client was charged $350.00 to file contempt proceedings against her former husband due to his failure to pay her $10,000.00 for her equity. Contempt proceedings were filed and he obtained an attorney with an offer to deed the house to her in satisfaction of the debt. The respondent informed the client that this was her best offer, and that she should accept the offer. She did not want to accept the offer, but wanted to proceed and have the $10,000.00 reduced to a judgment (another offer that had been suggested). I requested a filing fee to file suit and sheriff's fee of $12.00. She became irate and said the deal was for $350.00. The client made monthly visits to the office and apparently took her anger, concerning her former husband, on the respondent by filing a complaint. The respondent did not tell the client that additional fees were going to be charged, only that costs were needed. She also demanded that suit be filed "by 5:00 P.M. on that date", however she was told that this was not possible. Whereupon she filed a complaint with the Bar. She wrote to the respondent and requested that her files be returned to her. This was done, with a copy of the correspondence provided to the Bar.

SUMMARY OF THE ARGUMENT

The accusations made by the Bar are in conflict with other statements and facts made by the Bar concerning matters before the Court.

The Bar admits that the respondent did not misappropriate funds (first paragraph of the Bar's Initial Brief at page 15), then goes on to mislead this Court by stating that "it appears one of his secretaries was able to steal trust monies...". Donna Miniaci was employed by the firm of Myers and Herrick, P.A. (Lewis O. Myers and Linda Johns Herrick), and she plead guilty to taking office funds, but not any trust funds. (See attached Exhibit 1).

There is no reason to believe that the respondent plans to ever again be a sole practitioner. The recommendations made by the Referee requiring remedial educational courses, along with case-load reports to the Bar, will resolve any problems in this area. Other misstatements and prophesies by Bar Counsel concerning the undersigned attorney are not correct. Counsel for the respondent was born on 16 December 1921 and has been a member of the Florida Bar, in good standing, since 1950. He is in excellant health with no immediate plans to retire. He is Senior counsel of the Law Firm of Lewis O. Myers, with which the respondent is associated.

The Bar also alleges "misuse of trust funds", then admits that no funds were misapplied and in fact were paid to the clients. Respondents loss of important papers while moving and the testimony and statements (Exhibit 2) that cash was retained in a safe place, separately, for the clients until computations could be made as to the correct amounts due, show that the Bar's proposal of two years suspension is excessive. The ruling of the Referee, having heard live testimony of the respondent and hearing presentations by both the respondent's and Bar's counsels to be correct and without an abuse of discretion.

ARGUMENT

THE REFEREE DID NOT ABUSE HIS DISCRETION AND A SIX MONTH SUSPENSION, OR LESS, IS REASONABLE GIVEN THE FACT THAT THE BAR DID NOT PROVE ANY TRUST ACCOUNT IRREGULARITIES, OTHER THAN INADEQUATE BOOKKEEPING.

Even though this honorable Court has the inherent power to determine a particular sentence in a case, even though it differes from what a referee recommends, the circumstances before the Court are different in that it is well settled that "an attorney is the agent for his client, and his acts are the acts of the principal". Beasley v. Girten, 61 So 2nd 179 (Fla 1952).

When Bar counsel represents to the respondent and his attorney that the purpose of the hearing will be only to determine the appropriate sentence, and then have the Board of Governor's approve the Referee's finding, allowing the respondent to continue to practice for a full thirty days after the "Board's meeting", then in fact states before the Referee that the purpose of the hearing is a "disposition hearing" (page 2 of the transcript), then the Bar should be held to its recommended 180 day suspension as represented to the Referee and adopted by the Referee. It is unconscionable to allow the Board of Governors to ask for a two-year suspension at an ex parte "meeting", when that length of sentence was not argued before the Referee, nor was the respondent, or his attorney, advised of the "Board meeting".

Even 1955 law, at 3 FL Jur 372, provides that an attorney has authority to perform all acts in and out of Court necessary or incident to the prosecution and management of the action. Mr. McGunegle should be held to the same standard as other attorneys, especially when his representations are relied upon by the respondent. The respondent did not seek additional legal counsel, with a speciality in Bar matters, after the Referee's Report, based on representations by Bar counsel that "the Referee's Report would end the matter, other than some later paper-work".

Paragraph two (2) of the Bar's Argument (page 17 of the Initial Brief) admits that "taken alone, none of the misconduct alleged here would warrant a long term suspension". The respondent takes the position that the delay in the proceedings, for matters that occured over four years ago, allows the Bar to "create" a pattern alleged here. The few last minute items that came before the Bar, and consoldated herein, were rushed through the system in a "stacking" fashion against the respondent.

Respondent's father, rather than retiring, has since attained the age of seventy-one (71) years of age, and has resumed the "active" practice of law. The practice is now known as Law offices of Lewis O. Myers, with his son, Leo O. Myers, as an associate. Bar counsel is unduly worried about the future, "someday" and respondent's counsel assures the Court that the remedial educational courses recommended by the Referee will eliminate the problem.

There is no testimony or evidene that "Lewis Myers" law practice "...paid andy deficiencies plus interest", as alleged by the Bar. Respondent was not a member of the Law Firm of Myers and Herrick, P.A. when Donna Miniaci embezzeled office funds. The respondent, therefore, had no responsiblity to "investigate how much money Ms. Miniaci stole". Actually the amount she took was determined by Linda Johns Herrick, now an assistant State Attorney, and confirmed by Lewis O. Myers, the other partner (Exhibit 1).

The respondent was given the responsibility for assuming the full burden of his father's active law practice, while still "winding down" his practice in Jacksonville. The respondent eventually did close his practice in Jacksonville, where he had lived for eight years, much to the dismay of some of his clients, four (out of nine) complaints which is before the Court were Jacksonville clients.

One of the remaining five cases involved a case which was not his case, but his father's case (Lewis). The Daymon matter involved a criminal client that was unhappy over his ten year sentence and only

complained that his bankruptcy was not filed and that an appeal was not filed, when there were no funds for costs or fees supplied to the respondent. A third client complained because the respondent requested costs (Juresh). The fourth client complained that her divorce was taking too long. Upon learning of the problem, the respondent overcame the secretarial problems and completed the case. The final recent case involved a dissatisfied HRS attorney that filed a complaint because the respondent had "taken HRS to task" and obtained custody of a minor child for his client.

As the respondent closed his Jacksonville practice and began to close out his trust account, cash was delivered to his father for safekeeping, and when advised by the respondent of the amount due on a particular case, said cash was deposited to the trust account of Lewis O. Myers, where the respondent had no signatory authority, and disbursed as appropriate. The trust funds of Leo O. Myers were being held separate and apart to avoid bank fees and to prevent an commingling of funds. Bank charges in Jacksonville had caused shortages and the respondent was not able to prevent certain shortages due to the bank's practice of service charges and charges for checks, direct to his account. The respondent disputes the Bar audit of his account, and explained to the auditor and Bar counsel why it "appeared that there were shortages", when in fact there were none.

The respondent denies that the trust funds were "misused". The Bar counsel admits that he can not determine the facts through "records", though the respondent assisted in obtaining his bank records by correspondence and cooperated in responding to the Bar's questions.

The trust money did not "simply vanish", but was kept safely separated from all other funds until disbursed as set forth above. (see Exhibit 2)

Respondent denies that Bar counsel "misspoke" during his presentation, most of which was made from notes. The Referee did not "choose to recommend to this Court the shorter suspension of 180 days", but instead chose to recommend the longer suspension of 180 days as the respondent's counsel had requested no suspension, or 90 days at the most.

As stated earlier, the Board of Governor's only considered the Bar counsel's view and presentation. The respondent, nor his counsel were not present to present the other position. The circumstances existing now, for the respondent, are much different from those that existed back in Jacksonville in 1989.

Respondent denies that there is a need for a two year suspension in this case. The statement that the Ocala area has an adequate supply of attorneys is untrue. One partner of the Law Firm of Myers and Stancil, became a Judge, and another partner of the Law Firm of Myers and Herrick, became an assistant state attorney. The respondent is the only lawyer son of Lewis O. Myers and able to join the firm and service the long standing clients. This present firm has been in the same location for over twenty-five (25) years and has a distinctive practice. It serves a segment of the population not adequately served by other firms (See pages 55 & 56 of the Transcript).

The respondent recently married, has two children, purchased a home, and has taken an active participation in various organizations, such as the Elks, Lions Club, and the American Legion. He has attended The First Presbyterian Church since child-hood and participates in other community activites. No complaints have been filed by clients, or others, for an extended period of time.

A short period of continued supervision, with remedial educational courses would permit the respondent to continue to be of service to the clients of the firm and to the Florida Bar. Respondent's counsel hereby continues to urge a shorter period of suspension, if any. It is unnecessary under the present conditions.

The Bar alleges in its argument that there are many trust account irregularities, however when the facts are known, there are only three cases, out of a total of nine cases, since 1989, that involve the trust account. These three cases involve the same set of circumstances of when the respondent was in the process of closing his Jacksonville practice and moving to Ocala to practice with his father. It was during the time the trust account was being closed and funds transferred to another lawyer, the respondent's father for safe keeping.

The respondent's realistic perception was that priority should be given to the firm's current clients with current deadlines, however that resulted in a lack of attention to the Bar complaints, thereby causing the instant case before the Court (see page 124, lines 22 through 25 of the transcript).

Rule 3.7-9 provides that at any stage of the proceedings respondent may negotiate an agreed-upon period of discipline. The Staff counsel for the Bar referred the respondent's calls to the Bar counsel, who refused to discuss any type of settlement or agreed-upon period of discipline in order to prevent an appeal. The Bar counsel stated that "it was all up to the Court's now".

Should the Court see fit to rule on the matter as presented, then the Court should consider the Gross case, The Florida Bar v. Gross, 610 442. (Fla. 1992), whereby it was held that a "Referee's findings in bar disciplinary proceeding enjoys the same presumption of correctness as judgment trier of fact in civil proceeding."

It is further argued that there was competent and substantial evidence to support the Referee's finding as stated in his Report. The Bar has not demonstrated an abuse of discretion by the Referee, and the cases cited by the Bar do not apply to the case before the Court for the following reasons.

The Aaron case cited by the Bar (page 18 of the Bar's Initial Brief) does not apply in the instant case because Mr. Aaron had been publicaly reprimanded for trust account violations and had, on this second occassion, taken $150,000.00 from an estate and deposited the same in his personal account and savings account. And the Bar had records to show that some of the funds were used for personal use. [In the instant case before the Court, the respondent has no prior disciplinary record, nor did he use trust money for personal use.]

The Abrams case (page 17 of the Bar's Initial Brief) does state that cumulative misconduct warrants increased levels of discipline involved the Court's ruling that a one year (1) suspension was sufficient. [In the instant case before the Court, the respondent is not guilty of representing clients with adverse positions, nor is the respondent guilty of a material misrepesentation to a Court of Law].

The McShirley case (page 21 of the Bar's Initial Brief) does not apply because in that case there was a commingling of funds and trust funds were shown to been used for personal reasons. There was a three year suspension. [In the instant case before the Court, the respondent did not commingle funds, and in fact kept them separate and apart from his own funds, and did not use said funds for personal reasons].

The Rosen case (page 21 of the Bar's Initial Brief) does not apply in the case before the Court because Rosen had been suspended from the practice of law for a felony conviction for grand theft. She had been reinstated, but was serving probation when there was other deliberate trust account violations. The Court, however, determined that a two year suspension was warranted. [None of the conduct of the respondent, in the instant case before the Court, amounts to the type of conduct cited in the Rosen case, however, the Bar continues to recommend the same two year suspension for the respondent].

In the Ward case (cited at page 22 of the Bar's Initial Brief) the wrong doing involved a deliberate act of Mr. Ward taking funds from his firms operating account to pay his personal bills and it warranted only a one year suspension. In that case the Court made a distinction concerning a theft from someone not a client is not as severe as theft from a client. [In the instant case before the Court, there is no allegation, nor any proof, nor any admission by the respondent, that there was any theft of funds from anyone. It is however admitted that there were book-keeping problems, complicated by a move from one city to another].

In the Wolf case (cited at page 23 of the Bar's Initial Brief) the attorney deliberately filed a false report with the Court to cover up her trust account violations amounting to use of her trust funds for personal reasons. The matter had happened over six years ago and she was suspended for two years. [In the instant case before the Court, there was no deliberate wrong doing by the respondent. There were no incorrect reports involving trust funds filed with a Court of Law. The instant case and the Wolf case are alike only in that the alleged wrong doing both occured more than four years ago, funds were returned to the clients, and the referee basically recommened a two year suspension.

In the Hartman case (cited at page 25 of the Bar's Initial Brief) the wrong doing involved the attorneys participation in usury between clients, and deliberate misuse of funds, even though this was mitigated by emotional instability and substance addition. He was given a two year period of suspension. [In the instant case before the Court the conduct of the respondent does not rise to the misconduct found in the Hartman case].

In the Padgett case (citied at page 26 of the Bar's Initial Brief) the attorney admitted to using his trust account for personal and business expenses. There was obvious commingling of funds. He also possessed contraband, but was only suspended for six months. [In the instant case before the Court the respondent did not use the funds for personal or business use and there was no commingling of funds. There are no other crimes that the respondent is guilty of and in fact has no criminal record. Even a six months suspension of the respondent, as recommended by the Referee, is excessive when matched with the Padgett case].

In the Willis case (cited at page 27 of the Bar's Initial Brief) the attorney took funds that was left with him to pay fines and costs for specific clients. He used the funds for his own use and did not pay the Court fines, resulting in legal complications for his clients. He was suspended for three years. [Again, in the instant case before the Court, the conduct of the respondent does not even compare to the misconduct found in the Willis case].

In the Whitlock case (cited at page 28 of the Bar's Initial Brief) the attorney transferred funds to his general office account, there was a commingling of funds and he paid his payroll out of his trust account. There was a suspension of three years. [In the instant case before the Court, the respondent did not transfer any funds to his operating account, he did not commingle the funds, and he did not pay personal or business bills from said funds. The funds from a closed trust account were kept separate and apart with someone that could be trusted. The Bar, with all its experience and resources, have not proven otherwise, even though the Bar has handled some of the matters, involving the respondent, since 1990].

In the Breed case (also cited at page 29 of the Bar's Initial Brief) the attorney was found to be involved in a check-kiting scheme, misuse of client's funds and involved in commingling of funds. He was given a two-year suspension. [In the instant case before the Court, the respondent was not involved in check-kiting, as that usually involves more than one bank, he was not found to have misused any client's funds, nor was there any commingling of funds. The two year suspension being sought by the Bar is excessive when compared to the activity of the respondent. His lack of attention to his books, his large case load, his closing of one practice and the assumption of another practice in a city of at least 100 miles away does not warrant a suspension of two years as suggested by the Bar].

The Simring case (cited at page 30 of the Bar's Initial Brief) appears to have been dismissed on 28 January 1993 as found in the Florida Decisions Without Published Opinions, page 11, of West's Florida Cases, dated 1 April 1993.

CONCLUSION

Wherefore, the respondent prays this honorable Court will uphold the Referee's finding of discipline for a period of suspension of six (6) months, and as argued by the Florida Bar at the dispositional hearing, or consider a lesser time of suspension, such as ninty (90) days, with a period of probation to follow.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing has been furnished by mail to the Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927, to John F. Harkness, Jr, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, and to David G. McGunegle, Bar Counsel, The Florida Bar, 880 North Orange Avenue Suite 200, Orlando, Florida 32801, this 24 day of May, 1993.

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