IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

LEO O. MYERS,

Respondent.
_____/

Case No. 79,472; 79,557; 80,342; 80,503;
[TFB Case Nos. 90-01,134 (04C); 90-01,145 (04C); 92-30,123 (05A); 92-30,617 (05A); 91-01,279 (05A); 92-31,214 (05A)]
and
92-31,200 (05A); 92-31,469 (05A); 92-31,682 (05A)

COMPLAINANT'S AMENDED REPLY BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "the bar."

The transcript of the final hearing dated October 14, 1992, shall be referred to as "T."

The report of referee dated December 30, 1992, shall be referred to as "RR."

ARGUMENT

A TWO YEAR PERIOD OF SUSPENSION IS APPROPRIATE GIVEN THE NUMEROUS DISCIPLINARY VIOLATIONS, MANY OF WHICH INCLUDED TRUST ACCOUNT IRREGULARITIES.

At the outset, the bar would note that the bar counsel who handled this case through the filing of the initial brief, David G. McGunegle, had no input with respect to this reply brief due to his hospitalization.

The bar takes exception to the respondent's characterization of the manner in which the three cases pending against him at the grievance committee were included so as to be disposed of by the referee at the final hearing. These were bar case numbers 92-31,200 (05A), 92-31,469 (05A) and 92-31,682 (05A). It was the respondent who expressed a desire to waive probable cause so that those cases could be consolidated with the ones being considered by the referee and therefore disposed of more quickly than would otherwise be possible (T.p.110). These cases were not "rushed through the system in a stacking fashion." They were included at the respondent's request and for his convenience. Further, the remaining bar cases were processed in a timely manner. As sometimes happens, the bar continued receiving grievances about the respondent during the time the first case was being processed and, as new files were opened, the matters were combined.

The respondent does not appear to be familiar with the manner in which the board of governors operates. Meetings of the Board of Governors of The Florida Bar are internal bar functions

which are never open to respondents. These meetings are not trials or hearings. Rather, the board merely reviews the reports of referee and the facts of the cases appearing on its agenda then votes on whether to seek an appeal of any particular report. Bar counsel at all times is subject to the direction of the board. See Rule of Discipline 3-7.5(e). In this case, bar counsel's recommendation to the referee as to discipline was not upheld by the board and bar counsel was directed to seek an appeal. Once the matter has proceeded beyond the issuance of the referee's report, jurisdiction rests with this court and bar counsel is without the authority to entertain any further "settlement negotiations" put forth by a respondent. The appropriate recourse for a respondent at that point is an appeal to this court under Rule of Discipline 3-7.7.

Essentially, the respondent entered an unconditional guilty plea only days before the scheduled final hearing. The respondent and his counsel met with bar counsel at the bar's Orlando office on October 12, 1992, and orally advised that the respondent would not contest the charges brought by the bar so as to prevent a trial and thus resolve the pending matters quickly. This was memorialized by the repondent's letter of October 12, 1992, addressed to bar counsel and placed into evidence at the final hearing before the referee on October 14, 1992, as joint exhibit 1. Under Rule of Discipline 3-7.6(m)(3), an unconditional guilty plea shall not preclude review as to the

disciplinary measures imposed. Further, Rule 3-7.9(e) provides that bar counsel has no authority to bind the board and that all consent judgments are subject to board approval. Thus, The Florida Bar has acted fully within the rules in this case.

The respondent is incorrect in his statement that the bar admitted no trust funds were misapplied. In fact, the bar stated on page 21 of its initial brief that although there was no clear and convincing evidence of intentional misappropriation, there were persistent shortages in the respondent's trust account. See the bar's two count complaint filed in case number 79,472 attached as the appendix, and T.pp.59; and 80. Such shortages, which the respondent maintains resulted from the debiting of bank charges, indicated that client funds were being misused. Apparently, client funds on deposit for specific purposes were being used to pay bank charges. The respondent could have avoided this misapplication of trust funds by either moving the account to a different bank which did not impose monthly charges for attorney trust accounts or by maintaining sufficient funds of his own on deposit to fully cover the monthly charges, assuming of course the funds were accounted for in the same manner as any other client's and were of a nominal amount.

Although the respondent asserts in his brief that his father deposited the respondent's trust funds to his own trust account,

this statement is somewhat misleading. The respondent testified at the final hearing that when he closed his trust account in Jacksonville, he withdrew the funds in the form of cash and sent them to his father (T.pp.69-70; and 106). Although the respondent initially stated his father put the funds in an account (T.p.71), under further questioning by the referee he revealed the trust funds were kept in his father's money belt at home (T.p.72). According to Lewis Myers, when the respondent told him how much money was owed to an individual, Mr. Myers would remove that amount of cash from the money belt, deposit it to his own trust account, then disburse the money (T.pp.130-131). Therefore, for the majority of the time in question, the trust funds were not being held in a bank account but rather were on deposit in a money belt kept in a private residence.

With respect to secretary Donna Miniaci's embezzlement, the respondent's testimony during the final hearing concerning the subject was in the context of discussing his trust account problems. There was absolutely no statement made to the effect that Ms. Miniaci stole only office funds from Lewis Myers (T.pp.81-82). In fact, the respondent's testimony appears to contradict his position in his answer brief that Ms. Miniaci took only money belonging to Myers and Herrick, P.A., Lewis Myer's law firm. At pages 81 and 82 of the transcript of the final hearing,

the respondent testified as follows:

> It is my position that money came into [t]he office was misappropriated by Donna Mannuchi (sic). She was found guilty of embezzlement and in fact was arrested, and that's a matter of public record in Marion County. [S]he repaying funds to dad at fifty dollars per month on an irregular basis for money she took from him.
>
> I never pursued to know exactly what was taken form [sic] me, but it's my position that the money in fact came into the office and that she misappropriated those funds. Out of our office funds, from new earnings that I had made form [sic] practicing law, we've reimbursed Weber -- I mean, Motor Homes of America and paid them six thousand dollars, I believe, and that client has been made whole.

Further, the document attached by the respondent to his brief as exhibit 1 does nothing to refute the bar's argument. It only shows that Ms. Miniaci is on probation and was ordered to make restitution in the amount of $18,778.25.

The respondent cannot now restate the facts differently from the referee's findings because he stipulated to the facts contained in the bar's complaints as being true (RR.p.1; T.p.141; joint exhibit 1). The facts of the report of referee and the rule violations found clearly show trust account recordkeeping irregularities. The bar stands on its previous argument that the case law and standards support a two year suspension. Findings of fact by the referee shall be upheld unless they are clearly erroneous and not supported by the evidence because they enjoy the same presumption of correctness as the judgment of trier of fact in a civil proceeding. The Florida Bar v. Gross, 610 So. 2d 442 (Fla. 1992). This is all the more true where a referee's

findings of fact are based upon allegations contained in the bar's complaint to which the respondent has stipulated. Many of his mitigating arguments were presented to the referee, who considered them in rendering his final disciplinary recommendation. For example, the respondent advised the referee that his practice served those who could not qualify for legal aid and who could not afford a private attorney (T.p.55). The areas of the transcript where he provided mitigation concerning the allegations of the bar's complaints are too numerous to recite here. Suffice it to say, the referee entertained considerable testimony from the respondent and argument from his counsel concerning mitigation.

For the purpose of clarity, the bar would note that the case of The Florida Bar v. Simring, 18 Fla. L. Weekly S73 (Fla. Jan. 21, 1993), cited by the bar in its initial brief, may now be found at 612 So. 2d 561. The case to which the respondent refers in his answer brief was a different matter involving Mr. Simring.

According to the respondent, he should receive nothing more than a six month suspension because, in part, anything longer would deprive the community of the services of a qualified attorney. A review of The Florida Bar Journal directory issue dated September, 1992, shows the Ocala area has approximately 273

attorneys, excluding the respondent. It also has a legal aid office, Withlacoochee Area Legal Services, Inc. It is doubtful that the number of practicing attorneys in Ocala is going to decline substantially in the near future. Therefore, the respondent's argument that by being suspended a certain segment of the population would suffer is questionable.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact and recommendations as to guilt but review his recommendation that the respondent be suspended from the practice of law for a period of six months with conditions and instead enter an order directing that the respondent be suspended from the practice of law for a period of not less than two years and thereafter be placed on period of probation consistent with the referee's recommendation and assess against the respondent the cost of these proceedings which now total $7,097.68.

Respectfully submitted,

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By: Jan Weckel #381586
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original and seven copies of the foregoing Amended Reply Brief and Appendix have been furnished by First Class mail to Mr. Sid J. White, Clerk of the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing was furnished by First Class mail to the respondent's counsel, Lewis O. Myers, Jr., 403 N.W. 2nd Street, Ocala, Florida, 32670; and a copy of the foregoing was furnished by First Class mail to Mr. John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 9th day of June, 1993.

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