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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

WILLIAM C. NESBITT,

Respondent.

______/

Case No. 80,046

TFB File No. 92-00852-04C

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, William C. Nesbitt, will be referred to as Respondent or Mr. Nesbitt throughout this Brief. The Appellee, The Florida Bar, will be referred to as such or as The Bar.

References to the Report of Referee shall be by the symbol "RR" followed by the appropriate page number.

References to the final hearing before the Referee on October 30, 1992, shall be by the symbol "T" followed by the appropriate page number.

References to exhibits submitted into evidence at the final hearing shall be as follows: the symbol "BE" followed by the exhibit number for Bar exhibits; the symbol "RE" followed by the exhibit number for Respondent's exhibits.

References to Respondent's Brief shall be as follows: "RB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The following facts are an accurate depiction of the facts in this case.

The facts as set forth in the Complaint filed by The Florida Bar against the Respondent and found in the record were not disputed by the Respondent. (T, p. 6-7)

An audit was conducted by The Florida Bar auditor of the Respondent's trust account in 1991-1992. (BE 1) The auditor found that during 1989, the Respondent failed to maintain a separate cash receipts and disbursements journal; failed to include reasons for disbursements and receipts column in the cash receipts and disbursements journal; failed to include a ledger card for 1989; failed to include records identifying some of the clients or matters concerning funds received, disbursed, or transferred; failed to include check numbers for all disbursements; failed to include the reasons for which trust funds were received, disbursed, or transferred; disbursed one hundred dollars ($100.00) in uncollected funds; failed to diligently handle the service charges on the trust account and had shortages in the monies in his trust account during 1989. (BE 1)

The Respondent also failed to pay his Florida Bar dues and has been suspended from the practice of law since 1990. The Respondent also is delinquent in complying with the Continuing Legal Education requirements. Due to both of these, the

Respondent has been prohibited from practicing law in the state of Florida since 1989. (BE 2)

Respondent was dilatory in his responses to requests by The Florida Bar regarding the audit of his trust accounts. The original records provided by Respondent to The Florida Bar were incomplete. (T, p. 44; BE 4) In March, 1991, Bar counsel requested the missing documents from Respondent's counsel. (T, p. 44; BE 4) The Respondent did not forward the requested documents. Further, requests were made of Respondent to submit missing materials on May 13, 1991; June 20, 1991; and October 7, 1991. (T, pps. 44, 45; BE 4) The only response received from the Respondent was a facsimile sent April 7, 1992, three days before the grievance committee hearing. The Respondent never provided the missing records requested by The Florida Bar's auditor. (BE 1)

SUMMARY OF THE ARGUMENT

The referee's recommendation that the Respondent should be suspended from the practice of law for a period of 91 days, that he must prove his fitness to practice at a hearing prior to reinstatement, and pay costs to The Florida Bar in the amount of $1,759.57 is appropriate. (RR, p. 4)

The Respondent violated the Rules Regulating Trust Accounts, has been delinquent in paying membership dues to The Florida Bar, has failed to comply with The Florida Bar's Continuing Legal Education requirements, was uncooperative with The Florida Bar, has demonstrated a pattern of misconduct, and has had substantial experience in the practice of law.

The laundry list of violations committed by the Respondent, coupled with aggravating factors, justifies the imposition of a 91-day suspension.

ARGUMENT

I. The imposition of a 91-day suspension is consistent with the purposes of discipline as set forth in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970).

In the case of The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), the Supreme Court of Florida enumerated the three purposes to be considered when imposing discipline for an ethical infraction. "First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations." 233 So. 2d at 132.

a) The first prong of this test has in part been conceded by the Respondent when he states that the proposed discipline does protect the public. (RB, p. 6) The imposition of this discipline is also fair to society and does not deny the public the services of a qualified lawyer. The recommended discipline is not unduly harsh under the circumstances. In similarly situated circumstances, this court has imposed discipline that was the same or harsher than that which is recommended by the referee. In The Florida Bar v. Weiss, 586

So. 2d 1051 (Fla. 1991), this court held that gross negligence in the handling of client trust accounts through failure to properly supervise accountant's work warrants a six-month suspension from the practice of law. In Weiss, there was no client injury nor complaint, the Respondent fully cooperated with The Bar, and there were no prior instances of misconduct in 28 years of practice. The recommended discipline in this case is more lenient than that imposed in Weiss and the Respondent cannot cite to the mitigation evidenced in Weiss.

Additionally, this discipline does not deny the public a qualified attorney in that it protects the public and guarantees that the Respondent will not be reinstated to practice law in Florida until the court determines he is competent, rehabilitated, and reformed. The Respondent argues and speculates that a suspension in Florida will automatically result in a suspension in Georgia, thereby depriving the citizens of Georgia a qualified lawyer. (RB, pps. 12-15) The Florida Bar's position is that this is an inappropriate reason to reduce Respondent's discipline in Florida. In The Florida Bar v. Sickmen, 523 So. 2d 154 (Fla. 1988) and The Florida Bar v. Sanders, 580 So. 2d 594 (Fla. 1991), this court held that it was not bound to the decisions concerning the imposition of discipline in another state when considering discipline for a Florida lawyer. Likewise, this court should not be influenced by potential or speculative discipline in another state when imposing discipline in a case where Respondent has flagrantly disregarded his responsibility with respect to the practice of

law in Florida, has grossly mismanaged a trust account, and then left the jurisdiction.

b) The judgment is fair to the Respondent in that it is sufficient to punish a breach of ethics and at the same time encourages reformation and rehabilitation. Although the Respondent has been technically suspended from the practice of law in Florida for over three years, the imposition of this discipline requires that a hearing concerning the Respondent's rehabilitation and fitness to practice be held prior to his reinstatement. The stigma of being suspended is sufficient to punish and the impending hearing will provide the impetus for the Respondent to take LOMAS and any other appropriate and rehabilitative action to reform his skills and become a diligent as well as competent lawyer. Once again, Respondent argues that a "défacto" suspension will prohibit reformation. (RB, p. 16) The Florida Bar maintains the same position concerning this contention, i.e., this is an inappropriate forum in which to evaluate and take into consideration the Respondent's status with the Georgia bar.

c) The judgment is severe enough to deter others who might be prone or tempted to become involved in like violations. The standards set forth in The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991), states that a public reprimand should be reserved for isolated instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent. The court suspended Rogers for 60 days, explaining that his "misconduct was not an isolated

lapse in judgment, but, instead, involved misconduct occurring from 1983 to 1986. There was a negative cash flow in a partnership in which Rogers contributed his legal and management services as his investment." Respondent's misconduct occurred during 1989. He had shortages in nearly every month ranging from $60.96 to $575.98. (BE 1) Further, Respondent's misconduct that arose in Florida Supreme Court Case No. 76,707 occurred during this same year, i.e., 1989. This prior case involved a two-count complaint in which the Respondent was found guilty of misconduct in which he acted without reasonable diligence and promptness in representing a client; that he did not keep a client reasonably informed; and, upon termination of representation, he failed to take the reasonably practicable steps to protect a client's interest. (BE 3) Therefore, this is not just a mere lapse in judgment or an isolated incident, but a pattern of misconduct. In implementing discipline in The Florida Bar v. Burke, 578 So. 2d 1099, 1102 (Fla. 1991), this court acknowledged that the incident being considered was brought about by the same negligence and prejudicial conduct for which Burke was previously disciplined. This court stated that "had this action been before us simultaneously with that previous disciplinary action, the penalty formerly imposed would more likely have been six months rather than 90 days because we would have been considering more than a single incident." The court in Burke imposed a 91-day suspension. Similarly, the Respondent's discipline should be 91 days under the same

rationale. The deterrent to others lies in the realization that patterns of misconduct or cumulative misconduct warrants a more severe discipline. The Florida Bar v. Vernell, 374 So. 2d 473, 476 (Fla. 1979); The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1983)

II. Gross negligence in the handling of client trust account warrants a 91-day suspension.

The Black's law dictionary defines gross negligence as "the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It is materially more want of care than constitutes simple inadvertence." According to Section 4.41(c) of the Standards for Imposing Lawyer Sanctions, suspension is appropriate when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Further, in Section 4.12, a suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

In The Florida Bar v. Neely, 488 So. 2d 535, 536 (Fla. 1986), gross negligence was found where the record established numerous accounting errors in respondent's trust account and a failure by Respondent to properly supervise this account. In The Florida Bar v. Weiss, 586 So. 2d 1051, 1054 (Fla. 1991), the court made a finding that the record supported a finding that the Respondent was grossly negligent in his handling of

client trust accounts by failing to properly supervise his accountant's work. Further, in The Florida Bar v. Burke, 578 So. 2d 1099, 1102 (Fla. 1991), the court found that the Respondent's misconduct rose to the level of gross negligence and that the appropriate discipline is a 91-day suspension. Burke was found guilty of violating trust accounting procedures by mishandling monies in an estate account. Although the referee does not explicitly state the Respondent's misconduct rises to the level of gross negligence in the handling of his trust account during 1989, the facts support this finding. The Respondent's records were missing at least one ledger card and all the information required by Rule 5-1.2(b)(5) and (6), including, but not limited to, the reasons for disbursements and receipts; (RE 1); one hundred dollars ($100.00) was disbursed against uncollected funds; and the Respondent had shortages in his trust account every month in 1989 ranging from $60.96 to $575.98. As in the previously cited cases, this amounts to a pattern of neglect and gross negligence in the handling of trust accounts.

The Respondent has cited many cases which imposed a public reprimand and/or probation to support his contention that this would be the appropriate discipline. Each of his cases is distinguishable from the case at bar and imposition of a more lenient discipline is not supported. Respondent cites The Florida Bar v. Gentry, 475 So. 2d 678 (Fla. 1985), in which Gentry received a public reprimand and an 18-month probation for misconduct involving an excessive fee and trust

violations. It is apparent that there are factual similarities between the two cases but distinctions arise concerning surrounding circumstances and mitigation.

In Gentry, the Respondent had received a six-month suspension just over one year before this opinion was decided by the court. But it must be pointed out that the client in the prior matter is in part involved in this later case coupled with some new allegations including the mishandling of the trust fund. This previous discipline is more stringent than was previously imposed on Respondent or in The Florida Bar v. Burke, 578 So. 2d 1099 (Fla. 1991). Further, the Referee in the second Gentry case required as a special condition of probation that the respondent "submit to The Florida Bar a plan for treatment of his alcoholism and continue in his treatment under that plan." 475 So. 2d at 681. It is obvious that the referee found in mitigation that the respondent was an abuser of alcohol. This same mitigating circumstance is absent from the case at bar.

The Respondent's reliance on The Florida Bar v. Borja, 554 So. 2d 514 (Fla. 1990), is weak at best, considering that Borja had no prior discipline, no cumulative misconduct, and he had instituted remedial procedures to guard against future violations. The Respondent, in the case at bar, committed two other breaches of ethics in which he received a public reprimand involving negligent handling of legal matters for clients.

The case of The Florida Bar v. Pino, 526 So. 2d 67 (Fla. 1988), does not involve similar conduct as it does not reflect gross negligence in the handling of a trust account over a period of one year. Therefore, this case does not support Respondent's proposition.

The Respondent's reliance on The Florida Bar v. Thomson, 429 So. 2d 2, 3 (Fla. 1983), is misplaced. The court expressly stated that "[W]ere this a recent event, we would likely suspend the Respondent. Because of the unusual and inexplicable time in disposing of this matter, however, we will restrict the punishment to a public reprimand . . ." Therefore, it is not persuasive that Thomson received a public reprimand for trust violations including forty-three checks returned for lack of sufficient funds. The imposition of a 91-day suspension is consistent with the wishes of the court in Thomson. Similarly, The Florida Bar v. Bornes, 428 So. 2d 648, 649 (Fla. 1983), is distinguishable from Respondent's circumstances in that Bornes was "depositing . . . payroll money in his trust account . . . [these] were not personal funds but were due and payable to the federal government. This procedure was adopted upon the advice of a certified public accountant." Unlike Respondent, Bornes consulted an accountant and was not grossly negligent in handling client funds.

III. The Supreme Court deals more severely with cumulative misconduct than with isolated misconduct; therefore, the discipline of 91-day suspension is justified.

In The Florida Bar v. Vernell, 374 So. 2d 473, 476 (Fla. 1979), this court found it to be appropriate to increase Vernell's discipline to a suspension in light of his two prior breaches of professional discipline and his cumulative misconduct in the case at bar. The court, in The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1983), stated that, in addition, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct. It is The Florida Bar's position that Respondent's misconduct rises to the level of cumulative misconduct of a similar nature. The trust violations as well as the previous violations all occurred during 1989 (BE 3) (the last year that the Respondent practiced in Florida was 1990) (BE 2) and all involve grossly negligent handling of legal matters. In the case at bar, it was mishandling of trust account records and in the previously decided case, it was mishandling of clients' cases. Increased discipline under these circumstances is evidenced in The Florida Bar v. Welch, 427 So. 2d 720, 721 (Fla. 1983) (imposing a three-month suspension in a failure to maintain trust account procedures because Respondent had been disciplined on three prior occasions); The Florida Bar v. Neely, 488 So. 2d 535, 536 (Fla. 1986) (holding that although the discipline for a violation of this kind ordinarily would be a public reprimand and probation with supervision of trust

account records, we find that, because Respondent has been disciplined on two prior occasions, a more severe discipline is appropriate in this proceeding ... In our opinion, a 60-day suspension and a two-year period of probation is the appropriate discipline); The Florida Bar v. Burke, 578 So.2d 1099, 1102 (Fla. 1991) (holding that discipline that arose from another case in which previous action was taken warrants a more stringent penalty than had the court been considering a single incident). In light of the foregoing, it is The Florida Bar's position that the discipline imposed is appropriate.

IV. The aggravating circumstances in the case at bar outweigh the mitigating circumstances that would support the Respondent's request for more lenient discipline.

Although the referee did not specifically enumerate the attending and mitigating factors in his report, these were fully argued at the hearing. The aggravating circumstances in this case more than justify the imposition of a 91-day suspension in this case. The first aggravating circumstance that has been previously discussed is the cumulative or pattern of misconduct involved. (R-8) Each of the violations concerned gross negligence of legal matters. Further, the Respondent has been prohibited from practicing law in the state of Florida since 1990 for failure to pay Bar dues and comply with the Continuing Legal Education requirements. (R-9) This lack of regard during the course of the last three years is evidence

concerning the Respondent's gross negligence in the handling of matters concerning The Florida Bar. Prior to this, his Bar dues were paid late. (R-21) Further, although Respondent has stated he has complied with the Continuing Legal Education requirements, he has failed to report the hours to The Florida Bar. (R-23) The Respondent, also, was uncooperative with The Florida Bar in that he failed to respond to The Florida Bar's requests for information (R-43-46); failed to respond to the Complaint (R-25); and failed to respond to the Request for Admissions (R-25). It was not until October 30, 1992, at the referee hearing, that the Respondent became concerned about his status with The Florida Bar. It was not until the Respondent thought discipline in our state would potentially and speculatively have an impact on the Respondent's license in another state that he actively participated in the proceedings. Further, the Respondent has been licensed to practice law in the state of Florida since 1981. (BE 2) He is not a novice to the practice of law. The Respondent has argued that he did not intentionally take any money from clients. (R-11) The Florida Bar agrees and has not accused Respondent of stealing. If that had been the case, The Florida Bar's position would have been that disbarment was the appropriate discipline.

The Respondent has cited numerous cases involving differing trust account violations in which a public reprimand and/or probation had been imposed. The Florida Bar concedes that if the Respondent had no cumulative misconduct and no

other aggravating circumstances existed, probation may have been the appropriate discipline. But, the Respondent has failed to balance the presence of aggravation and/or lack of mitigation on his part, which distinguishes the facts at bar from those in the enumerated cases. Absent from The Florida Bar v. Staley, 457 So. 2d 489 (Fla. 1984); The Florida Bar v. Suprina, 468 So. 2d 988 (Fla. 1985); The Florida Bar v. Diaz-Silveira, 477 So. 2d 562 (Fla. 1985); The Florida Bar v. Norton, 510 So. 2d 290 (Fla. 1987); The Florida Bar v. Lumley, 517 So. 2d 13 (Fla. 1987); The Florida Bar v. Fields, 520 So. 2d 272 (Fla. 1988); The Florida Bar v. Johnson, 526 So. 2d 53 (Fla. 1988); The Florida Bar v. Aaron, 529 So. 2d 685 (Fla. 1988); and The Florida Bar v. Bell, 536 So. 2d 974 (Fla. 1988) are the aggravating circumstances present in the case at bar, i.e., the cumulative misconduct, the suspension in excess of three years with The Florida Bar due to delinquency in Bar dues and Continuing Legal Education requirements, and the uncooperativeness with The Florida Bar concerning requests for information as well as a lack of response to the Motion to Deem Matters Admitted and to the Complaint. Further, as previously distinguished, there is no mitigation regarding alcoholism or other dependency as is evidenced in The Florida Bar v. Gentry, 475 So. 2d 678 (Fla. 1985). The mitigation considered, which is lacking in the case at bar, in The Florida Bar v. Diaz-Silveira, 477 So. 2d 562 (Fla. 1985), is the overwhelming response from well-respected members of the community that came forward to testify on behalf of Diaz-Silveira regarding his

truth, veracity, and community activities. Further, the referee found that Mr. Diaz-Silveira was remorseful and fully cooperated with The Florida Bar. Although these findings of mitigation are not found within the case, they are public record and were the basis for the consent judgment entered into between The Florida Bar and Mr. Diaz-Silveira and accepted by this court. Similarly, the referee's report in The Florida Bar v. Norton, 510 So. 2d 988 (Fla. 1987) referenced in mitigation that Mr. Norton had no prior discipline and took action to correct the deficient trust accounts.

The Respondent does argue that he balanced his check book every month and it balanced and that this is a ramification of poor bookkeeping. (R-13) It is obvious that the Respondent made no effort to substantially comply with the trust accounting procedures as set forth in the Rules Regulating The Florida Bar. The audit establishes that the Respondent's trust account ran shortages up to $575.98 every month and that there was no documentation in the journal regarding receipts and disbursements. (BE 1)

The Respondent also contends that his financial misfortunes are grounds to discount his failure to pay Bar dues and comply with the Continuing Legal Education requirements. (R-21) Although financial distress can be considered in mitigation, it should not be in this instance. The Respondent made no effort to go on inactive status or to respond to the allegations of delinquency in any matter. Financial distress is not sufficient to explain his failure to respond to The

Florida Bar regarding dues payments, compliance with continuing legal education requirements, and the complaint in this matter.

The Respondent also alleges that no client filed a complaint with The Florida Bar nor were any clients injured due to his misconduct (RB, p. 10) and that he is no longer a sole practitioner. (R-35) According to The Florida Bar v. Davis, 577 So. 2d 1314 (Fla. 1991), in which Davis argued in mitigation that his client suffered no financial loss, that he announced his retirement from private practice and that he was found not guilty on prior disciplinary matters, the court did not reduce the discipline and imposed a 90-day suspension followed by two years probation for failure to maintain trust account records and failure to promptly render a full accounting.

CONCLUSION

Respondent and The Florida Bar have had the opportunity to plead their respective sides of this case to the Referee. The Referee, having heard the testimony, judging the credibility of the witnesses, and having reviewed the evidence, has made his recommendations as to guilt of the Respondent and the discipline to be imposed.

The Respondent does not argue the validity of the Referee's findings of fact or findings of guilt. What Respondent argues is that the discipline imposed is too harsh and requests the imposition of a more lenient discipline.

The recommended discipline is appropriate and is supported by the Standards for Imposing Lawyer Discipline. This proposed discipline is consistent with the case law in that gross negligence coupled with the aggravating circumstances warrants a 91-day suspension.

The purposes of discipline will be met by imposition of the recommended discipline in this case. Respondent's actions in this case establishes a clear need to protect the public from possible similar actions by Respondent in the future should his financial position deteriorate. The proposed discipline is fair to Respondent in that it will encourage reformation and rehabilitation by allowing him the opportunity to develop the skills necessary to become competent and diligent. Finally, accepting this recommended discipline will

be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Referee's recommendation in this case should be accepted.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. 80,046; TFB File No. 92-00852-04C, has been forwarded by certified mail # P360-179-631, return receipt requested to WILLIAM C. NESBITT, Respondent, at his record Bar address of Post Office Box 900175, Atlanta, Georgia 30329, on this 19th day of February, 1993.

Alisa Smith
ALISA M. SMITH, Bar Counsel