

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Petitioner,

v.

Supreme Court Case
No. SC17-782

The Florida Bar File
No. 2017-30,371 (07B) (CES)

DENNIS L. HORTON,

Respondent.

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-5.2, Rules of Discipline, the following proceedings occurred:

Respondent was emergency suspended by order of the Supreme Court of Florida dated May 3, 2017, with an effective date of June 2, 2017, pursuant to R. Regulating Fla. Bar 3-5.2. Thereafter, respondent filed an Emergency Motion for Relief and Clarification Regarding Order of Suspension on May 8, 2017. On May 9, 2017, the bar filed its response and the undersigned was appointed as referee. On May 12, 2017, respondent filed a Motion to Dissolve or Modify Order of Emergency Suspension. A hearing on respondent's motions was held on May 19,

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JOHN A. TOMASINO
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CLERK, SUPREME COURT
BY

2017 and the interim Report of Referee was issued on May 26, 2017

recommending that the emergency suspension order not be modified as to respondent but that respondent's law partner, Michael Horton, be permitted to access the law firm's trust account. On June 16, 2017, the Supreme Court of Florida entered its order approving the Report of Referee and denying respondent's Motion to Dissolve or Modify Order of Emergency Suspension and granting his Emergency Motion for Relief and Clarification Regarding Order of Suspension with respect to permitting his law partner's access to the law firm's trust account.

The final Report of Referee was to be filed within 90 days of the order appointing the referee pursuant to R. Regulating Fla. Bar 3-5.2. The Report of Referee was due on or before August 7, 2017. The final hearing was set for July 20, 2017 and July 21, 2017. On July 3, 2017, respondent moved for a continuance of the final hearing and provided a written waiver of the time requirements set forth in rule 3-5.2 on July 7, 2017. On July 11, 2017, the undersigned referee granted respondent's motion for continuance of the final hearing and the matter was rescheduled for August 24 and 25, 2017. On July 13, 2017, respondent moved for an extension of time for the referee to file his report. On July 21, 2017, the Supreme Court of Florida entered its order granting the referee until November 9, 2017 to file his report. The evidentiary hearing was held on August 24 and 25, 2017. The sanction hearing was held on October 23, 2017. On or about November

7, 2017, a Motion for Extension of Time to File Report of Referee was filed. The parties consented to the extension of time. The extension of time was granted granting the referee until and including November 29, 2017 to file his report.

II. FINDINGS OF FACT

Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

Narrative Summary of Case.

After considering all the pleadings and evidence, pertinent portions of which are commented on below and supported by competent substantial record evidence, this referee finds that The Florida Bar has proven its case by clear and convincing evidence.

The Florida Bar's Exhibits 1-22 were admitted into evidence over respondent's objection to bar's exhibit 5. Respondent's Exhibits 1-33 were also admitted into evidence. The referee also heard testimony from the following witnesses in this matter: Matthew Herdeker, Branch Auditor of The Florida Bar, Dennis Horton, respondent, on his own behalf, and Kay Lasky, bookkeeper for Dennis Horton.

Respondent testified that he represented Edward Lowman, a seventy-four-year-old client, in drafting a revocable living trust and a power of attorney.

Respondent testified that Mr. Lowman requested respondent name himself as a fifty percent beneficiary of the Fifth Amendment to the Edward A. Lowman Revocable Living Trust. Respondent admitted to drafting the fifth amendment to the living trust naming himself as a beneficiary in the distribution, dated July 19, 2011. Respondent testified that he then forwarded the document to Mr. Lowman, who executed it and returned it to respondent for storage.

In September 2016 and October 2016, Mr. Lowman agreed to loan respondent a total of \$90,000.00. Respondent stated that using the power of attorney issued to him by Mr. Lowman, he issued three checks to himself from Mr. Lowman's SunTrust Bank checking account totaling \$90,000.00 on September 9, 2016, September 26, 2016 and October 5, 2016 as reflected in The Florida Bar Exhibit 6. On October 14, 2016, respondent wrote a fourth check to himself in the amount of \$15,000.00 from Mr. Lowman's SunTrust Bank account and attempted to deposit the funds into his personal checking account maintained at CenterState Bank. Mr. Lowman, in his deposition, The Florida Bar Exhibit 5, stated that he did not agree to the fourth loan to respondent of an additional amount of \$15,000.00. In evaluating the entirety of the evidence presented this Referee does not find there was sufficient evidence to support the notion that the respondent intended to convert the \$15,000 from Mr. Lowman. In consideration of respondent's testimony and the presentation of the audio recording of Mr. Lowman expressing

his desire to provide no further loans, confusion may have resulted as to the intent of when such termination of further 'authorized loans' would begin. In other words, it is conceivable that Mr. Lowman's statements could be interpreted to mean one of two things: a) a desire to immediately end his participation and agreement to providing any loans, or b) a desire to not provide any additional loans beyond those that had already been authorized. It was respondent's contention that the final \$15,000 amount was in fact a "loan" that was authorized prior to Mr. Lowman's termination of further loans. It is of note that this the very reason along with a myriad of others, that Mr. Lowman should have been advised to seek independent counsel regarding any and all "loans".

On October 19, 2016, CenterState Bank returned the check for insufficient funds because Mr. Lowman had removed most of the funds from his SunTrust checking account with a "Closing Debit." Regardless of whether respondent asked Mr. Lowman directly for loans or if Mr. Lowman volunteered them, it is clear that respondent requested specific amounts of loans from Mr. Lowman. Respondent testified that he initially did not provide a promissory note to Mr. Lowman to secure the loan nor did he advise Mr. Lowman to seek the advice of independent legal counsel regarding the transaction.

The Florida Bar exhibits 11-15 and the testimony given established that on or about August 30, 2016, pursuant to a durable power of attorney prepared

by respondent and issued to him by Christa M. Barry, a seventy-five-year-old client, respondent transferred \$30,000.00 of the \$32,066.34 balance in Ms. Barry's money market account maintained at SunTrust Bank to her checking account maintained at SunTrust Bank. On the same day, respondent transferred the \$30,000.00 from Ms. Barry's SunTrust checking account to respondent's trust account.

Respondent testified that according to the death certificate, bar's exhibit 12, Ms. Barry died on September 5, 2016. Respondent admitted in his sworn statement on January 10, 2017, The Florida Bar Exhibit 20, that on the next day he transferred \$17,500.00 from the Barry account to trust account. Respondent noted in the memo line of the check that one-half of the amount of the check was for his attorney's fees and the other one-half was for his personal representative fee in the Barry estate. Respondent testified that he had not yet been appointed personal representative by the probate court at the time he took the \$17,500 fee. Respondent was appointed two (2) days later.

Matthew Herdeker, Branch Auditor of The Florida Bar, was also offered as an expert. He conducted an audit of respondent's three trust accounts for the time period of January 1, 2016 through December 31, 2016 and reviewed respondent's operating and personal checking accounts for the time period of July 1, 2013 through December 31, 2016. Mr. Herdeker testified that respondent used

the \$17,500.00 he obtained from Ms. Barry's account on September 5, 2016 to cover an overdraft of \$5,677.38 in his operating account and transferred portions of the \$17,500.00 to his other business accounts, another personal account, and paid various operating expenses of his law firm.

On October 19, 2016, respondent wrote a check in the amount of \$15,500.00 from the Estate of Christa M. Barry account to himself for fees as personal representative. This same day, respondent's bank dishonored the \$15,000.00 check respondent issued from the account he held pursuant to a power of attorney issued to him by Edward A. Lowman. Respondent testified under oath during his sworn statement on April 6, 2017, in The Florida Bar' Exhibit 21, in response to questioning about the aforementioned transaction that "it wasn't a coincidence . . . I needed that money, so I thought I would take my – take a portion of my personal representative's fee."

Respondent testified that he provided legal advice and services to Richard O'Connell, age eighty-five. Mr. O'Connell resided in an assisted living facility. Mr. Herdeker, testified that respondent, pursuant to the power of attorney prepared by respondent and issued to him by Mr. O'Connell, changed the name on the accounts to reflect respondent's name as power of attorney and changed the mailing address. Respondent indicated that these changes were made at the request of Mr. O'Connell.

Mr. Herdeker testified that in year 2014, respondent invoiced Mr. O'Connell for various legal services he provided to Mr. O'Connell but that he did not draft invoices reflecting the legal services provided in 2015 and 2016.

Mr. Herdeker testified that, as reflected in The Florida Bar's exhibit 17, that in year 2015, respondent issued 34 checks totaling \$43,000.00 from Mr. O'Connell's accounts to either his personal checking account or operating accounts. During this same time period, respondent deposited funds back into Mr. O'Connell's Chase Bank checking accounts in the amount of \$4,800. One of the checks written came from respondent's personal account shared with his wife.

Mr. Herdeker also testified that, as reflected in The Florida Bar's exhibit 17, that in year 2016, respondent issued 33 checks totaling \$82,840.00 from Mr. O'Connell's accounts to either his personal checking account or operating accounts. During this same time period, respondent deposited funds back into Mr. O'Connell's Chase Bank checking accounts totaling \$40,050.

Respondent testified under oath during his sworn statement on April 6, 2017 that there were times when Mr. O'Connell's checking account "would fall short." Respondent testified that he would deposit funds back into Mr. O'Connell's checking account to cover Mr. O'Connell's medical bills and caregiver.

On or around November 22, 2016, after the commencement of the bar's investigation in this matter, respondent issued a letter, The Florida Bar's

Exhibit 18, to Mr. O'Connell informing him for the first time of respondent's compensation for 2015 and 2016. In the letter, respondent attempted to explain his fees. Respondent failed to disclose, however, the total amount he paid himself in 2015 and 2016 and the amounts he returned to Mr. O'Connell. In 2015, respondent paid himself a total of \$43,000.00 from Mr. O'Connell's checking account and returned \$4,800.00, for a net total of \$38,200. Respondent represented to Mr. O'Connell in the letter that his compensation for 2015 was \$38,200.00. In 2016, respondent paid himself \$82,840.00 from Mr. O'Connell's checking accounts and returned \$40,050.00, for a net total of \$42,790. Respondent represented to Mr. O'Connell in the letter that his compensation for 2016 was \$39,760. In the letter, respondent also enclosed timesheets previously not sent to Mr. O'Connell and offered to provide legal services for Mr. O'Connell in 2017 for no charge.

Mr. Herdeker testified that Mr. O'Connell also maintained a brokerage account with JP Morgan Chase. The Florida Bar Exhibit 19 reflects that on or around February 12, 2016, Mr. O'Connell signed a letter, prepared by respondent, authorizing respondent to "liquidate and use monies for my care from my JP Morgan Chase Brokerage Account." Between February 2016 and January 2017, the brokerage account statements were addressed to respondent's office address.

From February 2016 through December 2016, respondent made sixteen transfers totaling \$66,500.00 from Mr. O'Connell's JP Morgan Chase brokerage account to Mr. O'Connell's savings account maintained at Chase Bank. Respondent testified under oath during his sworn statement on April 6, 2017 that he made the transfers when Mr. O'Connell ran short of money. Respondent testified that he used the funds to pay for Mr. O'Connell's expenses, such as his certified nursing assistant.

Mr. Herdeker testified that respondent used some of the funds from Mr. O'Connell's JP Morgan Chase brokerage account primarily for his own benefit. Mr. Herdeker testified to and The Florida Bar Exhibit 22, attachment H, reflect that on February 17, 2016, respondent transferred \$5,000.00 from Mr. O'Connell's JP Morgan Chase brokerage account to Mr. O'Connell's Chase Bank savings account. On February 18, 2016, respondent transferred the \$5,000.00 from the Chase Bank savings account to Mr. O'Connell's checking account maintained at Chase Bank. On the same day, respondent transferred the \$5,000.00 from the Chase Bank checking to respondent's operating account maintained at CenterState Bank by issuing check number 1982. Respondent then used the funds in his operating account to cover an overdraft, to pay overdraft charges in the operating account, the Internal Revenue Service and Thomson Reuters.

Mr. Herdeker testified to and The Florida Bar Exhibit 22, attachment I, reflect that on February 22, 2016, respondent transferred \$5,000.00 from Mr. O'Connell's JP Morgan Chase brokerage account to Mr. O'Connell's Chase Bank savings account. On February 25, 2016, respondent transferred \$4,000.00 of the \$5,000.00 to Mr. O'Connell's checking account maintained at Chase Bank. On the same day, respondent transferred \$3,850.00 of those funds to his CenterState Bank operating account by check number 1938. From the operating account, respondent then transferred a portion of the funds to one of respondent's other business entities and made payments on a debt owed by respondent to the Internal Revenue Service.

Mr. Herdeker testified to and The Florida Bar Exhibit 22, attachment J, reflect that On July 11, 2016, respondent transferred \$3,500.00 from Mr. O'Connell's JP Morgan Chase brokerage account to Mr. O'Connell's Chase Bank savings account. On July 12, 2016, respondent transferred \$2,650.00 of the \$3,500.00 to Mr. O'Connell's Chase Bank checking account. On the same day, respondent transferred the \$2,650.00 to his CenterState Bank operating account by check number 1989. From the operating account, respondent used the funds to cover an overdraft, to pay an overdraft fee in the operating account and transferred portions to his personal checking accounts.

Mr. Herdeker also testified to the procedures regarding the audit of respondent's accounts. Mr. Herdeker testified that respondent maintained a trust

account at First Green Bank, two additional trust accounts at CenterState Bank, and operating accounts at CenterState Bank and at First Green Bank. Respondent also maintained personal checking accounts at CenterState Bank and at First Green Bank.

During his sworn statement to The Florida Bar dated April 6, 2017, The Florida Bar's Exhibit 20, respondent testified under oath that he commingled client funds with his personal funds by receiving credit card payments for cost deposits, in his operating account maintained at CenterState Bank and then failed to timely transfer those funds to his trust account.

Mr. Herdeker testified that after review of respondent's accounts, respondent repeatedly and significantly over drafted his operating account maintained at CenterState Bank due to insufficient funds during 2015 and 2016 as reflected in The Florida Bar' Exhibit 9 and 10. Mr. Herdeker confirmed that respondent incurred overdraft fees in his CenterState Bank operating account totaling \$5,565.00 in 2015 and \$6,265.00 in 2016. These client funds designated for costs were utilized for purposes other than those for which they were entrusted to him as a result of the deficiencies in the operating account.

Mr. Herdeker also reported that the audit of respondent's trust account maintained at First Green Bank revealed that he failed to follow the minimum required trust accounting procedures in that he failed to identify the client matter

on all trust account checks, failed to consistently identify the client matter and reasons for transactions in the journal, and failed to consistently identify the reasons for transactions on the client ledgers. Because of these trust account violations, Mr. Herdeker testified that respondent was not in substantial compliance with the trust account rules.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

A. While respondent denied knowledge of some of the rules, under Rule 3-4.1, every member of The Florida Bar, including respondent, is charged with the knowledge of the rules of ethics and the rules governing the bar membership.

B. 4-1.8(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of

independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. Based upon the evidence and testimony presented, as well as respondent's own admission, he entered into a business transaction with Mr. Lowman. Respondent received loans from Mr. Lowman in the amounts of \$50,000 on September 9, 2016, \$20,000 on September 26, 2016 and \$20,000 on October 5, 2016. Respondent on each of these occasions failed to advise his client in writing to seek independent counsel, failed to provide in writing full disclosure of the terms and failed to receive in writing informed consent from Mr. Lowman.

C. 4-1.8(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules. The clients of respondent as referenced in the bar's petition are elderly and reside in assisted living facilities and/or nursing homes. The testimony established that these clients were in reliant upon respondent as none of these individuals had close family or friends to assist them, particularly in regard to financial matters. Respondent was familiar with each client's financial situation and assets, at a time when respondent was in financial distress. The financial information that was available to

respondent as to each of these clients assisted in his ability to utilize clients' funds to aid and alleviate his personal financial distress. In assessing the credibility of the testimony presented, it does not appear that respondent had the intent to permanently deprive his clients from their funds. This is evidenced by the refunding of monies to Mr. O'Connell throughout the years of 2014 – 2016 and by the repayment of the "loans" received from Mr. Lowman. Further, the Florida Bar's expert acknowledged that he was not in the position to opine or determine whether any of the monies asserted by Respondent to be payments for fees were in fact earned or not. The timing of some of the payments and the respective amounts are certainly suspect.

D. 4-1.8(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship. The evidence presented and respondent's own admission established a violation of the rule. Respondent drafted a fifth amendment to Mr. Lowman's revocable living trust in which he left fifty percent of the residuary trust

to respondent. Respondent then forwarded it to Mr. Lowman to be signed and after execution, maintained the document at his law office.

E. 4-1.15 A lawyer shall comply with The Florida Bar Rules Regulating Trust Accounts. The bar's audit clearly demonstrated respondent's technical trust accounting deficiencies. Respondent is ultimately responsible for the trust account in his firm. While Ms. Lasky testified as to the trust account procedures in place, she is not at fault for her limited knowledge of the requirements of the rules related to the trust account. In consideration of all of the trust account violations, respondent was not in substantial compliance with the rules regarding trust accounts.

4-8.4(c) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule. Respondent acknowledged and testified that he took funds for fees from Ms. Barry's estate account as a personal representative prior to him being formally appointed by the

probate judge. On August 30, 2016, under a power of attorney, respondent transferred \$30,000 of \$32,000 from Ms. Barry's money market account to her checking account. On the same day, respondent then transferred the \$30,000 to a trust account for Ms. Barry. On September 5, 2016, Ms. Barry passed away. The next day, respondent issued a check in the amount of \$17,500 from the trust account to his operating account. The memo on the check indicated that half of the funds were for attorney's fees and half for his appointment or work as the personal representative. At the time of the issuance of the check, respondent had not yet been appointed as personal representative. He was formally appointed personal representative two (2) days later by the court. Additionally, on October 19, 2016, an additional amount of \$15,500 was taken from Ms. Barry's trust account for personal representative fees and deposited into respondent's operating account. Based upon the testimony and the bank records, this amount was taken for fees after the \$15,000 check respondent wrote from Mr. Lowman's account failed to clear as the account had been closed. Ultimately, those fees covered numerous overdraft fees that were pending in respondent's account.

Rule 4-8.4(c) is also applicable as it relates to respondent's client, Richard O'Connell. From August 2014 through November 2016, respondent paid himself fees in numerous amounts. Respondent indicated that the purpose of these fees was to pay for legal services for Mr. O'Connell. In 2016, respondent paid himself

\$82,845 in fees. Respondent testified that he was only entitled to \$40,000 in fees in that some monies were refunded back to Mr. O'Connell. Given respondent's financial circumstances, the additional funds were taken to help minimize the monetary issues that he was facing. Respondent placed monies back into Mr. O'Connell's account at points in time when Mr. O'Connell's accounts were also running low. The fees collected from Mr. O'Connell in 2015 and 2016 were not invoiced. Timesheets from such legal services were not supplied until after this bar investigation had begun. Further, when the timesheets were supplied, respondent offered to perform legal services for free in 2017. Although no evidence indicated that the yearly net fees for 2014, 2015, and 2016 were not earned, there was no satisfactory rationale as to why in 2016 respondent collected over \$40,000 above what he indicated he had earned. It is recognized that throughout the year, this overage was returned to Mr. O'Connell. Additionally, the Mr. O'Connell's JP Morgan account had numerous withdrawals through the course of 2016, upwards of \$66,000, which respondent indicated went for payment of Mr. O'Connell's expenses; however, on three occasions Mr. Herdecker discovered the use of funds from the JP Morgan account for respondent's financial matters. As with all three clients, respondent had complete and unfettered control of the client's monies, and in particular as to Mr. O'Connell in 2015 and 2016 respondent provided no documentation to support the appropriateness of monies being taken

out of or returned to Mr. O'Connell's account(s) until after the Florida Bar investigation began. There was an apparent free flow of monies in and out of Mr. O'Connell account(s) controlled by respondent, particularly in 2016.

5-1.1(a)(1) A lawyer must hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for fees, costs, and expenses, must be kept in a separate bank or savings and loan association account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person and clearly labeled and designated as a trust account except: (A) A lawyer may maintain funds belonging to the lawyer in the lawyer's trust account in an amount no more than is reasonably sufficient to pay bank charges relating to the trust account; and (B) A lawyer may deposit the lawyer's own funds into trust to replenish a shortage in the lawyer's trust account. Any deposits by the lawyer to cover trust account shortages must be no more than the amount of the trust account shortage, but may be less than the amount of the shortage. The lawyer must notify the bar's lawyer regulation department immediately of the shortage in the lawyer's trust account, the cause of the shortage, and the amount of the replenishment of the trust account by the lawyer. During the audit period, respondent received payments from clients by credit card to cover future costs. These credit card payments were deposited into

respondent's operating account. Respondent failed to timely transfer these client trust funds into his trust account. This constituted commingling.

F. 5-1.1(b) Money or other property entrusted to an attorney for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion. Respondent received clients' costs into the operating account through credit cards. Those credit card amounts for costs were not immediately or within a reasonable time placed into the trust account. During these deposits, the operating account was, on a fairly consistent basis, experiencing deficiencies. The credit card cost deposits were consumed and utilized at various points to address the operating expense deficiency. Because the operating account had repeated significant overdrafts due to insufficient funds in 2015 and 2016, client funds were misused for purposes other than those for which they were intended.

G. 5-1.2(b) Records may be maintained in their original format or stored in digital media as long as the copies include all data contained in the original documents and may be produced when required. The following are the minimum trust accounting records that must be maintained: (1) a separate bank or

savings and loan association account or accounts in the name of the lawyer or law firm and clearly labeled and designated as a "trust account"; (2) original or clearly legible copies of deposit slips if the copies include all data on the originals and, in the case of currency or coin, an additional cash receipts book, clearly identifying the date and source of all trust funds received and the client or matter for which the funds were received; (3) original canceled checks or clearly legible copies of original canceled checks for all funds disbursed from the trust account, all of which must: (A) be numbered consecutively; (B) include all endorsements and all other data and tracking information; and (C) clearly identify the client or case by number or name in the memo area of the check; (4) other documentary support for all disbursements and transfers from the trust account including records of all electronic transfers from client trust accounts, including: (A) the name of the person authorizing the transfer; (B) the name of the recipient; (C) confirmation from the banking institution confirming the number of the trust account from which money is withdrawn; and (D) the date and time the transfer was completed. (5) original or clearly legible digital copies of all records regarding all wire transfers into or out of the trust account, which at a minimum must include the receiving and sending financial institutions' ABA routing numbers and names, and the receiving and sending account holder's name, address and account number. If the receiving financial institution processes through a correspondent or

intermediary bank, then the records must include the ABA routing number and name for the intermediary bank. The wire transfer information must also include the name of the client or matter for which the funds were transferred or received, and the purpose of the wire transfer, (e.g., “payment on invoice 1234” or “John Doe closing”). (6) a separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers, and the account balance, and containing at least: (A) the identification of the client or matter for which the funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed, or transferred; (7) a separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing: (A) the identification of the client or matter for which trust funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed, or transferred; and (8) all bank or savings and loan association statements for all trust accounts. The bar’s audit clearly demonstrated respondent’s technical trust accounting deficiencies. The checks written from the trust account failed to identify client matters on each of those checks and failed to

consistently demonstrate what the fees were actually utilized for in the legal matter and which particular clients the funds were applied.

H. 5-1.2(d) The minimum trust accounting procedures that must be followed by all members of The Florida Bar (when a choice of laws analysis indicates that the laws of Florida apply) who receive or disburse trust money or property are as follows: (1) The lawyer is required to make monthly: (A) reconciliations of all trust bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the balance per bank with the balance per the checkbook and the cash receipts and disbursements journal; and (B) a comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons for these differences. (2) The lawyer is required to prepare an annual detailed list identifying the balance of the unexpended trust money held for each client or matter. (3) The above reconciliations, comparisons, and listings must be retained for at least 6 years. (4) The lawyer or law firm must authorize, at the time the account is opened, and request any bank or savings and loan association where the lawyer is a signatory on a trust account to notify Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, in the event the

account is overdrawn or any trust check is dishonored or returned due to insufficient funds or uncollected funds, absent bank error. (5) The lawyer must file with The Florida Bar between June 1 and August 15 of each year a trust accounting certificate showing compliance with these rules on a form approved by the board of governors. If the lawyer fails to file the trust accounting certificate, the lawyer will be deemed a delinquent member and ineligible to practice law. The bar's audit clearly demonstrated respondent's technical trust accounting deficiencies.

IV. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Bar v. Black, 602 So. 2d 1298 (Fla. 1992) (respondent unsecured, usurious loans from client, failing to inform client of legality of the transaction, and failure to advise of right to separate representation – 60 day suspension)

The Florida Bar v. Doherty, 94 So. 3d 443 (Fla. 2012) (disciplinary case against respondent from ethical violations that occurred through representation of an elderly client to whom he provided both legal and financial investment services. There was a substantial risk that respondent representation of client would be limited by his own interest. Respondent acted purposefully to make his personal, pecuniary interests at least as important as those of his client and her estate. In

consideration of aggravators, of most significance, prior disciplinary history disbarment was found to be appropriate.)

The Florida Bar v. Rule, 601 So. 2d 1179 (Fla. 1992) (a number of instances of mishandling of trust account funds were committed, including comingling of trust funds and other business ventures, failing to have cash receipts, ledger cards, failing to comply with minimum trust accounting requirements, and of drafting a will in which attorney or member of attorney's family appears as beneficiary. 91 day bar suspension)

The Florida Bar v. Anderson, 638 So. 2d 29 (Fla. 1994) (dealt with respondent who prepared nine testamentary instruments, six of which named him or his wife as beneficiaries. Referee noted respondent's age, his apparent honesty and remorse, and lack of disciplinary record in his long legal career (twenty seven years) – 90 day suspension)

The Florida Bar v. Johnson, 132 So.3d 32 (Fla. 2013) (Involved respondents misconduct in connection with his mismanagement of his trust account as well as attorney's contempt of court orders. The Court emphasized that the misuse or misappropriation of funds held in trust is one of the most serious offenses a lawyer can commit and disbarment is presumptively appropriate sanction.)

The Florida Bar v. Prevatt, 609 So.2d 37 (Fla. 1992) (Respondent undertook management of client's financial affairs. When client placed in nursing home care

respondent over a number of years took loans for himself in the amount of \$15,000 and made loans to his friends and other clients in approximate amount of \$25,000. Litigation was necessary to establish a final accounting and to obtain repayment. Ten years elapsed prior to obtaining repayment. – 5 year disbarment)

Although no one case is found to be directly on point, the aforementioned cases were utilized and considered in formulating a framework in assessing and developing an appropriate sanction in this matter. This case at bar is found to possess a unique combination and number of violations as well as a distinct combination of mitigating and aggravating circumstances.

V. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

4.1 Failure to Preserve the Client's Property

4.12 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.

4.3 Failure to Avoid Conflicts of Interest

4.32 Suspension is appropriate when a lawyers knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

4.6 Lack of Candor

4.62 Suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

5.1 Failure to Maintain Personal Integrity

5.11(f) Disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

7.0 Violations of Other Duties Owed as a Professional

7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

VI. AGGRAVATING AND MITIGATING FACTORS

9.22 Aggravating Factors

- (b) dishonest or selfish motive;
- (c) pattern of misconduct;
- (d) multiple offenses;
- (h) vulnerability of victim; and
- (i) substantial experience in the practice of law.

9.32 Mitigating Factors

- (a) absence of prior disciplinary record; and
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct.
- (g) character or reputation
- (l) remorse

The case at bar involves the respondent engaging in activities near the end of his legal career that stemmed from financial distress in which respondent found himself immersed in. The respondent practiced in an area of the law in which some of the most vulnerable of clients exist, the elderly. This is of great significance. Respondent is 69 years of age. After being a Florida Bar member since 1974, the evidence presented demonstrated that the respondent's financial distress was the direct basis for his chosen activities in dealing with three of his clients. Based on the testimony presented and the credibility assessment made of the testimony provided from each witness, including the respondent, it does not appear that it was respondent's intent to convert any of the monies in question without re-compensating the respective client. Regardless of this finding, respondent represented clients that were fully reliant on his representation to act with their best interest at heart. Each of the clients appeared to have no support from either family or friends. Although it appears

to this Referee that respondent intended to repay the loans to Mr. Lowman (as he eventually did, although after the Florida Bar investigation began) and in fact refunded Mr. O'Connell monies during the years of 2014 – 2016, given respondent's severe financial crisis, respondent place Mr. O'Connell and Mr. Lowman at significant financial risk had respondent not found himself in the position to reimburse each of them.

Respondent has engaged in representing clients within the specialized area of elder law for far too long to conduct himself in this manner. It is unquestionable that respondent's activities and the timing of activities were not a coincidence. Respondent admitted as much. It is abundantly clear that respondent's pattern of activity during the relevant period of time were focused on his best interest, i.e. to address immediate concerns of his own financial distress. It has been argued that this case is a "generational" case, in that the practice of law has changed and the interaction between attorney and client has significantly changed – and it has, but what should not and cannot change is the necessity to undertake our ethical responsibilities with care and diligence. The rules and regulations, the ethical standards and the principles that bar members agree and swear to adhere to apply when all is well in our professional and personal lives, but are of even greater import when times of strife or distress enter into our lives. As members of the bar we must strive on a daily basis and

on a client by client basis to meet and adhere to expectation placed upon us. Our professional demands this of us, our clients deserve this from us, and the public must see this in us.

It is not without recognition and is of significance that respondent has practiced law for over forty years with no disciplinary action. Respondent has paid the restitution owed to Mr. Lowman with interest. The Florida Bar has indicated that no additional restitution is owed. Multiple witnesses testified as to respondent's character and standing in the community. The number of witness and number letters of support are of note. The respondent has been a strong and positive leader in the community, involved in many charitable and noteworthy community activities, and is well respected. The respondent is further found to be contrite and generally remorseful.

Attorney discipline must serve the following three purposes: (1) the judgement must be fair to society (*The Florida Bar v. Liberman*, 43 So. 3d 36 (Fla. 2010) and *The Florida Bar v. Behm*, 41 So. 3d 136 (Fla. 2010)); (2) must be fair to the respondent (*The Florida Bar v. Liberman*, 43 So. 3d 36 (Fla. 2010) and *The Florida Bar v. Behm*, 41 So. 3d 136 (Fla. 2010)); and (3) the judgement must be severe enough to deter others who might be prone or tempted to become involved in like violations (*The Florida Bar v. Adorno*, 60 So.3d 1016 (Fla. 2011) and *The Florida Bar v. Liberman*, 43 So. 3d 36 (Fla.

2010) and *The Florida Bar v. Behm*, 41 So. 3d 136 (Fla. 2010)). While sanctions imposed on a lawyer obviously have a punitive aspect, nonetheless, it is not the purpose to impose such sanctions as punishment. *Florida's Standards for Imposing Lawyer Sanctions*, Section III (A)(1.1), Purpose of Lawyer Discipline Proceedings, Commentary, Pg. 9 (Update 2015).

The legal profession affords each Florida Bar member an awesome responsibility. The legal knowledge possessed affords in each bar member the power of representing the client. Such power must not be abused. As a profession, we are also given the special and vital responsibility of self-regulation. It is with this significant responsibility and in review of the evidence and testimony presented, including the aggravating and mitigating factors, that this Referee makes the following recommendation.

VII. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that respondent be disciplined by:

- A. Twenty four (24) month suspension, nunc pro tunc to the date of the emergency suspension entered by the Florida Supreme Court on May 3, 2017.

B. Payment of The Florida Bar's costs in these proceedings. See section IX below.

VIII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following:

Personal History of Respondent:

Age: 69

Date admitted to the Bar: December 20, 1974

Prior Discipline:

By court order dated, May 3, 2017, respondent was emergency suspended due to the same allegations as the present case. Respondent remains suspended.

IX. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following cost were submitted to the Court in the form of an Affidavit by The Florida Bar and found to be reasonably incurred by The Florida Bar.

Investigative Costs	\$3,258.90
Court Reporters' Fees	\$2,695.36
Copy Costs	\$137.57
Bar Counsel Costs	\$394.14
Audit Costs	\$12,942.96

Administrative Fee

\$1,250.00

TOTAL

\$20,678.93

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 29th day of November, 2017.

/s/ Phillip A. Pena
Phillip Pena, Referee

Original To:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

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