

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC00-579

vs.

TFB File No. 99-00,433 (02)

JOHN A. BARLEY,

Respondent.

CROSS REPLY BRIEF

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ARGUMENT

I. THE REFEREE'S FINDINGS AND THE RECORD SUPPORT THE CONCLUSION THAT BARLEY MISAPPROPRIATED CLIENT TRUST FUNDS.

Mr. Barley argues that the Report of Referee does not contain factual findings to support the conclusion that he misappropriated client trust funds. He is mistaken. While the Report does not use the word "misappropriate", it is clear from the wording used that the referee found Mr. Barley wrongfully took possession of client trust funds.¹ In the paragraph 2 of his findings of fact, Judge Bean states: "The evidence supports a determination that Mr. Emo consistently demanded, in written form, the return of the funds, and never authorized their use as an advance toward unearned attorney's fees." (RR p. 3). In paragraph 11 of the Report, the referee found that "immediately following his persuading Mr. Emo that the funds had to remain on deposit he began to draw on those funds for his own unauthorized purposes." (RR p. 6).

Mr. Emo's written demands were introduced into evidence (Bar Exhibits 7, 8, 9). Mr. Emo also testified that he did not verbally authorize Mr. Barley to take those funds as advance fees and costs (TR 10/20/00 p. 62). An audit conducted by James F. Wells, CPA and Bar Auditor, revealed that Mr. Barley's trust account had a

¹ "Misappropriate" means to wrongfully take possession. See The New Merriam-Webster Dictionary 52 and 468 (1989)

shortage of \$76,760.68 attributable to Mr. Barley's unauthorized use of funds deposited for a specific purpose. (Bar Exhibit 14, TR 11/03/00 p. 331-337). The records supplied by Mr. Barley show that he had drawn from the \$76,760.68 fund over thirty times between November 5, 1997 through February 13, 1998, totaling \$88,708.01, and that these disbursements did not correspond to billings for work done on behalf of Mr. Emo or his businesses. Mr. Barley was not authorized by his client or by rule to use the funds for anything other than funding a settlement, and he took those funds to "meet operating expenses of [his] law firm". (TR 1/10/01 p. 571). Therefore, Mr. Barley took unauthorized possession of trust funds for his own use. In other words, he wrongfully took possession of the funds; Mr. Barley misappropriated client trust funds. Use of client funds deposited for a specific purpose to pay for unrelated personal and business expenses warrants a finding of misappropriation, for which disbarment is the presumed penalty. The Florida Bar v. de la Puente, 656 So.2d 65, 69 (Fla. 1995).

CONCLUSION

Mr. Barley should be disbarred for misappropriating client trust funds.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Cross Reply Brief regarding Supreme Court Case No. SC00-579, TFB File No. 99-00,433 (02) has been mailed by certified mail # 7099 3400 0010 4419 4991, return receipt requested, to JOHN A. BARLEY, Respondent, at his record Bar address of 400 North Meridian Street, Post Office Box 10166, Tallahassee, Florida 32302-2166, and by certified mail # 7099 3400 0010 4419 5301, return receipt requested, to his alternate address of 4927 Heathe Drive, Tallahassee, Florida 32308 on this _____ day of February 2002.

Edward Iturralde, Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Cross Reply Brief of Complainant, The Florida Bar, is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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