IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC00-579

vs

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

JOHN A. BARLEY,

Respondent.
_____/

REPORT OF REFEREE

SUMMARY OF PROCEEDINGS

The undersigned was appointed as referee to conduct disciplinary proceedings herein pursuant to Rule 3-7.6, Rules of Discipline.

On March 22, 2000 The Florida Bar filed its Complaint against Respondent. On April 12, 2000 the Bar served a Motion for Default. A Default was entered on April 17, 2000 and this cause was set for final hearing on June 12, 2000. On May 8, 2000 Respondent served his Answer, Response to Request for Admissions, Motion to Set Aside Default and Motion for Abatement. On May 12, 2000 the Bar filed its Responses to said motions. Also on that date, a Motion to Strike Respondent's Answer and Response to Request for Admissions was filed.

On June 12, 2000 a motion hearing was held at which time the Referee granted Respondent's Motions to Set Aside and for Abatement, and denied the Bar's Motion to Strike.

On October 20, 2000 a final hearing was begun in this matter. Evidence was taken but not completed, the final hearing being resumed on November 3, 2000, at which time the evidence as to the issues of violations of the Rules Regulating The Florida Bar was closed and the parties were permitted to file written closing arguments. The Bar's closing argument was served on November 9, 2000, and Respondent's closing argument was served on November 17, 2000.

On November 21, 2000 the final hearing was resumed for the third day, at which time the Referee announced on the record the intention to recommend guilt as to all allegations in the Complaint. At that time Respondent argued an ore tenus Motion for Continuance of the final hearing as to the issues of discipline, which was granted. On December 18, 2000, the Referee entered a Report of Referee as to Guilt.

On January 10, 2001, the final hearing resumed, evidence was taken and argument heard with regard to the issue of discipline. All of the aforementioned pleadings, responses thereto, exhibits received in evidence and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

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.

Findings of Fact:

The Referee finds that The Florida Bar has proven, by clear and convincing evidence, the following facts:

1. Warren Emo, in his capacity as president of ArC/MASTERBUILDERS, Inc., deposited $76,760.68 in Respondent's trust account for a specific purpose, i.e., to fund the settlement according to the terms of Respondent's October 29, 1997 letter addressed to Marion D. Lamb, III (**Bar's Exhibit 4**). The fact that the purpose was rendered moot by the failure of the parties to agree to settlement terms on October 30, 1997 did not change the character or nature of the funds.

2. 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.

3. Mr. Emo first learned that the funds had been drawn down on December 23, 1997 in a phone conversation with Respondent. When Mr. Emo asked for return of the funds, Respondent informed him for the first time that the funds had been

overdrawn. When Mr. Emo inquired how much was left, Respondent told him that the overdraft approximated $23,000, but that Respondent was anticipating a large settlement and would soon be in a position to make good on the shortage.

4. Instead of paying Mr. Emo the balance that remained in his trust account as of that date, Respondent continued to withdraw the remaining trust funds until the entire $76,760.68 had been withdrawn by February 13, 1998.

5. On January 26, 1998, Mr. Emo wrote the first of five (5) written demands for return of the funds (**Bar's Exhibit 7**). He followed up by faxing the same letter to Respondent on February 27, 1998, wrote again on March 3, 1998 (**Bar's Exhibit 8**) and again on September 9, 1998 (**Bar's Exhibit 9**) and September 14, 1998.

6. Respondent offered one item of written corroboration, an office memo written by his bookkeeper, Deborah Browne, purporting to memorialize instructions from the client authorizing the use of the funds, dated November 5, 1997, the date upon which he made the first withdrawal of funds. No copy of this memo, or any other written confirmation of that purported authorization, was sent to Mr. Emo. Deborah Browne was not called to testify as to the legitimacy of the memo purportedly authored by her.

7. Despite Respondent's testimony to the effect that upon receipt of each of the written demands for return of the funds he telephoned Mr. Emo and received

verbal assurance that he could continue to use the funds, there is no documentary evidence memorializing said telephone conversations.

8. The detailed invoices prepared by Respondent contain multiple entries of "telephone with Mr. ____; draft memo to file", but Respondent has not produced any such "memo to file" he may have drafted following the alleged telephone conferences with Mr. Emo in which Mr. Emo allegedly receded from his demand for return of the funds. In none of the subsequent written communications emanating from Mr. Emo is there any reference to an agreement contrary to the previous written demand for return of the funds.

9. Respondent's testimony to the effect that he had a telephone conversation with Warren Emo on October 30, 1997, at which time he told Mr. Emo that the check for $76,760.68 had been deposited in his trust account, and that there was no point in allowing it to remain there unless Mr. Emo wanted it to remain, and at that point Mr. Emo told him to keep it in the trust account, contradicts his own affidavit in which Respondent stated, on page 10 (**Respondent's Exhibit 16**), that he had encouraged Mr. Emo to leave the funds on deposit as a show of good faith to counsel for Slab Construction, to substantiate the representation that Mr. Emo wanted to settle the case and had the settlement funds available for that purpose.

10. Respondent's affidavit (**Respondent's Exhibit 16**) is consistent with the testimony given by Warren Emo, in which he stated that Respondent virtually insisted that the $76,760.68 remain in the trust account to insure that Mr. Lamb, Slab's attorney, would no longer abstain from prosecuting his third party complaint, and would join forces with ArC/MASTERBUILDERS' opponents.

11. There is substantial evidence in the record to support the inference that Respondent used this technique to manipulate Mr. Emo into allowing the funds to remain in his custody so that he might avail himself of the use of those funds in a manner contrary to the purpose for which they were deposited. The Bar's evidence supports the inference that Respondent intended to avail himself of those funds at the time he persuaded Mr. Emo to leave them in his trust account, as evidenced by the fact that immediately following his persuading of Mr. Emo that the funds had to remain on deposit he began to withdraw those funds for his own unauthorized purposes. The record contains undisputed evidence that Respondent made the first $500 withdrawal of funds on November 5, 1997 (**Bar's Exhibits 14 & 15**), less than a week after Mr. Emo had been persuaded to leave the money in the trust account. Thereafter, there began a systematic withdrawal of the funds over the ensuing three and one-half months. Further, the dates and amounts of the withdrawals bear no correlation to the dates or hours being invoiced by Respondent.

12. The record establishes that Mr. Emo paid seven (7) invoices prior to depositing the funds in Respondent's trust account (**Bar's Exhibit 3**) and another invoice afterward (**Bar's Exhibit 6**). The invoices were rendered on an average of every 11.7 days, and were paid on an average of 4.1 days after the invoice date. Mr. Emo advanced fees to Respondent on request on at least three (3) occasions (**Bar's Exhibit 3**). As of October 30, 1997, the date of the trust fund deposit, Respondent had been paid $50,571.41 in fees and costs during a three month period, and was paid an additional $11,947.33 on November 21, 1997, for a total of $62,518.74.

13. The evidence does not support a finding of a decision having been made by Mr. Emo to deposit $76,760.68 in Respondent's trust account as an advance toward unearned fees, nor is there any logical basis for concern on Respondent's part that legitimate fees earned in the future would not be timely paid. There is no basis for any belief that Respondent feared for non-payment of invoices, so as to justify his requirement that Mr. Emo leave such a disproportionate sum of money in his trust account for that purpose.

14. There is undisputed evidence that Mr. Emo paid Respondent three (3) advances for unearned fees, beginning with the initial deposit of $5000, followed by a $3000 advance paid on September 19, 1997, and $3500 paid on October 7, 1997 (**Bar's Exhibit 3**). It is also undisputed that Mr. Emo was given credit for all of these

fee advances on the invoices provided by Respondent, dated August 15, 1997, September 25, 1997, and October 15, 1997 (**Bar's Exhibit 3**). However, none of the invoices rendered after Mr. Emo deposited the $76,760.68 in Respondent's trust account reflect such a credit balance.

15. Respondent testified that he had been suspended for sixty days in 1989. He asserted, however, that the Referee, Judge Arthur Lawrence, had found no intentional misconduct or misconduct involving moral turpitude. Judge Lawrence, however, made specific findings of fact in the Report of Referee (**Bar's Exhibit 18**) that Respondent began making unauthorized withdrawals from a $200,000 trust, of which he was the sole trustee of a trust he drafted, contrary to the provisions of a settlement agreement that there were to be three trustees. The Referee further found that Respondent also drafted a financial statement for the purpose of obtaining a loan on behalf of the trust, which failed to disclose a $47,500 loan he had obtained from his client without a written loan instrument. Respondent was found to have then effected a settlement, from which he took both an hourly fee and a contingent fee, contrary to his client's instructions. Judge Lawrence found that after having been discharged by the client, Respondent drafted three separate notes to document the $47,500 loan and backdated the notes to January and February, 1982. The Referee recommended, and the Supreme Court found (**Bar's Exhibit 19**) that Respondent had

violated disciplinary rules of the former Code of Professional Conduct 2-106(A) (entering into an agreement for or charging or collecting an excessive fee) and 9-102(B)(4) (failing promptly to pay over funds, securities or other property which the client is entitled to receive). Such misconduct is similar to that which is charged here.

16. Mr. Emo paid Respondent's invoices promptly and without protest despite his misgivings. His reasons for doing so did not arise from a belief that the fees were reasonable and had been earned, but rather out of a sense of his being "held hostage" by the circumstances of the litigation and negotiations in which his firm had become embroiled, i.e., that he had employed Respondent when his first lawyer developed a conflict and had to withdraw; that he employed Respondent with the knowledge that the first lawyer's legal fees for the first six months of representation had amounted to approximately $10,000; that he discovered that Respondent's fees were going to far exceed his previous experience ($50,000 in the first three months) but felt that he had no choice but to continue with Respondent's representation because a.) he couldn't afford to pay a third lawyer to learn the case; b.) he was involved in acrimonious litigation with two large corporations represented by large and expensive law firms and didn't want to send a message of weakness or uncertainty; and c.) he felt the end was in sight.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating Rules 4-1.5(a) (Illegal, Prohibited, or Clearly Excessive Fees.), 4-1.15(a) (Clients' and Third Party Funds to be Held in Trust.), 4-1.15(b) (Notice of Receipt of Trust Funds; Delivery; Accounting.), 4-1.15(d) (Compliance With Trust Accounting Rules.), 4-8.4(c) (Conduct involving dishonesty, fraud, deceit, or misrepresentation), 5-1.1(a) (Nature of Money or Property Entrusted to Attorney.) and 5-1.2(b) (Minimum Trust Accounting Records.) of the Rules Regulating The Florida Bar.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

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

Suspension from the practice of law in the State of Florida for Three (3) years, nunc pro tunc to April 9, 1999. It is further recommended that Respondent be placed on probation for a term of two (2) years following reinstatement. Recommended conditions of probation: (1) imposition of costs in the amount of $4,140.53; (2) participation in the LOMAS program; (3) completion of the Bar's Trust Account Course.

V. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS

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

A. Personal History of Respondent:

Age: 60 years old

Date admitted to the Bar: June 20, 1969

B. Aggravating Factors:

Standard 9.22

(a) Prior Discipline: Respondent was suspended for sixty days effective May 6, 1989.

(c) a pattern of misconduct;

(d) multiple offenses;

(i) substantial experience in the practice of law;

C. Mitigating Factors:

Standard 9.32

(g) positive character/reputation (including Respondent's commitment to providing legal assistance to those in need)

(i) delay in disciplinary proceedings (resulting from the operation of the rule concerning emergency suspension)

(k) imposition of other penalties or sanctions (emergency suspension)

(l) remorse

(m) remoteness of prior offense (approximately 13 years)

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

I find the following costs were reasonably incurred by The Florida Bar:

Costs incurred in this matter:

Grievance Level				
1.	Photocopies	$ 285.15		
2.	Investigative Costs		11.50	
	Sub-Total		$ 296.65	$ 296.65
Referee Level				
1.	Administrative Costs pursuant to Rule 3-7.6(o)(1)(I), Rules of Discipline		$ 750.00	
2.	Investigative Costs		64.40	
3.	Preparation of Trial Exhibits		75.50	
4.	Attorney Travel		67.96	
	a) 5/19/00 Conference	18.16		
	b) 6/12/00 Hearing	41.80		
	c) 10/20/00 Parking	6.00		
	c) 11/08/00 Parking	2.00		
		$ 67.96		
5.	Court Reporter Fees		867.50	
	a) Merit Reporting 6/12/00	80.00		
	b) Wilkinson & Assoc 10/20/00	240.00		
	c) Wilkinson & Assoc. 11/03/00	277.50		
	d) Wilkinson & Assoc. 11/21/00	45.00		
	e) Wilkinson & Assoc. 01/10/00	225.00		
		867.50		
	Sub-Total		$ 1,825.36	$ 1,825.36
	TOTAL			$ 2,122.01

Costs incurred in the Emergency Suspension case:

1.	Administrative Costs pursuant to Rule 3-7.6(o)(1)(I), Rules of Discipline		$ 750.00	
2.	Investigative Costs		66.70	
3.	Court Reporter Fees		1,201.82	
	a) 6/2/99 Deposition	377.32		
	b) 6/4/99 Hearing	824.50		
		$1,2001.82		
		TOTAL	$ 2,018.52	$ 2,018.52
		GRAND TOTAL		$ 4,140.53

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

DATED this _____ day of _____, 2001.

_____

James Roy Bean, Circuit Judge/Referee
Post Office Drawer 1000
Taylor County Courthouse
Perry, Florida 32348

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32301, and that copies were mailed by regular U.S. Mail to JOHN A. BOGGS, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; DONALD M. SPANGLER, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; JOHN A. BARLEY, Respondent, at his record Bar address of 400 North Meridian Street, Post Office Box 10166, Tallahassee, Florida 32302-2166, and JOHN A. BARLEY, Respondent, at his alternate address of 4927 Heathe Drive, Tallahassee, Florida 32308, on this _____ day of _____, 2001.

_____
James Roy Bean, Circuit Judge/Referee