

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

-vs-

MARK W. McFALL,

Respondent.

Case No. SC 02-1350
TFB No. 2002-10,583 (20D)

Case No. SC 02-750
TFB No. 2002-11,275 (20D)(HES)

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS.

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On June 17, 2002, The Florida Bar filed its Complaint against Respondent in these proceedings. The Respondent served his Answer and Affirmative Defense to the Florida Bar's Complaint on July 24, 2002. On September 19, 2002, a final hearing was held in this matter. 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.

In addition, the Petition for Emergency Suspension, the Response to the Petition for Emergency Suspension, and the granting of the Petition for Emergency Suspension entered by the Supreme Court of Florida on April 26, 2002, were before the Referee. The Referee heard argument on the Motion for Rehearing and The Florida Bar's Response to Respondent's Motion for Rehearing. These pleadings are also a part of the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

A. 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.

B. Narrative Summary of case:

The parties entered into a Joint Stipulation of Facts and Rule Violations, which is attached to this Report and by reference made a part hereof.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating the following Rules Regulating the Florida Bar: Rule 4-1.15(a); Rule 4-

8.4(a); Rule 4-8.4(c); Rule 5-1.1(a); Rule 5-1.1(c); Rule 5-1.2(b)(2); Rule 5-1.2(b)(3); Rule 5-1.2(b)(4); Rule 5-1.2(b)(5); Rule 5-1.2(b)(6); Rule 5-1.2(b)(7); Rule 5-1.2(c)(1); Rule 5-1.2(c)(2); and Rule 5-1.2(c)(3).

IV. RECOMMENDATIONS 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:

- A. Suspension from the practice of law for a period of six (6) months, retroactive to the date of the Emergency Suspension (April 26, 2002), to be followed by 3 years of probation with the following special conditions:
 - i. Respondent receive psychological/psychiatric counseling and treatment, including taking medication as prescribed;
 - ii. Respondent shall authorize such treatment provider to report quarterly to The Florida Bar on the Respondent's fitness to practice law;
 - iii. Respondent shall, at the request of The Florida Bar, and at Respondent's expenses, submit to an annual evaluation by a treatment provider of The

Florida Bar's choice, to insure the Respondent's fitness to practice law;

- iv. Respondent shall submit to random audits of his office accounts, trust accounts, and escrow accounts by The Florida Bar;
- v. Respondent shall attend a debt management course within the year of probation at the direction of The Florida Bar.

B. Payment of The Florida Bar's costs in these proceedings.

III. 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:

- a. Age:
- b. Date Admitted to Bar: April 26, 1990

B. Aggravating factors:

- a. Selfish dishonest motive. Respondent admits that he took the money to satisfy his need to financially benefit himself and his family. Respondent used the

funds for support of himself and family for living expenses. Respondent further admits that he knew that he was not entitled to two separate withdrawals and only colorable entitlement to one. The Respondent withheld a fee of \$1000.00 to which he, at the time of the withdrawal, knew he was not entitled. When objected to, he failed to reimburse the account, and instead made two further withdrawals knowing he was not entitled to any of them.

- b. Multiple offenses. Respondent committed theft of funds as outlined above. Respondent failed to maintain proper records in that he failed to keep cash disbursement/receipts records and failed to keep single client account cards.
- c. Respondent intentionally misled The Florida Bar about the whereabouts of the funds as evidenced by his initial response to this complaint.

C. Mitigating Factors:

- a. Respondent has no prior disciplinary complaints in either the State of Florida or the State of Texas.
- b. Respondent was a self-starter, and with the help of his wife, put himself through college and law school. His prior work history includes 7 years as an employee of the Polk County Sheriff's Department rising to the level of Detective Sergeant in the Criminal Investigation Unit. He had no disciplinary complaints in that capacity.
- c. Respondent had a good reputation in two counties in which he practiced.
- d. Respondent suffers from medical problems including depression (beginning in 1995) and chronic pain (beginning in 1998). Respondent had experienced significant pain management treatments and health problems which affected his ability to perform the functions and obligations necessary to remain in a law firm. Respondent's health affected his ability to maintain the rigors of a successful private solo practice.

- e. The conduct was out of character and a result of mental and physical diminished capacity.
- f. Restitution has been paid in full.
- g. The amounts of money were small in comparison to the total amount of money entrusted to him.
- h. Although there is a series of thefts, they were short in duration, isolated in time, and limited to one account.
- i. Respondent has admitted all violations and has become cooperative with The Florida Bar.
- j. Respondent has expressed sincere remorse.
- k. Rehabilitation is probable. With proper treatment Respondent's mental and physical health conditions can be maintained.
- l. Respondent is not likely to re-offend.

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

I find the following costs were reasonably incurred by The Florida

Bar:

Administrative costs pursuant to Rule 3-7.6(o)(1)(I)	\$ 750.00
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Costs expended by The Florida Bar

Out of pocket expenses	208.94
Investigator Expenses (Exhibits B-1 through B-3)	<u>149.10</u>
Total	\$ 1,108.04

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 2d day of October, 2002.

Janette Dunnigan, Circuit Judge/Referree
P. O. Box 1000
Bradenton, Florida 34205

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; STEPHEN C. WHALEN, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607; and SCOTT K. TOZIAN, Esquire, Smith and Tozian, P.A., Attorney for Respondent, 109 North Brush Street, Suite 150, Tampa, Florida 33602.

— JANETTE DUNNIGAN