

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
v.
WOODROW HARPER,
Respondent.

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69,054

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SUPREME COURT
TALLAHASSEE, FLORIDA

COMPLAINANT'S REPLY BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the complainant, The Florida Bar, will be referred to as "The Bar"; respondent, Woodrow Harper, will be referred to as "respondent". Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar will be referred to as the "Disciplinary Rules". The transcripts for the December 2, 1986 final hearing will be referred to as T.

ARGUMENT

THE REFEREE'S RECOMMENDED THREE MONTHS SUSPENSION WITH AUTOMATIC REINSTATEMENT FOR BOTH CASES FOLLOWED BY A PERIOD OF TWO YEARS PROBATION WITH SEMIANNUAL AUDITS OF THE TRUST ACCOUNT IS ERRONEOUS AND UNJUSTIFIED AND THE BOARD OF GOVERNORS' RECOMMENDED SUSPENSION FOR A PERIOD OF ONE YEAR WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT COUPLED WITH A TWO YEAR PERIOD OF PROBATION FOLLOWING REINSTATEMENT AND PAYMENT OF COSTS IS THE APPROPRIATE MEASURE OF DISCIPLINE IN THIS PARTICULAR CASE.

At the outset The Florida Bar reiterates the arguments it made in its Initial Brief. In his Answer Brief, the respondent cites several cases where attorneys have received lighter discipline than that urged by the Bar. He uses these cases to support his argument that the referee's recommendation is appropriate in his case. The Bar contends these cases, as with many discipline cases, are distinguishable and have limited value as a guide here.

The respondent's first argument is that an attorney's attitude is an important consideration for the court in determining discipline. He cites The Florida Bar v. Thompson, 500 So.2d 1335 (Fla. 1986). Here an attorney was given a ninety-one day suspension with proof of rehabilitation required prior to rein-

statement as a result of his conviction on felony drug possession charges. The court noted that because the accused attorney did not seem to fully appreciate the serious nature of the charges against him it was willing to support the referee's recommendation of more serious discipline. As Thompson, supra, points out an attorney's attitude and a sense of genuine intention to correct his behavior in the future are mitigating factors. Yet in the present case the respondent refused to admit to the referee that he had fabricated a letter to the client in order to exculpate himself. If anything, Thompson, supra, should support a more serious discipline.

Respondent also argues throughout that there are numerous mitigating circumstances. However, other than marital difficulties and his grandmother's brief illness, the record is devoid of any mitigating factors.

In relation to respondent's misconduct regarding his trust account, several cases were cited where attorneys had received lesser discipline.

In The Florida Bar v. Bartlett, 462 So.2d 1087 (Fla. 1985) the accused attorney received a thirty day suspension for basically improper trust account record keeping with some shortages. The amount of money involved was relatively small; no clients were injured; and there does not appear from the opinion

that there was any knowing misuse of the funds. He also did not violate any other disciplinary rules. In the present case the amount of money involved was much greater. Furthermore, the respondent admitted to having improperly used the funds for his own personal purposes (T. p. 34).

In The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985) the attorney was suspended for sixty days for misuse of trust funds. The court noted that it is important to examine the nature of the offense and the circumstances surrounding it. In addition, the court should also consider the effect of the misconduct on others as well as the character of the accused attorney. In this case Mr. Moxley was found to have an exceptionally good character. He had been in practice for approximately fourteen years and had been active in the bar association and pro bono work as well as being a devoutly religious man. He fully cooperated with the Bar and more or less turned himself in for discipline. No clients were injured due to his trust account violations nor did any complain. He took steps to improve his account procedures on his own. In fact at the time of the Bar's inquiry all the monies had been replaced.

As a result of these mitigating circumstances Mr. Moxley was given a lighter discipline of a sixty day suspension with three years probation. It is important to note, though, that Justice Adkins and Justice Ehrlich, who was joined by Justice Alderman,

dissented. Justice Adkins felt the attorney should be disciplined by a public reprimand. Justice Ehrlich felt a six month suspension would be more appropriate given the number of significant mitigating circumstances. He strongly stated that

"The degree of departure from the ethical canons of the profession, not the degree of loss sustained by the client, should determine the appropriate punishment. Otherwise the philosophy of Bar discipline is reduced to 'what the client doesn't know can't hurt the attorney'." Id. at 817.

In contrast the respondent does not exhibit such an exemplary character as Mr. Moxley. While it is not known if the respondent has taken steps to correct his trust accounting practices, his departures from the Code of Professional Responsibility have been substantial. He lied to a client on several occasions as to the status of his case. He refused to admit that he had fabricated a letter to this same client to exculpate himself in the matter. He admitted to having used trust funds for his personal use. Although he has expressed his regret for what he has done, such departures from the Code are too serious to condone or mitigate in any substantial fashion as was apparently done by this referee.

In The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986) the attorney was found guilty of various trust accounting violations.

The court did not find any dishonesty on his part nor was the client damaged. In the present case the respondent used the funds from the trust account for his own personal purposes. In Neely, supra, the attorney deposited a client's personal injury protection benefits check for \$2,948.512 in his trust account and was unable later to pay his client for a short period due to problems within the account. While he was guilty of trust accounting violations he was not found to have used the money for himself. Therefore the lighter penalty of a sixty day suspension followed by a two year period of probation was appropriate.

Lastly the respondent cites The Florida Bar v. Heston, 501 So.2d 597 (Fla. 1987). This case was a consent judgment and as such should have no precedential weight. Furthermore, the case does not set forth how long the attorney was using the trust funds for himself.

Finally, the Bar notes in The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986) the court increased the recommended discipline from ninety days to one year followed by probation for two years in a misappropriation case. This case involved the misuse of client funds. He misappropriated approximately \$10,500 held in trust for a guardianship which he admitted and had a trust account check returned for insufficient funds. Because the attorney repaid the money, cooperated with the Bar, was remorseful over his wrongdoing, and had problems with alcohol, suspension and not disbarment was ordered.

The court also noted disbarment would be warranted absent sufficient mitigating circumstances because of the ease by which a lawyer can raid his trust account. Commenting on the mitigating factors the court wrote that they

"...simply can neither erase the grievous nature of respondent's misconduct in stealing clients' funds, nor diminish it to the extent of warranting the same punishment which has been meted out for much less serious offenses." Id. at 1231.

This case involved neglect, lying to a client, improper trust account record keeping and misuse of substantial amounts of trust funds for several months. Tunsil, supra, is much closer in point and should be much more persuasive than the cases cited by respondent.

The Bar submits it is the degree of the departure from the Rules and not whether injury has been caused to a client which must be examined first. Lying and misusing trust funds are serious departures. They call for a one year suspension with proof of rehabilitation. Respondent argues there are many mitigating matters yet few are indicated in the record. They cannot excuse the gross departures from the Code of Professional Responsibility. Finally, if merely repaying the monies is sufficient to preclude a showing of rehabilitation, then the deterrent effect on other attorneys would be substantially undermined.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays that this Honorable Court will review the referee's findings of fact and recommendations of guilt and discipline approve the findings of fact and recommendations of guilt but reject the recommended disciplines of two concurrent three months suspensions with automatic reinstatements to be followed by a period of two years probation with semiannual audits and instead impose discipline of a suspension for a period of at least one year with proof of rehabilitation required to be followed by a two year period of probation with semiannual audits of the trust account subsequent to any eventual reinstatement and tax costs against the respondent currently totalling \$2,233.85 with interest at the statutory rate due and accruing thirty days subsequent to this court's final order.

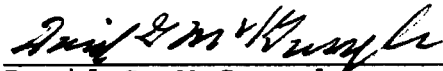
Respectfully submitted,

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