

1-1-89

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Case No. 72,068

[TFB Case No. 88-30,069 (05B)]

TOM K. DOUGHERTY,

Respondent.

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THE FLORIDA BAR'S INITIAL BRIEF

FILED

SID J. WHITE

DEC 6 1988

CLERK, SUPREME COURT

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar"; the appellee, Mr. Dougherty, will be referred to as the respondent; "R" will refer to the record and "RR" will refer to the Report of Referee.

STATEMENT OF THE FACTS AND CASE

Respondent acted as trustee for the funds of the complainant, Ms. Pauline Zepp, since 1978. Beginning in about 1985, respondent neglected his trustee duties, resulting in inadequate communication with his client and untimely and inaccurate accountings, RR-3.

Upon investigation by The Florida Bar, it was found that respondent had properly tendered certain shares of stock for redemption. However, respondent invested the proceeds, without disclosure to his client, in two mortgages. One mortgage went to his long time client, Mr. Heritage, while another went as a mortgage loan to Rocky Mount, Inc. When asked at the grievance committee hearing if Rocky Mount, Inc., were his clients, he answered affirmatively. Only later did he reveal to the grievance committee that he is a one-third principal of the company along with his clients. Further, respondent failed to record the Rocky Mount mortgage deed for thirteen months, RR-3,4, R-9.

Upon The Florida Bar's review of respondent's general trust account as well as Ms. Zepp's, it was found that both accounts were in violation of the trust accounting rules. The violations involved lack of adequate record keeping and two overdrafts in

the Zepp trust. Subsequently, respondent made full accountings and took steps to bring his accounts into full compliance with the rules, R-11-13, RR-4.

As the referee found, there was no evidence of any intention to misappropriate trust funds, but rather sloppy and negligent actions, RR 5-6.

The grievance committee found probable cause regarding the above conduct on December 10, 1987. A complaint was filed and heard by a referee on June 2, 1988. The referee found respondent in violation of the rules pursuant to a stipulation of facts by the parties and recommended a private reprimand.

The Florida Bar sought reconsideration of the Report of Referee on the basis that a private reprimand was not authorized by the rules but the referee denied it, stating this type of conduct should be minor misconduct. The Board of Governors voted to appeal and seek public discipline at their November, 1988, meeting and this Brief is filed pursuant to that action.

SUMMARY OF ARGUMENT

The referee found that the respondent in this case failed to act with reasonable diligence as trustee of an inheritance trust by failing to tender stock for exchange and to provide accurate accountings in a timely manner. When he did tender the stock for exchange in cash, he reinvested the cash in a venture wherein he had a conflicting business interest without disclosure to or consent from his client. He jeopardized his client's security interest by failing to record the resulting mortgage for over one year. Finally, his trust account records were not in conformance with the minimum Florida Bar rules.

The referee's recommendation of a private reprimand for the respondent in these circumstances is clearly inappropriate under the Rules Regulating The Florida Bar, Rule 3-5.1(b), making private reprimands appropriate only in cases of minor misconduct. The recommended discipline does not achieve the purpose for which discipline sanctions are imposed by this Court, nor is the recommendation appropriate with current standards for imposing attorney discipline.

Therefore, The Florida Bar asks this Court to find the respondent in violation as recommended by the referee and to impose the public discipline warranted in this case.

ARGUMENT

POINT I

WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE OF A PRIVATE REPRIMAND IS OVERLY LENIENT AND CONTRARY TO THE RULES REGULATING THE FLORIDA BAR IN THIS CASE?

Rule 3-5.1(b) of the Rules of Discipline, effective January 1, 1987, and therefore controlling in this case, provides: "Minor misconduct is the only type of misconduct for which a private reprimand is an appropriate disciplinary sanction." Pursuant to Rule 3-7.5(k)(1)(3), a referee may only recommend a private reprimand in cases based upon a complaint of minor misconduct.

The instant case is not a complaint of minor misconduct pursuant to the rules and therefore a private reprimand is not an option. This was apparently the intent of the new rules in order to streamline the grievance committee procedure and to allow all findings of probable cause to become public.

It should be noted that other factors make a private reprimand inappropriate. This case involves neglect, failure to account, conflict of interest and technical trust account violations. In The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), this Court held that public discipline was warranted for technical trust accounting violations even where no harm to the client had taken place. This case further stated that public

reprimands were appropriate for technical violations of the trust accounting rules.

In The Florida Bar v. Padgett, 481 So.2d 919 (Fla. 1986), this Court imposed a six month suspension on an attorney who had knowingly comingled personal and client funds for his personal convenience. The Court noted that as in the case at hand, the clients had not been harmed but stated:

"That the client suffered no real loss, however, is not the point. Attorneys owe a fiduciary duty to their clients and the trust accounting rules exist to insure that attorneys live up to the high standards expected of them. To knowingly comingle funds merely for convenience is outrageous, and we will not tolerate it. We find the referee's recommended punishment inadequate.", at 919.

In The Florida Bar v. Wagner, 497 So.2d 238 (Fla. 1986), the attorney lent one client's trust funds to another client and became involved in a business transaction between his own corporation and a client in a basic factual scenario quite similar to the case at hand. This respondent was suspended for 18 months with three years probation and restitution required. Surely the basic similarity of these facts demand that the respondent in the case at hand at least receive public discipline.

Although the respondent cited The Florida Bar v. Aaron, 529 So.2d 685 (1988), as citation for his recommendation of a private

reprimand, Aaron involved a public reprimand for technical trust accounting rules.

Florida's Standards for Imposing Lawyer Sanctions, approved November, 1986, by The Florida Bar's Board of Governors in an effort to effect disciplinary guidelines in accordance with the American Bar Association, also provides for significantly more serious discipline than a private reprimand in this case. Section 4.13 provides that public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes little or no injury or potential injury to a client.

Thus, nothing less than a public reprimand is appropriate in this case involving neglect, conflict of interest, as well as technical trust accounting violations.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court to review the Report of Referee, findings of fact, and recommended discipline, and impose nothing less than a public reprimand or stronger public discipline as well as order payment of costs in this matter, currently totalling \$1944.79.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief has been furnished by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. mail to Counsel for respondent, George E. Hovis, at Post Office Box 848, Clermont, Florida, 32711; and a copy has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 7th day of December, 1988.

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