

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

CASE No. 74,086
TFB No. 87-25,512 (12B)

v.

DONALD K. MCSHIRLEY,
Respondent.

FILED
ESTABLISHED

NOV 27 1989

CLERK, SUPREME COURT
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REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.5, Rules of Discipline, a Final Hearing hearing was held on September 19, 1989. The enclosed pleadings, orders, transcripts and exhibits are forwarded to The Supreme Court of Florida with this report, and constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: David R. Ristoff

For The Respondent: John A. Weiss

II. Findings of Fact as to Each Item of Misconduct With Which the Respondent is Charged: After considering all the pleadings and evidence before me, I find: The respondent has admitted and this Referee finds as facts the following: In about January 1987, The Florida Bar initiated an audit of respondent's trust account records. In August 1988, a limited audit was completed by Florida Bar Staff Auditor, Pedro J. Pizarro, C.P.A. The following was discovered during the audit: Respondent's bank accounts were labeled as "Escrow" rather than as "Trust" as required. Several personal real estate transactions were handled through respondent's trust account. Several dates reflect that the disbursements made to or on behalf of the respondent exceeded the amount of his personal funds commingled by him in the trust account, creating a deficit or negative balance. In some instances disbursements made to or on behalf of certain clients exceeded funds deposited into the trust account for such clients, creating negative balances for those clients. The reconciliations reconstructed by the Staff Auditor reflected shortages in May 1980 of (\$1,066.87), which increased to (\$10,634.63) by May 1982. No records were available to reconstruct reconciliations

for the period from June 1982 through July 1984. Estimated reconciliations prepared for August 1984 through January 1986 reflect the shortages reached approximately (\$27,000.00) for that same period. Further, during the course of The Florida Bar investigation regarding respondent's trust account it was discovered that respondent converted approximately \$27,000.00 of his trust account funds to help finance his law office as well as to sponsor little league sports. In approximately February 1986, respondent obtained a loan to reimburse the shortages in his trust account.

In addition, based upon the testimony presented at the Final Hearing the Referee finds that while respondent asserts that his trust account records were properly maintained or preserved until lost by a mover sometime between October 1986 to May 1987 it is inconsistent with the fact that respondent deliberately misappropriated funds in a piecemeal fashion over a period of time from early 1984 through January 1986. Respondent admitted at the Final Hearing that if he did not have enough money to pay the bills, that he would write a check from his trust account to his general account and pay the bills. Respondent further testified that he would sometimes pay bills directly from the trust account. (Tr. Final Hearing p. 20. l. 3-7). Therefore, respondent's assertion of maintaining accurate records, ie, maintaining reconciliations, is inconsistent with these misappropriations.

III. Recommendation as to Whether or Not the Respondent Should Be Found Guilty: I find respondent guilty as to the following: Rule 5-1.1(b) (Rule 11.02(4) (b) before January 1, 1987) (failure to maintain the records or to produce them); Rule 5-1.2(b) (2) (Bylaws Section 11.02(4) (c) 2.b. before January 1, 1987) (deposit slips required); Rule 5-1.2(b) (4) (Bylaws Section 11.02(4) (c) 2.c. before January 1, 1987) (cancelled checks required); Rule 5-1.2(b) (5) (Bylaws Section 11.02(4) (c) 2.e. before January 1, 1987) (cash receipts and disbursements journal required); Rule 5-1.2(b) (6) (Bylaws Section 11.02(4) (c) 2.f. before January 1, 1987) (ledger cards required); Rule 5-1.2(b) (7) (Bylaws Section 11.02(4) (c) 2.g. before January 1, 1987) (bank statements required); Rule 5-1.2(c) (1), (2), and (3) (Bylaws Section 11.02(4) (c) 3.a., b., and c. before January 1, 1987) (reconciliations, comparisons, and listings required); Rule 5-1.2(c) (4) (Bylaws Section 11.02(4) (c) 3.d. before January 1, 1987) (evidence of compliance which requires the lawyer to authorize and request the bank to notify The Florida Bar in the event any trust check is returned due to insufficient or uncollected funds, absent bank error); Rule 4-1.15 (Disciplinary Rule 9-102(A) before January 1, 1987) (commingling lawyer's funds with client's trust funds); DR 1-102(A) (3) (engage in illegal conduct involving moral turpitude); DR 1-102(A) (4) (engage in conduct involving dishonesty, fraud,

deceit, or misrepresentation); and DR 1-102(A)(6) (engage in any other conduct that adversely reflects on his fitness to practice law).

IV. Recommendation as to Disciplinary Measures to be Applied: I recommend that DONALD K. MCSHIRLEY be disciplined by a three (3) year suspension from the practice of law, passage of the Ethics portion of The Florida Bar examination and payment of the costs of this disciplinary proceeding.

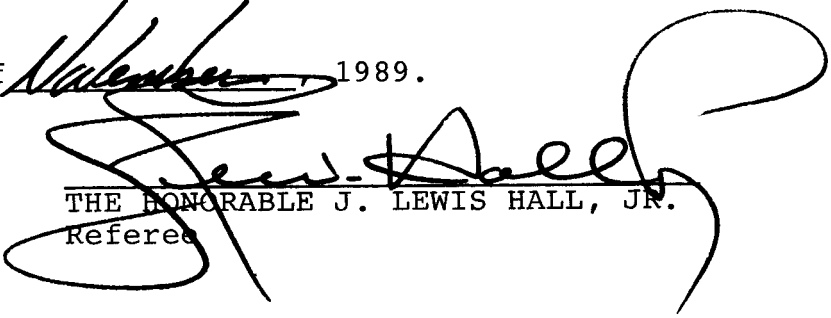
V. Personal History and Past Disciplinary Record: After a finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.5(k)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

1. Age: 42
2. Date admitted to The Bar: 10/23/75
3. Mitigating Factors: The absence of a prior disciplinary record; Good character or reputation; remorse; timely good faith effort to make restitution, even prior to the initiation of disciplinary proceedings, along with the fact that no client was ever damaged or harmed; and a cooperative attitude toward disciplinary proceedings.
4. Aggravating Factors: The deliberate and intentional misappropriation of a substantial amount of money for respondent's personal benefit.

VI. Statement of Costs and Manner in Which Costs Should Be Taxed: I find the following costs were reasonably incurred by The Florida Bar:

(See attached Statement of Costs)

Dated this 17th day of November, 1989.


THE HONORABLE J. LEWIS HALL, JR.
Referee

Copies furnished to:

John A. Weiss, Counsel for Respondent
David R. Ristoff, Branch Staff Counsel
John T. Berry, Staff Counsel

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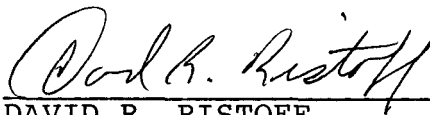
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STATEMENT OF COSTS

1. Administrative Costs	\$ 500.00
2. Staff Auditor Expenses: (Pedro J. Pizarro - Audit)	
a. Time Expended (183 3/10 hours).....	5,118.05
b. Travel Expenses.....	108.23
3. Court Reporter Expenses:	
(Margie Frohock - Referee Hearing 9/19/89)	
a. Appearance Fee	50.00
b. Transcript (63 pages @ \$3.00).....	189.00
c. Postage	1.50
4. Staff Counsel Expenses: (David R. Ristoff - Referee Hearing, held in Tallahassee 9/19/89)	
a. Transportation (Airfare & Car Rental)	219.56
b. Meals	14.72
5. Staff Auditor Expenses: (Pedro J. Pizarro - Referee Hearing, held in Tallahassee 9/19/89)	
a. Travel Expenses	<u>206.54</u>
 TOTAL AMOUNT DUE TO DATE:	 \$ <u>6,407.60</u>

Respectfully submitted,



DAVID R. RISTOFF
Branch Staff Counsel
The Florida Bar, Suite C-49
Tampa Airport Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
(Attorney #358576)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Statement of Costs has been furnished to JOHN A. WEISS, Counsel for Respondent, at 101 North Gadsden Street, Post Office Box 1167, Tallahassee, Florida 32301-1167, by Regular U.S. Mail; and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32301-8226, by Regular U.S. Mail; on this 7th day of Nov., 1989.



DAVID R. RISTOFF
(Attorney #358576)