

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

CASE NO. SC09-1040

Complainant,

TFB NO. 2009-11,443 (6A)

v.

KEVIN J. HUBBART,

Respondent.

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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 the Rules Regulating The Florida Bar, a sanctions hearing was held in regard to this matter. Any pleadings, notices, motions, 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: Karen B. Lopez

For The Respondent: Pro Se

II. Findings of Fact as to Each Item of Misconduct With Which the Respondent Is Charged: TFB No. 2009-11,443 (6A):

On June 22, 2009, The Florida Bar filed a Notice of Determination of Guilt in the following misdemeanor and felony matters: CTC03-01180MMANO-E, CRC03-00880CFANO-K, CRC08-10132CFANO-K, and CRC08-18754CFANO-K. The Respondent entered pleas of *Nolo Contendere* in each of these criminal matters and the respective Courts entered orders withholding adjudication and imposing various sanctions in the four separate worthless check charges; one misdemeanor and one felony on December 15, 2003, and two felonies on May 5, 2009. The amount of the outstanding checks was as follows: \$99.55, \$245.92, \$330.00 and \$220.68. The Florida Bar elected to proceed against the Respondent on the determination of guilt in the three felony matters. The Florida Supreme Court entered an order suspending the Respondent from the practice of law on June 23, 2009, effective July 23, 2009. Pursuant to Rule 3-7.2(h)(2), the undersigned was appointed Referee to hold a sanctions hearing. A sanctions hearing was held on August 21, 2009, and then continued until September 25, 2009, at the request of the Respondent. On September 25, 2009, the sanctions hearing was reconvened to receive any additional evidence and receive and consider the argument of counsel.

At the August 21, 2009, hearing, the Respondent admitted that he had been

charged by information with the various felonies and testified that he was not informed of the dishonored checks before being criminally charged. He admitted entering pleas of *nolo contendere* to the charges and these pleas were accepted by the respective Courts. He also admitted to having been sentenced to the various criminal sanctions as noticed and offered by The Florida Bar. Respondent stated at the time of his issuance of the four worthless checks over a period of six years, he was under extreme pressure with “a business deal gone bad” and was engaged in intense litigation. Respondent testified that he had no knowledge of the dishonored checks until it was too late to avoid criminal liability. Respondent testified that he suffered from attention deficit disorder (ADD) and that this condition caused him to fail to focus upon and timely respond to important matters. This Referee afforded the Respondent additional time until the continued hearing on September 25, 2009, to provide any available medical evidence regarding this putative matter offered by the Respondent in extenuation or mitigation. The Respondent failed to present any additional mitigation evidence and had no additional information to present at the September 25, 2009, hearing. In fact, the Respondent never presented any credible evidence of any kind other than his own statement regarding this alleged medical condition. At all times during these proceedings, the Respondent presented himself in a coherent and logical fashion, appearing to be free from any medical condition

which might otherwise adversely affect his ability to focus or concentrate on these matters or their potentially adverse consequences.

III. Recommendations as to Whether or Not the Respondent Should Be Found Guilty:

Based on Rule 3-7.4 and the Respondent's admissions and the evidence presented before me, I recommend that the Respondent be found guilty of violating the following Rule Regulating The Florida Bar:

a. TFB File No. 2009-11,443 (6A):

Rule 3-7.2 (Procedures upon criminal or professional misconduct; Discipline upon Determination or Judgment of Guilt of Criminal Misconduct).

IV. Recommendation as to Disciplinary Measures to Be Applied:
Suspension for a period of three years.

In making this recommendation, I considered the evidence presented and the following case law: Referees in disciplinary proceedings may not "go behind" a conviction to determine whether or not the attorney is actually guilty of the offense. *The Florida Bar v Kandekore*, 766 So 2d. 1044 (Fla. 2000). However, the Respondent can be allowed to present evidence as to the circumstances of their convictions to demonstrate mitigation in favor of less severe sanctions. *The Florida Bar v. De La Torre*, 994 So 2d 1032 (Fla. 2008). The Florida Standards for

Imposing Lawyer Sanctions 5.11, provides for disbarment when a lawyer is convicted of a felony under applicable law. Issuing worthless checks constitutes unethical conduct and subjects the attorney to professional discipline and that even if restitution is made, burdens the recipients and is fundamentally dishonest. *The Florida Bar v Williams*, 753 So 2d 1258 (Fla. 2000).

V. Personal History and Past Disciplinary Record: Pursuant to the finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(m)(l), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Year of Birth: 1963

Date Admitted to Bar: 11/20/1996

Prior Disciplinary Convictions and Disciplinary

Measures Imposed Therein: Public Reprimand in SC07-835, TFB No.: 2004-10,651(6A), 2005-11,186(6A), 2005-11,578(6A), and 2006-11,326(6A). In this matter, the Respondent entered a Conditional Guilty Plea for Consent Judgment and an Addendum to the Conditional Guilty Plea for Consent Judgment. The Respondent entered a Conditional Guilty Plea to violations of Count I: I find Respondent guilty of violating Rule **1-3.4(a)** (A CLER delinquent member shall not engage in the practice of law in this state); **1-3.6** (Any person who fails to comply

with CLER shall be deemed a delinquent member and shall not engage in the practice of law in Florida); **4-5.5** (A lawyer shall not practice law in violation of the regulation of the profession); **4-7.10(a)** (A lawyer shall not use a firm name, letterhead, or other professional designation that violates subdivision (b)(1) of rule 4-7.2); and **4-7.10(b)** (A lawyer may not practice under a deceptive trade name).

Count II: I find Respondent guilty of violating Rule **3-4.3** (Misconduct and Minor Misconduct); **4-1.4(a)** (A lawyer shall keep a client reasonably informed about the status of a matter and shall comply with reasonable requests for information); **4-1.5(f)** (A contingency fee agreement shall be in writing and shall state the method by which the fee is to be determined; upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement showing the remittance to the client and the method of its determination); **4-1.7(b)** (Duty to avoid limitation on independent professional judgment); **4-1.8(a)** (A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client); **4-1.8(i)** (A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client); **4-7.10(a)** (A lawyer shall not use a firm name, letterhead, or other professional designation that violates subdivision (b)(1) of rule 4-7.2); and **4-7.10(b)** (A lawyer may not practice

under a deceptive trade name).

Count III: I find Respondent guilty of violating Rule **3-4.3** (Misconduct and Minor Misconduct); **4-1.15** (A lawyer shall comply with The Florida Bar Rules Regulating Trust Accounts); **4-7.10(a)** (A lawyer shall not use a firm name, letterhead, or other professional designation that violates subdivision (b)(1) of rule 4-7.2); **4-7.10(b)** (A lawyer may not practice under a deceptive trade name); **4-8.4(a)** (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct); **5-1.1(a)** (A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation; a lawyer may maintain funds belonging to the lawyer in the trust account in an amount no more than is reasonably sufficient to pay bank charges relating to the trust account); **5-1.1(b)** (Money or other property entrusted to any attorney for a specific purpose is held in trust and must be applied only to that purpose); **5-1.1(e)** (Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person; a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); **5-1.2(b)** (A lawyer shall maintain the minimum trust accounting records prescribed by the Rules Regulating The Florida Bar; and **5-1.2(c)** (A lawyer who receives or disburses trust money or property shall

follow the minimum trust accounting procedures prescribed by the Rules Regulating The Florida Bar).

Count IV: I find Respondent guilty of violating Rule **3-4.3** (Misconduct and Minor Misconduct); **4-1.7(a)** (A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client; **4-1.7(b)** (A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest); and **4-8.4(a)** (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct).

The referee notes that the Respondent is not certified in any area of practice.

Aggravating Factors:

- a) Prior disciplinary record with extensive violations
- b) Pattern of misconduct over an extended period of time

Mitigating Factors: personal problems as testified to by the Respondent without corroboration or any credible support

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

As to TFB File No.2009-11,443 (6A) (HFC):

| | |
|---|--------------------------|
| <u>Administrative Costs Pursuant to Rule 3-7.6(q)(1)(I)</u> | \$1,250.00 |
| <u>Bar Counsel Costs</u> | 25.36 |
| <u>Investigative Costs</u> | 217.50 |
| <u>Investigator Expenses</u> | 44.00 |
| <u>Court Reporter Costs</u> | 520.00 |
| <u>Miscellaneous Costs</u> – Copy Costs | <u>25.00</u> |
| TOTAL for TFB File No. 2009-11,443 (6A) (HFC): | <u>\$2,056.86</u> |

It is recommended that all such costs and expenses be charged to the 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 11th day of December, 2009.

Gregory P. Holder
The Honorable Gregory P. Holder, Referee

Copies:

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