

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

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JOHN A. TOMASINO

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CLERK, SUPREME COURT

THE FLORIDA BAR,

Complainant,

v.

CAROLE SUZANNE BESS,

Respondent.

Supreme Court Case

No. SC14-1423 BY _____

The Florida Bar File

No. 2013-31,297 (18B)

REPORT OF REFEREE ACCEPTING CONSENT JUDGMENT

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 July 21, 2014, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. 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.

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.

1. Between 2012 and 2013, respondent failed to maintain the minimum required trust accounting records and failed to follow the minimum required trust accounting procedures resulting in a check being dishonored due to insufficient funds.

2. The bar's audit revealed ongoing shortages in the trust account due to improper transfers to the operating account, two utility payments, and an improper disbursement to a client from the trust account.

3. There was no evidence of intentional misappropriation.

4. During the time period in question respondent delegated all bookkeeping duties, including maintenance of the trust account, to her nonlawyer employees. Until November 2012, respondent's brother, a certified public accountant, handled the bookkeeping duties for all of respondent's office locations. Thereafter, respondent hired an office manager who assumed all of the bookkeeping duties for all of the office locations.

5. Respondent failed to properly train her office manager and failed to supervise the maintenance of the various accounts, including the trust

account. Additionally, respondent's failure to maintain the minimum required trust account records contributed to the ongoing errors in the account.

6. Respondent frequently was absent from her office during the time period in question because she was caring for a terminally ill family member and was suffering health concerns of her own.

7. During 2013, respondent's office manager, without respondent's knowledge or consent, paid office expenses from the trust account because there were insufficient funds in the operating account. The office manager did not bring the cash flow problem to respondent's attention.

8. During the audit period, respondent also commingled her earned fees with trust funds in her merchant account. Clients made numerous deposits by credit card into the merchant account, which respondent did not designate as a trust account. These deposits consisted of respondent's earned fees, as well as funds that were to be held in trust for filing fees. Earned fees then were transferred to the operating account and the funds required to be held in trust then were transferred to the trust account.

9. After the bar brought the trust account shortage to respondent's attention, respondent hired an accountant to reconstruct the trust account records she failed to maintain and provided them to the bar at a later date. She also funded the shortage with her own funds.

10. No clients lost any money or complained to the bar.

III. RECOMMENDATIONS AS TO GUILT

I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

4-1.15 A lawyer shall comply with The Florida Bar Rules Regulating Trust Accounts.

5-1.1(a)(1) 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. All funds, including advances for fees, costs, and expenses, shall be kept in a separate bank or savings and loan association account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person and clearly labeled and designated as a trust account. 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 an attorney for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney's

fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion.

5-1.2(b)(2) Records may be maintained in their original format or stored in digital media as long as the copies include all data contained in the original documents and may be produced when required. The following are the minimum trust accounting records that shall be maintained original or clearly legible copies of deposit slips if the copies include all data on the originals and, in the case of currency or coin, an additional cash receipts book, clearly identifying the date and source of all trust funds received and the client or matter for which the funds were received.

5-1.2(b)(3) Records may be maintained in their original format or stored in digital media as long as the copies include all data contained in the original documents and may be produced when required. The following are the minimum trust accounting records that shall be maintained original canceled checks or clearly legible copies of original canceled checks for all funds disbursed from the trust account, all of which must: (A) be numbered consecutively, (B) include all endorsements and all other data and tracking information, and (C) clearly identify the client or case by number or name in the memo area of the check.

5-1.2(b)(5) A separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers, and the account balance, and

containing at least: (A) the identification of the client or matter for which the funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed, or transferred.

5-1.2(b)(6) A separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing: (A) the identification of the client or matter for which trust funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed, or transferred.

5-1.2(c)(1)(A) The lawyer shall cause to be made monthly reconciliations of all trust bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the balance per bank with the balance per the checkbook and the cash receipts and disbursements journal.

5-1.2(c)(1)(B) The lawyer shall cause to be made monthly a comparison between the total of the reconciled balances of all trust accounts and the total of the

trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons therefor.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

4.1 Failure to Preserve the Client's Property

4.12 Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

7.0 Violations of Other Duties Owed as a Professional

7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Mitigating Factors: 9.32

- (a) absence of prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (g) character or reputation; and
- (l) remorse.

Aggravating Factors: 9.22

(c) pattern of misconduct;

(d) multiple offenses; and

(i) substantial experience in the practice of law.

V. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Bar v. Benes, 123 So. 3d 559 (Fla. 2013) – Ninety days suspension for failing to supervise a nonlawyer employee resulting in a rouge employee of a real estate company for which the attorney handled closing being able to improperly obtain funds from the attorney's trust account. The attorney permitted his nonlawyer employee to field requests for disbursements from the trust account from real estate agents employed by the real estate company for which the attorney handled closings. The attorney did not review these requests. As a result, a rogue real estate agent employed by the real estate company was able to misappropriate more than one million dollars by making improper disbursements requests. There was no evidence either the attorney or his employee misappropriated any funds or benefitted from the real estate agent's illegal actions. The bar's audit also revealed shortages in the attorneys trust account that were unrelated to the real estate agent's misappropriation. The attorney failed to maintain the minimum required trust accounting records and failed to follow the

minimum required trust accounting procedures. The attorney also engaged in commingling and paid personal expenses from his trust account. Because the misappropriated funds were covered by insurance, no clients suffered any losses and the attorney fully covered the unrelated shortage as soon as it was brought to his attention. In mitigation, the attorney had no prior disciplinary history, there was no dishonest or selfish motive, he made a timely effort to rectify the consequences of his misconduct, he fully cooperated with the bar, and was remorseful. In aggravation, the attorney was experienced in the practice of law and there were multiple offenses.

The Florida Bar v. Buck, 76 So. 3d 938 (Fla. 2011) – Thirty day suspension and two years of conditional probation pursuant to a Consent Judgment for Conditional Guilty Plea for failing to adequately supervise his nonlawyer employee. The attorney's poor supervision created an atmosphere wherein his employee was permitted to act outside the scope of her authority to obtain an interest in mortgaged property rightfully belonging to a client. Additionally, the attorney obtained a loan from a client but did not timely execute a mortgage deed and promissory note to the client nor did he obtain a timely written acknowledgement that the attorney had advised the client to obtain independent. Finally, shortages appeared on 48 of the attorney's client ledger cards and he failed to follow the minimum required trust accounting procedure. The nonlawyer

employee handled the trust account, she intentionally hid information related to the trust account from the attorney, she instructed the staff that no negative balances were ever to be shown on any journal or client ledger card, and she ordered all such information to be kept from the attorney. After the bar commenced its audit, the attorney hired a CPA who brought the attorney's trust account into substantial compliance with the rules. There was no evidence funds were misappropriated from the trust account. In a second matter, the attorney delegated the preparation of all filings in an estate to his nonlawyer assistant/office manager without sufficient supervision. The employee's actions resulted in the estate not being properly closed and the court issuing several orders requiring certain delinquent documents be filed. The attorney was not made aware of these orders by his employee. When he learned of them, he filed the necessary documents to close the estate. During his probation, the attorney was required to undergo a LOMAS review and follow any and all recommendations proposed by LOMAS at his expense, attend Ethics School, and file quarterly reports prepared by his CPA which support a determination that his trust account was in substantial compliance with the bar's trust accounting rules. In aggravation, there was a pattern of misconduct, multiple offenses, and the victims were vulnerable. In mitigation, the attorney had no prior disciplinary history, there was no dishonest or selfish motive, he timely good faith effort to rectify consequences of misconduct, he fully cooperated with the bar, he

was inexperienced in the practice of law during much of the time period involved and his nonlawyer employee was an experienced office manager/assistant in whom he reposed a great deal of trust, and there was interim rehabilitation and remorse.

The Florida Bar v. Maloy, 22 So. 3d 69 (Fla. 2009) – Ninety day suspension and 2 year period of probation pursuant to a Consent Judgment for Conditional Guilty Plea for having shortages in her real estate closing trust account in violation of her duties as title agent for Attorneys' Title Insurance Fund. The audit revealed that the attorney failed to maintain the minimum required trust accounting records and failed to follow the minimum required trust accounting procedures.

Additionally, the attorney permitted two independent contractors to handle real estate closings without adequate supervision and permitted one of the independent contractors access to her attorney trust account. As a result, the two independent contractors were able to misappropriate a significant amount of trust funds. The independent contractors were also able to forge the attorney's signature on title insurance commitments. The attorney was required to undergo a LOMAS review. In aggravation, there was a pattern of misconduct and multiple offenses. In mitigation, she had no prior disciplinary history, there was no dishonest motive, she was suffering from medical issues at the time, she promptly contacted her malpractice insurance carrier and self-reported the matter to the bar, worked with the title insurer to resolve the issues, and was remorseful.

VI. RECOMMENDATION 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. Ninety day suspension with automatic reinstatement to the practice of law.

B. Two year period of probation to commence upon reinstatement with the following terms:

i. Respondent shall attend and complete the next scheduled Trust Accounting Workshop.

ii. Respondent agrees to retain, at respondent's expense, the services of a certified public accountant acceptable to The Florida Bar to review respondent's trust account records on a monthly basis during the term of probation. Quarterly statements shall be prepared by the certified public accountant for review by The Florida Bar. The quarters are March 31, June 30, September 30 and December 31. Statements shall specify whether respondent is in compliance with the Rules Regulating Trust Accounts and shall include the monthly reconciliations, copies of the bank statements of respondent's trust accounts and a list of clients with the individual client trust account balances. Respondent is responsible for the submission of the quarterly statements to The Florida Bar.

iii. Respondent will pay a quarterly monitoring fee of \$100.00 to The Florida Bar. All quarterly monitoring fees must be remitted no later than the end of each respective quarter in which the monitoring fee is due. All fees must be paid to the Bar's headquarters office in Tallahassee. *Failure to pay shall be deemed cause to revoke probation.*

VII. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following personal history of Respondent, to wit:

Age: 50

Date admitted to the Bar: May 24, 1990

Prior Discipline: None

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

I find the following costs were reasonably incurred by The Florida Bar:

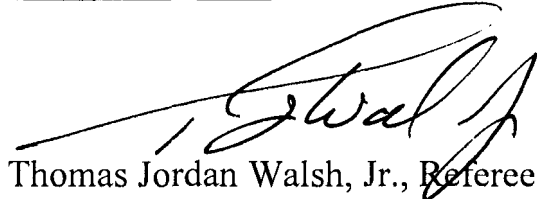
Investigative Costs	\$2,082.78
Bar Counsel Travel Costs	\$224.52
Court Reporters' Fees	\$1,019.65
Administrative Fee	\$1,250.00

TOTAL \$4,576.95

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and that should such cost judgment not be satisfied within thirty days of said judgment becoming final, Respondent shall be deemed

delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 13 day of Nov, 2014.


Thomas Jordan Walsh, Jr., Referee

Original To:

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