IN THE SUPREME COURT OF FLORIDA

CASE No. 65,432

THE FLORIDA BAR,

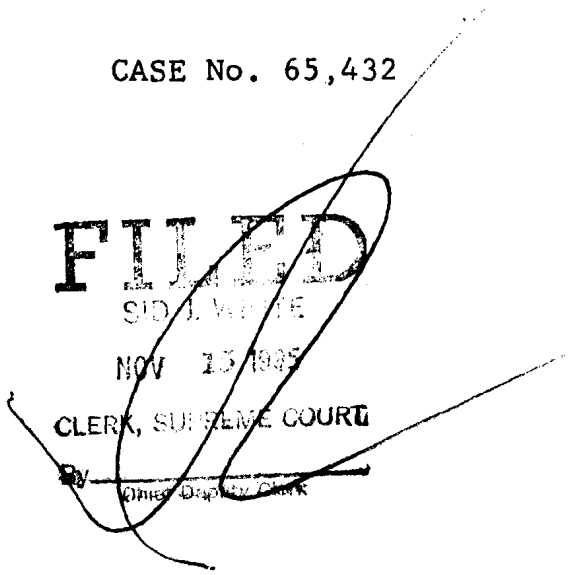
Complainant,

-vs-

STEPHEN F. JACKSON,

Respondent.

_____/



RESPONDENT'S REPLY BRIEF IN

SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
TABLE OF CASES	i
POINTS ON REVIEW	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
CONCLUSION	16
CERTIFICATE OF SERVICE	16

TABLE OF CASES

	Page
Batch v. State, 405 So.2d 302 (Fla.4th DCA 1981)	9
The Florida Bar v. Abney, 279 So.2d 834 (Fla. 1973)	4
The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981)	15
The Florida Bar v. Hawkins,444 So.2d 961 (Fla. 1984)	4
The Florida Bar v. Johnson, 313 So.2d 33 (Fla. 1975)	4
The Florida Bar v. Mitchell, 385 So.2d 96 (Fla. 1980)	15
The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973)	4
The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970)	4
Hamilton v. State, 306 So.2d 600 (Fla. 2d DCA 1975)	9,10
In Re. Ruffalo, 390 U.S. 544 (1968)	11
Johnson v. State, 371 So.2d 556 (Fla. 2d DCA 1979)	9
Rewis v. United States, 401 U.S. 808 (1971)	11
Rothermel v. Fla. Parole and Probation Comm'n, 441 So.2d 663 (Fla. 1st DCA 1983)	9
State v. Junkin, 89 So.2d 481 (Fla. 1956)	4

POINTS ON REVIEW

I

THE COMPLAINT MUST BE DISMISSED BECAUSE THE COMPLAINANT DID NOT PROVE THE CHARGES BY CLEAR AND CONVINCING EVIDENCE, PARTICULARLY SINCE THERE REALLY WAS ONLY ONE WITNESS WHO TESTIFIED AGAINST MR. JACKSON, HIS TESTIMONY WAS UNCORROBORATED, AND MR. JACKSON DENIED THE CHARGES UNDER OATH.

II

THE MOST SEVERE DISCIPLINE WHICH MAY BE IMPOSED UPON MR. JACKSON IS A PRIVATE REPRIMAND; HE IS ENTITLED TO THE BENEFIT OF THE AMENDMENT TO RULE 11.04(6)(c) OF THE INTEGRATION RULE.

III

THE REFEREE'S RECOMMENDED DISCIPLINE, SUSPENSION FROM THE PRACTICE OF LAW FOR NINETY DAYS, IS EXCESSIVE; THE MAXIMUM DISCIPLINE SHOULD BE A PRIVATE REPRIMAND.

SUMMARY OF ARGUMENT

I

There was only one witness who testified against Mr. Jackson, who was credited by the Referee. Mr. Jackson denied the charges under oath. Mr. Jackson's testimony established that his phone calls were an inquiry, not a demand. He merely sought to determine if there were a method by which the two men could be compensated of which he was unaware. The testimony of the other witnesses corroborated that of Mr. Jackson. The Bar's references to Mr. Jackson's testimony are misleading and taken out of context.

II

Procedural changes in the law are applied to pending proceedings. Florida law dictates that this Court apply the law applicable at the time an appeal is decided. The amendment to Rule 11.04(6)(c) applies, even though the Grievance Committee proceedings were over by the time the amendment took effect. Additionally, the Rule of Lenity requires that the amendment be applied. The Bar previously acknowledged the unfairness of proceeding against Mr. Jackson beyond the grievance committee stage.

III

Mr. Jackson's position is that, on the merits, the discipline in this cause should be a private reprimand. His position is not simply that since the Bar recommended a private

reprimand to the Referee that that should be the discipline. In similar cases the attorneys received private reprimands. The Bar's position in this Court that Mr. Jackson's discipline should be a suspension for ninety days is totally contrary to its position before the Referee that his discipline should be a private reprimand. The Bar's attempt to justify its contradictory positions presents a sorry spectacle. There is no justification for the Bar's change of position.

ARGUMENT

I

THE COMPLAINT MUST BE DISMISSED BECAUSE THE COMPLAINANT DID NOT PROVE THE CHARGES BY CLEAR AND CONVINCING EVIDENCE, PARTICULARLY SINCE THERE REALLY WAS ONLY ONE WITNESS WHO TESTIFIED AGAINST MR. JACKSON, HIS TESTIMONY WAS UN-CORROBORATED, AND MR. JACKSON DENIED THE CHARGES UNDER OATH.

The Bar's silence concerning The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970); State v. Junkin, 89 So.2d 481 (Fla. 1956); The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973); The Florida Bar v. Abney, 279 So.2d 834 (Fla. 1973); and The Florida Bar v. Johnson, 313 So.2d 33 (Fla. 1975) is deafening.

The Bar's citation to The Florida Bar v. Hawkins, 444 So.2d 961 (Fla. 1984) and Article XI Rule 11.06(9)(a) of the Integration Rule of the Florida Bar is meaningless. In the context of this case, Rayman, Junkin, Quick, Abney, and Johnson control.

The Bar's lame attempt to explain away the Referee's refusal to credit the testimony of Richard Ronda is fatally transparent. The Referee mentioned every other witness. It is inconceivable that the Referee would not have mentioned Mr. Ronda if he believed him.

The Bar's misinterpretation of Mr. Jackson's testimony cannot be permitted to stand. The Bar conveniently omits the palpable: Mr. Jackson's phone calls were an inquiry, not a demand. That the Bar refuses to acknowledge the truth does

not change it. An examination of Mr. Jackson's testimony confirms that the phone calls were an inquiry.

Mr. Jackson testified that he called Mr. Steven Vitar, the insurance investigator to whom Mr. Bollo had spoken (T.59). He told Mr. Vitar that he was calling as a favor to Mr. Bollo, a client of his firm (T.59). He told Mr. Vitar that the reason he called was to determine whether there was a method by which Mr. Bollo could be compensated (T.59). He told Mr. Vitar that he was not a litigation attorney, that as far as he knew, from reading the New York statute, a lay witness can only obtain travel expenses and lost wages (T.59). He told Mr. Vitar that since he was not a litigation attorney there might be some provision of which he was unaware which provided for additional compensation (T.59).

Mr. Vitar referred Mr. Jackson to Mr. Jackstadt, the insurance company's attorney (T.60). Mr. Jackson spoke to Mr. Campito in Mr. Jackstadt's office (T.60).

Mr. Jackson felt uncomfortable when he made the phone calls to Mr. Campito (T.63). Mr. Jackson was not a litigation attorney and he just asked Mr. Campito, who was a litigation attorney, if he knew of any method by which these two men could be compensated, of which he was unaware (T.63). He only knew the New York statute and had never had to deal with any witnesses before (T.63). He felt uncomfortable because he was unsure of what he was asking (T.63). He felt that, since he was not a litigation attorney, he was only asking the question to Mr. Campito if he knew of a

way that these men could be compensated of which he was unaware (T.64).

Mr. Jackson agreed to help Mr. Bollo, a client of the firm, to resolve the problem for both Mr. Bollo and the insurance company by asking whether or not there was some way that he could be compensated (T.64).

Mr. Jackson never asked Mr. Bollo for any fee for this, he never expected any fee, and he never intended to bill Mr. Bollo (T.65). Mr. Jackson's firm bore the entire cost of the long distance telephone conversations (T.65).

On cross-examination, Mr. Jackson reiterated that when he spoke to Mr. Campito he told him that he was not a litigation attorney (T.71). He asked him, since that was his field, if there were a way that Mr. Bollo could be compensated of which he was unaware (T.71). He was asking a question (T.72). It was like a criminal attorney asking a probate attorney a question about an estate or a tax attorney asking a criminal attorney a question about criminal law (T.72). That was what he did in this situation (T.72). He asked Mr. Campito, since that was his field, if there were a way that Mr. Bollo could be compensated (T.72).

Mr. Jackson left the matter in Mr. Campito's hands, as he was the litigation specialist in New York (T.80). It would be up to Mr. Campito to resolve the matter and to get back to him and say that he had consulted with his insurance company, as he said he was going to do, and state that the insurance

company felt that it was improper (T.80-81). He never did that (T.81).

The Bar's refusal even to acknowledge the existence of this testimony is appalling.

The testimony of Marsha Green corroborated that of Mr. Jackson. She had worked as Mr. Jackson's legal secretary from April, 1982, until February, 1983 (T.94). She heard Mr. Jackson tell the attorney for the insurance company that he was calling for Mr. Bollo (T.96). Mr. Jackson told him that he did not handle this type of case, he was a real estate attorney, and he wanted to know whether, if Mr. Bollo went to New York to testify, there were any kind of monetary compensation which he could obtain because he did not want to testify in the case at all because he was afraid of the man against whom he would be testifying (T.96). The Bar conveniently ignores this testimony also.

The Bar simply did not prove its case by clear and convincing evidence. All Mr. Jackson did was make inquiry of Mr. Campito as to whether or not there were a method by which Mr. Bollo could be compensated of which he was unaware (T.72). He was merely asking a question (T.72). It was like a criminal attorney asking a probate attorney a question about an estate or a tax attorney asking a criminal attorney a question about criminal law (T.72). That was what Mr. Jackson did in this situation (T.72). He asked Mr. Campito, since this was his field, if there were a way that Mr. Bollo could be compensated (T.72). The tes-

timony of Ms. Green and Mr. Bollo corroborate and support Mr. Jackson. Mr. Campito's testimony is much too thin a read upon which to sustain the Referee.

Indeed, it is rather obvious that Mr. Campito, a very unexperienced attorney, misunderstood Mr. Jackson's questions. Mr. Jackson was not demanding compensation for Mr. Bollo and Mr. Shepherd. He simply was asking whether or not compensation was available. He did not know. Indeed, Mr. Campito conceded that he really did not understand what Mr. Jackson was trying to say, nor did he ask for an explanation (T.22). The Court cannot permit Mr. Campito's mistake to lead to tragic consequences for Mr. Jackson.

The Bar's references to Mr. Jackson's testimony are misleading and taken out of context. For example, Mr. Jackson did feel uncomfortable, but it was bacause he was not familiar with litigation (T.63). He only asked Mr. Campito if he knew of a way that the men could be compensated of which he was unaware (T.63). Mr. Jackson did think that the amount was ridiculous; however, he also understood how Mr. Bollo felt (T.70). He told Mr. Bollo that he understood (T.70). He told Mr. Bollo that he would not want to put his life on the line, if he really felt that he would be subject to physical reprisals from the person against whom he would be testifying (T.70).

In sum, all Mr. Jackson did was make inquiry of Mr. Campito as to whether or not there were a method by which Mr. Bollo could be compensated of which he was unaware (T.72).

The Court must disapprove the Report of Referee and dismiss the complaint with prejudice.

II

THE MOST SEVERE DISCIPLINE WHICH MAY BE IMPOSED UPON MR. JACKSON IS A PRIVATE REPRIMAND; HE IS ENTITLED TO THE BENEFIT OF THE AMENDMENT TO RULE 11.04(6)(c) OF THE INTEGRATION RULE.

The Bar concedes, as it must, that Johnson v. State, 371 So.2d 556 (Fla. 2(d) DCA 1979); Rothermel v. Fla. Parole and Probation Com'n, 441 So. 2d 663 (Fla. 1st DCA 1983); and Batch v. State, 405 So.2d 302 (Fla. 4th DCA 1981), hold that procedural changes in the law are applied to pending proceedings. The Bar also concedes, as it must, that that is a correct statement of the law. The Bar then adopts the totally unreasonable position that since the Grievance Committee proceeding in this cause was concluded prior to the amendment to Rule 11.04 (6)(c) taking effect it does not apply. The Bar is wrong.

Hamilton v. State, 306 So.2d 600 (Fla. 2d DCA 1975), involves a very similar situation. In Hamilton, the defendant was sentenced without being given credit for time spent in jail awaiting trial. After he was sentenced, and while his appeal was pending, Florida Statute 921.161(1) was amended to require trial courts to give defendants credit for time served in jail awaiting trial. The Second District held that the defendant was entitled to the benefit of the amendment:

> "The other point raised by appellant on appeal does have merit. It concerns the matter of his reduction of sentence. We find that Chapter 73-71, Laws of Florida, 1973, amending Florida Statutes, Section 921.161(1), became effective

> after the trial judge sentenced the appellant. Under these circumstances, the applicable Florida law dictates that this court apply the law applicable at the time the appeal was decided...
>
> Accordingly, we remand this case for the sole purpose of permitting the trial court to correct the sentences pursuant to the statute, supra, in which it is required that the appellant be given credit for time spent in jail awaiting trial. It is pointed out the judgments and sentences entered by the trial court on March 5, 1971, were consistent and in accordance with existing law..." (306 So.2d at 601)

Analogously, here, the applicable Florida law dictates that this Court apply the law applicable at the time this appeal is decided. Clearly, the law is that when a grievance committee determines that a private reprimand is suitable discipline, and the designated reviewer concurs, the designated reviewer has the final word and the matter proceeds no further. Here, the Grievance Committee had determined that a private reprimand would be suitable discipline (App. 4) and the designated reviewer concurred (App. 4). Under the present applicable law the matter would proceed no further. Under Hamilton, Mr. Jackson is entitled to the benefit of the amendment.

The Bar's attempt to separate grievance committee matters from referee proceedings is illogical. Article XI of the Integration Rule, entitled "Rules of Discipline", provides that the exclusive jurisdiction of this Court over the discipline of at-

torneys shall be administered in the manner set forth in the Article. Grievance committee hearings, referee proceedings, and review by this Court, are all part of the disciplinary process. It is a whole. Grievance committee proceedings simply cannot be excised from the rest of article XI.

Presuming arguendo that the Bar's position is at least intellectually and morally defensible, the Court must reject it because of the Rule of Lenity which demands that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808,812 (1971). A Bar disciplinary matter, of course, is a quasi-criminal proceeding. In Re Ruffalo, 390 U.S. 544, 551 (1968). The amendment deals with a crucial aspect of Bar disciplinary matters: the appropriate discipline. Since the application of the amendment yields a far less harsh discipline than the Referee's recommendation, the amendment must be applied.

Significantly, in the proceedings below, the Bar acknowledged the unfairness of proceeding against Mr. Jackson beyond the grievance committee stage. Prior to the final hearing, Mr. Jackson and the Bar entered into a conditional guilty plea for consent judgment. They agreed that Mr. Jackson's discipline would be a private reprimand by the Court of Governors (App. 1-3). The Bar predicated its recommendation of a private reprimand upon two considerations: first, Mr. Jackson had no prior disciplinary history (App. 4). Second, the Grievance Committee had determined that a private re-

primand would be suitable discipline (App. 4) and the designated reviewer concurred (App. 4). Under the amendment to the integration rule that became effective July 1, 1984, specifically Rule 11.04(6)(c), the designated reviewer has the final word in approving grievance committees' recommendations of private reprimands (App. 4-5). Thus, had Mr. Jackson's Grievance Committee met subsequent to July 1, 1984, the matter would have been closed (App. 5).

The most severe discipline which may be imposed upon Mr. Jackson is a private reprimand.

III

THE REFEREE'S RECOMMENDED DISCIPLINE, SUSPENSION FROM THE PRACTICE OF LAW FOR NINETY DAYS, IS EXCESSIVE; THE MAXIMUM DISCIPLINE SHOULD BE A PRIVATE REPRIMAND.

The Bar concedes, as it must, that "but for the vicissitudes of time the initial grievance committee recommendation, concurred in by the designated reviewer, had it occurred after July 1, 1984, would have laid the matter to rest." (Bar Brief at p. 8).

The Bar then misstates Mr. Jackson's position. Mr. Jackson's position is not simply that since the Bar itself recommended a private reprimand to the Referee that that should be the discipline. Rather, additionally, Mr. Jackson's position is that, on the merits, the discipline should be a private reprimand.

Mr. Jackson possessed an unblemished record prior to this incident. Several very fine character witnesses testified on his behalf. There are no discipline decisions that are directly in point. However, in its letter to the Referee in support of its recommendation of a private reprimand the Bar cited similar cases which establish that a private reprimand is the appropriate discipline:

> "In case 15C77029 the Board approved a consent judgment for a Board appearance private reprimand where the respondent knowingly presented false evidence and perjured testimony to a court. In case 06C78H47 the Board approved a grievance committee recommendation for a Board level

> private reprimand where the respondent filed a pleading containing statements which he knew were false. In case 06A76016 the Board approved a referee's report recommending a Board level private reprimand and payment of costs where there was evidence that respondent allowed a bribe to pass from his client to a county commissioner in respondent's office. The respondent thereafter introduced another client to the same commissioner. Apparently the evidence regarding the bribe was of questionable weight. In the case before your honor there is a sharp difference as to whether or not the respondent, in fact, intended to profit from the witness fees in the event of payment thereof." (App. 5)

Here, the evidence was uncontradicted that Mr. Jackson was not to receive anything, even if the witness fees were paid.

Presuming arguendo that Mr. Jackson was guilty of everything the Bar charged, his conduct was certainly no worse than that of the attorney in case 15C77029 who knowingly presented false evidence and perjured evidence to a court. His conduct was certainly no worse than that of the attorney in case 06C78H47 who filed a pleading containing statements which he knew were false. His conduct certainly was no worse than that of the attorney in case 06A76016 who allowed a bribe to pass from his client to a county commissioner in his office and thereafter introduced another client to the same commissioner. Those attorneys received only a private reprimand. That is all that Mr. Jackson should receive.

The Bar's attempt to justify its contradictory positions before the Referee and before this Court presents a sorry spec-

tacle indeed. Contrary to the Bar's assertion, Mr. Jackson does not seek to omit from consideration the respective roles played by each party to the discipline process. Rather, as set forth supra, Mr. Jackson's position is that, on the merits, the worst discipline that should be imposed is a private reprimand. The Bar's lame excuse that it recommended a private reprimand because it did not know what the testimony at the Referee's hearing would be is without merit. The Bar knew exactly what the testimony would be. There were no surprises. The Bar's citation of Fla. Bar Code Prof. Resp., D.R.7-109(C) is way off base. That deals with the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. Here, there was never even a whisper of a hint that the witnesses were going to testify to anything other than the truth. Payment was not contingent upon the content of their testimony or the outcome of the case.

The Bar's citation of The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981) and The Florida Bar v. Mitchell, 385 So.2d 96 (Fla. 1980), is misplaced. Those cases involved repetitive misconduct, over long period of time, with many different people. Indeed, the Bar has not favored the Court with a single citation supporting its new position that Mr. Jackson's discipline should be suspension from the practice of law for ninety days.

The most severe discipline which may be imposed upon Mr. Jackson is a private reprimand.

CONCLUSION

This Court must disapprove and vacate the Report of the Referee, and dismiss the complaint with prejudice; in the alternative the Court must disapprove and vacate the Referee's recommended discipline and impose discipline no more severe than a private reprimand; and the Court should grant such other further relief as it deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to DAVID M. BARNOVITZ, Esq., the Florida Bar, Fort Lauderdale Office, Galleria Professional Building, 915 Middle River Drive, Suite 602, Fort Lauderdale, Florida 33304, this 13 day of November, 1985.

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