IN THE SUPREME COURT OF FLORIDA

CONFIDENTIAL

THE FLORIDA BAR,

Complainant,

v.

BRINLY S. CARTER,

Respondent.
_____/

Case No. 66,126
(TFB No. 07C84C82)

RESPONSE BRIEF OF THE FLORIDA BAR
AND BRIEF IN SUPPORT OF CROSS PETITION FOR REVIEW

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PRELIMINARY STATEMENT

Reference to the transcripts will be by citation (T. and date)

Reference to Bar exhibits will be by citation (Ex.)

Reference to the referee's report will be by citation (RR)

STATEMENT OF THE CASE

In late March, 1984, John Hans Beck sent a letter of complaint to The Florida Bar against the respondent. After a hearing on August 29, 1984, probable cause was found. The Bar's formal complaint was thereafter filed in early November, 1984. The referee was appointed on November 9, 1984. He granted respondent's motion to maintain confidentiality by order dated January 21, 1985. At the time, respondent was representing himself. On April 15, 1984, the referee set a pretrial conference for May 8, 1985. The conference was continued until July 22, 1985 after respondent retained counsel who requested a continuance. After the July pretrial conference, a second one was held on August 20, 1985. Evidentiary hearings were held on October 11, 1985 and November 11, 1985. The disciplinary hearing was held March 7, 1986. Part of the reason for that hearing being set some four months after the last evidentiary hearing was to grant the respondent an opportunity to correct the record-keeping in the estate. (T. Nov. 11, 1985, pp. 44-46) At the conclusion of the discipline hearing, the referee requested proposed referee reports from both parties within two weeks. His report dated May 11, 1986 was thereafter filed in this Court.

Since it was received during the May Board of Governors meeting, it was considered at their July, 1986 meeting which concluded on July 18, 1986. Due to a mix-up, respondent's counsel was not promptly notified of the Board's consideration of the report. He then filed a motion for continuance to file a petition for review dated August 4, 1986 which was granted. Respondent's counsel filed a motion to withdraw dated August 20, 1986 enclosing copies of correspondence to his client and indicating he had been unable to receive instructions as to whether he wished him to represent him in seeking review of the referee's report. The motion was granted on August 22, 1986. Thereafter, respondent filed a motion for additional time on or about August 29, 1986 and was granted until September 12, 1986. On September 15, 1986, respondent's original brief in support of petition for review was returned for correction since it did not comply with the appellate rules and it was directed to be served on or before September 22, 1986. The Bar filed a cross-petition for review on September 22, 1986 and received respondent's brief on September 24, 1986.

At the July, 1986 meeting of the Board of Governors, the Board approved the referee's findings of fact and recommendations of

guilt and discipline. The Board also directed Bar Counsel to cross-petition for review to insure that the recommended discipline would require proof of rehabilitation if adopted by the Court. In his report, the referee recommends that the respondent be found guilty of violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 3-104(A) for failing to properly supervise nonlawyer personel in the recordkeeping of estates, 3-104(C) for failing to insure nonlawyer personnel comply with the applicable provisions of the Code of Professional Responsibility and 3-104(D) for failing to examine and be responsible for all work delegated to nonlawyer personnel with respect to estate records. The referee further recommended the respondent be found not guilty of violating Article XI, Rule 11.02(3)(a) of The Florida Bar's Integration Rule for engaging in conduct contrary to honesty, justice or good morals, and be found not guilty of violating Disciplinary Rules: 1-102(A)(4) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and 1-102(A)(6) for engaging in other misconduct adversely reflecting on his fitness to practice law.

As discipline, the referee recommends that the respondent be suspended from the practice of law for a period of three months

and thereafter until he shall prove his rehabilitation as provided in Rule 11.10(4). In recommending his discipline, the referee noted respondent's prior disciplinary history. He specifically found that the cumulative discipline principal applies to the present case and calls for sterner discipline. He also recommends respondent be assessed the costs of these proceedings currently totalling $1,910.64.

STATEMENT OF FACTS

Following the death of Dr. Robert Tauber, respondent was retained and represented the personal representative in the estate. The personal representative was John Hans Beck. The respondent's statement of facts tells the story of the estate from his perspective and argues that problems with his aging office staff led to his problems in this case as well as his prior case wherein he was publicly reprimanded on March 17, 1983. See The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983) That case also involved inadequate recordkeeping in an estate sale. In any event, focus must be given to the facts at issue in this particular case. As noted by the referee, the estate was complex and spawned considerable litigation. It was handled out of respondent's office inasmuch as Mr. Beck resided part of the year in Illinois and part in Florida. (RR, Section II, para. 2) There is no doubt that the size, geographical disbursal of assets, including some in Europe, and litigation contributed to difficulties in handling this particular estate.

In early 1984, Mr. Beck wrote two letters dated February 20, 1984 and March 5, 1984 requesting the respondent furnish him with a detailed accounting of the expenses which had been incurred in handling the estate. He also asked for a copy of the statement which previously had been furnished to the Internal Revenue Service. (RR, Section II, para. 3, Ex. 6) Although Mr. Beck did not receive a response to either letter, the referee found he had access to respondent's office throughout the handling of the estate and to the estate records. At this time, most of the estate matters had been settled. (RR, Section II, para. 3) In any event, he visited respondent's law office on March 13, 1984 and obtained a statement of fees and expenses dated January 12, 1984 which had been prepared by respondent's paralegal, Helen Wall. (Ex. 1; Appendix Ex. 2) it cited attorney's fees awarded by the Court totalling $70,000.00 which was done on May 11, 1983 (Ex. 4; Appendix Ex. 3) at which time the personal representative was awarded fees totalling $35,130.00. (Ex. 5) The document cited expenses of $27,159.93. These included: copying costs estimated at $12,500.00, mileage costs of $2,254.00, fifty seven months of bookkeeping at $50.00 a month totalling $2,850.00, postage of $5,000.00 and long distance telephone charges of $3,555.93. Anticipated closing costs were set at $1,000.00. (Ex. 1)

Although Mr. Beck thought the expenses were too high and requested an explanation, he was provided with no further actual documentation for the expenses then or later. The referee found that while it was disputed whether he was advised the expenses listed on the statement were estimates, it is apparent on their face that several were estimates. (RR, Section II, para. 4) The statement also was submitted to the Internal Revenue Service and ultimately accepted.

Interestingly, although it is dated January 12, 1984 and predates Mr. Beck's letters requesting a detailed accounting of the expenses, it was not sent to him. Rather, he was given a copy when he visited the office in March of 1984. The referee specifically found that as of that time, the respondent's office personnel were not maintaining any adequate records relative to the expenses of this estate or other estates being handled by respondent's office whether as personal representative or as attorney. (RR, Section II, para. 4; it appears this should be paragraph 5) In fact, Mrs. Wall, who was the paralegal, testified it would take six or eight weeks of research to come up with a more accurate figure than that represented on Exhibit One from

the records being maintained. (T. Oct. 11, 1985, p. 44) She also stated that respondent did not keep detailed records on expenses in estates during that period of time. Rather, he kept general records consisting of ledger sheets of expenses and his date book regarding appointments wherein long distance charges were kept in the back. Further, although there was discussion of the need to keep better records, particularly with this estate, it was not done. Neither was an effort to redevelop the records or institute better recordkeeping for the Tauber estate. (T. Oct. 11, 1985, pp. 45-46) In fact, the respondent testified that the office staff had fallen down on the job during that period in time, although he denied inadequate recordkeeping extended to other estates. (T. Nov. 11, 1985 pp. 5-8) The referee also noted the respondent asserted that the deficiencies had been corrected.

Bar staff investigator, Charles Lee, was dispatched to go over the expenses represented by Exhibit One. From the information available in respondent's office for the period from 1979 through May 25, 1984, the estimates for copy costs and postage exceeded the available totals for the entire office. The total available copy costs from office records was $7,020.24 versus the

$12,500.00 estimate for the estate. Postage for the estate was estimated at $5,000.00 versus total available office postage costs of $4,362.89. Exhibit One also lists estate telephone charges of $3,555.93, whereas the available office records link only $876.99. (Ex. 14) It appears that the inadequate record-keeping within the office and other practices made verification almost impossible. (T. Oct. 11, 1986, pp. 64-86) In any event, Mr. Lee's report (Ex. 14) was prepared from all available information provided by respondent or his staff. (Appendix Ex. 4) The referee did not comment directly on the report.

In what should be paragraph 6 of his report, the referee found that respondent had relegated the estate recordkeeping to his non-attorney staff and exercised no meaningful supervision over the adequacy of that recordkeeping. Accordingly, respondent could not submit a reasonably accurate statement of expenses on the Tauber estate other than his standard bookkeeping charge based on the number of months the estate was open and perhaps the mileage estimate and anticipated closing costs. The referee noted that the attorney is charged with the responsibility of seeing reasonably accurate records of expenses for clients are maintained so that proper accounting can be rendered at the

appropriate time. It was not done in the Tauber estate. The referee also noted, "It is no less important to maintain reasonably accurate records of estate expenditures where the attorney is representing the personal representative and handling the estate than it is to maintain accurate records of cost monies being expended on behalf of any other client". (RR, Section II, para. 6) Finally, the referee noted the estate was still active; that respondent is still attorney of record; and that Mr. Beck and the respondent still enjoy an attorney and client relationship. The main reason appears to be that respondent has been paid his entire attorney's fee which includes closing the estate. (Ex. 4) Mr. Beck testified he refused to accept respondent's attempt to withdraw toward the end of 1984 because he had been paid in full for handling the estate. (T. Oct. 11, 1985 p. 22; Ex. 17)

SUMMARY OF ARGUMENT

The referee's findings of fact are fully supported by the clear and convincing weight of the evidence. The referee took all appropriate matters into consideration and properly concluded from the overwhelming weight of the evidence that the respondent failed to properly supervise his nonlawyer staff regarding the keeping of estate records. He did not insure their compliance with the rules, nor did he examine their recordkeeping. As the attorney, he obviously is responsible for the delegated work whether it is done properly or improperly.

The recommended suspension for three months and thereafter until he proves his rehabilitation is proper under Fla. Bar Integr. Rule, art. XI, Rule 11.10(4). It requires proof of rehabilitation prior to reinstatement in that referee has put in a condition precedent prior to any reinstatement. The reason for the requirement is respondent's prior two public reprimands. Note that the second reprimand contains misconduct similar in nature to that in this case. Given the cumulative discipline principle which the referee found clearly applicable in this case, proof of rehabilitation is an absolute requirement. This Court should add an additional day to the suspension if it is

deemed necessary to require proof of rehabilitation and to fully effectuate the referee's recommendation.

The referee properly recommended the respondent be assessed the total amount of costs in this particular case which was tried in one count and where the major costs were transporting respondent's former bookkeeper from Colorado as well as four transcripts of hearings. Finally, there are no excessive delays in the prosecution of this case which would justify any mitigation and where the respondent himself was responsible for delays on three occasions.

ARGUMENT

POINT ONE

THE REFEREE DID NOT FAIL TO CONSIDER MITIGATING FACTS AND CIRCUMSTANCES.

Respondent first argues that the complexity and the size of the estate should mitigate the findings against him. The referee did note the estate was complex and spawned considerable litigation. However, that is not the point. The point is whether the record-keeping of expenses was adequately maintained. It was not with respect to this estate. As testified to by Helen Wall, those inadequacies extended to other estates during that period in that no detailed records were kept, only general ones. (T. Oct. 11, 1985, pp. 44-46) It would appear that the more complex and lengthy an estate is, the more it needs more detailed record-keeping to keep an accurate track of the expenses. Moreover, respondent's argument underscores the referee's finding that he relegated the recordkeeping to his office staff and exercised no meaningful supervision over its adequacy. Respondent simply asserts he had no reason to think that Mrs. Wall's estimates were inaccurate to any significant degree and that they may be fairly accurate when the estate is finally closed. It remains open as of this day despite Mr. Beck's impatience. There is no question

that the recordkeeping for the Tauber estate was inadequate and it was not an isolated problem. Further, it should be noted that a substantial portion of respondent's law practice involves estate and probate work. (T. Oct. 11, 1985, pp. 56, 88)

Finally, respondent's self-serving argument regarding his attempt to withdraw in late 1984 is misleading. Mr. Beck refused to allow the withdrawal in light of the fact that respondent had been fully paid his attorney's fee. The order stated the fees were final and included closing out the estate. (T. Oct. 11, 1985, p. 22; Ex. 4 and 17)

In sum, respondent did not keep adequate records in this estate. The Bar further submits that the referee's finding it extended to other estates is supported by the direct testimony of his bookkeeper. The finding should be upheld. Perfect recordkeeping is not required, but adequate recordkeeping is required. To allow inadequate recordkeeping to be acceptable would mean that an attorney similarly situated could simply charge back to the estate whatever he or she deemed acceptable by way of expenses absent an objection. Clearly, that state of affairs is totally unacceptable for estate or any practice.

POINT TWO

THE REFEREE PROPERLY FOUND THE RESPONDENT FAILED TO PROPERLY SUPERVISE, SEEK COMPLIANCE WITH THE RULES AND EXAMINE AND BE RESPONSIBLE FOR THE DELEGATED WORK REGARDING ESTATE RECORDS.

The respondent does accept the fact that he is ultimately responsible as the supervising attorney for his nonattorney staff. However, he states that the breakdown for at least the Tauber estate was the aging process on his elderly employees. He previously noted this particular problem in his statement of facts with respect to Mrs. Wall and particularly her sister, Martha Brown. He also argued in the previous section that Mrs. Wall was competent and was responsible for the control of all of the office records shortly after she was hired in 1970 until at least late 1983; and that he had no reason to presume Mrs. Wall's estimates were not accurate. The referee's finding that he relegated the recordkeeping within his office to his nonattorney staff and exercised no meaningful supervision over its adequacy is clearly and convincingly supported by the evidence in the record. This is particularly underscored by the staff investigator's report. In it, he concluded from the available records that some estimates for the Tauber estate were in excess of his entire office expenses during the period. (T. Oct. 11, 1985, pp. 64-86; Ex. 1, 14) Respondent simply let matters get out of hand

and cannot avoid the consequences of his lack of meaningful supervision of his staff. The referee's finding is clearly and convincingly supported by the evidence.

For both this section and the preceding one, respondent has a heavy burden in attacking the referee's findings which he has not met. It is well settled the referee's findings of fact enjoy the same presumption of correctness as does the trier fact of civil proceeding. Fla. Bar Integr. Rule, article XI, Rule 11.06(9)(a)(1). Regarding conflicts in evidence, the referee acts as the Court's fact finder and resolves those conflicts. This issue was most recently addressed in The Florida Bar v. Stalnaker, 485 So.2d 815, 816, (Fla. 1986) where the Court wrote at page 816:

> A referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985); The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985). The evidence presented before the referee boils down to a creditability contest between Stalnaker and Jones. The referee listened to and observed both of them, and, as our fact finder, resolved the conflicts in the evidence. See The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980). Our review of the record discloses support for the referee's findings, and, therefore, we will not disturb them.

In Hoffer, supra, the Court wrote at page 642:

> Our responsibility in a disciplinary proceeding is to review the referee's report and, if his recommendation of guilt is supported by the record, to impose an appropriate penalty. The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). The referee, as our fact finder, properly resolves conflicts in the evidence. See The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966).

In the Hirsch case the Court wrote at page 857:

> Fact finding responsibility in disciplinary proceedings is imposed upon the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968).

More recently, in Hecker, supra, the Court again noted at page 1242:

> It is well established that a referee's finding of fact is presumed correct and will be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

The referee's findings of fact are clearly and manifestly supported by the clear and convincing weight of the evidence which is the standard in Bar disciplinary proceedings. Respondent's arguments are without merit and the referee's findings of fact should be upheld by this Court.

POINT THREE

(INCLUDES CROSS-PETITION POINT)

THE REFEREE'S RECOMMENDED DISCIPLINE IS NOT EXCESSIVE AND THIS COURT SHOULD INSURE THAT PROOF OF REHABILITATION IS REQUIRED PRIOR TO RESPONDENT'S POSSIBLE REINSTATEMENT DUE TO HIS TWO PREVIOUS PUBLIC REPRIMANDS.

This point encompasses the one point raised on the cross-petition. Essentially, respondent believes that a suspension for a fixed period of three months and an indefinite period thereafter until he proves his rehabilitation is excessive. He notes financial impact will have on himself, his family, and his associate. He notes that the client did not lose any money directly, as also noted by the referee. He also notes that the referee made little inquiry as to respondent's family, reputation in the community, and other available skills if he were suspended. In this regard, the Bar would only submit that the respondent was fully represented by counsel at the hearings who could have elicited whatever information he chose.

Respondent does not address the purpose of discipline nor the cumulative principal regarding discipline. The former is defined in part in Fla. Bar Integr. Rule, Article XI, Rule 11.02.

> The primary purpose of discipline of attorneys is the protection of the public, and the administration of justice, as well as protection of the legal profession through the discipline of members of the Bar.

The appropriate discipline in each case should be fair to society, protect it from future unethical conduct by the attorney, but not deny it the services of an otherwise qualified attorney. It should also be sufficient to punish the breach of ethics and to encourage reform and rehabilitation. Finally, it should serve as a deterrent to those members of the Bar who cannot or will not follow the rules. See The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983) The latter principal is one of long standing. See e.g. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a)(4) and The Florida Bar v. Bern, 425 So.2d 526, 528 (Fla. 1982).

With regard to the discipline in this particular case, the referee made it very clear that he would have recommended a public reprimand if this were the only instance of misconduct. However, he was aware the respondent was publicly reprimanded in The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982) which issued on February 25, 1982 and flowed from litigation over family assets as well as derogatory remarks the respondent made against a judge. On March 17, 1983 he was again publicly reprimanded in

The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983) partly for failing to keep complete records of a personal property sale for an infirm elderly client. He also had failed to pay $64.52 to each of four heirs for several months despite several requests in handling the ensuing estate. In this case, the Court wrote at page 4:

> The referee recommended a four-month suspension. This Court has recently publicly reprimanded Carter, The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982) and ordinarily the finding of guilt on additional charges would warrant a heavier and more substantial penalty. But the activities complained of in this case do not fall within the category of cumulative misconduct since the instant misconduct occurred prior to our decision in the previous case. The prior discipline could not, therefore, have deterred his conduct in this case.

The Court then went on to publicly reprimand the respondent and placed him on one year's probation.

This referee specifically addressed the question of whether the cumulative discipline applied to the Tauber estate proceeding which began in 1979 and continues. He noted the problems and complaint to The Florida Bar were filed in 1984. He further noted that, although many of the estate expenditures occurred prior to the first public reprimand on February 25, 1982, he was on notice at that time and clearly as of the time of the second

reprimand on March 17, 1983. He further noted that the second reprimand partly involved inadequate recordkeeping of clients' property. Finally, the referee mitigated the cumulative principle to the extent of the expenditures and expenses incurred prior to the issuance of the first reprimand. The referee found that the prior reprimands had not served to teach the respondent of the importance of operating within the applicable rules. He also wrote in the concluding paragraph to Section IV of his report:

> In my opinion, only a suspension requiring proof of rehabilitation prior to reinstatement will achieve this goal. The recommended suspension takes into account the mitigating element mentioned above in this lengthy and complex estate which is ongoing. I also note in mitigation respondent's actions did not cause his client to lose money directly. Otherwise, the recommended suspension period would have been longer given the similar nature of misconduct here as in part of the second reprimand.

Finally, he noted that the purposes set forth in Lord, supra, would be met by the suspension.

The problem in this particular case is respondent's prior discipline. Absent the prior public reprimands, one would be appropriate in this particular case. See e.g. The Florida Bar v. Chase, 467 So.2d 983 (Fla. 1985). It involved very different

facts emanating from a criminal case and resulted from that respondent's inactions and nonappearance. His excuse was that a law student had been failing to routinely pass on messages from his client. Moreover, in The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980) this Court suspended an attorney with no prior record in a misappropriation case. Addressing the appropriate disciplinary measure, the Court wrote at page 1223:

> Public reprimand should be reserved for such instances as isolated instances of neglect, [citation omitted]; or technical violations of trust accounting rules without willful intent, The Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978) or lapses of judgment, ...[citation omitted].

In this instance, the inadequate records are not trust account records, but they are estate records from which the respondent will seek reimbursement from the circuit court at the time the estate is closed. If his expenditure request is approved, it should be based on adequate and not inadequate records. Otherwise one could charge whatever they felt appropriate absent active objection. The Bar would submit that this referee has carefully weighed the appropriate measure of discipline and his recommendation for a suspension requiring proof of rehabilitation prior to reinstatement is amply justified by respondent's prior disciplinary history. In fact, he knew the records were inade-

quate in this particular instance. According to Mrs. Wall, they discussed it, but he never affirmatively took any steps to see that he or his staff corrected the problem until this case arose. Simply put, the prior disciplines have had little, if any, impact on the manner in which the respondent has chosen to practice. The Bar submits that a short term suspension not requiring proof of rehabilitation will have little impact on the manner in which respondent handles his duties as an attorney in the future. The referee is eminently correct that only a suspension requiring proof of rehabilitation will accomplish the purposes of discipline and achieve the goal. Note, in Bern, supra, that respondent had two prior private reprimands and one public reprimand prior to receiving the suspension for three months and a day with proof of rehabilitation required. Note also that that case arose out of a conflict of interest between Bern and his client in a business situation. After citing several cases involving cumulative discipline, the Court wrote at page 528:

> The Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct.

There is similar misconduct in the second reprimand with regard to recordkeeping in this situation.

See also The Florida Bar v. Shannon, 376 So.2d 858 (Fla. 1979) where an attorney was suspended for three months and a day for improper handling of an estate including failure to distribute assets, overpayments to himself, and failure to close out the estate in a timely manner. That attorney had no prior discipline.

The referee's recommended discipline was for a period of three months and thereafter until he shall prove his rehabilitation. Fla. Bar Integr. Rule, art. XI, Rule 11.10(4) reads in pertinent part:

> The respondent may be suspended from the practice of law for an appropriate time or a definite period of time and an indefinite period thereafter to be determined by the conditions imposed by the judgment....A suspension of three months or less shall not require proof of rehabilitation or satisfactory passage of the Bar examination; a suspension of more than three months shall require proof of rehabilitation;....

The referee did not place in his recommended discipline the additional day. However, given the first sentence of the suspension rule, it appears he is recommending that the respondent be suspended for a definite period of three months and an indefinite period thereafter until he proves his rehabilitation. If approved by this Court, that would be the condition imposed by

the judgment. The Bar submits the recommendation means respondent cannot file a petition for reinstatement until the expiration of three months and then he must prove his rehabilitation. Obviously, given Section IV of the referee's report, the referee clearly intended that proof of rehabilitation be a requirement.

The Bar could only find one case where this Court suspended an attorney for three months and thereafter until he proved his rehabilitation. See The Florida Bar v. Phillips, 276 So.2d 32 (Fla. 1983). The three months or less language with automatic reinstatement in the suspension rule was adopted effective December 1, 1972. In Re: The Florida Bar, 262 So.2d 857, 874, (Fla. 1972). The prior rule which did not have that language was adopted in In Re: The Florida Bar, 225 So.2d 881, 895-896 (Fla. 1969). It became effective on July 1, 1969. The 1972 change became effective for all proceedings within the scope of the rules on December 1, 1972. See In Re: The Florida Bar, 262 So.2d 857, 858 (Fla. 1972). In Phillips, supra, the Court was considering a referee's report dated July 6, 1972 and issued its order on April 4, 1973 reducing the recommended one year suspension to the period of three months and thereafter until rehabilitation

has been established to the satisfaction of the Court. It appears that although the Phillips case arrived at the Court prior to the rule change, the decision was made under the new rules. The Bar submits it is authority for the Bar's position that this referee's recommendation as stated calls for and requires proof of rehabilitation prior to reinstatement.

Just as a referee's findings of fact are accorded great weight, his recommended discipline should be given substantial support unless it is erroneous, unlawful or unjustified as set forth in Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(e). In this instance, given respondent's prior disciplinary history especially where it involves similar misconduct, the referee's recommended discipline should be adhered to and supported. If an "additional day" should be added in order to make clear that proof of rehabilitation is required then this Court should do so in its order suspending the respondent. The referee's recommended discipline should be effectuated and supported and not made lesser by the failure to add the one day to the recommended definite period of suspension if deemed necessary. Further, this is not a case where the recommendation is for a definite period of time with no conditions precedent prior to reinstatement. It

is clear that where there are no conditions precedent recommended following the definite period of suspension, the "and one day" requirement becomes critical. However, where there are definite conditions precedent as set forth here, the Bar submits that it is not necessary. However, the additional day should be added by this Court if deemed appropriate and necessary to fully effectuate the referee's recommendation.

POINT FOUR

THE REFEREE DID NOT ERR IN ASSESSING COSTS AGAINST THE RESPONDENT IN THIS MATTER.

In cases of disciplinary violations, this Court has routinely assessed costs against the respondents. In The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982) the Court wrote at page 328:

> We hold that the discretionary approach should be used in disciplinary actions. Generally, when there is a finding that an attorney has been found guilty of violating a provision of the code of professional responsibility, the bar should be awarded its costs. At the same time, the referee and this Court should, in assessing the amount, be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable. The amount of costs in these circumstances should be awarded as sound discretion dictates.

In Davis, supra, the referee had recommended the respondent be found not guilty of two of three counts in the complaint and assessed costs accordingly. The Court also noted that the Bar submitted no information on its costs restricted to the one count on which he had been found guilty. In this case, although the referee found the respondent not guilty of misrepresentation and deceit with respect to the January 12, 1984 statement of expenses and the possible $5,000 overpayment in fees, he was found guilty of failing to properly supervise his nonlawyer personnel to

insure there was adequate recordkeeping. Moreover, the complaint was cast in one count. It appears that the respondent is simply arguing that he should not be found guilty and, therefore, no costs should be assessed against him. If he were to prevail ultimately, that indeed would be the case. However, the Bar submits the referee's recommendations of guilt and assessment of costs should be upheld in their entirety.

Finally, formal complaints in Bar disciplinary proceedings are filed subsequent to a finding of probable cause by a grievance committee made up of lawyers and nonlawyers. The Bar does not engage in using a "shot gun" approach to prosecuting disciplinary cases. In any event, respondent's argument with respect to costs is inextricably linked to whether he prevails in his petition for review. If he does not, which the Bar submits should be the outcome, then those costs which are reasonable under the circumstances should be taxed against the respondent. In fact, the largest cost item was a witness cost totalling $492.84. That was necessarily incurred in reimbursing Helen Wall for her travel expenses from Colorado. The other major items have to do with transcripts. Accordingly, the Bar submits that the entire costs totalling $1,910.64 should be taxed against the respondent.

POINT FIVE

THERE IS NO EXCESSIVE DELAY IN THIS PARTICULAR CASE.

While delay has resulted in disciplines being mitigated in the past, the Bar submits there is no excessive delay in the handling of this particular case. The complaint was received by The Florida Bar on April 2, 1984. The probable cause hearing was August 29, 1984 and the Bar's complaint was filed on November 5, 1984. The referee noticed the matter for a pretrial conference May 8, 1985 which was continued until July 22, 1985 when respondent sought counsel just prior to the May hearing. The second pretrial conference was held on August 20, 1985 and evidentiary hearings on October 11, 1985 and November 11, 1985. The disciplinary hearing was held on March 7, 1986 and the referee report thereafter submitted bearing a date of May 11, 1986. There was some delay as noted between the November and March hearings at the request of the respondent so that he could straighten up the records. (T. Nov. 11, 1985 pp 44-46)

The referee's report was received by the Bar during the week of the May, 1986 Board meeting which meant that it would have to be

considered at the July, 1986 meeting. During that period and after the Board meeting, respondent's counsel was unable to communicate with his client. He did file a motion for extension of time to file a petition for review dated August 4, 1986 and later a motion to withdraw dated August 20, 1986 which was granted two days later. The motion attached copies of his letters to his client requesting instructions relative to a petition for review. Only after that occurred, did respondent file a motion for additional time which was granted on August 29, 1986 giving respondent until September 12, 1986 to serve a petition and brief. An additional slight delay occurred when respondent's brief had to be returned because it did not comply with the rules of appellate procedure.

It can readily be seen that delays which respondent complains of are attributable to the number of factors including himself on three occasions. In any event, they are not of sufficient magnitude to warrant any mitigation of the referee's recommended discipline.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, recommendations of guilt and discipline; and uphold all and suspend the respondent for a period of three months and thereafter until he proves his rehabilitation in a separate proceeding or suspend him for a period of three months and one day if deemed necessary to retain the requirement of proof of rehabilitation prior to reinstatement and tax costs against him currently totalling $1,910.65.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Response Brief of The Florida Bar and Brief in Support of Cross Petition for Review as well as the attached Appendix has been furnished by Federal Express to the Supreme Court of Florida, the Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing was mailed by ordinary U.S. mail to Brinly S. Carter, respondent, P. O. Box 121, DeBary, Florida 32713; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301 on this 15th day of October, 1986.

David G. McGunegle
Bar Counsel