IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

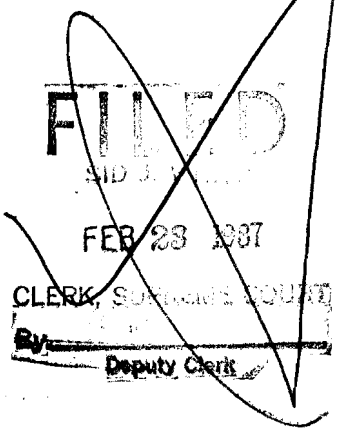
v

JOE G. HOSNER,

Respondent.
_____/

CASE NO: 68,953

(TFB File No: 01-84N85)



RESPONDENT'S INITIAL BRIEF

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commingling his personal funds with his client's trust funds.

Respondent was not charged with dishonesty, misappropriation, or failure to make any trust disbursals when they were due. There is no evidence indicating any returned trust fund checks, undue delay in making trust disbursals, or inconvenience to any clients. Furthermore, there is no evidence indicating any intent by Respondent to deprive any client of funds.

Of the twelve months audited (the entire existence of the trust account at the time of the second audit in March 1984), there were overages in Respondent's trust account nine of those twelve months. The overages resulted from a surplus of Respondent's funds being in the trust account.

The only evidence submitted in the case was the April 27, 1984 letter report submitted to Bar Counsel by Bar staff auditor Clark Pearson. His report was based upon audits conducted of Respondent's trust account in Respondent's offices in October 1983 and March 1984. A copy of the report is attached to this brief as Appendix A.

Mr. Pearson summarized his two audits in the last paragraph of his report:

> If this report consisted of two separate examinations, with one for the period up through October and one for the period since then, it would be my opinion that Mr. Hosner was not in substantial compliance with the Bar's rules and procedures for trust accounting for the first period, but that he was in substantial compliance for the second period.

Mr. Pearson noted that when he first visited Respondent's office in October 1983, Respondent had not reconciled his ledger cards on a quarterly basis as then required by paragraph 4.a of the bylaws to rule 11.Ø2(4)(c) of the Integration Rule (Audit, p.1). Mr. Pearson then proceeded to reconcile Respondent's trust account from its inception in March 1983 until the end of September 1983.

At the end of his first visit, Mr. Pearson prepared Summary Trust Reconciliations of Respondent's trust account (Audit, p.2). This initial report showed deficits in the account amounting to a maximum of $62,463.43. It also showed that at times Respondent's personal funds in the trust account resulted in overages up to almost $13,ØØØ.ØØ.

After Mr. Pearson's initial visit, Respondent and his CPA, John Sansom, reconciled all of Respondent's trust accounts and presented them to Mr. Pearson during his audit in March 1984. The updated, and properly reconciled cards, indicated a shortage in only three of the nine months originally audited. The largest deficit was $7,943.ØØ. At times the overage amounted to over $32,7ØØ.ØØ.

Among the errors detected by Mr. Sansom and Respondent in the interim between the two audits was Respondent's failure to post a $25,ØØØ.ØØ trust deposit (Audit, p.5). That omission accounted for a large portion of the paper deficit that Mr. Pearson first reported. In other words, had Respondent logged in

the $25,000.00, the large deficits reported in Mr. Pearson's first report would have been materially reduced. Without posting this deposit, Respondent gave the impression that he was disbursing on funds not collected when in fact the funds were properly in trust.

SUMMARY OF ARGUMENT

Respondent was only accused of violating the Bar's trust accounting rules and of commingling his personal funds with his client's trust funds. He admitted those offenses. There is no evidence indicating, and Respondent was not charged with committing, any acts of a dishonest nature. There is nothing indicating he intentionally deprived any clients of any trust funds. There were no trust fund checks returned for any reason, there is no evidence that any funds were delayed in disbursement and there is nothing indicting any clients were inconvenienced, let alone prejudiced.

This Court has consistently handed out reprimands for misconduct such as that which occurred in this case. Suspension is not appropriate for a first offense involving no dishonesty.

When Respondent's lapses in trust accounting rules, covering only seven months, are considered in light of his promptly rectifying his errors (as indicated by the auditor after his second audit) it becomes obvious that the primary goal of disciplinary proceedings has been met: protection of the public. Respondent has cured the shortcomings in his practice. The Bar's failure to promptly bring this action is a material

mitigating factor. The Bar auditor filed his report on April 27, 1984. Nine months later, the grievance committee found probable cause. Yet, it was not until June 25, 1986, almost 18 months later, that the Bar saw fit to file its formal complaint in this cause.

This Court has ordered the Bar to bring disciplinary proceedings with dispatch. Failure to do so will result in mitigation of discipline. Respondent argues that his misconduct, without mitigation, warrants at most a public reprimand. When the Bar's delay is considered as mitigation, the appropriate sanction becomes a private reprimand.

ARGUMENT

RESPONDENT'S MISCONDUCT, WHEN CONSIDERED IN LIGHT OF THE MITIGATING FACTORS INVOLVED, WARRANTS A PRIVATE REPRIMAND.

Respondent does not argue to this Court that his conduct does not merit discipline. He admitted the Bar's allegations of misconduct, i.e., failure to abide by the Bar's trust accounting rules and commingling his personal funds with his trust funds. He recognizes that a sanction is appropriate.

Respondent does argue, however, that the referee's recommendation of a ninety day suspension is incredibly harsh and is completely out of line with this Court's previous decisions. In fact, a suspension for any duration is not consistent with prior caselaw.

The misconduct that Respondent was accused of committing, and to which he pleaded guilty, occurred over only seven months and covered the period March 1983 until September 1983. A subsequent audit covering the next five months concluded that Respondent was in substantial compliance with the Bar's rules. There is no indication that Respondent's trust account has not stayed in compliance during the three years since the last audit was conducted.

During the seven month period that Respondent failed to abide by the Bar's accounting rules, he never bounced any trust fund checks. There is no indication he ever failed to promptly disburse trust funds timely. And there is no indication that he

ever benefited from the shortages that occurred during three of the seven months audited.

That Respondent never intended to deprive any client of any funds is proved by the fact that most of the time there was an overage in his trust account. That overage resulted from Respondent's own funds being in the account.

Respondent's misconduct consists of technical record keeping omissions and keeping his own funds in his trust account during a seven month period ending three and one half years ago. Yet the referee recommends he receive a ninety day suspension!

There is no basis for the referee's recommendation.

This Court has indicated time and again that technical, record keeping violations of the Bar's ponderous trust accounting rules warrant, at most, a public reprimand. See, for example, The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986); The Florida Bar v. Suprina, 468 So.2d 988 (Fla. 1985); The Florida Bar v. Staley, 457 So.2d 489 (Fla. 1984), and The Florida Bar v. Reese, 263 So.2d 794 (Fla. 1972).

Recognizing the validity of public reprimands as discipline for trust accounting violations, the Bar has recommended many times that this Court accept pleas for such a discipline. See, e.g., The Florida Bar v. Heston, 12 FLW 85, Case No. 68,983 (Jan. 29, 1987), (involving shortages up to $7,300.00); The Florida Bar v. Wolf, 492 So.2d 1329 (Fla. 1986); and The Florida Bar v. Diaz-Silveira, 477 So.2d 562 (Fla. 1985).

Respondent submits that there have probably been numerous

private reprimands for trust record-keeping and commingling violations. But, by definition, those cases are not available for citation to this Court. However, Respondent is aware of one case where a lawyer's second instance of keeping poor trust account records resulted in a public reprimand. The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986).

In Mitchell, despite a three year period (May 1980 to May 1983) of commingling and poor record-keeping, and despite a prior private reprimand in 1978 for the same offense, this Court publicly reprimanded the accused lawyer.

Mitchell is significant because it shows that occasionally misconduct such as that in the instant case merits only a private reprimand.

Reprimands for failing to abide by the Bar's trust accounting rules and for commingling is consistent with the three purposes of discipline as enunciated in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). There, this Court said that any discipline imposed should be fair to the public, i.e., protecting them from unethical conduct, fair to the lawyer in that it will help rehabilitate him; and lastly, that it will serve as a deterrent.

Respondent argues that a private reprimand will serve the first two purposes stated in Pahules. This Court's prior pronouncements will fulfill the third. In making such an assertion, Respondent emphasizes that his misconduct was rectified prior to the Bar's second audit, that there was no

allegation of dishonesty, that no client was prejudiced and last, that his last act of misconduct occurred over three years ago.

A ninety day suspension, as recommended by the referee, is far more harsh than discipline for similar misconduct imposed by this Court in the past. For example, in The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986), this Court suspended a lawyer appearing before the Court for the third time for sixty days for misconduct similar to that involved in the instant case. In Neely, this Court stated:

> We find a violation of Integration Rule 11.02(4) concerning the administration of trust accounts [footnote omitted], and agree with the referee that the violation was not intentional but the result of gross neglect. Although the discipline for a violation of this kind ordinarily would be a public reprimand and probation. . . .

Neely had been previously suspended for 90 days in 1979 and publicly reprimanded in 1982. He had evenhad a trust account check dishonored in his most recent case. Yet, after noting that there was no dishonesty and no harm to clients, this Court ordered only a 60 day suspension.

The Respondent in Neely, on his third trip before the Supreme Court, and after bouncing a trust fund check, received a suspension 30 days shorter than that recommended in the case at Bar.

The discipline to be imposed in disciplinary cases is "the sole province and responsibility of this Court". The Florida Bar v. McCain, 361 So.2d 700, 708 (Fla. 1978). No presumption of

correctness accompanies the referee's recommended discipline. **Id.**

Respondent asserts that a private reprimand, as first given in **Mitchell, supra,** is appropriate. But, even if a public reprimand were declared appropriate for the offense itself, the Bar's delinquent prosecution of this case should reduce the discipline to a private reprimand.

The responsibility for diligently prosecuting disciplinary cases rests with The Florida Bar. **The Florida Bar v. Wagner,** 197 So.2d 823, 824 (Fla. 1967); **State ex rel The Florida Bar v. Oxford,** 127 So.2d 107 (Fla. 1960).

If the Bar fails in its duty to diligently bring a disciplinary case,

> the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is true even though the record shows that the conduct of the lawyer merits discipline.

The Florida Bar v. Randolph, 238 So.2d 635, 637 (Fla. 1970).

Disciplinary proceedings have been pending against the Respondent since, at least, the Bar's auditor first appeared in Respondent's office in October 1983. The second visit by the auditor, in February 1984, resulted in his April 27, 1984 report. If Respondent's conduct warranted suspension, the Bar should have expeditiously processed his case after receiving the audit report.

The Bar did not expeditiously handle Respondent's case after receiving Mr. Pearson's report. in fact, the grievance committee

did not find probable cause until January 1985. And the Bar's complaint was not filed until June 1986. The 18 month delay in filing the complaint is a violation of Integration Rule 11.Ø4 (6)(b). That rule requires the Bar to "promptly" file a formal complaint after a finding of probable cause.

If suspension was necessary to protect the public from Respondents conduct, the Bar's formal complaint should have been filed immediately after probable cause was found.

If Respondent's misconduct was so serious that suspension was necessary, a probable cause hearing should have been held immediately after the auditor's report was filed.

Clearly, the Bar did not expedite this case. Why? Perhaps, because Respondent cured his omissions between Mr. Pearson's two visits. Perhaps, because there was no showing of dishonesty. Perhaps, because Respondent is no threat to the public.

If Respondent's actions did not merit prompt disciplinary action by the Bar, they do not merit suspension from practice.

The public does not need protection from Respondent. A reprimand will be a fair discipline, both in terms of protecting the public and in being fair to Respondent. Pahules, supra.

Respondent has no objection to this Court's imposing probation for three years, with quarterly trust account reports, if this Court deems such necessary for the protection of the public. Respondent's curing the defects in his account, however, obviates the necessity of a trust accounting seminar.

Respondent urges this Court to reject the referee's

recommendation of discipline and to impose a private reprimand as the appropriate sanction.

CONCLUSION

The referee's recommended discipline is too harsh and should be rejected by this Court. A private reprimand is the appropriate discipline for respondent's misconduct because there was no dishonesty involved, because Respondent's omissions were promptly corrected, and because the Bar did not diligently prosecute this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Initial Brief has been furnished this 23rd day of February, 1987, to SUSAN V. BLOEMENDAAL, Bar Counsel, The Florida Bar, Tallahassee, Florida 32301-8226.

JOHN A. WEISS