

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

vs.

JOE G. HOSNER,
Respondent.

CASE NO: 68,958

TFB NO: 01-84N85

FILED
APR 20 1987
CLERK OF THE COURT
Deputy Clerk

RESPONDENT'S REPLY BRIEF

JOHN A. WEISS
P.O. BOX 1167
TALLAHASSEE, FL 32302
(904) 681-9010

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ARGUMENT	
RESPONDENT'S MISCONDUCT, WHEN CONSIDERED IN LIGHT OF THE MITIGATING FACTORS INVOLVED, WARRANTS A PRIVATE REPRIMAND.	1
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

	<u>Page</u>
The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986)	1,2,6
The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985)	3,6
The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986)	1,2,5
The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980)	2,3

ARGUMENT

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

Respondent acknowledges that he is guilty of the charges brought against him, i.e., failure to keep his trust account records and commingling. He points out as mitigating factors, however, the following:

(1) none of Respondent's clients were harmed by his trust accounting rule violations;

(2) he took prompt corrective action upon being notified of his shortcomings; and

(3) none of the rule violations or shortages in his trust account inured to Respondent's benefit.

Despite these factors, the Referee recommended a discipline more harsh than that imposed by this court in the overwhelming number of trust accounting recordkeeping violations.

Respondent, in his initial brief, cited numerous cases indicating that a public reprimand is the appropriate discipline for his offense. Respondent points with particularity to The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986) and The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986) as overwhelming support for his position. In Neely, despite the fact that at least one trust account check bounced, and despite the fact that the Respondent had been previously disciplined by the Supreme Court on two prior occasions (a 90 day suspension and a public reprimand) the discipline imposed was only a 60 day suspension.

There is absolutely no justification for Respondent receiving, absent a prior disciplinary history, a suspension 30 days longer than that given in Neely.

In Mitchell, which was that Respondent's second appearance before this Court for exactly the same offense for which he had previously been disciplined, trust account recordkeeping violations, the discipline imposed was a public reprimand. Mitchell's first appearance had resulted in a private reprimand. Respondent should receive the same discipline that Mr. Mitchell received his first time before the court, i.e., a private reprimand.

The primary purpose of disciplinary proceedings is to protect the public. Suspending Respondent in 1987 for misconduct that occurred in 1983, and which was corrected by September, 1983, will afford the public no added protection. If Respondent was such a threat to the public that suspension was necessary, The Florida Bar was obligated to bring disciplinary proceedings promptly. Their delay from April 1984 until June 1986 to file their formal complaint arguably indicates that Respondent's misconduct was not such that the public needed protection from him. The Bar's delay should also be considered an additional mitigating factor.

The Bar points to The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980) as support for the Referee's recommended discipline. Even the Bar, however, had to acknowledge that Welty's offense was far, far more serious than that at hand. Mr. Welty engaged

in a course of conduct over two years of disbursing clients' funds to himself. During that period he had shortages ranging from \$11,600.00 to \$24,000.00 in his account. Welty, p.1222. In other words, he was robbing Peter to pay Paul over a long period of time. No such conduct is apparent in the case at hand.

In The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985) the deficits and the period of wrongdoing were similar to that in Welty. The evidence in Moxley, unlike the instant case, showed a pattern of disbursing trust funds to the Respondent's business and law office accounts. He "knowingly and intentionally" violated the Code. Yet, his discipline was a suspension for 30 days less than that recommended in the case at Bar!

Both Moxley and Welty involved deliberate deception and knowing misuse of client's funds. There are no such elements present in the case at bar.

Respondent was only charged with recordkeeping violations and commingling. He was not charged with dishonesty and he did not benefit from his negligent recordkeeping. During the seven month period involved in the Bar's first audit, there were no checks returned for insufficient funds, there is no evidence that any client's funds were delayed in disbursement and there is no showing that Respondent benefited from any of his acts. Furthermore, when the Bar's second audit was conducted, Respondent had rectified all of his past errors.

The Bar refers to the standards for imposing lawyer sanctions as support for the Referee's recommendation. Those

standards are mere guidelines and do not carry the weight of law. Paragraph 1.3 of those standards sets forth their purpose:

A comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct.

Paragraph 3.0 of the standards suggests that a court consider four factors in determining a discipline. Those factors are:

- (a) The duty violated;
- (b) The lawyer's mental state;
- (c) The potential or actual injury caused by the lawyer's misconduct; and
- (d) The existence of aggravating or mitigating factors.

Paragraph 4 of the standards deal with failure to preserve the client's property. Paragraph 4.1 states that "absent, aggravating or mitigating circumstances" the sanctions set forth are "generally" appropriate in cases which involve the failure to preserve a client's property.

Respondent did not fail to preserve any client's property. Even assuming, for the purposes of argument, that failing to abide by The Florida Bar's strict trust accounting requirements falls within that category, Respondent argues that paragraph 4.13 or 4.14 are the appropriate paragraphs to consider rather than the paragraph cited by Bar Counsel. Those paragraphs read as follows:

4.13 Public reprimand is appropriate when a

lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 Private reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client or where there is a technical violation of trust account rules or where there is an unintentional mishandling of client property.

Respondent's misconduct falls squarely within the provisions of rule 4.14. He violated the technical recordkeeping trust account provisions and there was an unintentional mishandling of client property. He caused only "potential" injury to his clients. In actuality, there was not only no injury to the clients, but there was not even any inconvenience to them.

Respondent's misconduct involved such offenses as failure to reconcile his trust account quarterly and disbursing earned fees to himself prior to a deposit in his trust account clearing. The latter act results in a bookkeeping shortage for the two or three days interim between a check being deposited in the trust account and the funds clearing. It does not, however, denote a lack of integrity or honesty on the lawyer's part.

Even absent mitigating factors, Respondent's misconduct warrants at most a public reprimand. Neely, supra. In the Bar's delay in bringing these proceedings is taken into account, coupled with Respondent's prompt rectification of his errors as specifically noted by the auditor after his second audit of Respondent's trust account, it is obvious that a private reprimand is appropriate.

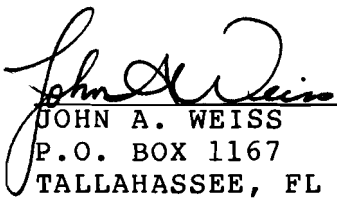
A suspension is simply not appropriate. Respondent's misconduct does not even approach that in Moxley, yet that lawyer was given a 60 day suspension. Respondent's offense is more closely akin to that in Mitchell, who did not get a public reprimand until his second offense. As was true with Mitchell's first offense, Respondent should get a private reprimand.

CONCLUSION

Respondent's misconduct involved no dishonesty, no harm to a client, and no gain to Respondent. There was no intent to deprive any client of any funds. This court has consistently imposed public reprimands for misconduct similar to Respondent's in previous cases. Respondent's prompt correction of the errors in his trust account, coupled with the Bar's 26 month delay from the time its auditor filed his report until a formal complaint was filed, make it evident that Respondent's misconduct warrants at most a private reprimand.

The Referee's recommended discipline of 90 days should be rejected by this court and, as a substitute therefore, a private reprimand should be imposed.

RESPECTFULLY SUBMITTED this 20th day of April, 1987.



JOHN A. WEISS
P.O. BOX 1167
TALLAHASSEE, FL 32302
(904) 681-9010

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been mailed to SUSAN V. BLOEMENDAAL, Bar Counsel, The Florida Bar, Tallahassee, Florida 32301-8226 this 20th day of April, 1987.



JOHN A. WEISS