

orig

IN THE SUPREME COURT OF FLORIDA

FILED  
SID A. WHITE

OCT 21 1987

THE FLORIDA BAR,  
Complainant,

CLERK SUPREME COURT  
By *jsl*  
Case No. 69-932

vs

JERRY DEAN BELL,  
Respondent.

\_\_\_\_\_ /

RESPONDENT'S ANSWER BRIEF

JOHN THOR WHITE, ESQ  
Bell, Maples & Assoc. PC  
Attorney for Respondent  
P.O. Box 10096  
St. Petersburg, FL 33733  
(813) 327-1345  
SPN 00000168

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE AND FACTS .....	1-2
SUMMARY OF ARGUMENTS .....	3
ARGUMENT, POINT ONE .....	4-6
ARGUMENT, POINT TWO .....	7-8
CONCLUSION .....	8
CERTIFICATE OF SERVICE .....	8

TABLE OF AUTHORITIES

The Florida Bar v Mitchell

493 So. 2d 1018 (Fla. 1986) .....	7
Disciplinary Rule 3-5.1 (b) .....	2, 4-6
Disciplinary Rule 3-7.5 (k) (1) (3) .....	2
Fla. R. App. P. 9.210 (c) .....	1
Fla. R. App. P. 9.210 (b) (3) .....	1

STATEMENT OF THE CASE AND FACTS

The Petitioner herein filed a separate Statement of the Case and Statement of the Facts in its Initial Brief. The Respondent, pursuant to Fla. R. App. P. 9.210 (c) specifically designates the following areas thereof as areas of disagreement:

First, contrary to Fla. R. App. P. 9.210 (b)(3) the Petitioner, without appropriate reference to any page of the record or transcript on appeal, states as a fact:

"This case arose from a complaint filed by Daniel Collier regarding irregularities in respondent's handling of an estate."  
(Initial Brief, p. 1 )

Second, in further contravention of the aforementioned rule, the Petitioner states as fact:

"The respondent presented many of the same mitigating circumstances to the committee which he later presented to the referee."  
(Initial Brief, p. 1 )

Third, without record citations, the Petitioner states as fact:

"... the committee declined to find minor misconduct ... and instead voted to find probable cause." (Initial Brief, p. 1 )

Fourth, Petitioner states without record cites:

"The Board of Governors ... voted to appeal the referee's recommended discipline as erroneous given the public nature of the complaint filed by the Bar." (Initial Brief, pp. 2-3 )

Fifth, Petitioner states as a record fact:

"The Board considered that the long standing nature of the violations of trust account rules warrants a public reprimand." (Initial Brief, p. 3 )

Finally, Petitioner states as a "fact" that:

"Rules 3-5.1 (b) and 3-7.5 (k) (1) (3) of the Rules of Discipline of the Florida Bar provide that a discipline of private reprimand is appropriate only in cases where there has been a finding by the grievance committee of minor misconduct." (Initial Brief, p. 3 )

The Respondent is aggrieved by the lack of Petitioner's references to the record or transcript on appeal since the Respondent cannot contest or artfully reply to implications and inferences arising from a silent record.

By contrast, the Respondent can defend himself against the Petitioner's hybrid statement of fact and law aforementioned wherein it is asserted that the cited Rules of Discipline somehow preempt this Court from following the Referee's recommendation of a private reprimand since those cited rules do not on their face stand for such a proposition.

## SUMMARY OF ARGUMENTS

The Respondent contends that the Petitioner's Initial Brief asserts that the Referee's recommendation of a private reprimand must, in effect, be overruled because it is (1) an unlawful disposition and (2) it is an inappropriate disposition.

The Respondent argues that such an adjudication in this case is lawful because the facts of record are not encompassed by the Disciplinary Rules' criteria which set forth circumstances in which a public reprimand is required and in any event the facts of this case establish a recognized exception to that criteria by reason of the fact that exceptional circumstances exist in this case which constitute the "exceptional circumstances" exception to the cited criteria.

Respondent further argues that the test to be applied in reviewing the Referee's recommendation in any given case is twofold: Is the recommendation lawful? And if so, is the recommendation appropriate?

Respondent submits that the recommendation under review is both lawful and appropriate and the Petitioner has not overcome the lower tribunal's presumption of correctness.

ARGUMENT POINT ONE

The thrust of Petitioner's argument in Point One of its Initial Brief is based upon a false syllogism which may be simply (and fairly) stated as follows:

The Rules of Discipline create procedures governing (a) confidential and (b) public discipline. True.

Ergo, all misconduct based upon a formal complaint must result in a published disciplinary action. False.

Rule of Discipline 3-5, cited by Petitioner, clearly permits the Florida Supreme Court to adjudge private reprimands ... without any limitation on this power of the Court stemming from the fact that the grievance proceeding was initiated by a "formal complaint" or otherwise.

Petitioner submits that a two step procedure is involved in determining that a private reprimand is warranted in any given case.

First, the threshold question of whether the subject conduct qualifies as "minor misconduct" must be answered in the affirmative (Rule 3-5.1 (b)).

Second, if that question is answered in the affirmative a more subjective determination must be made as to whether a private reprimand is appropriate given the totality of the circumstances.

As to this threshold question Respondent would note that Rule 3-5.1 (b) (1) sets forth a criteria which eliminates certain types of conduct from consideration as "minor misconduct." In matching the facts of record to the criteria aforementioned, one comes to the following conclusions:

Did the Respondent misappropriate clients' funds? The answer is a resounding "No."

Was the misconduct likely to result in actual prejudice to the rights of the clients? Not likely; the auditor's report attached to Petitioner's Initial Brief (please see page 9 of the report) shows that the actual trust account balances in every case vastly exceeded the so-called shortages set forth in the overage/shortage column. Apparently, the shortages noted by the auditor represent a "worst case" scenario in which every client entitled to trust funds would make a demand for all of his funds at the same time.

In this regard it appears equitable to note that on some dates such a run on the bank would result in a surfeit of funds and on others a shortage of funds. Furthermore, it should be recalled that when called upon to reconcile his trust account, the Respondent was able to and in fact did deposit \$677.66 to promptly reconcile the account. (Auditor's report, p. 10 )



The balance of the criteria set forth in Rule 3-5 (b)(1)( c. through f.) are answered in the negative or in favor of the Referee's determination that the Respondent committed errors warranting, inter alia, private reprimand.

In addition to the above reasons, the Respondent submits that his conduct qualifies as minor misconduct amenable to private reprimand by reason of the omnibus provision of Rule 3-5 (1) which states, by implication, that even the existence of one or more of the conditions set forth in a. through f. of the said Rule does not disqualify Respondent from the imposition of lenient disciplinary measures if unusual circumstances exist. (emphasis added) For clarity, the Court is referred to the following language in the cited Rule:

(1) Criteria. In the absence of unusual circumstances ...

It is axiomatic that the Referee's findings of fact and conclusions of law come before the Court clothed with a presumption of correctness. The mitigating factors attendant to the Referee's recommendation are manifold and compelling. The Referee's findings relative to the Respondent's contributions to his trade and to his community are significant. In sum, the Referee's recommended disciplinary action should be presumed to be based upon "unusual circumstances" sufficient to qualify Respondent for the recommended private reprimand.

ARGUMENT POINT TWO

Respondent submits that Petitioner's argument on this point primarily debates the "appropriateness" of the Referee's recommended sanctions as opposed to the "lawfulness" thereof; the latter being the subject of Petitioner's arguments on Point One.

Petitioner has cited The Florida Bar v Mitchell, 493 So. 2d 1018 (Fla. 1986) for the proposition that the Court has, in the past, declined to accept a referee's recommendation of a private reprimand in instances involving trust account procedure violations. Obviously, similar violations resulting in the Court's acceptance of a private reprimand cannot be cited by Respondent as contrary authority since such decisions are not published.

Respondent submits, as does the Petitioner, that

"... every case must be assessed individually."  
Initial Brief, p. 13

Respondent agrees with Petitioner's cited case authority standing for the proposition that attorneys' public trust must be upheld, and that a lawyer should safeguard his client's funds with greater diligence than his own monies, and that the public must be protected against incompetent, unethical, and irresponsible representation.

However, the appropriateness of the Referee's recommendation must be assessed individually in every

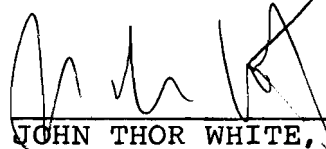
individual's case. Respondent, now retired from the honorable practice of law, contends that substantial unusual circumstances exist in his case and that these circumstances are manifest not only in his long and worthy career and in his familial and other non-professional endeavours, but also in the very nature of the subject grievance which involves no degree of moral turpitude or financial loss to any client.

CONCLUSION

Respondent requests that this Honorable Court ratify, adopt, and approve of the Referee's recommended disposition in this action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOHN B. ROOT, JR., Bar Counsel, by express mail delivery on this 20 day of October, 1987.



JOHN THOR WHITE, ESQ  
Bell, Maples & Assoc., PC  
P.O. Box 10096  
St. Petersburg, FL 33733  
(813) 327-1345  
SPN 00000168