

FILED

SID J. WHITE

IN THE SUPREME COURT OF FLORIDA

SEP 18 1987

THE FLORIDA BAR,

Complainant,

v.

JERRY DEAN BELL,

Respondent.

CLERK, SUPREME COURT

Case No. ~~69-932~~
By *pl*
Deputy Clerk
(TFB Case No. 86-16,531 (06C)
(formerly 06C86H12)

COMPLAINANT'S BRIEF IN SUPPORT
OF PETITION FOR REVIEW

JOHN F. HARKNESS
Executive Director
The Florida Bar
Tallahassee, Florida 32301
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, Florida 32301
(904) 222-5286

and

JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(305) 425-5424

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
TABLE OF OTHER AUTHORITIES	iii
SYMBOLS AND REFERENCES	iv
STATEMENT OF THE CASE	1-3
SUMMARY OF ARGUMENT	4-5
STATEMENT OF THE FACTS	6-7
ARGUMENT	
POINT ONE	8-11
THE REFEREE'S RECOMMENDATION FOR DISCIPLINE OF PRIVATE REPRIMAND, IN A PUBLIC PROBABLE CAUSE CASE IS ERRONEOUS IN LIGHT OF RULE 3-5.1(b) OF THE RULES OF DISCIPLINE WHICH PROVIDES THAT MINOR MISCONDUCT IS THE ONLY TYPE OF MISCONDUCT FOR WHICH A PRIVATE REPRIMAND IS AN APPROPRIATE DISCIPLINARY SANCTION; AND RULE 3-7.5(k)(1)(3) WHICH PROVIDES THAT A REFEREE CAN ONLY RECOMMEND A PRIVATE REPRIMAND IN CASES OF MINOR MISCONDUCT.	
POINT TWO	12-17
A DISCIPLINE CONSISTING OF A PUBLIC REPRIMAND, PROBATION, AND PAYMENT OF COSTS IS MORE APPROPRIATE AS A DISCIPLINE IN THIS CASE, GIVEN THE LONG STANDING NATURE OF THE ADMITTED VIOLATIONS OF THE RESPONDENT, THAN IS THE REFEREE'S RECOMMENDATION FOR A PRIVATE REPRIMAND, PROBATION, AND PAYMENT OF COSTS.	
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>The Florida Bar v. Breed,</u> 378 So.2d 783 (Fla. 1979)	13
<u>The Florida Bar v. Dancu,</u> 490 So.2d 40 (Fla. 1986)	13, 14, 15
<u>The Florida Bar v. Lord,</u> 433 So.2d 983 (Fla. 1983)	16
<u>The Florida Bar v. Mitchell,</u> 493 So.2d 1018 (Fla. 1986)	14
<u>The Florida Bar v. Moxley,</u> 462 So.2d 814 (Fla. 1985)	13, 14
<u>The Florida Bar v. Neely,</u> 488 So.2d 535 (Fla. 1986)	15
<u>The Florida Bar v. Padrino,</u> 500 So.2d 525 (Fla. 1987)	15
<u>The Florida Bar v. Welty,</u> 382 So.2d 1220 (Fla. 1980)	14

TABLE OF OTHER AUTHORITES

Disciplinary Rules of the Code of Professional Responsibility of
The Florida Bar:

	<u>PAGE</u>
9-102(A)	2

The Florida Bar Integration Rules, Article XI, Rule:

	<u>PAGE</u>
11.02(4)	2

The Florida Bar Bylaws Under the Integration Rules, Article XI,
Rules:

	<u>PAGE</u>
11.02(4)	2
11.02(4) (c) (2) (e)	2
11.02(4) (c) (2) (f)	2
11.02(4) (c) (3) (a)	2, 7
11.02(4) (c) (3) (d)	2

The Rules of Discipline of the Rules Regulating The Florida Bar:

	<u>PAGE</u>
3-5.1(b)	3, 8, 9, 10, 11
3-5.1(b) (2)	1
3-7.1(a) (2)	10
3-7.3(j)	1
3-7.5(k) (1) (3)	3, 8, 10

SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "the Bar".

The following symbols will be used:

- T For the transcript of the referee hearing on May 14, 1987.
- REF For the Referee's Report.
- AR For the auditors report dated December 27, 1985.

STATEMENT OF THE CASE

This case arose from a complaint filed by Daniel Collier regarding irregularities in the respondent's handling of an estate. Although the matter was settled to Mr. Collier's satisfaction, an audit of the respondent's books in September and October, 1985, by The Florida Bar revealed he was not in substantial compliance with the trust accounting requirements of the Bar. A grievance committee hearing was held on January 14, 1986. The respondent presented many of the same mitigating circumstances to the committee which he later presented to the referee. After considering all the evidence, the committee declined to find minor misconduct pursuant to Rule 3-5.1(b)(2) and instead voted to find probable cause. The Bar's complaint was filed with this Court on October 21, 1986, in accordance with Rule 3-7.3(j). The Honorable Edward H. Ward, Circuit Court Judge in the Thirteenth Judicial Circuit was appointed referee. At the hearing held on May 14, 1987, the respondent stipulated to the accuracy of the auditor's report dated December 27, 1985, and tendered an unconditional guilty plea which was accepted. The Referee's Report was thereafter forwarded to this Court on July 24, 1987.

In his report, the referee made several recommendations as to possible violations of the Integration Rule and Disciplinary Rules of The Florida Bar's Code of Professional Responsibility. He recommended finding the respondent guilty of violating Disciplinary Rule 9-102(A) for failing to maintain client funds separate from his own. He recommended findings of guilt for violations of Integration Rule 11.02(4) for applying client funds to other purposes than the specific purpose for which they were entrusted to him, and the following Bylaws of the Integration Rule: 11.02(4)(c)(2)(e) for failing to maintain a separate cash receipt and disbursement journal; 11.02(4)(c)(2)(f) for failing to maintain proper client ledger cards; 11.02(4)(c)(3)(a) for failing to prepare periodic trust account reconciliations as required; and 11.02(4)(c)(3)(d) for failing to authorize and request the banks in which he had signatory authority on a trust account to notify The Florida Bar in the event a check was returned due to insufficient funds or uncollected funds.

As discipline, the referee recommended the respondent be given a private reprimand by the Board of Governors, be placed on probation for two years with the express condition that he attend and complete a seminar on trust accounting if he decides to continue the active practice of law, and pay costs totalling \$744.50. The Board of Governors approved the referee's findings

of fact and recommendations of guilt, but voted to appeal the referee's recommended discipline as erroneous given the public nature of the complaint filed by the Bar. 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. Such is not the case here.

Moreover, the Board considered that the long standing nature of the violations of trust account rules warrants a public reprimand rather than a private reprimand.

The Board of Governors of The Florida Bar seeks review by this Court.

The Bar's Petition for Review was filed simultaneously with this Brief.

SUMMARY OF ARGUMENT

The Florida Bar seeks review of the discipline recommended by the referee. In this case, it was recommended by the referee that the respondent be given a private reprimand. The Florida Bar believes that a public reprimand would be the appropriate discipline as no minor misconduct was found by the grievance committee.

The respondent admits that he failed to manage his trust account according to rules set out by this Court. At its meeting, the grievance committee voted to find probable cause rather than minor misconduct. This decision was made after hearing and considering the respondent's testimony regarding factors in mitigation.

The Bar contends that the Rules of Discipline prohibit a private reprimand under the circumstances of the case. A discipline of private reprimand is appropriate only in cases based upon a complaint of minor misconduct. Therefore, the referee committed an error in recommending such a discipline in this public case based upon a formal complaint.

In addition, the nature of the respondent's misconduct warrants a more severe discipline. Although the violations were technical in nature and no clients lost funds as a result, the respondent had been in continuous violation of the Rules Regulating Trust Accounts for a least two years. This was not an isolated incident, but rather a continuing problem. Given the nature of the offense and surrounding facts, case law tends to support the Bar's position, that a public reprimand would be the appropriate measure of discipline.

STATEMENT OF THE FACTS

In September and October, 1985, the respondent's trust account records were audited by The Florida Bar. The auditor's report dated December 27, 1985, reflected that the respondent was not in substantial compliance with the trust accounting requirements of The Florida Bar. The respondent entered an unconditional guilty plea to the formal complaint on May 14, 1987.

The respondent maintained a trust account, numbered 653-070525 at Sun Bank. On December 6, 1984, he made a deposit of \$26,152.30 which was subsequently disbursed from the trust account to cover personal items. Respondent produced adequate documentation to establish that the money deposited represented personal funds commingled in the trust account (Appendix AR, p. 2). The respondent kept some of his personal funds in the trust account from which he advanced costs on behalf of certain client from whom no trust funds had been received in advance. This practice resulted in a temporary overage in the account. After September, 1983, respondent's funds in the account were not sufficient to cover the costs advanced, thus creating shortages (Appendix AR, pp. 3-4). Apparently no record had been kept to

reflect the running balance of his funds in the trust account. These shortages represent the use of clients' funds for purposes other than the specific purpose for which they were entrusted to respondent (Appendix AR, p. 4). In November, 1984, the shortage reached \$2271.73 (T p. 12; Appendix, AR p. 3). Later months produced smaller shortages in the account (Appendix, AR p. 3).

The respondent also did not maintain a separate cash receipts and disbursements journal, failed to keep proper ledger cards, failed to prepare periodic trust account reconciliations as required by Integration Rule Bylaw 11.02(4)(c)(3)(a) and no copy was produced of an authorization to the banks to notify The Florida Bar in the event any trust check was returned due to insufficient or uncollected funds (Appendix, AR p. 4).

A reconciliation was prepared by the Bar auditor for all months from June, 1983, through September 11, 1985 (Appendix, AR, p. 2). This reconciliation reflected a shortage of \$677.66 as of September 11, 1985 (Appendix, AR pp. 2-3). On November 13, 1985, the auditor furnished the respondent the revised reconciliation (Appendix, AR p. 2-3) and on December 9, 1985, the respondent provided the auditor with a copy of a deposit slip and of respondent's office account check showing a deposit of \$677.66 to cover the shortage (T p. 13; Appendix, AR p. 4).

ARGUMENT

POINT ONE

WHETHER THE REFEREE'S RECOMMENDATION FOR DISCIPLINE OF PRIVATE REPRIMAND, IN A PUBLIC PROBABLE CAUSE CASE, IS ERRONEOUS IN LIGHT OF RULE 3-5.1(b) OF THE RULES OF DISCIPLINE WHICH PROVIDES THAT MINOR MISCONDUCT IS THE ONLY TYPE OF MISCONDUCT FOR WHICH A PRIVATE REPRIMAND IS AN APPROPRIATE DISCIPLINARY SANCTION; AND RULE 3-7.5(k)(1)(3) WHICH PROVIDES THAT A REFEREE CAN ONLY RECOMMEND A PRIVATE REPRIMAND IN CASES OF MINOR MISCONDUCT.

The Rules of Discipline which are codified as Chapter 3 of the Rules Regulating The Florida Bar appear to have been deliberately drawn with a dichotomy of procedure depending on whether a confidential or a public discipline is appropriate. Each procedure has its own built in safeguards. It was the apparent intent of the drafters of the Rules of Discipline to simplify and streamline the disciplinary process, thereby hopefully making it more efficient and easier to oversee. It was also hoped that this efficiency would result in a faster disposition of an ever-increasing workload, without loss of fairness to respondents or to complaining parties. For these reasons, the drafters of the Rules of Discipline intended to divide misconduct into two separate categories: minor misconduct handled in a confidential manner and misconduct based upon a formal complaint handled in a public forum.

Minor misconduct is designed to discipline an attorney in minor instances of rule violations. It will normally result in a private reprimand to an attorney administered by the Board of Governors of The Florida Bar or by the appropriate grievance committee. The procedures of recommending, approving, and awarding the private reprimand are, under the Rules of Discipline, normally governed by, and overseen by, the Board of Governors (Rule 3-5.1).

In those cases wherein the respondent rejects the grievance committee report, the rejection shall be deemed to change the committee finding to a finding of "probable cause for minor misconduct". In those cases where the Board of Governors rejects the grievance committee report recommending a private reprimand for minor misconduct, it shall be deemed to be a finding of "probable cause".

The rule further provides that in those cases wherein either the Board or the respondent rejects the minor misconduct report, confidentiality will remain in effect after filing the formal complaint in this court and until this court enters an order imposing public discipline. Thus it can be seen that the procedures concerning this type of discipline are largely controlled by the Board of Governors and the Board remains responsible for minor misconduct cases except when the

recommended report of minor misconduct is rejected, either by the Board or by the respondent.

Rule 3-5.1(b) of the Rules of Discipline explicitly provides that "Minor misconduct is the only type of misconduct for which a private reprimand is an appropriate disciplinary sanction".

In the case at hand, there was no finding of minor misconduct by the grievance committee, neither the Board nor the respondent had the opportunity to reject a finding of misconduct. The grievance committee, instead, recommended a finding of "probable cause". Bar Counsel then filed in this Court a formal complaint for other than minor misconduct. Rule 3-7.1(a)(2) provides that at the time of filing the complaint, the matter will no longer be confidential.

This case proceeded to referee trial. The referee was advised of the provisions of Rule 3-7.5(k)(1)(3) during the course of argument concerning an appropriate discipline (T pp. 49-50). That rule is a clear mandate that "... a private reprimand may be recommended [by the referee] only in cases based upon a complaint of minor misconduct".

In the case at Bar the referee has recommended a discipline extending to a private reprimand, probation upon stipulated conditions and payment of costs.

It is the position of The Florida Bar that that portion of the recommended discipline which recommends a private reprimand is not within the authority of the referee to recommend and, under the provision of Rule 3-5.1(b), is not an appropriate disciplinary sanction in this case. Rather, The Florida Bar recommends a discipline of public reprimand, probation as stipulated by the referee, and payment of costs.

ARGUMENT

POINT TWO

WHETHER A DISCIPLINE CONSISTING OF A PUBLIC REPRIMAND, PROBATION, AND PAYMENT OF COSTS IS MORE APPROPRIATE AS A DISCIPLINE IN THIS CASE, GIVEN THE LONG STANDING NATURE OF THE ADMITTED VIOLATIONS OF THE RESPONDENT THAN IS THE REFEREE'S RECOMMENDATION FOR A PRIVATE REPRIMAND, PROBATION, AND PAYMENT OF COSTS.

The referee has recommended that respondent be privately reprimanded and thereafter be placed on probation for two years. In addition, if the respondent intends to continue the active practice of law, he must attend and complete a seminar on trust accounting. He further recommends the respondent pay costs.

The respondent admits to being guilty of failing to comply with the minimum trust accounting procedures. He commingled personal funds and advanced funds out of his trust account to clients for whom no trust monies were received in advance. He failed to keep track of his personal funds in the account. As a result, in September, 1983, the account contained insufficient funds to cover costs advanced by the respondent. Thus, client money was being used for purposes other than the specific purposes for which it had been entrusted to him. In December, 1984, the respondent commingled an additional \$26,152.00 of his own funds with those of his trust account. This money was subsequently disbursed to cover personal items. He failed to

properly maintain his records. He made no monthly bank reconciliations from June, 1983, through September, 1985. When these were prepared for him by The Florida Bar, a shortage of \$677.66 was found to exist. His client ledger cards were incomplete; he failed to retain all cancelled checks as required; and he had not authorized the bank to notify the Bar in the event a trust account check was returned for insufficient or uncollected funds. The respondent did, however, make good the shortage of funds from his trust account with monies from his office account. As a result, no clients lost any money. He also cooperated fully with the Bar in its investigation.

Although every case must be assessed individually, the punishment imposed in cases involving similar misconduct must also be examined in determining the appropriate disciplinary measures. The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979).

The Court has not taken lightly an attorney's use of trust funds for purposes other than those for which they were intended. The Florida Bar v. Moxley, 462 So.2d 815 (Fla. 1985). As clients must often place their funds in the hands of an attorney with a degree of blind trust which is found in few other economic relationships, it is important that disciplinary process be able to assure that this public trust is upheld by members of the legal profession. The Florida Bar v. Dancu, 490 So.2d 41 (Fla.

1986). As a result, the court has in the past declined to accept a referee's recommendation of a private reprimand in instances of technical violations of trust accounting procedures. The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986).

Although the respondent sets forth numerous mitigating circumstances, moral turpitude or dishonesty is not a prerequisite to recommending a public reprimand. A lawyer should safeguard his clients' funds with greater diligence than his own. The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980). The respondent owed a fiduciary duty to his clients to protect their funds. He has considerable experience in the practice of law and has maintained a trust account since being admitted to The Florida Bar in 1965. Yet his trust account was not properly maintained for a period of more than two years. In a hard hitting dissent, Justice Ehrlich noted in The Florida Bar v. Moxley, 462 So.2d 817 (Fla. 1985) that it is the degree of departure from the ethical canons and rules rather than the degree of loss suffered by the client which should determine an attorney's punishment. To do otherwise would reduce the philosophy of Bar discipline to "what the client doesn't know can't hurt the attorney". Considering the fact that the auditor's report revealed that after September, 1983, the respondent's account contained insufficient personal funds to cover the costs he had advanced to

clients (AR p. 4), it is indeed a fortunate circumstance that no clients lost any money.

In The Florida Bar v. Padrino, 500 So.2d 525 (Fla. 1987), the attorney submitted an unconditional guilty plea for a consent judgment. He failed to maintain his trust account procedures and to follow trust account procedures in accordance with the minimum requirements of The Florida Bar. In mitigation it was noted that he had not misappropriated client funds for his own use. The shortages had resulted from his inadequate bookkeeping procedures. The attorney had no previous history of discipline. In view of these mitigating circumstances, the referee recommended a public reprimand. This case is representative of many other similar cases involving the same issue. A public reprimand has been deemed the type of discipline appropriate in cases involving trust account violations which have resulted from gross neglect rather than intentional misappropriations. The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986).

This Court stated in The Florida Bar v. Dancu, 490 So.2d 40 (Fla. 1986), that the most important concern in regulating and defining the practice of law is "the protection of the public from incompetent, unethical, and irresponsible representation". The public must be protected from attorneys who do not properly handle their trust accounts and thereby place their clients'

funds in jeopardy. This can only be accomplished by appropriately disciplining attorneys who fail to adhere to the rules.

The purpose of discipline, as addressed by this Court on several occasions with the most recent being The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983) at page 986. Discipline should serve three purposes. It must be fair to society in that it must protect the public from unethical conduct without denying the services of a qualified attorney due to an unduly harsh penalty. This is not an issue here since the most the Bar is seeking is a public reprimand and probation. Such a discipline would not be unduly harsh given the long term nature of the misconduct.

Second, the judgment must be fair to the attorney to punish the misconduct and encourage rehabilitation and reform. Although the respondent may retire from the active practice of law, he does not plan to close out his trust account at this time. The referee and the Bar concur in their recommendation that the respondent attend and complete a seminar on trust accounting procedures should he decide not to retire.

Finally, discipline should be severe enough to deter others from similar misconduct. Disregard for the rules on trust account handling and record keeping simply because the respondent did not take the time to familiarize himself with them demands a public

reprimand. The Board of Governors submits that members of The Florida Bar should be made aware that if they fail to properly handle their trust accounts, they will be disciplined. A private reprimand simply cannot accomplish this.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will review the referee's report and recommendations; approve the findings of fact and recommendation of guilt; but reject his recommended discipline of a private reprimand and two year probation and order instead a public reprimand with a two year period of probation including the respondent's attendance and completion of a seminar on trust accounts and payment of costs.

Respectfully submitted,

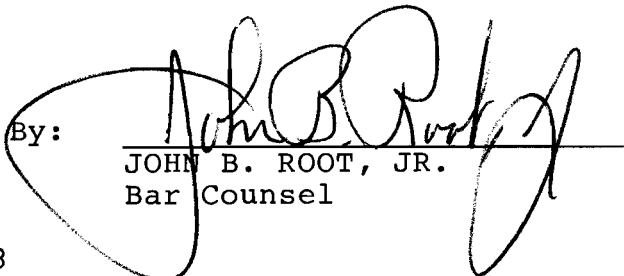
JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, Florida 32301
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, Florida 32301
(904) 222-5286

and

JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(305) 425-5424

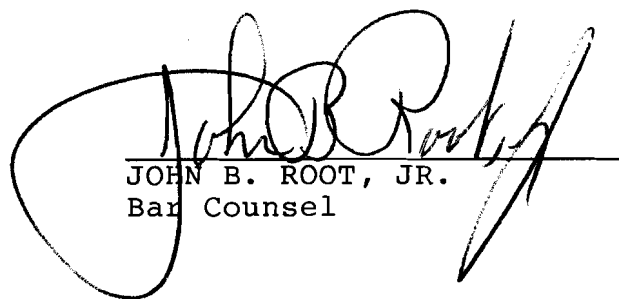
By:



JOHN B. ROOT, JR.
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Brief in Support of Petition for Review has been furnished by Federal Express, I.D. number 1042391475, to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing has been furnished by ordinary U.S. mail to John Thor White, Counsel for respondent, at 463 30th Street North, Post Office Box 10096, St. Petersburg, Florida, 33733; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, this 17th day of September, 1987.


JOHN B. ROOT, JR.
Bar Counsel