IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JERRY DEAN BELL,

Respondent.
_____/

Case No. 69,932
(TFB Case No. 86-16,531 (06C))
(Formerly 06C86H12)

COMPLAINANT'S REPLY BRIEF

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

SYMBOLS AND REFERENCES

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

T For the transcript of the referee hearing on May 14, 1987

AR For the auditors report dated December 27, 1985

STATEMENT OF THE CASE

In his statement of the case, the respondent represents that he is aggrieved by the Bar's lack of reference in some cases to the record on appeal in its statement of the case. These points will be addressed separately; however, it is noted that the respondent represents that The Bar stated as fact six points about which he complains. Without exception, these statements are found in the Bar's Statement of the Case and not in its Statement of the Facts.

The first statement to which the respondent objects was intended solely to provide background information as to why the audit of his trust account was performed. Respondent's objection to a lack of a citation to the record is immaterial as the initial complaint is not at issue here, and he entered a plea of guilty to the formal complaint.

In regard to the second area of contention, some of the basis for the statement is found in Bar's Exhibit Number Two as referred to in the transcript of the referee hearing on May 14, 1987. (T p.28). On page two of this grievance committee report it states that:

> On January 14, 1986, the accused appeared before the Grievance Committee for the Sixth Judicial Circuit in defense of these matters and stated his conduct resulted from severe personal and physical problems.

He further stated he had recently received treatment for alcohol addiction.

Further basis for the Bar's statement can be found in Respondent's Exhibit Number One which was his summary of arguments in mitigation. (T pp 16-17, Appendix pp 6-8).

In replying to the third objection made by respondent to the Bar's Statement of the Case, it is appropriate to note that the statement on page one of the Bar's initial brief stating that the formal complaint was filed on October 21, 1986, was an error. The formal complaint was filed on January 23, 1987. (Certificate of service, formal complaint). The provisions of Rule 3-3.2(a) Rules of Discipline, forbid the filing of a formal complaint unless either a grievance commitee or the board shall first find probable cause exists to believe that the respondent is guilty of misconduct justifying disciplinary action or unless the respondent has been determined or adjudged to be guilty of the commission of a felony or unless the respondent has been disciplined by another entity having jurisdiction over the practice of law. That the committee failed to find minor misconduct and instead voted to find probable cause is evidenced by the fact that the Bar was required to file a formal complaint rather than a complaint of minor misconduct. This has not previously been questioned by the respondent at any stage of the proceeding.

The bases for the fourth and fifth statements to which the

respondent objects are contained in The Bar's petition for review and were not challenged by the respondent. In addition, in paragraph three of the Petition for Review the Bar stated that the Board of Governors had considered this case and had voted to reject the referee's recommendation of a private reprimand and wished to seek review by this court and urged the discipline be a public reprimand and probation. Moreover, no written record reflecting the action of the Board of Governors was available at the time of the filing of the petition for review or the initial brief. However, no petition for review may be filed by the Bar without the express permission and guidance of the Board of Governors.

The respondent's last point is also without merit. The rules governing The Florida Bar, when construed together, do indeed support the Bar's position. The pertinent wording of Rule 3-7.5(k)(1)(3) is:

> [The referee's report shall include:] . . . recommendations as to the disciplinary measures to be applied, provided that a private reprimand may be recommended only in cases based on a complaint of minor misconduct. (Emphasis added.)

SUMMARY OF ARGUMENT

The respondent correctly states that the Bar's initial brief asserts that the referee's recommendation of a private reprimand should be overruled because it is an unlawful disposition under the Rules of Discipline and because, considering the respondent's prior discipline and the nature of the offense herein, a private reprimand is an inappropriate disposition.

The respondent thereafter asserts that a private reprimand is appropriate in this case simply because the facts meet some of the criteria given in the Rule which cites factors which would make a finding of minor misconduct by the grievance committee appropriate. This assertion, of course, misses the point and is irrelevant as well as not being completely factual. The rule is clear that a private reprimand may only be recommended by a referee in cases based on a minor misconduct complaint. (Rules of Discipline 3-7.5(k)(1)(3).) Such complaints, when filed, remain confidential. The complaint in the case under consideration is not confidential. Another Rule provides, in part, Rules of Discipline 3-5.1(b)(4) that "[U]pon trial before a referee following rejection by a respondent of a report of minor misconduct, the referee may recommend any discipline authorized under these rules." The respondent properly does not contend that this referee trial followed a rejection by himself of a minor misconduct finding.

Under the rules in effect at the time this public complaint was filed (January 23, 1987) the respondent and the referee cannot now take away the discretion, under the rules, of a grievance committee in deciding whether certain misconduct constitutes minor misconduct.

Case law and the Standards For Imposing Lawyer Sanctions, approved by the American Bar Association, illustrate the appropriateness of a public reprimand in this case.

ARGUMENT

POINT I

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.

"Minor Misconduct" is a term of art which refers to a specific type of discipline which results in a private reprimand. It has a specific meaning in the context of the Rules of Discipline. It does not refer to attorney misconduct which happens to be of small significance. The term refers to one of the findings against an attorney which can be made only by a grievance committee or by the Board of Governors.

Respondent's "false syllogism" recited in Point One of his Argument proves to be exactly that. It lacks a minor premise and arrives at an invalid conclusion. It does not represent the Bar's thinking.

The respondent contends that his misconduct qualifies as minor misconduct both because it does not fall within the disqualifying criteria set forth in Rule 3-5.1(b)(1), and because of the unusual mitigating circumstances of his case. However, his misconduct did, in fact, contain at least one of the listed criteria; to wit: it was likely to result in actual prejudice

(loss of money) to a client. Although the statement that the respondent did not misappropriate client funds may actually be true, the audit report demonstrated substantial shortages over a period of two years. (Appendix AR, p. 3) The respondent had to pay, at the time of The Florida Bar audit, the sum of $677.66 to balance his trust account. (Appendix AR, p. 4) Therefore it is substantiated that he used client funds for purposes other than the purposes for which he received the funds.

The respondent appears to have misunderstood the meaning of Rule 3-5.1. A careful reading shows that the determination as to whether or not an action constitutes minor misconduct as the term is used in that rule, rests solely with the grievance committee or the Board of Governors. In the instant case it was the grievance committee which had responsibility to examine any unusual mitigating factors the respondent cared to bring before it in determining whether they were sufficient to warrant a finding of minor misconduct. This power does not rest with the referee, although the Bar does agree that he should take these factors into account when making his recommendation as to discipline. Therefore, the criteria the respondent refers to are immaterial here as neither the grievance committee nor the Board of Governors recommended a finding of minor misconduct. Neither the respondent nor the referee can change a finding of probable cause into minor misconduct, which is what would be necessary in the present case in order for the referee to make a valid

recommendation for discipline consisting of a private reprimand.

Respondent's entire argument under Point I is irrelevant to the issues because, in this case, neither the grievance committee nor the Board of Governors made a finding of "minor misconduct" which was later refused by the respondent. The Bar has not contested that the grievance committee had a possible option to make a finding of minor misconduct if the disqualifying criteria were not present. The grievance commitee did not, however, select that option. The formal complaint filed by the Bar was not a minor misconduct report, therefore under the Rule, the referee did not have the option of recommending a private reprimand in this case.

ARGUMENT

Point II

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 Bar stands on its argument that a public reprimand is the appropriate discipline for instances of technical violations of the rules regulating trust accounts when shortages are shown to exist as in this case. Doubtless there exist instances of private reprimands for similar misconduct. However, since the adoption of the new procedural rules which became effective January 1, 1987, any previous cases based upon a formal complaint resulting in a private reprimand would have little or no precedential value here.

In addition, counsel for the respondent appears to have misunderstood the auditor's report. (Appendix AR, pp 1-5) Apparently he compared the reconciled balance with the amount of the shortage, but the amount he should have compared is that reflected in column one (Appendix AR, p 3). During a period of twenty-eight months, twenty-four consecutive months reflected shortages, some of which were substantial. The other four months resulted in overages, three of which were substantial. The overage demonstrated commingling by the respondent of his own

funds with those of his clients. The overages were also a violation of the rules regulating trust accounts.

The Bar maintains that although the respondent's misconduct did not involve any moral turpitude or known financial loss to any client, the fact remains that due to his negligence and his failure to follow applicable trust accounting rules, the danger was clear and present that his clients could have lost money.

The Bar agrees that the respondent has made significant contributions to his profession and his community. In fact without this, the Bar might have recommended a suspension in this case. It is obvious that because he has had a long career in the practice of law, he should have known to take the utmost care in protecting funds entrusted to him by his clients.

One of two standards recited in the Standards For Imposing Lawyer Sanctions, approved by the American Bar Association in February, 1986, (Appendix, pp 9-13) is the appropriate sanction which should be considered by this Honorable Court in this case:

> 4.12 Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
>
> 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.

The remaining standard which might be thought to bear on this case, which the Bar asserts is not appropriate, and for reasons already cited, cannot be approved, is:

> 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 when there is a technical violation of trust account rules or when there is an unintentional mishandling of client property.

The commentary under this standard makes it clear that the standard should apply only to cases where a lawyer's sloppy bookkeeping practices make it difficult to determine the state of a client trust account, but where all client funds are actually maintained. In this case, all client funds were not maintained as required by the rules of trust accounting. The auditors report (Appendix AR, p. 3) reflects shortages in 24 out of 28 months.

In The Florida Bar v. Hosner, Case No. 68,953, (Fla. Oct. 15, 1987.), a recent decision by this court, the facts appear to be very close to the present case. A majority of this court there concluded that a public reprimand was the appropriate discipline. The Bar believes that a public reprimand is an appropriate discipline in this case also.

In reference to the respondent's argument that he is retired

and no longer practicing law, it is pertinent to note that he does not represent that he has petitioned the Board of Governors to be placed in a retired status under the rules. Unless such standing is sought and granted, the status of retirement can be illusory and might change overnight.

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 with a two year period of probation and approve instead a public reprimand and probation for two years including respondent's attendance and completion of a seminar on trust accounting and payment of costs now totalling $774.50.

Respectfully submitted,

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PAGE(S) MISSING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Reply Brief has been furnished by Federal Express, Airbill No. 1042391490, to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing has been furnished by First Class U. S. Mail to John Thor White, Counsel for Respondent, 463 30th Street North, Post Office Box 10096, St. Petersburg, Florida 33733; and a copy has been furnished by First Class U. S. Mail to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, this 5th day of November, 1987.

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