IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs. Case No. 70,319

CHARLES MCCALL MIMS,

Respondent.
_____/

REPLY BRIEF OF PETITIONER

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ARGUMENT

The Florida Bar's position as to the appropriate level of discipline in the instant case has not changed. Respondent's assertion in his Answer Brief that the Bar, in written argument to the referee, conceded that suspension for three years would also be an appropriate discipline, is patently incorrect. The Bar's request was as follows:

> Based upon the nature and seriousness of Respondent's misconduct, the presence of numerous aggravating circumstances, and in light of the Florida Standards and cases cited herein, The Florida Bar strongly urges this Court to recommend that Respondent be disbarred. However, should this Court recommend as discipline a period of suspension, The Florida Bar requests such period be no less than three years duration and that prior to his petitioning for reinstatement, that Respondent be required to: (1) make complete restitution to former clients damaged as a result of his misconduct; (2) reimburse the Florida Bar Clients' Security Fund for claims paid in his behalf; and (3) attain a passing score on the Multistate Professional Responsibility Exam. The Florida Bar further requests that in the event Respondent is reinstated or readmitted to the practice of law, that he be placed on probation for three years, during which time he would be subject to random audits of his clients' trust accounts. (emphasis added)

Complainant's Written Closing Arguments as to Appropriate Discipline at 8.

Because of the possibility that a term of suspension, rather than disbarment, might be imposed, the Bar included a request that any suspension be no less than three years in length. In order to secure some measure of protection for the public, the Bar also requested conditions to Respondent's reinstatement. The Florida Bar remains firm in its conviction that disbarment is the appropriate level of discipline in this case.

The Florida Bar concurs with Respondent's argument that mitigating factors should be considered in determining the appropriate level of discipline against an accused attorney. However, these mitigating factors should be factors which have been recognized as such by prior decisions of this Court and by the Florida Standards for Imposing Lawyer Sanctions. Clearly, there must be sufficient evidence in the record to establish that mitigating factors were, in fact, present. Respondent urges that several factors should be considered in mitigating the discipline imposed against him. These include restitution, remorse, and cooperation during the Bar disciplinary proceedings.

With regard to restitution, Respondent is correct that restitution was made by the time of the final hearing before the Referee. However, his assertion that restitution was made prior to the initiation of any proceedings against him is not supported by the record. The testimony of Mr. Danny Kepner,

the investigating member of the grievance committee, clearly indicates that it was only after repeated telephone calls and confrontations with Respondent that restitution was made. (TR 35-37, 40-45). Forced or compelled restitution is not considered to be a mitigating factor.

With regard to Respondent's cooperation, or lack thereof, the record speaks for itself. The testimony of Mr. Danny Kepner and Mr. Clark Pearson, already referenced in the Bar's Initial Brief, clearly establishes that Respondent's assertions of cooperation are not supported by the record.

Respondent further argues that he diligently adhered to trust accounting rules and procedures subsequent to the Bar's audit. This, likewise, is not supported by the record. Mr. Pearson, the Florida Bar's auditor, testified at the final hearing that, as of the time of the conclusion of the audit, Mr. Mims's trust account records were still not in balance and, that during the time the audit was being performed, at least one check was presented for payment when there were not sufficient funds in the account to cover the check. (TR 95-105).

Respondent discounts the importance of his prior disciplinary record by arguing that the prior instances of misconduct were not related to the misconduct in the case now

before this Court. However, the two prior instances of misconduct dealt with neglect of legal matters and Respondent in the instant case has again been found guilty of neglecting a legal matter. Even unrelated instances of prior misconduct are considered as aggravating factors. Where the prior misconduct is of a similar nature, even more severe discipline is warranted. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982, Rehearing denied 1983).

The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986), cited by Respondent, can be distinguished from the instant case in several regards. The numerous mitigating factors in Tunsil were uncontested by The Florida Bar. In the instant case, The Florida Bar strongly disputes the factors cited by the Referee as mitigating against disbarment. The most significant mitigating factor in Tunsil was the attorney's admitted alcoholism. There has been no indication of impairment in the instant case.

CONCLUSION

The Florida Bar again urges this Court to find that the appropriate discipline in the instant case is disbarment. The seriousness of the underlying misconduct and the presence of numerous aggravating factors clearly supports the imposition of the most severe sanction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been mailed regular U.S. mail and by certified mail # P 675 195 365, return receipt requested, to CHARLES MCCALL MIMS, Respondent, at his Bar address of 908 Kinney Drive, Pensacola, Florida 32504-8127 this 16th day of June 1988.

SUSAN V. BLOEMENDAAL
Bar Counsel