IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JAMES W. AARON,

Respondent.

Case No. 70,338
[TFB Case No. 87-23,842(10A)]
(Formerly 10A87C20)

COMPLAINANT'S ANSWER AND REPLY BRIEF

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SYMBOLS AND REFERENCES

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

The Referee Report shall be referred to as R.

The transcript for the final hearing on September 25, 1987, will be referred to as T.

STATEMENT OF THE CASE

The Bar filed its Petition for Review on November 25, 1987, and its initial brief on December 18, 1987. The respondent also filed a petition for review on November 27, 1987, which the Bar is treating as a cross-petition. The respondent then filed a motion for extension of time to file his brief which was granted and the brief was submitted in due course.

SUMMARY OF ARGUMENT

In respondent's Initial Brief, several arguments that he was denied due process are made which are without merit. He was awarded all due process rights under the rules. The Florida Bar stands on its previous arguments contained in the Initial Brief and here maintains that the referee properly denied the respondent's motion to dismiss on all grounds and properly admitted into evidence the Bar's exhibit number five which was his dues statement. There is no violation of the privilege against self-incrimination in the mandatory annual certification of compliance with trust account record keeping rules.

The Bar does submit the referee erroneously recommended the respondent receive a private reprimand given the requirements of Rule 3-7.5(k)(1)(3) of the Rules of Discipline. Under this rule a referee may recommend a private reprimand only in cases based upon a finding of minor misconduct by a grievance committee. The present matter is a case based upon a finding of probable cause.

The Bar does not take issue with the referee's basic findings of fact. However, the Bar submits he made an erroneous conclusion from the evidence as to the respondent's lack of guilt in misrepresenting the status of his trust account to the prior referee. The appropriate level of discipline is a public

reprimand and probation for one year during which period respondent should be responsible to schedule quarterly reviews of his trust account record keeping.

ARGUMENT

Point I

THE REFEREE ACTED PROPERLY IN DENYING RESPONDENT'S MOTION TO DISMISS.

The Florida Bar maintains the referee acted properly in denying the respondent's Motion to Dismiss.

On January 20, 1987, the Tenth Judicial Circuit Grievance Committee "A" considered two cases against respondent. The committee voted unanimously to find probable cause in this matter concerning the respondent's trust account. However, no probable cause was found to exist for the first case, an unrelated complaint by Mr. Bagwell.

The respondent argues that a member of the committee, Jonathan Hancock, was biased against him and improperly participated in the proceedings rather than recusing himself from this case as he had in the Bagwell matter. Mr. Hancock and the respondent were opposing counsel in a civil matter involving Mr. Bagwell which gave rise to the the first grievance. The record fails to disclose a motion or direct request by respondent to recuse Mr. Hancock prior to the grievance committee hearing on this case. A review of the grievance committee transcript shows that Mr. Hancock offered to recuse himself from voting on this case. The respondent declined and indicated he did not feel Mr.

Hancock was biased against him. At pages 24-25. Note, Mr. Hancock did recuse himself from voting on the Bagwell case. However, he did vote on this unrelated trust account matter. At pages 29-30. Copies of the pertinent pages are attached in the appendix.

The respondent's argument that the grievance committee proceedings against him were biased is totally without merit. The respondent was given the opportunity to request Mr. Hancock and any other grievance committee members present to recuse themselves. At no time did the respondent request that either Mr. Hancock or any other member do so. Furthermore, Mr. Hancock voluntarily chose to recuse himself from the only matter in which the respondent expressed concern. If the respondent feared Mr. Hancock was also biased against him in this matter concerning his trust account, he should have raised that objection at the time of the hearing. He did not do so.

Furthermore, the respondent's assertion that the grievance committee did not find probable cause in the trust account matter is in error. It is not unusual for Bar Counsel to recite the findings of the committee for the record since Bar Counsel is more familiar with the procedures and rules. Bar Counsel on such occasions is merely reciting what the committee voted. To place the committee's vote on the record and to then poll each member

would serve no useful purpose. This situation is clearly different from that in The Florida Bar v. G.B.T., 399 So.2d 357 (Fla. 1981) where the Bar filed two separate counts in a complaint against a respondent where the grievance committee had only found probable cause on the one count. The second count charged a separate violation which was not part of that committee's finding. Here, Bar Counsel merely announced the committee's findings and not something different or new. If the Court deems this to be a possible error, then the Bar submits it is a harmless one. Moreover, the Bar further submits relief would not be dismissal of the case but return to the grievance committee for ratification of their earlier vote. It would clearly elevate the form over substance if done. The Bar submits there was no error and this matter should be decided on the merits.

The respondent's next argument that the selection of grievance committee members is improper and violates his constitutional rights is also without merit. Rule 3-3.4(c) of the Rules of Discipline outlines the selection process of the members for the grievance committee. The duty to appoint members is the responsibility of the Board of Governors of The Florida Bar. At least one-third of the committee members must be composed of non-lawyers. The Bar is aware there are approximately 580 attorneys in the Tenth Judicial Circuit but

does not know how many non-white males and non-white females there are. The respondent offers no evidence that there has been any systematic exclusion of non-white males or non-white females. In fact, Dr. Lottie Tucker, a black female, was appointed to grievance committee 10"A" as a non-lawyer member in February, 1987.

The respondent's further argument regarding the nature of discipline proceedings is without merit. The respondent's concern appears to be that he was not afforded due process. Rule 3-7.3 of the Rules of Discipline fully protects the respondent's due process rights during grievance committee proceedings. Rule 3-7.3(g) sets forth the respondent's rights and responsibilities in detail. It provides that at a reasonable time before the hearing he must be informed of the conduct being investigated and the rule violations being charged. He is given the opportunity to explain, refute, or admit the alleged misconduct. He has the right to be present at the proceedings, face his accuser, call witnesses, present evidence, and cross examine subject to reasonable limitation. He also may be required to testify and to produce evidence unless he claims a privilege or right properly available to him under applicable federal or state law. Rule 3-7.5 likewise protects his due process rights in hearings before a referee. The Bar submits the respondent was fully afforded

notice of the charges and a complete opportunity to be heard at both the grievance committee and referee levels.

It is true that bar disciplinary proceedings share the same goals as do criminal proceedings in seeking to protect the public, deter others and discipline or punish the offender. However, as noted in The Florida Bar v. Musleh, 453 So.2d 794, 796 (Fla. 1984), disciplinary proceedings "...do so in the context of enforcing the higher standard of duty and conduct required of those who exercise the privilege of practicing law. See Fla. Bar. Integr. Rule, Article XI, Rule 11.02." Current Rule 3-1.1 of the Rules of Discipline reads: "A license to practice law confers no vested right to the holder thereof, but is a conditional privilege which is revokable for cause." See also The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985) and The Florida Bar v. Wolf, 257 So. 2d 547 (Fla. 1972). The main point is that due process is applicable and was fully applied. Respondent was deprived of no due process protections throughout this case. He received the same protections available to any other attorney.

In this, as in any other disciplinary case, the determination being made is whether or not discipline should be imposed. The purpose of Bar discipline is set forth in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). It should serve

three purposes. First, it must be fair to society, both protecting it from unethical conduct but not denying the public the services of a qualified attorney due to an unduly harsh penalty. Secondly, the judgment must be fair to the respondent to punish the breach and encourage rehabilitation and reform. Finally, the disciplinary judgment must be severe enough to deter others who might be prone or tempted to become involved in similar misconduct.

The Bar submits that improper trust account record keeping should not be treated lightly. Members of the Bar must be told in plain terms that if they fail to handle their trust accounts properly they will be disciplined even where the mismanagement and mishandling results in no actual losses to clients.

ARGUMENT

POINT II

THE REFEREE ACTED PROPERLY IN ADMITTING COMPLAINANT'S EXHIBIT NUMBER FIVE INTO EVIDENCE.

The Referee acted properly in admitting complainant's exhibit number five into evidence at the final hearing on September 20, 1987. The exhibit consisted of a copy of the respondent's Bar dues statement for the year 1986. He certified that he had read the rules and his trust account was being maintained in substantial minimum compliance when that was not the case. (R - p.3) He admitted checking paragraph four was a misleading statement to the Bar regarding monthly bank reconciliations. (R - p.3)

The respondent now maintains that being compelled to certify whether or not he is in substantial minimum compliance with the rules violates his Fifth Amendment right against self-incrimination. The Bar recognizes that under Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 574 (1967) an attorney may not be disciplined for validly asserting his fifth amendment right against self-incrimination in refusing to testify before a grievance committee. This right is applicable in all proceedings absent immunity. It need only be validly asserted regarding a well founded fear of possible self-incrimination for criminal prosecution. The Bar is certainly unaware how the

misrepresentation, which was not under oath, on the compliance form here could raise the spector of criminal prosecution given the facts in this case. Trust accounts must be maintained in accordance with the rules as part of the privilege of the practice of law in Florida. They are deemed to have a public aspect relating to protection of clients and a lawyer's fitness to practice. See Rule 5-1.1 of the Rules Regulating Trust Accounts and former Florida Bar Integration Rule, Article XI, Rule 11.02(4). Annual notice of compliance with the rules on trust account record keeping is but one of the burdens of the privilege. The requirement does not violate the self-incrimination privilege and certainly does not give an attorney license to lie on the form to hide possible record keeping problems or worse. The requirement is one of several in this area to protect the public who must entrust funds to members of the Bar.

Furthermore, the referee's findings of fact and recommendations as to guilt were based upon all of the available evidence and not solely upon the Bar's exhibit number five. A review of the record reveals the referee considered the staff investigator's report (R. p.2) as well as the respondent's own testimony that he believed during his period of probation the Bar would assist him in bringing his account into compliance. (R. p.3; T pp.85-88, 95-96, 117)

ARGUMENT

POINT III

THE REFEREE MADE AN ERRONEOUS RECOMMENDATION IN LIGHT OF RULE 3-7.5(k)(1)(3) IN RECOMMENDING A PRIVATE REPRIMAND IN A PROBABLE CAUSE CASE.

The respondent asserts the referee was justified in his departure from the language of Rule 3-7.5(k)(1)(3) of the Rules of Discipline by recommending the respondent receive a private reprimand. He also asserts the referee was correct in finding him not guilty of misrepresenting the status of his trust account to then Circuit Judge Richard H. Bailey who acted as referee at the December 10, 1985, final hearing.

The Florida Bar reiterates its argument contained in its Initial Brief. The referee's recommended discipline of a private reprimand and probation is inappropriate given the continuing nature of the respondent's trust account record keeping violations. Even if such a recommendation were justified, the Rules Regulating The Florida Bar do not empower a referee to circumvent Rule 3-7.5(k)(1)(3) where probable cause and not minor misconduct was found by the grievance committee. The referee did not have the authority to make a finding of minor misconduct where the complaint was based upon a finding of probable cause by the grievance committee.

CONCLUSION

WHEREFORE, The Florida Bar requests this Honorable Court to affirm the referee's basic findings of fact and recommendation as to guilt concerning the trust account record keeping violations but reject the conclusions and recommendations as to lack of guilt of deceiving Judge Bailey as to the status of his trust account on December 10, 1985, as erroneous, inadequate and unjustified from the evidence and also reject the recommendation of a private reprimand for similar reasons; and enter an order in an appropriate opinion placing the respondent on probation for a period of one year during which time he should be responsible for scheduling with The Florida Bar quarterly reviews of his trust account; and tax costs against the respondent currently totalling $972.26 with interest at the statutory rate due and accruing thirty days subsequent to this court's final order.

Respectfully submitted,

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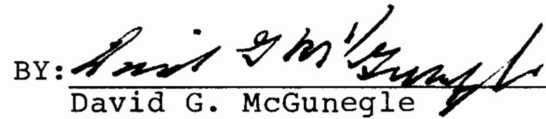
BY: 
David G. McGunegle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the original and seven (7) copies of the foregoing Brief and accompanying appendix by U.S. Mail to the Clerk of the Supreme Court, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing, by U.S. mail, on respondent, James W. Aaron, Post Office Box 3351, Sebring, Florida, 33870; a copy to respondent's co-counsel, David Wilson III, Post Office Box 3154, Winter Haven, Florida, 33880; and a copy to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 29th day of January, 1988.

David G. McGunegle
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