IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JAMES W. AARON,

Respondent.
_____/

Case No. 70,538
[TFB Case No. 87-23,842(10A)]
(Formerly 10A87C20)

COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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SYMBOLS AND REFERENCES

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

The Board of Governors of The Florida Bar shall be referred to as the Board of Governors.

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.

Bar exhibits will be referred to as B Ex-.

STATEMENT OF THE CASE

Following the court's order in The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986), in which the respondent was publicly reprimanded for commingling and improper trust account record keeping, a review of the respondent's trust records was conducted by a staff investigator from The Florida Bar. This review disclosed the respondent had failed to bring his account into compliance with the rules as required. This gave rise to the filing of the present complaint against the respondent by the Bar.

A final hearing was held on September 25, 1987. The referee recommended the respondent be found guilty of violating the following rules of Article XI of The Florida Bar's Integration Rule: 11.02(3)(a) for conduct contrary to honesty, justice or good morals, and 11.02(4)(c) and the accompanying bylaw for improper trust account record keeping. He also recommended the respondent be found guilty of violating Disciplinary Rule 9-102(B)(3) of The Florida Bar's Code of Professional Responsibility for improper trust account record keeping. He recommended the respondent be found not guilty of Disciplinary Rules 1-102(A)(4) for conduct involving fraud, deceit, dishonesty or misrepresentation, and 1-102(A)(6) for other misconduct reflecting adversely on his fitness to practice law. He

recommended the respondent receive a private reprimand, a one year period of probation during which time the Bar would review his trust account records on a quarterly basis, and pay the cost of these proceedings.

The Board of Governors of The Florida Bar reviewed the referee's recommendation at its November, 1987, meeting and approved his findings of fact but took exception to his recommendations of not guilty regarding making a misrepresentation to the previous referee under oath and the overall recommendation of discipline which is considered erroneous and unjustified. The Board voted to file a petition for review of the referee's recommendations and seek a public reprimand, one year period of probation with quarterly reviews of respondent's trust account and payment of costs by respondent. The Board further urges that scheduling of the trust account reviews be the responsibility of the respondent.

The Bar filed it Petition for Review on November 25, 1987. Respondent also filed one dated November 27, 1987, which the Bar is treating as a cross-petition.

STATEMENT OF THE FACTS

In August, 1984, two staff investigators of The Florida Bar reviewed the respondent's trust account records and determined he was not in substantial minimum compliance with the rules. (B Ex - pp. 11-12). Thereafter, in 1985, he entered an oral plea to misconduct involving commingling and improper trust account record keeping, received a public reprimand, and was placed on a one year period of probation. The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986). After the court's order became final in July 1986, a staff investigator from the Bar reviewed the respondent's trust records for the period July 1985 to July 1986. The review disclosed the respondent had failed to bring his trust account records into compliance as required by the court. (R p. 2)

Respondent did not have a separate receipt disbursement journal nor a cash receipt book. Each client did not have a separate ledger card. Available client ledgers reflected both trust and non-trust activity without distinction. The checks were not identified by number nor were they identified as being trust or non-trust. The respondent had failed to deposit funds belonging in part to himself and in part to trust to the trust account in at least sixty-five instances. This constituted commingling per se. Bank records failed to reflect deposits and

cost expenditures relative to the clients. The respondent reconciled some but not all of his monthly bank statements. His cash receipt book consisted of his regular office receipt book. His records revealed he had bank deposit slips but there were no duplicate office receipts. There was no letter to the bank instructing it to notify the Bar in the event a trust account check was returned for insufficient funds; nor could he tell the referee whether or not he had notified his bank. (R p. 2)

Although the respondent's trust account was not in substantial minimum compliance with the rules, he certified on his 1986 dues statement that he was in compliance. (R p. 3) He admitted at the final hearing on September 25, 1987, that checking paragraph four on his 1986 Bar dues statement regarding monthly bank reconciliations was a misleading statement to the Bar. (R p. 3) The respondent only partially complied with Integration Rule 11.02(4)(c) and Disciplinary Rules 1-102(A)(6) and 9-102(B)(3). He did not maintain all the written trust records required by the rules nor did he follow all the procedures required. He stated he believed the staff investigator would assist him in bringing his account into compliance during this probationary period. (R p. 3; T pp. 11,130) The Bar filed a complaint against the respondent on April 7, 1987, alleging he had failed to bring his trust account into compliance and that he had falsely testified under oath at a

hearing before then Circuit Judge Richard H. Bailey on December 10, 1985, that he had done so regarding the status of his trust account. At that hearing which focused in part on his record keeping and which he entered a plea to having been not in compliance with the rules, he testified under oath:

Q. Now, Charlie Lee, I think, and Colleen Rook of my office came down and went through your records in August of 1984?

A. I believe so.

Q. And did you then bring those current and in conformance with the rules, subsequent to that visit?

A. Correct.

See the Referee Report at page 2, and B Ex - 2 at pages 11 and 12.

The referee found the respondent guilty of technical trust account violations, but not guilty of misrepresenting the status of his trust account as on December 10, 1985, to Judge Bailey.

SUMMARY OF ARGUMENT

The referee properly found the respondent was not in substantial minimum compliance with the rules governing trust account record keeping procedures. However, the referee has reached an erroneous, inadequate and unjustified conclusion from his findings of fact in paragraph three of section two. While the Board of Governors of The Florida Bar accepts the referee's findings of fact, it disagrees with his conclusion from those findings as to the respondent's testimony about the status of his trust account on December 10, 1985. Specifically, the Board believes a different legal conclusion is mandated - that respondent lied under oath about the status of his trust account. The respondent admitted he failed to manage his trust account according to the rules set out by this court after the December 10, 1985, hearing. (T p. 116) Although he apparently attempted to bring his account into compliance pursuant to this court's order in The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986), he failed to do so. He states he believed it was the Bar's responsibility to assist him in this during his probationary period. (R p. 3; T pp. 11,130) The respondent either never brought his trust account into substantial minimum compliance or he did so and then allowed it to fall out of compliance or he does not understand the minimum rules of trust accounting

procedures required of all attorneys practicing in the state of Florida.

A referee's findings of fact are given the same weight as a civil trier of fact and are not subject to attack unless they are without support in the evidence. The findings and recommendations of guilt are given a presumption of correctness and should be upheld unless they are clearly erroneous or without support in the record. See, The Florida Bar v. Vannier, 498 So.2d 896,898 (Fla. 1986). However, the legal conclusions and recommendations are subject to broader consideration by this court since the court has the responsibility to enter an appropriate judgment. See, The Florida Bar; In Re Inglis, 471 So.2d 38, 41 (Fla. 1985).

The Bar also submits Rules 3-5.1 and 3-7.5(k)(1)(3) of the Rules of Discipline of The Florida Bar prohibit the referee from recommending a private reprimand in a case based upon a formal public complaint. A discipline of a 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 this instance, the Board of Governors of The Florida Bar submits the referee has reached an inadequate, erroneous and unjustified conclusion as to one recommendation of guilt and discipline given the evidence in the case and Rule 3-5.1 and 3-7.5(K)(1)(3). The Board of Governors submits the appropriate level of discipline for the continued trust account record keeping problems alone is a public reprimand, a one year period of probation during which time the respondent must be responsible for arranging arrange for quarterly reviews of his trust account by the Bar, and payment of costs.

ARGUMENT

Point I

WHETHER THE REFEREE DREW AN ERRONEOUS AND UNJUSTIFIED CONCLUSIONS FROM THE FINDINGS OF FACT BASED ON THE EVIDENCE PRESENTED AND THUS MADE INADEQUATE RECOMMENDATIONS AS TO DISCIPLINE AND WHETHER THE BOARD'S RECOMMENDATION OF A PUBLIC REPRIMAND WITH A ONE YEAR PERIOD OF PROBATION IS THE APPROPRIATE MEASURE OF DISCIPLINE.

The referee drew improper conclusions from the findings of fact based on the evidence presented when he concluded the respondent did not make a misrepresentation under oath to the previous referee under oath as to the status of his trust account at the time of the hearing. Further, he made inadequate recommendations as to discipline. Even with this erroneous finding the continued trust account record keeping problems above warrant more. The Board of Governor's recommendation of a public reprimand and a one year period of probation is the appropriate measure of discipline. The referee found the respondent had failed to maintain his trust account in minimum substantial compliance with the rules and had misled the Bar when he certified on his 1986 dues statement that he had maintained his trust account in compliance with the rules when he had not (R p. 3). He concluded, however, the respondent had not falsely testified before Circuit Judge Richard G. Bailey during the December 10, 1985, final hearing held in The Florida Bar v. Aaron, 490 So.2d 941 (Fla. 1986). The referee determined the

respondent had not fully understood the question posed by Bar Counsel and therefore his answer did not mean he stated his trust account was in substantial minimum compliance with the rules on December 10, 1985. (R p.2) The respondent testified as follows:

Q. Now, Charlie Lee, I think, and Colleen Rook of my office came down and went through your records in August of 1984?

A. I believe so.

Q. And did you then bring those current and in conformance with the rules, subsequent to that visit?

A. Correct.

See the Referee Report at page 2, and B Ex - 2 at pages 11 and 12.

The Bar submits that given the thrust of that portion of the case, the intent of the question had to be clear and the respondent simply either misled the court with his answer or did not understand the minimum record keeping rules. It is true Bar Counsel did not go on to ask if his records were still in compliance, but the thrust of that portion of hearing was so clear that had Bar Counsel asked this ultimate question it would have been insulting to all concerned. Obviously, it was contemplated that the respondent's trust records would be maintained properly after being brought into substantial minimum

compliance with the rules. Please also note this was a conditional plea case and any other answer could have undermined the agreement. (B Ex - 2 pp. 4,24,40-41,44) Respondent had not contested the allegation his trust account had not been kept in accordance with the rules.

It is well established that a referee's findings of fact are given the same presumption of correctness as those of a trier of fact in a civil proceeding. See Article XI, Rule 11.06(9)(a)(1) of The Florida Bar's Integration Rule for cases prior to January 1, 1987, and the identical current rule which is 3-7.5(k)(1)(1) of the Rules of Discipline. This court will not rewrite a referee's findings of fact and will adopt same including the recommendations of guilty unless they are clearly erroneous or lacking in evidentiary support. See The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986); The Florida Bar v. Price 478 So.2d 812 (Fla. 1985); The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985); The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978); and The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). As noted in Stalnaker, supra, at page 816, and several other cases, the referee is the fact finder for this court in disciplinary proceedings and resolves

the conflicts in the evidence. The Board of Governors of The Florida Bar does not argue with the referee's findings of fact.

However, the Board believes that the referee's legal conclusion from those findings of fact and thus his recommendation that the respondent was not guilty of false swearing before Circuit Judge Bailey is erroneous and unjustified. In questioning, Staff Counsel failed to follow up to pin the respondent's answer to the day of the final hearing, thus it is possible the respondent may have misunderstood that the question related to the current status of the respondent's trust account. (T pp. 83-85; B Ex pp. 11-12) However, the Bar submits it had to have been obvious from the context and general tenor of the question what Bar Counsel meant as well as the thrust of that portion of the case. If the respondent believed the question related to the status of his trust account previous to December, 1986, then he must have believed it was permissible to allow the account to fall back out of compliance.

This court has more latitude to consider whether the referee's legal conclusions and recommendations are warranted by the findings of fact as noted in Inglis, supra. Although it was a reinstatement case, the standard disciplinary law applied and the court noted it had to accept the referee's findings of fact

unless they were not supported by competent substantial evidence in the record. The court went on to state:

> With regard to legal conclusions and recommendations of the referee, this Court's scope of review is somewhat broader as it is ultimately our responsibility to enter an appropriate judgment. At page 41.

The Bar submits that the conclusion the referee drew regarding the respondent's understanding and testimony on December 10, 1985, was erroneous and unjustified. He was before that referee mainly due to the condition of his record keeping. The intent of the question was plainly obvious. Did he bring it in to compliance after the staff investigators' visit? Is it now? To accept the conclusion that he misunderstood the question means that respondent must have believed once he brought the records into line with the rules, he did not have to keep them in compliance. Otherwise his answer was a plain misrepresentation under oath to Judge Bailey. The Bar submits it was the latter. He knew what that portion of the case was about and, having entered an oral conditional plea, he was aware it could also unravel. This referee has been erroneously and unjustifiably generous with his conclusion and recommendation of no knowing misrepresentation and it should be overturned. Accordingly his entire recommendation for discipline was similarly flawed since it flowed partly from his conclusion on this point.

ARGUMENT

Point II

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 three 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. 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. 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.

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." Rule 3-7.5(k)(1)(3) further provides that a referee may only recommend such a discipline in cases based on a complaint of minor misconduct. Such cases are handled in a confidential manner

unless either the Board of Governors or the respondent rejects the report of minor misconduct. Then confidentiality remains in effect until this Court enters an order imposing a public discipline. See Rules 3-5.1(b)(4) and 3-7.3(m) of the Rules of Discipline.

In the case at hand, there was no finding of minor misconduct by the grievance committee and this case was not a complaint of minor misconduct based upon a respondent's rejection of a report of same pursuant to Rule 3-7.3(m). The grievance committee, instead, entered a finding of "probable cause." Bar Counsel then filed in this Court a formal complaint on April 7, 1987, 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.

In the case at Bar the referee has recommended a discipline extending to a private reprimand, probation with conditions, and payment of costs. The Rules of Discipline, effective January 1, 1987, clearly do not provide for a referee to make such a recommendation. Given the regulatory scheme laid out in Chapter three of the Rules Regulating The Florida Bar, the only rule which mentions the recommendation of a private reprimand not explicitly tied to a finding of minor misconduct is rule 3-5.1(a). Under this rule the Florida Supreme Court may, in its

discretion, recommend such a discipline. The Bar submits this is reserved for cases involving minor misconduct reports which have been rejected by the accused attorney or the Board of Governors pursuant to Rule 3-5.1(b)(4). To interpret this rule otherwise is to cause the dichotomy set in Chapter three between cases based upon minor misconduct and those based upon findings of probable cause to become blurred. As a result, the clear language of rules 3-5.1(b) and 3-7.5(k)(1)(3) becomes less meaningful.

It is the position of The Florida Bar that that portion of the recommended discipline which recommends a private reprimand was not within the authority of the referee to recommend pursuant to the clear language in Rule 3-7.5(k)(1)(3) which states in part "...provided that a private reprimand may be recommended only in cases based on a complaint of minor misconduct." A private reprimand is not an appropriate disciplinary sanction in this case under the rules. Moreover, where the misconduct involves that for which he was disciplined and failed to correct, that in and of itself should call for public discipline. The Florida Bar recommends a discipline of public reprimand, a one year period of probation during which the respondent must take the responsibility for scheduling the Bar quarterly reviews of his trust account records, and payment of costs.

CONCLUSION

WHEREFORE, The Florida Bar requests this Honorable Court to affirm the referee's basic findings of fact and recommendation as to guilt of 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, place the respondent on probation for a one year period of probation during which time he should be responsible for scheduling with The Florida Bar quarterly reviews of his trust account; and tax costs against 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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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 18th day of December, 1987.

David G. McGunegle
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