IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 70,413
[TFB No. 87-23,650 (19)]

V.

JEFFREY M. MART,

Respondent.
_____/

COMPLAINANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

The complainant, The Florida Bar, will be known as the Bar.

The referee's report will be referred to as R.

Beacon 21 Development Corporation will be referred to as Beacon 21.

ARGUMENT

The respondent's several arguments do not have merit. The bar reiterates and stands on it's initial argument as to all matters.

As to Point I

The lengthening *of* the minimum period *of* disbarment by Rule *of* Discipline 3-5.1(f) is procedural in nature.

The Bar does not contest the referee's findings of fact, however, his recommendation of a three year period of disbarment is insufficient given the present rules and the sheer magnitude of the respondent's misconduct.

The respondent argues that the rule change is substantive in nature rather than procedural. Black's Law Dictionary defines procedure as:

> The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer: the machinery, as distinguished from it's product. Black's Law Dictionary, Fourth Edition, at 1367-8 (1968).

The act of making an application to the Board of Bar Examiner's once a disbarment is imposed is the "machinery" which

activates the "product" of disbarment. The length of time a disbarred attorney must wait for making his application is merely a part of that machinery.

Bar disciplinary proceedings are remedial in nature and are designed to protect the public and the integrity of the legal system rather than to punish the lawyer. DeBock v. State, 512 So.2d 164 (Fla. 1987). Therefore, the rule of statutory construction that should apply is that which provides that where there are changes in statutory law, remedial or procedural changes may be immediately applied to pending cases as opposed to prospective application only. Of course, in this case we are concerned with the Rules of Discipline promulgated by the Court to govern the Bar. Heilmann v. State 310 So.2d 376 (Fla. 2d DCA 1975).

In addition, former Integration Rule 11.10(5) did not prohibit terms of disbarment exceeding three years. The three year period was merely a minimum. Therefore, it appears no procedural rights have been modified by the rule change as it was possible to be disbarred for longer than three years under the old rules. Even if this court finds the disbarment rule change is substantive rather than procedural, the Bar stands on its original argument that the sheer magnitude of the respondent's

misappropriation warrants five year disbarment even under the old rules.

The respondent is correct in his statement that this court is not bound by the referee's recommendations in determining the appropriate discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978); and see e.g. The Florida Bar v. Padgett, 481 So.2d 919 (Fla. 1986). However, the Bar does not agree with his statement that both the referee's findings of fact and recommendations come to this court with the presumption of correctness and should be upheld unless shown to be clearly erroneous. He cites three cases to support his argument: The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986); and The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986). Lipman and Fields, supra, only address the referee's findings of fact and recommendations as to guilt. The recommendations as to the appropriate levels of discipline are not addressed in either opinion. Vannier, supra, appears to be a somewhat broader interpretation. However, it remains unclear what weight a referee's recommended level of discipline should be given. The Bar submits that this court's standard of review with respect to the recommendation of discipline is more broad than that of the review of the findings of fact. This court has more latitude to consider whether the referee's legal conclusions and recommendations are warranted by

the findings of fact as ultimately it is this court's responsibility to enter an appropriate judgment. The Florida Bar: In Re Inglis, 471 So.2d 38, 41 (Fla. 1985). See also The Florida Bar v. Aaron, 13 F.L.A. 443 (Fla. July 14, 1988), which is currently pending on a Motion for Rehearing regarding broader review of legal conclusions. It has long been held that this court has the sole responsibility to impose the appropriate level of discipline after reviewing the referee's findings of fact and recommendations of guilt. The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978); The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980).

The Bar recognizes that in mitigation the respondent cooperated with the Bar and voluntarily suspended himself from the practice of law. In fact, where it not for these mitigating factors, an even longer term of disbarment may have been warranted. However, the Bar cannot agree with the respondent's arguments that the adverse personal and social consequences he suffered are mitigating or justify a shorter period of disbarment. A somewhat analogous case is The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986). There the attorney was charged with eight counts of grand theft to which he pled no contest. He had misappropriated money from elderly clients over a long period of time. This court upheld the referee's recommendation of disbarment despite the fact that the accused

attorney had sought treatment for his disease of alcoholism, had made prompt restitution to his clients, and had no prior disciplinary history. It should be noted that the disbarment was made nunc pro tunc to the date of his suspension.

In his report the referee recognized the respondent had been forced into bankruptcy, lost an excess of $1,000,000 of his own money, had been criminally prosecuted for his activities concerning Beacon 21 and had served some time in jail. (R p. 5-6) However, the referee also found that the respondent's misuse of trust funds ranked with the offense of subordination of perjury and that the magnitude of his misdeeds called for the ultimate discipline available. (R p. 7) The fact remains that the respondent knowingly diverted funds from Beacon 21 closings that were properly due American Pioneer Bank in an attempt to salvage the development. This was done over a long period of time and continued even after he was confronted by a bank official. (R p. 5) That the respondent suffered adverse social consequences as a result of his misconduct does not alleviate the fact that Chicago Title found it necessary to purchase the entire Beacon 21 loan from American Pioneer Bank for $3,000,000. The respondent's misdeeds have served not only to greatly tarnish his own name and reputation, but the reputation of the legal professional as well.

ARGUMENT

As to Point II

The application of Rule 3-5.1(f) does not offend the ex post facto doctrine in this case.

In his brief, the respondent argues that disbarment is quasi penal and thus, the application of the new disciplinary time periods in Rule 3-5.1(f) would amount to an improper ex post facto application of the new rules. The respondent attempts to compare bar disciplinary proceedings to criminal proceedings. However, it is well established that bar disciplinary proceedings are neither civil nor criminal but rather are quasi-judicial in nature. The Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986); Rule of Discipline 3-7.5(e)(1). In addition, unless otherwise provided in the Rules, disciplinary proceedings are governed by the Florida Rules of Civil Procedure rather than the Florida Rules of Criminal Procedure. Rule of Discipline 3-7.5(e)(1); former Integration Rule 11.06(3)(a). Ex post facto legislation which is prohibited by both the Constitution of the United States and the Constitution of the State of Florida generally applies only to criminal rather than to civil matters. Harisiades v. Shaugnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586, (1952); Board of Commissioners of Everglades Drainage District v. Forbes Pioneer Boat Line, 80 Fla. 252, 86 So. 199,

201 (Fla. 19201, reversed on other grounds, 258 U.S. 388 42 S.Ct. 325, 66 L.Ed. 647 (1922).

In Florida, the constitutional prohibitions against ex post facto laws do not to apply to judicial disciplinary proceedings. See IN RE Inquiry Concerning a Judge, Etc., 357 So.2d 172, 180, 181 (Fla. 1978). However, in that case due process considerations caused this court to apply the rule prospectively as the improper actions committed by the judge were not grounds from removal at the time they were committed. This differs from the present case in that the wording of former Integration Rule 11.10(5) put all attorneys on notice that the three year period of disbarment was merely a minimum and that longer term disbarments were possible. In addition, the United States Eighth Circuit Court of Appeals determined that the prohibition against ex post facto laws did not apply in disbarment proceedings against an attorney in Iowa. Matter of Randall, 640 F.2d 898 (8th Cir. 1980), Cert.den., two cases, 454 U.S. 880, 70 L.Ed. 189 (19811, 102 S.Ct. 361. Therefore, it appears the respondent's ex post facto argument lacks merit.

ARGUMENT

As to Point III

The period *of* the respondent's suspension should not be deducted from the period of disbarment.

The respondent argues that the period of his suspension should be deducted from the period of disbarment imposed. The respondent agreed to a voluntary suspension from the practice of law in February, 1987 which was ordered by this Court on March 9, 1987.

Case law does exist to support nunc pro tunc discipline orders. In Knowles, supra, the disbarment order was made nunc pro tunc to the prior temporary suspension by the court citing the mitigating factor of no prior record, prompt restitution, control over his alcoholism and absence of drinking. In The Florida Bar v. Seidler, 375 So.2d 849 (Fla. 1979), an attorney was suspended for a period of ninety-one days nunc pro tunc the day on which he submitted an affidavit consenting to cease practicing law. The affidavit was submitted upon the suggestion of the grievance committee. This court upheld the referee's recommendation due to the mitigating circumstances of the case. For instance, the attorney submitted a guilty plea and the affidavit that he would refrain from practicing law pending the

final disposition of the matter, and he took steps to rehabilitate himself by entering into psychiatric treatment.

However, the Bar maintains that given the facts of the present case, the disbarment of any period of time nunc pro tunc to date of the respondent's suspension would be neither appropriate nor effective. It would fail to serve the purposes of discipline laid out in The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). Discipline should protect society, punish the breach of ethics, encourage reform and act as a deterrent to those attorneys who cannot or will not follow the rules. The misuse of trust funds is one of the most serious types of misconduct an attorney can engage in. The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979). The temptation may be great to "borrow" funds entrusted to an attorney for a particular purpose and use them for some other purpose. The amount of money involved in the present case and the length of time that the "borrowing" went on are especially aggravating.

The Bar submits that nothing exists in the record that should cause this court to disbar the respondent nunc pro tunc the date of his suspension given the gravity and long standing nature of the misconduct. At least a full five year period of disbarment will send a message to other members of the Florida Bar that the misappropriation of trust funds, regardless of the amount, cannot and will not be tolerated.

CONCLUSION

WHEREFORE, The Board of Governors of The Florida Bar respectfully prays this Honorable Court will review the referee's findings of fact, conclusions, recommendation of guilt and discipline and support the findings of fact and recommendation of guilt but reject the recommendation as to the three year period of disbarment and order the respondent be disbarred for a period of five years and pay the costs of these proceedings which currently total $2,504.31.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY the the original and seven (7) copies of the foregoing Complainant's Reply Brief has been furnished by UPS Next Day Air, No. N349-X85, to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. mail to Counsel for respondent, Richard D. Kibbey, at 416 Camden Avenue, Stuart, Florida, 34994; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 22nd day of August, 1988.

DAVID G. McGUNEGLE
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