IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

HAROLD W. COLEE, JR.,

Respondent.

_____/

Case No. 70,804

(TFB File No. 85-10627-04A)

INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

SYMBOLS AND REFERENCES

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

The Referee's Report shall be referred to as R.

The parties hereto stipulated to the transcript of the Grievance Committee hearing in lieu of testimony and referral to such shall be as T.

STATEMENT OF THE CASE

On January 26, 1988, the Referee entered his Order on Disciplinary Proceeding finding Respondent guilty of violating DR 7-102(B)(2). In his order, the Referee recommended Respondent receive a private reprimand, be placed on probation for a period of one year and complete ten hours of Bar approved CLE courses involving ethical instructions.

On June 3, 1988, pursuant to direction from its Board of Governors, the Bar filed its Petition for Review of the Referee's report pursuant to Rule 3-7.6(c)(1), Rules of Discipline. The Board of Governors concurred with the referee's findings of fact but took exception to his recommended discipline in light of the provisions of Rules 3-5.1(b) and 3-7.5(k)(1)(3) of the Rules of Discipline.

The Board of Governors voted to file a petition for review of the referee's recommendation as to discipline and seek a ninety (90) day suspension.

STATEMENT OF FACTS

As admitted by Respondent at all times pertinent to the allegations herein, Respondent was a member of The Florida Bar actively engaged in the practice of law.

On or about January 10, 1985, a circuit jury in Duval County, Florida, awarded one Jacqueline M. Weldon a judgment against Southern Bell Telephone and Telegraph Company in the amount of one million eighty-eight thousand dollars ($1,088,000.00) (T-8). At trial in the above matter, evidence showed Ms. Weldon has been negligently struck in her eye by an employee of Southern Bell, causing total blindness in the eye (T-8).

On January 14, 1985, Respondent contacted the general attorney for Southern Bell in North Florida, Nathan H. Wilson, concerning the Weldon law suit. At this time, Mr. Wilson was told by Respondent that he (Respondent) had evidence or had available to him, evidence that would or might set aside the verdict in the Weldon case against Southern Bell (T-9). Respondent would not reveal the nature of the evidence over the telephone and set up a meeting with Mr. Wilson the next morning.

The next morning, January 15, 1985, Respondent met with Mr. Wilson and Mr. George Gabel, the attorney who defended Southern Bell against Ms. Weldon's claim (T-9). At the meeting was another attorney invited by Respondent, David Tumin (T-11).

At this meeting, Respondent related to Mr. Wilson and Mrs. Gabel that he represented a client who had facts which could be verified to the effect that a fraud had been perpetrated in the Weldon case. Respondent and Mr. Tumin said their witness had enough evidence for Southern Bell to set aside the verdict and receive a new trial (T-12).

Respondent related how his client had inquired if this information would be worth anything to him. Respondent then proceeded to inform Mr. Wilson that for his client to come forward with this information it would cost Southern Bell two-hundred thousand dollars ($200,000.00) following the setting aside of the verdict (T-12).

The payment was to be made through an escrow agreement making the payment to Respondent, Mr. Tumin, and their client. Any payment of such sums were contingent upon the verdict against Southern Bell being set aside (T-12, 13).

During the January 15, 1985, meeting, Respondent would not reveal the nature of the evidence possessed by his client or

who his client was. While discussing the possible areas of concern, Mr. Wilson made it clear that Southern Bell was not interested in paying for evidence and would only be amenable to paying a reasonable attorney fee and normal investigative costs (T-14). Such payment would be made only upon assurances that no witness would receive any such funds.

Subsequent to the January 15, 1985 meeting, Mr. Wilson was told by Respondent that his client would not come forward without an agreement to pay for the evidence (T-20).

When Respondent informed his client that Southern Bell would only pay attorney fees and investigative costs, the client was no longer interested in going through with producing the evidence (T-21).

Out of concern of their obligation to the court, Mr. Gabel and Mr. Wilson filed a motion to compel Respondent to reveal the identity of his client. The presiding judge entered an order after an evidentiary hearing requiring Respondent to reveal his client's name. Shortly thereafter, Respondent received permission from his client to reveal his identity and informed Southern Bell that his client's name was Edgar Amos.

While Mr. Amos cannot recall specifically discussing a figure of $200,000.00 for his evidence, it was his

understanding that Respondent was going to approach Southern Bell with the evidence of fraud he had been given by Mr. Amos.

The deposition of Mr. Amos subsequently revealed that the evidence he had was a statement to the effect that Ms. Weldon had impaired vision but nothing more than what was known by Southern Bell at the time of the trial.

SUMMARY OF THE ARGUMENT

The Bar does not take issue with the referee's basic findings of fact. 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.

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.

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 July 2, 1987, for other than minor misconduct. Rule 3-7.1(a)(2) provides that at the time of fling 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 paying 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 the 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.

In the instant matter the Bar would recommend that appropriate discipline would be a suspension of (90) days, probation for one (1) year and passage of the ethics portion of the Florida Bar Exam. In support of this discipline the Bar would cite to the case of The Florida Bar v. Jackson, 490 So.2d 935 (Fla. 1986). In Jackson, the Court suspended an attorney for ninety (90) days where the attorney requested that his clients be paid for testimony in a pending case.

Suspension from practice in such circumstances as present herein is also appropriate under Section 6.12, Florida Standards for Imposing Lawyer Sanctions. Section 6.12 provides that where an attorney is aware that material information is being withheld from a court and takes no remedial action suspension is appropriate.

CONCLUSION

The Florida Bar requests this Honorable Court to affirm the referee's basic findings of fact and to reject the recommended discipline of a private reprimand as being erroneous under the present Rules of Discipline. The Bar would argue that the appropriate discipline would be a ninety day suspension, probation, passage of the ethics portion of The Florida Bar Exam and payment of costs in the amount of $1,007.07.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been mailed by certified mail # P675 195 362, return receipt requested, to HAROLD W. COLEE, JR., Respondent, at his Bar address of 1221 King Street, Jacksonville, Florida 32204, this 1st day of July, 1988.

JAMES N. WATSON, JR.
Bar Counsel