IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 70,827
(TFB Case Nos. 87-22,458 (05B)
and 87-22,459 (05B)

vs.

PATRICIA F. ANDERSON and
FRANK A. McCLUNG,

Respondent.
_____/

ANSWER BRIEF

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PRELIMINARY STATEMENT

The misconduct here involved arose out of an appeal from a judgment in a civil action wherein Respondent's clients prevailed on a Counterclaim and opposing counsel took the appeal. In that case, Respondents' client will be referred to as Defendant and the opposing party will be referred to as Plaintiff.

Respondents do not have available a copy of the transcript of the record before the Referee so that they cannot refer to the pages therein. However, the findings of fact of the Referee refer to the pages of the transcript upon which he based his findings. By referring to the Referee's report, the court can readily locate the evidence in the transcript.

STATEMENT OF THE CASE

This matter is before the court on the Florida Bar's Petition for Review of a Referee's Report in a Bar disciplinary proceeding.

The Florida Bar filed its Complaint against Respondents alleging that they were guilty of violating:

1. Integration Rule Article 11, Rule 11.02(3)(a) for conduct contrary to honesty, justice or good morals.

2. Disciplinary Rule 1-102(A)(4) for conduct involving dishonesty, fraud, deceit, or misrepresentation.

3. Disciplinary Rule 1-102(A)(5) for engaging in conduct that is prejudicial to the administration of justice.

4. Disciplinary Rule 1-102(A)(6) for engaging in other conduct that adversely reflects on his fitness to practicing law.

5. Disciplinary Rule 7-106(C)(1) for stating or alluding to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by municipal evidence.

The Respondents filed their respective Answers admitting, denying or explaining the facts alleged in the Complaint.

After an Evidenciary Hearing the Referee entered and filed his Referee's Report wherein he made findings of fact, conclusions of law and recommendations. He recommended that:

1. Both Respondents be found guilty of violating:

(1) Integration Rule of The Florida Bar Article 11, Rule 11.02(3)(a); conduct contrary to honesty, justice or good morals.

(2) The Respondent McClung be found guilty of violating Disciplinary Rule of the Florida Bar, Rule 102(A)(4) for conduct involving dishonesty, fraud, deceit, or misrepresentation and that Respondent Anderson be found not guilty thereof.

(3) That both Respondents be found guilty of violating Disciplinary Rule 1-102(A)(5) for engaging in conduct prejudicial to the administration of justice.

(4) That both Respondents be found guilty of violating Disciplinary Rule 1-102(A)(6) for engaging in other conduct that adversely reflects on their fitness to practice law.

(5) That Respondents Anderson and McClung be found not guilty of violating Disciplinary Rule 7-106(C)(1) for stating or alluding to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by municipal evidence.

The Referee further recommended that Respondent Anderson receive a private reprimand by the Board of Governors and that Respondent McClung receive a public reprimand.

The Florida Bar filed its Petition for Review of the Referee's Report.

STATEMENT OF FACTS

This grievance matter arose out of conduct of the Respondents during the course of an appeal from a judgment entered in a civil action. The basic facts are succinctly stated in Hutchins v. Hutchins, 501 So.2d 722 (5th DCA Jan. 29, 1987). The facts are more elaborately stated in the findings of fact of the Referee. The Respondents do not take issue with any of the facts set out in Hutchins, supra, or in the findings of fact made by the Referee. However, to enable the court to better understand the entire situation giving rise to this proceeding, the facts should be amplified.

The civil action was between two brothers who were engaged in business together. One brother decided to sever his business relationship. The civil litigation arose out of controversies caused by the severing of said relationship. The Plaintiff in the civil action was the owner and holder of the Defendant's promissory notes approximating $50,000.00 and he sued his brother thereon. The brother, hereinafter referred to as Defendant, counterclaimed on the basis of (1) a tortious interference with the Defendant's relationship with his patients, and (2) unlawfully taping telephone conversations between the Defendant and his staff and the Defendant and his patients. The Plaintiff filed an Answer to the Counterclaim alleging, among other things, that Defendant had consented to the taping.

During the course of pre-trial discovery the Defendant represented by McClung took the deposition of the Plaintiff and

interrogated him relative to the taping of Defendant's office telephone. The Plaintiff asserted his Fifth Amendment rights relative to all questions relating to the taping of the office telephone. The Defendant then interrogated the Plaintiff as to the Plaintiff's taping of his, the Plaintiff, wife's telephone and again the Plaintiff asserted his Fifth Amendment rights and refused to answer any questions relative thereto. Subsequently, the Defendant moved for a Summary Judgment on his Counterclaim based upon the refusal of the Plaintiff to submit to discovery. Subsequent to the filing of the Motion for Summary Judgment, the Plaintiff waived his Fifth Amendment rights and the Defendant took his deposition. During the course of the deposition, the Plaintiff answered all questions relative to the tapping of the office telephone but again asserted his Fifth Amendment rights as to the tapping of his wife's telephone. The case came on for trial before a jury.

During the course of the trial McClung called the Plaintiff as an adverse witness and asked him: "Mr. Hutchins, when I took your deposition initially and asked you about putting this tap and tape on Tom's line, how many times did you take the Fifth Amendment?" The question was objected to and argued. It was McClung's position that the defense of consent by the Defendant was inconsistent with taking the Fifth Amendment and that this line of questioning in some manner attacked the credibility of the Plaintiff. The trial judge sustained the objection. (Record on Appeal 31-44; Amended Initial Brief by Appellant 18) The following day of the trial

McClung again attempted to use Appellant's resort to the privilege against self incrimination during the first discovery deposition. The trial judge reversed his ruling of the prior day and allowed McClung to go into the matter. (Record on Appeal 339-40; Appellant's Amended Initial Brief 18-19) At that time McClung read to the jury every question on the first deposition where the Plaintiff asserted his Fifth Amendment privilege. (Record on Appeal 340-347; Appellant's Amended Initial Brief 19-20) In addition thereto, over objection, McClung published a portion of the December 6th deposition (the second deposition) wherein the Plaintiff asserted his Fifth Amendment rights relative to questions concerning the taping of his wife's telephone. The depositions were not offered in evidence and the record of the trial consisted solely of the questions asked by McClung in the first deposition relative to the taping of the office phone where the Plaintiff asserted his Fifth Amendment rights and the questions asked at the second deposition relative to the taping of his wife's telephone wherein the Plaintiff asserted his Fifth Amendment rights.

Pursuant to the jury's verdict, a judgment was entered against the Plaintiff on the Defendant's Counterclaim, from which judgment the appeal here involved was taken by the Plaintiff.

After the trial of the case the Respondent here, Anderson, became associated with the Respondent McClung in his law office. She had not in any way participated in the case heretofore described. McClung assigned her the task of writing

the Defendant's Answer Brief and she familiarized herself with the record of the trial, which did not include either of the Plaintiff's depositions because they had never been offered in evidence.

The Plaintiff/Appellant filed his Initial Brief which devoted only one and one-half pages to any alleged error arising out of the use of small portions of the Plaintiff's depositions.

Respondent Anderson prepared and filed Defendant's Answer Brief.

Subsequent to the filing of the Appellant's Initial Brief, and Appellee's Answer Brief, Appellant changed attorneys who, with the consent of the Respondents, filed an Amended Initial Brief. A large portion of the statement of facts in the Amended Initial Brief consists of a discussion of facts relative to the wire tapping and approximately one-third of the argument in said brief is devoted thereto and the legal effect of the Plaintiff's assertion of his Fifth Amendment rights. (Appellee's Amended Initial Brief)

Mr. Hal K. Litchford who prepared the Amended Initial Brief testified that before preparing the Amended Initial Brief he had read, in addition to the record, the two depositions of Plaintiff and thus knew that the Plaintiff had in fact answered at his second deposition all questions propounded to him relative to the tapping of the office phone.

Plaintiff/Appellant's Amended Initial Brief for some reason did not disclose a single reference to the fact that in

Plaintiff's second deposition he had answered all questions propounded to him relative to the taping of the office phone. Said brief does assert that Ken waived his Fifth Amendment rights as to the wire tapping of his office phone in his Affidavit in Opposition to the Defendant's Motion for Summary Judgment. This statement is inaccurate because the Affidavit in Opposition to the Motion for Summary Judgment merely states that the Plaintiff had the Defendant's permission and consent to the tapping of the office phone.

Confronted with this new attack in the Amended Initial Brief of Appellant and knowing nothing about the waiver of Plaintiff's Fifth Amendment rights in the second deposition, Anderson filed an Amended Answer Brief based solely on the trial court record in which she alleged that the Plaintiff did not waive his Fifth Amendment rights relative to tapping the office phone until the time of the jury trial. (Pages 15, 15a and 15b of the Amended Answer Brief)

The Amended Answer Brief was filed on August 7, 1986. On August 13 Mr. Burjon, an associate of Mr. Litchford, with full knowledge of the misstatements in the Amended Answer Brief, as reflected by the second deposition of the Plaintiff, called the Respondent Anderson on the telephone. He did not tell her about the misstatements on pages 15, 15a and 15b in the Amended Answer Brief. Instead, he told her in effect that inasmuch as the jury heard part of the second deposition but didn't hear all of it, he and Mr. Litchford thought it would be well to supplement the record on appeal adding thereto the second

deposition and asked that she consent to so supplementing the trial court record. Anderson initially consented thereto but then put the Respondent McClung on the telephone. McClung took the position that the second deposition was not a part of the trial court record and that the supplementation of the record by including the deposition would inject issues into the case that were not before the jury and would in effect amount to a new trial at the appellate court level. As a result, the Respondents did not agree to supplement the record.

On August 21, 1986, Plaintiff/Appellant filed a Motion to Supplement the Record by including the December 6 deposition and in paragraph 6 of the motion quoted pages 15, 15a and 15b of Defendant's Answer Brief and then included portions of the second deposition. This should have put Respondents on notice of errors in the Amended Answer Brief.

On August 27 before Respondents had a chance to respond to the Motion to Supplement the Record, the Appellate Court entered an Order authorizing its supplementation. On August 29, before the Respondents received a copy of the Order Authorizing Supplementation of the Record but after the Order was entered, they filed Appellee's Response to said motion. A careful reading of this Response reflects that they did not deny in any way that the excerpts on pages 15, 15a and 15b of their Amended Answer Brief contained misrepresentations of fact. They merely took the position that the second deposition was not a part of the record before the trial court, it did not come before the judge or the jury, and it should not be included in the record.

After the Plaintiff/Appellant supplemented the record, he filed a Reply Brief wherein the misrepresentations on pages 15, 15a and 15b of the Amended Answer Brief were dramatically pointed out. As the Referee found:

> "Thereafter Appellant's Reply Brief was filed and, at that point ANDERSON according to her testimony, realized that she had 'in fact --*** over characterized that second deposition transcript.' It was also at that point that McClung recognized that some error was made. Both Anderson and McClung testified that they planned to apologize to the appellate court in the oral argument."

Sometime after the supplementation of the record and the filing of Plaintiff's Reply Brief, the Plaintiff filed his motion in the appellate court seeking sanctions against the Respondents for including in their Amended Answer Brief the misrepresentations heretofore referred to. Respondents filed their Response to the Appellant's Motion for Sanctions. In the findings of fact the Referee found that in said Response, "they argued that 'the deposition testimony was not misrepresented' and failed to clarify that portion of the brief which was clearly erroneous." This finding of fact is absolutely correct in that in the Response, Respondents "failed to clarify that portion of the Brief which was clearly erroneous." It is somewhat misleading in stating that in the Response "they argued that the deposition testimony was not misrepresented." The quoted portion of the findings of fact is actually the title to the portion of the argument designated "1. The deposition testimony was not misrepresented." However, the

misrepresentations in pages 15, 15a and 15b are not covered in the argument and was neither admitted nor denied. The argument under this section of the Response is directed to the fact that the Plaintiff never fully submitted to discovery in that in the second deposition he took the Fifth Amendment as to all questions relative to the taping of the wife's telephone. It would have been better if the Respondents had admitted the misrepresentations instead of avoiding this issue. On the other hand, they did not argue or represent to the court that the material on pages 15, 15a and 15b was not misrepresentations.

The Motion for Sanctions came on to be heard before the appellate court and Respondents for the first time acknowledged the misleading nature of the language in the above mentioned paragraphs.

The appellate court struck the misrepresentations in pages 15, 15a and 15b of the Defendant's Amended Answer Brief and assessed against Respondents personally the sum of $350.00 to be paid to the Plaintiff's counsel as fees.

SUMMARY OF ARGUMENT

The Respondents, as a result of negligence on the parts of both of them, unknowingly misrepresented the facts in an appellate proceeding. Opposing counsel in said proceeding pointed out and documented the misrepresentations in the Brief prepared by Respondents so that the same became obvious both to the Respondents and to the appellate court. Although not denying said misrepresentations, Respondents did not promptly admit the same and did not apologize to the court.

For these offenses, a private reprimand is adequate discipline for Respondent Anderson and a public reprimand adequate discipline for Respondent McClung.

FIRST POINT INVOLVED

DO THE FACTS OF THIS CASE AS FOUND BY THE REFEREE REQUIRE THAT THE RESPONDENT ANDERSON BE FOUND GUILTY OF VIOLATING DISCIPLINARY RULE 1-102(A)(4)?

Disciplinary Rule 1-102(A)(4) provides:

> "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The referee in effect found that there was not clear and convincing evidence that the Respondent Anderson violated this disciplinary rule. It is incumbent upon the Bar to demonstrate that the facts of this case required that the Referee make a recommendation of a finding of guilt.

Bar counsel in its Brief, after setting out a portion of the findings of fact of the Referee, then stated:

> "Clearly the above described conduct involves at least one of the following: dishonesty, fraud, deceit, or misrepresentation. Since the referee failed to provide any explanation for a not guilty recommendation, there is no basis for upholding his not guilty recommendation."

The quoted findings of fact in the Bar's brief, standing alone, might have required a recommendation of guilt. However, Bar counsel has omitted from the findings of fact quoted all findings of fact explaining the reasons for the misstatements and the bases of the Referee's recommendation.

The following findings of fact of the Referee were considered by him in recommending that the Respondent Anderson be found not guilty.

> "Whether or not there had been such a waiver could have only been gleaned from a second deposition of the appellant which had been taken by McClung and of which a portion had been read into the trial court record, but the deposition had not been offered in evidence.
>
> In preparing her initial Answer Brief, Anderson inquired of McClung as to whether the appellant continued to assert his Fifth Amendment privilege at deposition, and McClung indicated that Appellant had so done.
>
> Thereafter Appellant's Reply Brief was filed and, at that point ANDERSON according to her testimony, realized that she had 'in fact -***over characterized that second deposition transcript.' It was also at that point that McClung recognized that some error was made. Both Anderson and McClung testified that they planned to apologize to the appellate court at in the oral argument."

The portion of the second deposition of the Appellant which had been read into the record, referred to in the findings of fact immediately above quoted, is that portion of the second deposition relating solely to the taping of the Plaintiff's wife's home telephone and to which the Plaintiff asserted his Fifth Amendment rights.

The Plaintiff's Amended Initial Brief asserted that the Plaintiff had waived his Fifth Amendment rights <u>when he filed his Affidavit</u> in Opposition to the Defendant's Motion for Summary Judgment on the Counterclaim. This affidavit was filed prior to the taking of the second deposition and in no way purported to waive the Plaintiff's Fifth Amendment rights.

When Respondent Anderson drafted the Amended Answer Brief, she had no reason to believe that the Plaintiff had waived his

Fifth Amendment rights in the second deposition and in fact, she had substantial reason to believe that he had not done so. It was in this context that the Respondent unknowingly made the misrepresentations on pages 15, 15a and 15b of the Amended Answer Brief. In making these misrepresentations under these circumstances, she could not have been guilty of dishonesty, fraud or deceit because there was no intent to deceive the court.

Further, on page 7 of the Bar's brief it is stated:

> "Since the referee found that Respondent Anderson had misrepresented the facts in her appellate brief as well as failed to acknowledge the misrepresentation in her response to the Motion for Sanctions,"

Apparently, Bar counsel takes the position that it was a violation of said disciplinary rule for the Respondent Anderson not to acknowledge the misrepresentations in her Response to the Motion for Sanctions.

To fully understand the Respondent's position, it is necessary to bear in mind the chronology of events which occurred subsequent to the filing of the Defendant's Amended Answer Brief. On August 13 one of the attorneys for the Plaintiff with full knowledge of the misstatements in the Amended Answer Brief, as reflected in the second deposition of the Plaintiff, called Respondent Anderson on the telephone. He did not tell her about misstatements on pages 15, 15a and 15b. Instead, he told her in effect that inasmuch as the jury heard part of the second deposition but didn't hear all of it, he and Mr. Litchford thought it would be well to supplement the record

on appeal by adding thereto the second deposition. He asked that she consent to so supplementing the record. Initially, she consented thereto but put the Respondent McClung on the telephone. Again Plaintiff's attorney did not advise McClung of the misstatements in the Amended Answer Brief and did not ask that they be corrected. McClung took the position that the second deposition was not a part of the trial court record and that the supplementation of the record by including the deposition would inject issues into the case that were not before the jury and would in effect amount to a new trial at the appellate court level. As a result, neither Respondent Anderson nor McClung agreed to supplement the record. On August 21 shortly after the filing of the Amended Answer Brief, the Plaintiff filed a Motion to Supplement the Record by including therein parts of the transcripts of the two depositions. On August 27 the court entered an Order allowing the supplementation of the record. On August 29 the Plaintiff filed his Reply Brief. The Motion to Supplement the Record contains material which might well have put these Respondents on notice that the Amended Answer Brief contained misstatements of fact. The Plaintiff's Reply Brief carefully pointed out the misstatements and the evidence reflecting the same. Thus, the Referee found that at this time and for the first time, these Respondents knew of the mistakes that had been made. It took no confirmation from these Respondents to establish their error to the appellate court and no denial thereof would have had any substance. When Respondents discovered the errors, there was

no need for them to do anything in order to make the court aware of them. It will be noted that in the objections to the supplementation of the record, Respondents did not in any way deny the misrepresentations but simply took the position that the record should not be supplemented because the material in the second deposition, other than that read to the jury relative to the tapping of the wife's telephone, was not a part of the record. It was not considered by the jury and had no place in the proceeding.

The Motion for Sanctions was a punitive effort on the part of the Plaintiff to punish Respondents for making the misrepresentations. It had nothing to do with the merits of the case and the Respondents were put in a position of having to defend themselves before the appellate court for making the misrepresentations. They could not and did not deny the misrepresentations. They were obvious. Instead of admitting them, they completely avoided the issue and insisted that the Plaintiff "never fully submitted to discovery" which was true in that he had asserted his Fifth Amendment privilege relative to the taping of his wife's telephone. At the hearing before the appellate court "counsel appeared at the designated time and, for the first time acknowledged the misleading nature of language above quoted." The misleading nature of the language had been obvious to the court at all times subsequent to the filing of the Appellant's Reply Brief. At no time was it denied. The failure to admit the misrepresentations was not an attempt to in any way mislead the court. The record was clear. The misrepresentations were obvious.

To constitute dishonesty, fraud, deceit or misrepresentation, there must be an intent to in some manner mislead the court. There is no evidence of such an intent on the part of the Respondent Anderson. Her failure to tell the court about such misrepresentations when the court had conclusive proof thereof constituted only a failure to plead guilty when guilt was obvious.

On page 8 of the Bar's brief Bar counsel stated:

> "Since the referee failed to provide any explanation for a not guilty recommendation, there is no basis for upholding his not guilty recommendation. It is especially influential that the referee found the Respondent Anderson guilty of the almost identical rule, the Florida Bar Integration Rule, Article IV, Rule 11.02(3)(a) for conduct contrary to honesty, justice or good morals."

As to the first sentence above quoted, Respondent is unaware of any rule of law requiring a Referee "to provide any explanation for a not guilty recommendation." The law is clear that guilt in a disciplinary proceeding must be based upon clear and convincing evidence. If the evidence supporting it is not of such quality, the Referee is required to recommend a finding of not guilty. That is the situation in this matter.

Integration Rule 11.02(3)(a) is far from "identical" with Disciplinary Rule 1-102(A)(4). Conduct constituting dishonesty, fraud, deceit or misrepresentation always is contrary to honesty, justice or good morals but conduct contrary to honesty, justice or good morals does not necessarily constitute conduct involving dishonesty, fraud,

deceit or misrepresentation. Respondent Anderson suggests that her failure to promptly acknowledge the misrepresentations on pages 15, 15a and 15b of the Amended Answer Brief might well constitute, as the Referee found, conduct contrary to justice or good morals but that said conduct is no wise constitutes dishonesty, fraud, deceit or misrepresentation.

SECOND POINT INVOLVED

DO THE FACTS OF THIS CASE REQUIRE THAT EITHER OF THE RESPONDENTS BE FOUND GUILTY OF VIOLATING DISCIPLINARY RULE 7-106(C)(1)?

Disciplinary Rule 7-106(C)(1) provides:

> "In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."

The Referee recommended that both Respondents be found not guilty of violating this Integration Rule. In the Bar's Brief on page 9, it is stated:

> "This finding of not guilty also appears without any explanation by the referee. The rule is a straightforward prohibition against making misrepresentations of fact to a tribunal which appears directly on point in this case, particularly given the referee's findings that respondents continued their misrepresentations after becoming aware of them in response to the Motion for Sanctions."

In attempting to discern the meaning of a disciplinary rule, one should look to the applicable ethical considerations. Ethical Consideration 7.25 is the ethical consideration applicable to Disciplinary Rule 7-106(C)(1) which provides, among other things:

> "***a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence;***and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider."

The disciplinary rule here involved is, in effect, a prohibition against the type of conduct described in the above quoted ethical consideration. The disciplinary rule has no relationship to the making of misrepresentations of fact. Such misrepresentations are covered by other disciplinary rules such as Disciplinary Rule 1-102(A)(4).

The facts of this case will not support a recommendation of guilt of a violation of Disciplinary Rule 7-106(C)(1) and the Referee could not find these Respondents guilty of violating said rule.

There is no evidence in this case that either Respondent had any reasonable basis to believe that the misstatements on pages 15, 15a and 15b of the Amended Answer Brief were not relevant at the appellate level. If they had been true, obviously they would have been relevant.

Likewise, there is no evidence in this case that at the time the Amended Answer Brief was filed, the Respondent Anderson had any knowledge which would lead her to believe that the misstatements on pages 15, 15a and 15b of the Amended Answer Brief would not be supported by the record.

Further, there is no evidence that the Respondent McClung had read the contents of pages 15, 15a and 15b and that he had any knowledge thereof at the time of filing the Amended Answer Brief.

THIRD POINT INVOLVED

ARE THE RECOMMENDATIONS OF A PRIVATE REPRIMAND FOR THE RESPONDENT ANDERSON AND A PUBLIC REPRIMAND FOR THE RESPONDENT McCLUNG ADEQUATE DISCIPLINE UNDER THE FACTS OF THIS CASE?

AS TO THE RESPONDENT ANDERSON ALONE

It is the position of the Florida Bar that Rule 3-5.1(b) and Rule 3-7.5(k)(1)(3) of the Rules of Discipline preclude the Referee from recommending a private reprimand for the Respondent Anderson. These Rules of Discipline became effective January 1, 1987. The conduct which warrants the Referee's recommendation of a finding of guilt all occurred in 1986 prior to the effective date of the above cited Disciplinary Rules. The last possible act of misconduct occurred when Respondent Anderson filed the Respondent's Response to Appellant's Motion for Sanctions on December 2, 1986. Prior to January 1, 1987, there were no Rules of Discipline 3-5.1(b) and 3-7.5(k)(1)(3). The rule in effect in December 1986 was Integration Rule 11.06(9)(a), which rule in part reads:

> "The referee's report shall include (1) a finding of fact as to each item of misconduct of which the respondent is charged, which findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding, (2) recommendations as to whether or not the respondent should be found guilty of misconduct justifying disciplinary measures, (3) recommendations as to the disciplinary measures to be applied;***"

Rule of Discipline 3-5.1(b) provides:

> "(b) MINOR MISCONDUCT
>
> Minor misconduct is the only type of misconduct for which a private reprimand is an appropriate disciplinary sanction."

Rule of Discipline 3-7.5(k)(1) is exactly the same as Integration Rule 11.06(9)(a) except as to subpart (3) which reads:

> "(3) recommendations as to the diciplinary measures to be applied, provided that a private reprimand may be recommended only in cases based on a complaint of minor misconduct;"

Thus, by adopting the Rules of Discipline effective January 1, 1987, the court eliminated the disciplinary measure of a private reprimand for all conduct other than minor misconduct and, in effect, made a public reprimand, a more serious disciplinary measure, the sole measure of discipline for misconduct which theretofore merited a private reprimand. The Bar in this case is taking the position that the Referee is precluded from recommending the discipline provided in the Integration Rule because of the adoption of the Rules of Discipline, even though the misconduct occurred prior to the effective date of the Rules of Discipline.

There is no provision in the Rules of Discipline giving them retroactive effect. It would seem clear that, absent a provision giving the rules retroactive effect, the rules do not have such effect as to matters of substance as distinguished from matters of procedure. The writer has been unable to find any disciplinary case directly in point on this subject.

However, Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), and Department of Business Regulation v. Stein, 326 So.2d 205 (Fla. 3d DCA 1976), although discussing statutes, should be equally applicable as to rules adopted by the Supreme Court of Florida.

It also seems clear that increasing the disciplinary measure for misconduct is not a matter of procedure. It is a matter of substance. The Respondents here fully recognize that the court has the power to order such disciplinary measures as it sees fit. On the other hand, Respondents here also recognize that the recommendations of the Referee who heard the evidence and observed the Respondents has some weight with the court. After considering the whole matter, the Referee recommended that Respondent Anderson receive a private reprimand and the court should give some weight to this recommendation.

AS TO BOTH RESPONDENTS

The Bar further argues that the Florida Standards for Imposing Lawyer Sanctions requires nothing less than a suspension of these Respondents. It must be recognized that the Florida Standards for Imposing Lawyer Sanctions are not the product of this court but express only the views of the Board of Governors of the Florida Bar. Thus, as a part of the opening statement to the Florida Standards for Imposing Lawyer Sanctions, it is stated:

> "In November, 1986, The Florida Bar's Board of Governors approved the Florida Standards for Imposing Lawyer Sanctions. Those sanctions carried over the same theoretical approach of the ABA Standards, while

changing some of the recommended discipline. The Board will be using these standards as established Board guidelines for discipline pursuant to Rule 3-7.8, Rules of Discipline, as well as in its recommendations to the Florida Supreme Court for discipline to be imposed."

Standard 3.0 is as follows:

"3.0 GENERALLY

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

(a) the duty violated;

(b) the lawyer's mental state;

(c) the potential or actual injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors."

The Bar cites Standard 6.12 as authority for demanding the suspension of this Respondent. Standard 6.1 reads as follows:

"6.1 FALSE STATEMENTS, FRAUD AND MISREPRESENTATION:

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court.

Standard 6.12 provides:

"6.12 Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action."

Assuming that the Florida Standards for Imposing Lawyer Sanctions have some bearing on the discipline to be

administered, the conduct of these Respondents does not fall within the purview of Standard 6.12 above quoted. The Referee did not find that they knew, when Anderson filed the Amended Answer Brief, that the statements on pages 15, 15a and 15b thereof were false. As a matter of fact, the evidence is clear that Anderson didn't knowingly make said misrepresentations. It is equally clear that McClung had no knowledge of the misrepresentations. They did not improperly withhold material information and took no remedial action. They learned of the misrepresentations for the first time when the Plaintiff filed his Reply Brief. This document clearly set out and proved the misrepresentations and advised the court of the material misrepresented -- the second deposition of the Plaintiff. The court having been advised of the misrepresentations and the material proving the same, no remedial action was required to advise the court of the misrepresentations.

Standard 6.14 of the Standards for Imposing Lawyer Sanctions is applicable to both of the Respondents. This Standard reads:

> "Private reprimand is appropriate when a lawyer is negligent in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding."

When this Standard is coupled with Standard 3.0, it becomes evident that a private reprimand is the appropriate discipline

for Respondent Anderson. She may have been negligent in not reading the second deposition even though it was not a part of the trial court record. As a result of this negligence, she unknowingly made the misrepresentations. Opposing counsel brought these misrepresentations to the attention of the court in a manner which made them apparent so no remedial action was required by Respondent. Her misrepresentations caused little or no actual or potential injury to a party, and caused little or no adverse or potentially adverse effect on the legal proceeding.

Although Standard 6.14 is applicable to both Respondents, the Referee, apparently believing McClung's conduct more culpable, recommended a public reprimand. McClung has not sought review therefrom.

In brief, the acts of misconduct of which Respondents are guilty are simply: (1) negligently and unknowingly making the misrepresentations on pages 15, 15a and 15b of the Amended Answer Brief; (2) not confessing to their guilt which was obvious to them for the first time and to the appellate court upon the filing of Plaintiff's Reply Brief; and (3) not apologizing to the court for the misstatements. The appellate court summed it up during the hearing on the Motion for Sanctions with the following dialogue:

> "Judge Cobb: All right.
>
> Now, you say you made a mistake and put that in -- an untruth -- in your brief.
>
> This question is made, and then in response why didn't you say that 'that is untrue and I withdraw it?'

> Ms. Anderson: Your honor, it is untrue with regard to the consent allegation. It is not untrue with regard to Williams Rules of Evidence.
>
> Judge Upchurch: Why don't you just clarify it?
>
> Judge Cobb: If you had answered it in the Response truthfully and honestly you might not be here today."

As far as the appellate court was concerned, the graviment of Respondents' offense was not the unknowing misrepresentations made in the Brief but their failure to acknowledge the error, which was obviously known to the court and their failure to voluntarily correct it. I suggest that the graviment of their offenses in this disciplinary proceeding is exactly the same. Their misstatements were not made for the purpose of misleading the court. Because of the work of opposing counsel, the court was not mislead by the misstatements and no remedial action was necessary. On the other hand, when these misstatements came to Respondents' attention, they should have promptly in some manner advised the court thereof and apologized. For this conduct I suggest that the recommended disciplines are adequate. I further suggest that a 60-day suspension is an unduly harsh and punitive measure not necessary for the protection of the Bench, the Bar or the public or for the deterrence of other lawyers from committing similar misconduct.

On page 12 of the Bar's Brief, it is stated:

> "Further, where a respondent has a prior disciplinary record, it is appropriate that they should be disciplined more harshly than otherwise, The Florida Bar v. Reese, 421 So.2d 495 (Fla. 1982)."

In The Florida Bar v. Reese, the Supreme Court merely approved the Referee's report and adopted his recommendation of discipline without any comment. The pertinent parts of the report of the Referee read:

> "As appears from the next section of this Report, Respondent (beginning in 1968) has been guilty of misconduct for which he has been disciplined on three occasions. In the Private Reprimand administered July 6, 1978, the Board of Governors advised the Respondent 'that this Board will treat harshly any future violation by you of our ethical standards'. This made little impression on Respondent as he failed to file affidavits with the Bar as required, beginning in May 1979.
>
> As Respondent has demonstrated the lack of sense of responsibility, and has not profited from previous disciplinary measures, serious consideration has been given to a recommendation of disbarment."

Respondents take no issue with the proposition that where a lawyer has demonstrated the lack of a sense of responsibility, and has "not profited from previous disciplinary measures". This court should order a disciplinary measure which would be harsher than if he had not been disciplined before. However, there is nothing in this record reflecting that these Respondents failed to demonstrate the lack of a sense of responsibility and that they have not profited from previous disciplinary measures.

Further on page 12 of the Brief, the Bar states:

> "Previous case law of this Court also indicates that a suspension for each respondent is appropriate. In The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983), the respondent was suspended for 60 days where he misrepresented the facts to a

trial judge in order to obtain a continuance."

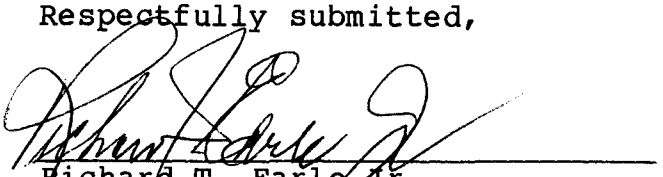
The above cited case is entirely different than the matter here before the court. Oxner knowingly and intentionally lied to the court to secure a continuance. He received a 60-day suspension. His conduct of lying was aggravated by his conduct in the disciplinary proceeding. He took the position that lying to the court "was a minor mistake and the Bar was making too big of a matter out of it." In the disciplinary proceeding he filed no Answer, and he denied the truth of all of the Bar's Requests for Admissions except that he was a member of the Bar subject to discipline by the Supreme Court. "The seriousness of his conduct in making bold faced lies to Judge Fine does not appear to be recognized by Respondent." He claimed that he had "only committed one error that merits no more than a private reprimand and that he has been punished enough by the pendency of these proceedings." The Referee found that Oxner seemed "to think that by refusing to recognize the significance of his conduct it will all just go away." Obviously, with this attitude Oxner had to receive a severe disciplinary penalty. Such is not the situation with these Respondents. They have admitted their errors before the Referee. They have impressed the Referee to such an extent that he believes a private reprimand is adequate for Anderson and a public reprimand adequate for McClung.

CONCLUSION

This disciplinary action was brought about solely by the conduct of the Respondents. It was the result of a lack of communication between the Respondents themselves, the failure of Respondent Anderson to read the second deposition, the failure of Respondent McClung to read carefully the Amended Answer Brief and the failure of both of them to acknowledge promptly the misrepresentations in the Amended Answer Brief. The misrepresentations were not the result of an effort to misstate the facts and mislead the court -- they were made unknowingly. The misrepresentations were brought to the attention of the Respondents at the same time that they were documented and brought to the attention of the appellate court. It required no action on the part of Respondents to remedy the situation which they had created. Their only fault in this regard was that they failed to acknowledge their errors and apologize.

The Referee heard the evidence and observed the Respondents and their reaction to this disciplinary proceeding and he recommended a private reprimand for Respondent Anderson and a public reprimand for Respondent McClung.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Answer Brief has been furnished to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; and a copy of same furnished to JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and JAN K. WICHROWSKI, Bar Counsel, The Florida Bar, 605 East Robinson Street, Suite 610, Orlando, Florida 32801, by regular U.S. mail, this 26th day of April, 1988.

Richard T. Earle Jr.