IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

PATRICIA F. ANDERSON and
FRANK A. McCLUNG,

Respondent.
_____/

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

THE FLORIDA BAR'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar"; the appellees, Mr. McClung and Ms. Anderson, will be referred to as the respondents, "R" will refer to the record and "RR" will refer to the Report of Referee.

STATEMENT OF THE FACTS AND OF THE CASE

Respondents Anderson and McClung were each charged by a consolidated complaint regarding their conduct in a civil appellate proceeding. On June 29, 1987, the Fifth District Court of Appeals issued an Order imposing sanctions on the respondents for misrepresenting certain facts in their Amended Answer Brief which respondents failed to acknowledge or promptly correct when called upon to do so (TFB Exhibit O). The misrepresentation in the Amended Answer Brief centered around the Appellant's alleged refusal to testify on a certain subject prior to trial, making it appear that respondents were bushwhacked at trial with previously unknown facts. However, the appellant had actually testified on the subject at a second deposition which had been taken by respondent McClung. This second deposition had been read, in part, into the trial transcript but not introduced as evidence (R-70, 71, 72). Respondent McClung handled the trial and respondent Anderson did not become associated with respondent McClung and the case until the appeal (R-85).

The misrepresentation was very specific as to the Appellant's alleged refusal to testify and the strong language was quoted by the Fifth District Court of Appeals in their Order Imposing Sanctions (TFB Exhibit O).

The opposing counsel first contacted the respondents regarding the misrepresentation by telephone. Without specifically stating that he believed respondents had misrepresented the facts, opposing counsel requested their stipulation to allowing the record on appeal to be supplemented with the second deposition which would refute the misrepresentation. Although respondent Anderson first spoke to opposing counsel and initally agreed to the stipulation, she refused to stipulate a few minutes later after consulting with respondent McClung (R-72, 73, 92, 93). Thereafter, opposing counsel filed a Motion to Supplement the Record in which respondents' misrepresentation was identified. The respondents filed a written objection to the Motion to Supplement which failed to acknowledge any misrepresentation. The Appellate Court allowed the supplementation. Next, opposing counsel filed their Reply Brief which further identified respondents' misrepresentation. Respondents McClung and Anderson each state that it was only at this point that they realized their misrepresentation (R-117). Respondents made no attempt to correct their brief and stated at final hearing that they were planning on doing so at oral argument (R-96).

Thereafter, opposing counsel filed a Motion for Sanctions (TFB Exhibit L) alleging respondents' misconduct in placing the misrepresentations in their brief among other things. Respondents' Response (TFB Exhibit M) argued that the deposition

testimony was not misrepresented and failed to clarify any misstatements. The appellate court issued an Order Imposing Sanctions (The Florida Bar Exhibit O) at which respondents appeared and for the first time acknowledged the misrepresentation. Respondent McClung acknowledged that he had read the brief and as the initial counsel should have caught the error. Respondent Anderson testified that she had relied on respondent McClung's statements and had not read the second brief prior to writing the Amended Answer Brief (R-86, 91, 113).

The referee made the essential findings of fact outlined above and found both respondent Anderson and respondent McClung guilty of:

> Integration Rule 11.02(3)(a) for conduct contrary to honesty, justice, or good morals.
>
> Disciplinary Rule 1-102(A)(5) for conduct prejudicial to the administration of justice.
>
> Disciplinary Rule 1-102(A)(6) for other conduct that adversely reflects on their fitness to practice law.

The referee further found respondent McClung guilty and respondent Anderson not guilty of:

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

And found both respondents McClung and Anderson not guilty of:

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

The referee recommended that respondent Anderson receive a private reprimand pursuant to Integration Rule 11.10(2) and respondent McClung receive a public reprimand. The referee also recommended that the costs of The Florida Bar proceedings be taxed against the respondents.

The Florida Bar's Board of Governors considered this matter at the March, 1988, meeting. They voted to seek review of the referee's not guilty findings regarding certain rules and seek suspension for each respondent.

SUMMARY OF ARGUMENT

The referee found that each respondent in this case was responsible for filing an appellate brief containing misrepresentations of fact. The respondents then compounded their misconduct by failing to acknowledge and actively denying their misrepresentations until brought before the appellate court and sanctioned.

The referee's recommendation of a private reprimand for respondent Anderson is clearly inappropriate under the Rules Regulating The Florida Bar, Rule 3-5.1(b), making private reprimands appropriate only in cases of minor misconduct. The referee's recommendation of a public reprimand for respondent McClung is also inappropriate in view of the seriousness of the misconduct, his clear knowledge of the misrepresentation, and his prior discipline history. Neither recommended discipline achieves the purpose for which discipline sanctions are imposed by this Court, nor are the recommendations appropriate with current standards for imposing attorney discipline.

Further, the referee's recommended not guilty findings as to certain rules appears without any basis in the facts and should not be accepted.

Therefore, The Florida Bar asks this Court to find each respondent guilty of each disciplinary rule as charged, although approving the referee's findings of facts, and to impose a significant suspension upon each respondent as well as order the payment of The Florida Bar's costs in this matter.

ARGUMENT

POINT I

WHETHER THE REFEREE'S RECOMMENDATION THAT RESPONDENTS BE FOUND NOT GUILTY OF DISCIPLINARY RULES 1-102(A)(4) AND BOTH RESPONDENTS NOT GUILTY OF 7-106(C)(1) IS ERRONEOUS?

The referee made a thorough and detailed finding of facts in this case. It is well settled that a referee's finding of facts in disciplinary proceedings are favored with a presumption of correctness, The Florida Bar Stalnaker, 485 So.2d 815 (Fla. 1986), and the Bar does not seek to change the referee's finding of facts.

However, while the referee recommended that respondent Anderson be found guilty of most rules charged, his recommendation that she be found not guilty of Disciplinary Rule 1-102(A)(4) and 7-106(C)(1) appears inexplicable and without basis in the facts. Therefore, The Florida Bar seeks to change these findings as to rule violations without objecting to the referee's finding of facts.

Specifically, Disciplinary Rule 1-102(A)(4) involves violation of the rule by dishonesty, fraud, deceit, or misrepresentation. 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:

> ...Appellant's attorney filed an Amended Initial Brief to which Appellee's attorney, Patricia F. Anderson, responded with an Amended Answer Brief. (Hrg. transcript, Exhibit "C") It is at this juncture that an erroneous statement was presented to the Apellate Court, via the Appellee's Amended Answer Brief..., RR-1, Section II.
>
> Before the oral argument, but approximately three months after respondent realized some error or "over-characterization" in the Amended Answer Brief, Appellant's attorney filed a Motion for Sanctions directed at, among other things, the erroneous portion of that brief, (Hrg transcript, Exhibit "L") Anderson and McClung filed a Response to Appellant's Motion for Sanctions, signed by both, in which they argued that "the deposition testimony was not misrepresented" and failed to clarify that portion of the brief which was clearly erroneous. (Hrg transcript, Exhibit "M") The Appellate Court issued sanctions after hearing an oral response from Anderson and McClung. (Hrg. transcript, Exhibit "O"), RR-1-2, Section II.

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. It is especially influential that the referee found respondent Anderson guilty of the almost identical rule, The Florida Bar Integration Rule, Article XI, Rule 11.02(3)(a) for conduct contrary to honesty, justice, or good morals, (RR-3, Section III).

The referee found both respondents not guilty of Rule 7-106(C)(1), "In appearing in his professional capacity before a

tribunal, a lawyer shall not state or allude to any matter that he had no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence". This finding of not guilty also appears without any explanation by the referee, (RR-3, Section III). 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 the Response to the Motion for Sanctions, (RR-2, Section II).

Therefore it appears that none of the above not guilty recommendations are supported by the referee's findings of fact or the record and should not be accepted. Respondent Anderson should be found guilty of both Rule 1-102(A)(4) and 7-106(C)(1) and respondent McClung should be found guilty of Rule 7-106(C)(1) in addition to the other findings of guilty recommended by the referee.

ARGUMENT

POINT II

WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE IS OVERLY LENIENT IN THIS CASE WHERE SUSPENSION IS APPROPRIATE FOR BOTH RESPONDENTS?

Rule 3-5.1(b) of the Rules of Discipline, effective January 1, 1987, and therefore controlling in this case, provides: "Minor misconduct is the only type of misconduct for which a private reprimand is an appropriate disciplinary sanction." Pursuant to Rule 3-7.5(k)(1)(3), a referee may only recommend a private reprimand in cases based upon a complaint of minor misconduct. The referee erroneously cited the Integration Rules of The Florida Bar, Article XI, Rule 11.10(2) in recommending that respondent Anderson receive a private reprimand. Since the Rules Regulating The Florida Bar had superseded the Integration Rule at the time, this recommendation is erroneous.

The instant case is not a complaint of minor misconduct pursuant to the rules and therefore a private reprimand is not an option. This was apparently the intent of the new rules in order to streamline the grievance committee procedure and to allow all findings of probable cause to become public.

Besides not being allowed by the rules, it should be noted that other factors make a private reprimand inappropriate. The

public is already aware of this case where an appellate court was so aggrieved by respondents' wrongdoing that an Order to Show Cause hearing was held and respondents were chastized and ordered to pay opposing counsel's costs. These facts were reported in area newspapers. It would be illogical to allow The Florida Bar's disciplinary action to remain private in view of these facts. Further, the purposes of attorney discipline enumerated by this Court in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983): protection of the public from unethical conduct, encouraging reformation to the respondent, and deterrence of others, are not served by the minimal discipline of a private reprimand. The public would view with skepticism any private discipline where they are already aware of the breach of ethics. Further, a private reprimand for respondent Anderson is illogical since the referee made his report public by amendment of January 21, 1988.

Florida Standards for Imposing Lawyer Sanctions, approved by The Florida Bar's Board of Governors in November, 1986, in an effort to promulgate uniformity in discipline, provides at Section 6.12 that a suspension is appropriate in cases involving attorney misconduct which is prejudicial to the administration of justice or involves dishonesty, fraud, deceit, or misrepresentation to a court where a lawyer knows false statements are submitted to a court and takes no remedial action. Since it is clear that at least upon receipt of the Reply Brief

both respondents were aware of their misrepresentation, and they took no remedial action (in fact, to the contrary, they refused to acknowledge the misrepresentation) nothing less that a suspension is appropriate for each respondent.

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). Both respondents have a previous history of discipline, as noted by the referee. Therefore, anything less than a suspension would be inadequate discipline for either respondent. Although the referee recommended that respondent Anderson receive a milder discipline than respondent McClung, a careful review of the facts indicate that this is not necessarily appropriate. Although respondent McClung actually handled the trial and the depositions and therefore had to be aware of the misrepresentation, respondent Anderson undertook the responsibility of writing the brief and making lengthy and detailed allegations about a deposition which she never even bothered to read.

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.

Therefore, the sixty day suspension for each respondent originally requested by The Florida Bar is appropriate in this case rather than the private reprimand for respondent Anderson and public reprimand for respondent McClung recommended by the referee.

CONCLUSION

While the referee made detailed and accurate findings of fact, his recommendations regarding a finding of not guilty as to certain rules is erroneous and without support in the facts. There is clear and convincing evidence of violation of Disciplinary Rule 7-106(C)(1) for stating matters not supported by admissible evidence by each respondent as well as Rule 1-102(A)(4) for conduct involving dishonesty, deceit, or misrepresentation by respondent Anderson.

Further, the discipline recommended by the referee is overly lenient and would fail to satisfy the goals and purposes of attorney discipline. A private reprimand for respondent Anderson is not authorized by the current rules and is illogical since the public is already aware of the misconduct and the Report of Referee is itself public. Similarly, a public reprimand is inappropriate for respondent McClung in view of the seriousness of these proceedings.

Therefore, The Bar respectfully requests that the Court accept the referee's basic findings of fact but reject the recommended not guilty findings as to Rule 1-102(A)(4) and 7-106(C)(1) for respondent Anderson and Rule 7-106(C)(1) for

respondent McClung and impose a minimum of a sixty day suspension from the practice of law upon each respondent and equally assess upon respondents the payment of the costs of the proceeding, currently totalling $1419.92.

Respectfully submitted,

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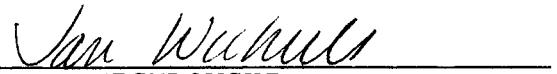
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief has been furnished by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by ordinary U.S. mail to Richard T. Earle, Jr., Counsel for respondents, at Post Office Box 416, 150 Second Avenue North, St. Petersburg, Florida, 33731; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 6th day of April, 1988.

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