IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PATRICIA F. ANDERSON and
FRANK A. McCLUNG,

Respondents.
_____/

Case No. 70,827
[TFB Case Nos. 87-23,458 (05B)
and 87-23,459 (05B)]

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REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

POINT ONE

A FINDING OF GUILT AS TO DISCIPLINARY RULE 1-102(A)(4) FOR RESPONDENT ANDERSON AND AS TO 7-106(C)(1) FOR BOTH RESPONDENTS IS WARRANTED IN THIS CASE INVOLVING MISREPRESENTATIONS IN AN APPELLATE ACTION.

The respondent's Answer Brief claims that respondent Anderson should not be found guilty of Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility for conduct involving dishonesty, fraud, deceit, or misrepresentation since the Referee's Findings of Fact indicate Ms. Anderson was unaware of the appellant's waiver of the Fifth Amendment privilege when she prepared the Amended Answer Brief. However, as the Fifth District Court of Appeals noted, it was the continuing failure of respondents to correct their misrepresentations and in fact, their aggressive denial of same, which made their conduct so serious. The Referee recognized this:

> Before the oral argument, but approximately three months after Respondents realized some error or "over-characterization" in the Amended Answer Brief, Appellant's attorney filed a Motion for Sanction, 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"), Report of Referee, Section II, p. 2.

Although respondents' Answer Brief concludes, "When respondents discovered the errors, there was no need for them to do anything in order to make the court aware of them", this feeling was not shared by the Appellate Court; as the Honorable Franklin D. Upchurch queried Ms. Anderson:

> When this was brought up and the Motion for Sanctions was first set, why didn't you just say that it was misleading and say 'The correct statements are as follows, and make your apology to that? Your response was almost a personal attack on the other side for having raised this error.', transcript of sanction proceedings, TFB Exhibit P, pg. 4.

Clearly, respondent Anderson's failure to correct the error, and in fact her denial of same, was noted by both the Appellate Court and the Referee. Such continuing conduct went beyond mere oversight and constituted willful misrepresentations warranting a finding by the Referee of guilt as to Disciplinary Rule 1-102(A)(4) for conduct involving dishonesty, fraud, deceit, or misrepresentation. As The Florida Bar noted in their Initial Brief, Ms. Anderson was found by the Referee to have violated Integration Rule, Article XI, Rule 11.02(3)(a) for conduct contrary to honesty, justice, or good morals and it is illogical to allow a not guilty finding to stand regarding this essentially similar disciplinary rule.

Regarding Disciplinary Rule 7-106(C)(1), the Referee found both respondents not guilty of:

> 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 Florida Bar seeks reversal of the Referee's not guilty recommendation since this rule appears to be the very basis of the respondents' wrongdoing in presenting incorrect facts to a tribunal. The Referee's Findings of Fact underscore respondents' violation of this rule since there is no dispute that respondents' actions caused misrepresentations to be placed in their appellate brief.

Respondents' Answer Brief argues that Ethical Consideration 7-25 is influential. The Florida Bar disagrees. While the non-mandatory ethical considerations discuss various aspects of a particular disciplinary canon, it is the disciplinary rule itself which must be looked at to discern its meaning. In this case, 7-106(C)(1) prohibits: "Stating or alluding to any matter [before a tribunal] that he/she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence". The motive of such a rule is clearly to prevent misrepresentation of the type which occurred in respondent's brief. As the Appellate Court stated:

> We are concerned that counsel who appear before this Court clearly understand that briefs submitted to us, upon which we must rely so heavily in the discharge of out appellate function, be truthful and fair in all respects., TFB Exhibit O.

Respondents' argument that respondent Anderson was initially unaware of the misrepresentation and that respondent McClung had not read the pages lack merit in view of their duty to the court to act diligently to avoid such misrepresentations and their continuing failure to correct the misrepresentations after they were made aware of them.

ARGUMENT

POINT TWO

A SIXTY DAY SUSPENSION IS THE APPROPRIATE DISCIPLINE FOR EACH RESPONDENT IN THIS CASE.

The Florida Bar seeks more significant discipline than the private reprimand for Ms. Anderson and the public reprimand for respondent McClung recommended by the Referee. The Rules Regulating The Florida Bar, Rule 3-7.5(k)(1)(3) clearly prohibit a private reprimand where the case is already public.

Respondents argue that the prior rules, which did allow private reprimands in this instance, apply. There is no authority for this contention. The explanatory note which accompanies the Rules Regulating The Florida Bar provides:

> All disciplinary cases pending as of 12:01 A.M. January 1, 1987, shall thereafter be processed in accordance with the procedures set forth in the Rules Regulating The Florida Bar.

Such a clear explanation should preclude the arguments of the respondents. Further, such a guideline is consistent with established rules of statutory construction where procedural rules are involved, Heilman v. State, 310 So.2d 376 (Fla. 2nd DCA 1975).

A private reprimand for respondent Anderson is further inappropriate since this case became public knowledge on April 9, 1987, when probable cause was found by the grievance committee. It is unfair to the public to allow them to be aware of allegations of unethical conduct, yet unaware that the attorney was disciplined for same. This is particularly true in this case since the Order of the Fifth District Court of Appeals imposing sanctions upon respondents was already public. Since the Referee made his Report of Referee public in the Amendment of January 21, 1988, a private reprimand for respondent Anderson is further inappropriate.

A suspension is the appropriate discipline for both respondents. In The Florida Bar v. Weed, 513 So.2d 126 (Fla. 1987), the Supreme Court of Florida imposed a sixty day suspension on the respondent where he had been found guilty of failing to meet the time requirements to prosecute three separate appeals, for which the appellate court sanctioned him by public reprimand. Weed also was found guilty of Disciplinary Rule 1-102(A)(4) for conduct of dishonesty, fraud, deceit, and misrepresentation, for filing two unsigned affidavits of judicial assistants, although the referee noted that the violation of that rule may have not been intentional. Like the respondents at hand, Weed had a prior disciplinary history, less serious than respondent McClung's but

equal to respondent Anderson's. This Court rejected the referee's recommended public reprimand, stating:

> With all due respect to the referee, we do not feel that the sanctions he imposed strike the proper balance. The totality of Weed's misconduct is to severe for a public reprimand... Weed already has been publicly reprimanded for these misdeeds by the district court of appeal; what effect one way or the other a second public reprimand would have is questionable. There must be some other sanction., at p. 128.

This case is controlling in the case at hand due to the factual similarity.

Respondents further argue that the Florida Standards for Imposing Lawyer Sanctions, Section 6.12, cited by The Florida Bar in the Initial Brief are not controlling since they are not the product of this Court. The Florida Bar responds that each referee assigned by this Court to conduct a disciplinary proceeding is now being sent a copy of these standards by the Court and this strongly indicates an adoption of these standards at least for guideline purposes. Certainly it is advantageous to all involved to adopt a uniform method of determining disciplinary guidelines.

Respondents next state that Section 6.12 does not apply to the situation at hand because the respondents were merely negligent in filing false statements and did not do so knowingly. This would be correct if respondents had corrected their

misrepresentations immediately upon learning of same. However, respondents knowingly continued their misrepresentations by denying same and attacking the other side, causing the appellate court to set a sanction hearing where for the first time, respondents acknowledged the misrepresentation. Therefore, Section 6.12 requires suspension "when a lawyer knows that false statements or documents are being submitted to the court to that material information is being withheld, and takes no remedial action", Section 6.12.

Respondents further assert that their previous disciplinary history does not warrant more severe sanctions. Case law is clear that "this Court deals more severely with cumulative misconduct than with isolated misconduct", The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979). The fact that respondent Anderson received discipline as recently as 1987 and now appears for her second discipline in her law career of only 6 years underscores the need for substantial discipline. Respondent McClung's disciplinary history also creates the need for more serious discipline than otherwise.

Therefore, nothing less than a sixty day suspension for each respondent is appropriate in this case.

CONCLUSION

Wherefore, 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 proceedings, currently totalling $1419.92.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief have 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 regular U.S. Mail to Counsel for the respondents, Richard T. Earle, Jr., at 120 Second Avenue, Suite 1220, St. Petersburg, Florida, 33701; 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 11th day of May, 1988.

Jan Wichrowski

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