72,068.

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complaintant,

v.

TOM. K. DOUGHERTY,

Respondent.
_____/

Case No. 72,68
[TFB Case No. 88-30.069) (05B)]

THE RESPONDENT'S ANSWERING BRIEF

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STATEMENT OF THE FACTS AND CASE

The Respondent will adopt the Report of Referee as the Statement of the Facts and Case.

ARGUMENT

Rule 3-5.1(b) sets out the definitions of minor misconduct. In the Report of Referee filed in this matter, the referee described the misconduct of the Respondent as it related to Rule 3-5.1(b). And the referee was very specific in holding that the conduct was in fact "minor misconduct".

The cases cited by the Florida Bar deal with cases involving an attorney's relationship with his or her client. As Judge Eaton correctly pointed out, the Repsondent had a fiduciary relationship with the person who complained but there was no attorney-client relationship.

The Florida Bar contends that pursuant to Rule 3-7.5(k)(1)(3) "... a private reprimand may be recommended only in cases based on a complaint of minor misconduct." It is the position of the Respondent that the referee's report in effect reduces the complaint to three counts of minor misconduct and the Respondent was found guilty on all three counts. To hold differently would mean that in every case filed against a Florida lawyer in which a count other than minor misconduct was included, the Referee would be precluded from finding minor misconduct regardless of how unfounded the misconduct charge was. In other words, the referee would be put in a position of either ruling against his own findings or finding not guilty as to all counts.

Obviously, when Rule 3-7.5(k)(1)(3) was adopted, it was not intended to place the referee in a subordinate position to the Board of Governors or the Grievence Committee.

This court should treat the rules regulating the Florida Bar no differently than it has treated Florida Statutes through the years. Rule 3-7.5 should be construed to give effect to the court's intent, even if the result seems contradictory to the Rules of Construction and the strict letter of the rule; the spirit of the law prevails over the letter. See Garner v. Ward, 251 So.2d 252; State v. Webb, 398 So.2d 820; Certain Lands v. City of Alachua, 518 So.2d 386 (Fla. App. 1 Dist. 1987); Smith v. Ryan, 39 So.2d 281; Beebe v. Richardson, 23 So.2d 718.

If emphasis is to be placed on any part of Rule 3-7.5, it should be placed on Rule 3-7.5(k)(1)(1) which states "... which findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding".

Since a grievence procedure is less formal than a criminal proceeding, the Respondent requests this court to consider some of the same facts that the referee considered and expounded on in detail. This is not a case where a crooked lawyer is trying to beat the wrap on a legal technicality. Legal Counsel for the Flordia Bar acknowleded at the hearing that the Respondent did nothing illegal and was not guilty of any dishonesty. As the referee pointed out in his report, the Respondent has led an exemplary life as a citizen of South Lake County and has conducted his law practice in a manner that has created nothing but respect and good will for the legal profession. There is nothing to be gained by a public reprimand of the Respondent. Rather, a public reprimand would not only tarnish the image of the Respondent but also would tarnish the image of the legal profession in South Lake County, Florida.

As the referee stated in his report, the Respondent's "... candor and demeanor during the hearing on this case shows that he realizes his errors, he admits them and he has taken corrective steps to comply with the rules in the future."

There is one final point the Respondent would request this Honorable Court to consider seriously. A review of the referree's report shows clearly that it was not dictated in haste or casually drafted. All findings of fact were made after careful consideration. To reverse the referee would also mean the conviction of the Respondent on a "legal technicality" and would mean that the referee had no choice but to rubber stamp the charges by the Florida Bar, regardless of the outcome of the hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Respondent's Answering 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 regular U.S. Mail to Jan K. Wichrowski, Bar Counsel, The Florida Bar, 605 East Robinson Street, Suite 610, Orlando, Florida 32801; John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 27th day of December, 1988.

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