IN THE SUPREME COURT OF FLORIDA
(Before a Grievance Committee)

THE FLORIDA BAR,	)	
	)	
Complainant,	)	
	)	CONFIDENTIAL
vs.	)	TFB NO: 87-22543-06A
	)	Supreme Court #72-613
JOHN G. FATOLITIS,	)	(Formerly 06A-87H65)
	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

I. SUMMARY OF ARGUEMENT

The trial referee's findings and recommendations are proper. The findings of fact are not based on an erroneous application of law and are supported my substantial competent evidence. The record shows that the trial referee made the requisite showings required by Florida Bar Arggravating and Mitigating Standards in issuance of its findings of fact and recommendations. The recommended discipline should not be disturbed.

II BACKGROUND OF THIS APPEAL

The Florida Bar does not challenge the referee's findings of fact. However, the Bar seeks review of the referee's recommended disclipline. Respondent Appellee does not challenge any portion of the proceedings.

III STATEMENT OF THE FACTS AND CASE

On March 18, 1988, the respondent appellee executed a written Waiver of Probable Cause hearing and requested that the matter at hand be forwarded for trial before a referee. On June 22, 1988, the Florida Bar filed a formal Complaint against the respondent/Appellee. A final hearing was held on October 7, 1988.

At the conclusion of the final hearing, the referee found that the respondent/appellee violated F.S.§ 732.502(1)(c) by signing his wife's name as a witness to the last will and testament of Mike Synedis. In addition, the referee found that the respondent/appellee improperly dated Mr. Synedis will prior to its execution and then failed to correct the date contained in the will to reflect the date it was actually executed. The referee found the respondent/appellee guilty of violating Disclipinary Rule 1-102(A)(5) (engaging in conduct that is prejudicial to the administration of justice) and DR 1-102(A)(6) engaging in conduct that adversely reflects on his fitness to practice law).

IV ISSUE INVOLVED ON APPEAL:

ISSUE: Whether the trial referee erred in issuing its Discipline Recommendations:

ANSWER: The record shows that the trial referee made the requisite findings required by Florida Bar standards in the issurance of his findings of fact and recommendations.

V APPLICABLE PRINCEPLES

A. The trial referee's findings and recommendations should not be disturbed unless complainant shows that they are not supported by substantial competent evidence or that it is based on an erroneous application of law

The judgment of a trial court is clothed in the presumption of correctness, and the burden rests upon the complaining party to demonstrate clearly that errors have been comitted. See Rules Regulating The Florida Bar, Rules of Discipline: 3-7-6 (c)(5). It is well settled that the appellate courts do not decide cases de novo, but that the standard applied on review is whether there is substantial competent evidence to support the trial courts order, and whether there are any errors which adversely affect the substantial rights of a party.

The findings and conclusions of a referee or circuit judge are recorded substantial weight, and they will not be overturned unless they are clearly erroneous or lacking in evidentiary support. Florida Bar v Wagner, 212 So.2d 770(Fla 1968); Florida Bar v Wendel, 254 So2d 197 (Fla 1971); Florida Bar v Baron, 392 So2d 1318 (Fla 1981).

Rules 9.22 and rules 9.32 provide the referee with the guidelines to determine whether a sanction should be applied and to what extent. Rule of disclipine 3-5.1 provides in part that: A judgment entered, finding a member of The Florida Bar guilty of misconduct, shall include one or more of the following disciplinary measures:

(a) Private reprimand. A Supreme Court of Florida order adjudging a private reprimand may direct the respondent to appear before the Supreme Court of Florida, the board of governors, or the referee for administration of the reprimand. A grievance committee report and finding of minor misconduct or the board of governors, upon review of such report, may direct the respondent to appear before the board of governors or the grievance committee for administration of the reprimand, A memorandum of administering of such a reprimand shall thereafter be made a part of the record of the proceeding.

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

(1) Criteria. In the absence of unusual circumstances misconduct shall not be regarded as minor if any of the following conditions exit:

(a) The misconduct involves misappropriation of a client's funds or property.

(b) The misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights or valuable

property rights) to a client or other person.

(c) The respondent has been publicly disciplined in the past three (3) years.

(d) The misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past five (5) years.

(e) The misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent.

(f) The misconduct constitutes the commission of a felony under applicable law.

VI THE RECORD PROVIDES AMPLE SUPPORT FOR THE TRIAL REFERREE'S FINDINGS OF FACT AND RECOMMENDATION

Rule 3-5.1(4) provides that "upon trial before a referee....., The referee may recommend any discipline authorized under these rules." Accordingly it was appropriate for the trial referee to enter a recommendation for a private reprimand. Neither the trial record or the petitioner/ appellant's review brief indicates how respondent/appellee's conduct could not be considered anything but minor misconduct given the criteria as set forth in 3 -5.1CB).

Petitoner/Appellants argue that rule 3-7.5(k)(1)(3) should control. This argument fails for several reasons. Initially, the rule provides "that a private reprimand may only be recommended only on a complaint of minor misconduct". The record indicates that respondent/Appellee waived his right to a probable cause hearing. Respondent/Appellee chose to go directly to a referee. Nowhere in the rules regulating the Bar does it indicate that if a respondent waives a probable cause hearing that the complaint subsequently filed would deny him the possibility of being found guilty of minor misconduct therefore allowing a private reprimand recommendation.

The trial referee considered both aggravating and mitigating circumstances in determine the type of discipline to recommend after his finding of a violation. (See Referee's Report). Further, the last sentence of the executed waiver of Probable

cause hearing form provides"The accused attorney is aware that this waiver of probable cause hearing shall not be deemed an admission of guilt in any further disciplinary proceeding. Given this proviso it defies logic to claim that the complaint was a minor misconduct recommendation by the grievance committee. No where on the complaint is a statement made that minor misconduct findings had been waived under rule 3-7.5 (K)(1)(3) thereby cutting off private reprimand possibilities.

Assertions by the petitioner/appellant do not remedy the fact that the last will and testament involved in the instant situation was not contested. Speculation as to what could have happened or might have happened in a will contest is not an appropriate basis for denying respondent/appellee his right to be sanctioned under the private reprimand standards especially when the complaint was filed after a waiver of probable cause.

B. The Supreme Court has Authority to issue Approporiate Attorney Discipline

Discipline for unethical conduct by a member of the bar must serve three purposes; first, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of any undue harshness in imposing penalty; second, judgment must be fair to Attorney being sufficient to punish breach of ethics and at the same time encourage reformation and rehabilitation; and third, judgment must be severe enough to deter others who might be tempted to become involved in like violations. The Florida Bar v Lord, 433 So2d 983 (Fla 1983). Each attorney disclipinary case must be assessed individually and in determining the punishment, the Supreme Court should consider the punishment imposed on other attorneys for similar misconduct. The Florida Bar v Breed, 378 So2d 783 (Fla 1979).

The rules regarding regulation of Lawyers: Disciplinary Rule 3.0 provides that in imposing sanctions after 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.

VII CONCLUSION

Based on the foregoing, and on Petitioner/Appellants total failure to meet their burden of showing reversible error by the trial referee, The Appellee respectfully requests that the referee's recommendations not be disturbed on this appeal. The decision below should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by United States mail upon BONNIE L. MAHON, ESQUIRE, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida, 33607, Attorney for Complainant; and JOHN T. BERRY, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 600 Appalachee Parkway, Tallahassee, Florida, 32301-8226, this the 24th day of March, A. D., 1989.

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