IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT T. MILLER,

Respondent.
_____/

Case No. 73,041
[TFB Case No. 88-30,913 (10A)]

REPLY BRIEF AND ANSWER BRIEF ON CROSS-PETITION FOR REVIEW

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SYMBOLS AND REFERENCES

In this Brief, the complainant, The Florida Bar, will be referred to as **"the Bar";** the respondent, Mr. Miller, will be referred to as **"respondent".**

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar reiterates the Statement of the Case and of the Facts stated in its Initial Brief with the additional statement that respondent filed a Cross Petition for Review on June 8, 1989.

ARGUMENT

POINT ONE

THE RULES OF DISCIPLINE PROHIBIT PRIVATE DISCIPLINE IN A PUBLIC PROBABLE CAUSE CASE.

The Florida Bar does not dispute respondent's contention that the Supreme Court of Florida has the exclusive jurisdiction to determine the appropriate discipline in a case involving a Florida attorney. The Rules Regulating The Florida Bar are, in fact, the Supreme Court's own rules for the administration of such discipline.

The plain language of Rule 3-7.5(k)(1)(3) of the Rules Regulating The Florida Bar mandates that a private reprimand may only be recommended by the referee in cases based upon a complaint of minor misconduct.

Thus, the recommendation of a private reprimand in this case, which was filed as a formal public complaint, and not as a complaint of minor misconduct, is procedurally inappropriate according to the Supreme Court's own Rules Regulating The Florida Bar.

ARGUMENT

POINT TWO

A PUBLIC REPRIMAND, PROBATION, AND THE PAYMENT OF COSTS IS THE MORE APPROPRIATE DISCIPLINE GIVEN THE NATURE OF THE MISCONDUCT.

There is a scarcity of discipline cases in Florida involving an attorney drafting a will in which he is named the contingent residual beneficiary. In its Brief in Support of Petition to Review, the Bar cited numerous cases from other jurisdictions involving facts similar to those in this case. Contrary to respondent's contentions, the cases are applicable.

The Bar previously pointed out that Iowa had taken the additional step of holding that ethical considerations are mandatory rather than aspirational. While Iowa is an exception to the norm, the Supreme Courts of various other states, when faced with similar fact situations, have found violations of disciplinary rules identical to those in Florida. These cases are certainly not binding, but they are important to this Court because they illustrate the considerations and the issues dealt with by other Supreme Courts in deciding the appropriate discipline under similar circumstances.

Respondent has cited In Re: Underhill's Estate, 42 Fla. Supp. 197 (Fla. 18th Cir. Ct. 1974), affirmed, 312 So.2d 525 (Fla. 4th DCA 1975), for the proposition that the conduct in this

case falls within the category of "exceptional circumstances" not requiring compliance with EC 5-5 of the Code of Professional Responsibility. That case is both distinguishable and nonpersuasive.

First, the circuit court in that case was deciding issues of will revocation, undue influence and testamentary capacity, not attorney discipline. Such reference to EC 5-5 is merely dicta and is certainly not binding on this Court.

Furthermore, In Re: Underhill is distinguishable in that the attorney in that case was the sole beneficiary of the client's will. There was therefore no question as to the testator's intent. In the present case, however, the respondent was the contingent residual beneficiary at the time the will was drafted. After the testator's wife died, respondent became the residual beneficiary. Because there was no discussion of this changed circumstance, it is far from clear that it was the testator's intent for respondent to inherit the bulk of his estate.

As stated by the respondent in his Answer Brief on p. 9, a discussion of the ramifications of the testator's wife's death would not have negated respondent's initial misconduct in agreeing to draft such a will. However, such a disclosure to the testator would be mitigating evidence and would bolster

respondent's claim that he was merely attempting to carry out the testator's true intent.

Contrary to what respondent has alleged, the Bar is not contending that the client does not have the right to have his will drawn as he or she sees fit. However, the attorney-drafter has a duty not only to the client but also to the integrity of the legal system. He must at all times seek to avoid the appearance of impropriety and the public's perception that lawyers with superior knowledge take advantage of unknowing clients. In order to fulfill these two duties, the attorney must advise the client of the vulnerability of such a will and that his own self-interest in the will might affect his professional judgment.

As the Illinois Supreme Court stated in In Re: Vogel, 92 Ill. 2d 55, 65 Ill. Dec. 30, 440 N.E. 2d 885 (1982), allowing an attorney to draft a will naming himself as contingent beneficiary involves the attorney in a conflict of interests, it may affect his competency to testify, it jeopardizes the will if a contest ensues, thus harming other beneficiaries and possibly nullifying the testator's intended distribution of his estate, and it diminishes confidence in the integrity of the legal profession. Id. at 889.

Respondent's actions in this case did all of the above. The Illinois Supreme Court publicly censured attorney Vogel. This Court should take similar action against respondent.

Respondent argues that a private reprimand will accomplish the purposes intended by attorney discipline because, as this Court stated in DeBock v. State, 512 So.2d 164, 167 (Fla. 1987), "bar discipline exists to protect the public, and not to punish the lawyer". The Bar argues that the protection of the public is best served by public discipline because public discipline puts other lawyers on notice as to what this Court considers unethical conduct and consequently deters others from similar actions in the future.

From a public image prospective, respondent's conduct also warrants public discipline. This Court also stated in DeBock:

> Not only is the individual citizen harmed by the unethical practitioner, all of society suffers when confidence in our system of law and justice is eroded by the unethical conduct of an officer of the Court. To protect the public the Bar is mandated to inquire into an attorney's conduct even when the appearance of impropriety exists.
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> Id. at 167.

This particular complaint became public on the filing of the complaint in this Court on September 13, 1988. It would be

inconsistent to now issue a private reprimand in an decision which would not be publicly available.

The goals of discipline outlined by this Court in The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983), are best served in this case by public discipline and by probation with those terms specifically outlined by the referee.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court to accept the referee's findings of fact but reject the recommended discipline of private reprimand and impose nothing less than a public reprimand with a one year period of probation, including the terms outlined by the referee, as well as the payment of costs in this proceeding, currently totalling $1,011.90.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIET that the original and seven (7) copies of the foregoing Reply Brief and Answer Brief on Cross-Petition for Review 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 Jerry A. DeVane, Counsel for respondent, at Post Office Box 1028, Lakeland, Florida, 33802; and a copy has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 27th day of July, 1989.

Alana C. Brenner

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