IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. **73,940**
[TFB Case No. **88-31,458 (18C)**]

v.

JOE M. MITCHELL, JR.,

Respondent.
_____/

ANSWER BRIEF

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SYMBOLS AND REFERENCES

The Florida Bar shall be referred to as the Bar.

The transcript of the final hearing held September 18, 1989, shall be referred to as T.

STATEMENT OF THE CASE

The Eighteenth Judicial Circuit Grievance Committee "C" heard testimony on November 7, 1988, November 8, 1988, and November 21, 1988. The Committee voted to find probable cause on November 21, 1988. The Bar filed its complaint on or around March 30, 1989. The respondent filed an answer on or around April 19, 1989, wherein he admitted all of the allegations contained within the Bar's complaint. The final hearing was held on September 18, 1989, and, the referee filed his first report on or around November 7, 1989. The respondent filed a motion for rehearing and amendment of Report of Referee on or around November 17, 1989, which was denied on January 18, 1990. An amended Report of Referee was entered on January 18, 1990, and the Second Amended Report of Referee was entered on January 22, 1990. The amendments were necessary to correct an omission as to findings of guilt or innocence on Rule 4-5.3(c).

The Board of Governors considered this case at its meeting which ended on March 17th, 1990, and voted not to seek an appeal of the Referee's recommended discipline. The respondent petitioned for review on March 29, 1990. He filed his initial brief on April 25, 1990.

STATEMENT OF THE FACTS

The respondent's statement of the facts in his initial brief appear to have been taken directly from the Bar's complaint. Because the facts of this case are uncontroverted, a recitation of them will be omitted from the Bar's answer brief.

SUMMARY OF THE ARGUMENT

The respondent admittedly failed to adequately supervise and train his legal secretary. As a result, she created documents where the signatures of the assistant State Attorney were forged by being xeroxed onto the signature page. These documents were utilized by another attorney in connection with his representation of one of the respondent's former clients. Not knowing that the documents were forged, he presented them to the court. Submission of a fraudulent document to a court is no minor issue. Furthermore, it is fortunate that none of the respondent's clients were adversely affected by his secretary's actions.

The referee considered all of the testimony and evidence presented before him at the final hearing including a memorandum in support of a private reprimand submitted by the respondent's counsel. (See Appendix) Clearly, the referee considered all of the evidence in mitigation prior to making his recommendation as to discipline. The respondent submits no new mitigating factors to be considered by this Court.

Given the seriousness of the respondent's misconduct in creating a situation wherein fraud could be perpetrated upon the court, the Bar maintains that a fifteen day period of

suspension without proof of rehabilitation would be a more appropriate level of discipline than that advocated by the respondent. This would send a clear and unambiguous message to other members of the Bar that they must adequately train their employees and maintain office procedures that will ensure nonlawyer personnel's conduct is compatible with the Rules of Professional Responsibility.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF A FIFTEEN DAY PERIOD OF SUSPENSION IS THE APPROPRIATE LEVEL OF DISCIPLINE GIVEN THE SERIOUS NATURE OF THE RESPONDENT'S MISCONDUCT.

The respondent admits that he failed to adequately supervise and train his legal secretary. As a result there was no system for properly disposing of closed misdemeanor files. (T. p. 41) The secretary, Brenda Hallum, merely threw away closed misdemeanor files whenever she needed more file space. (T. pp. 40-41) In at least two instances Ms. Hallum apparently forgot to return original documents to the clerk of the court for filing. (T. p. 56) There is no way to determine how many other original documents were simply thrown away when they should have been filed with the court.

Although the respondent did not personally present false evidence to the court, his failure to adequately supervise his legal secretary made the use of such fraudulent documentation possible. In this case, the real injury is to the legal system and not to the former clients. A judge should be able to rely upon representations made by an attorney. It is important that an attorney never mislead the court by making false statements of law or fact. The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983). Submission of a forged document to a court is "a serious

offense which should not, and will not, be tolerated." The Florida Bar v. Kauffman, 498 So.2d 939, 940 (Fla. 1986). Although the accused attorney in Kauffman personally submitted forged documents to a court, the Bar submits that there is little difference except in degree between whether the attorney personally submits false documents to the court or makes it possible for them to be submitted because of his failure to supervise his employees. The end result is the same.

The respondent attempts to characterize his actions as "minor misconduct". In The Florida Bar v. Kauffman, supra, this Court stated that "a fraud on the court clearly cannot be considered minor misconduct for which a private reprimand is appropriate." At p. 940. The term minor misconduct is a term of art intended for a certain class of cases. In the Rules of Discipline, Rule 3-5.1(b), one of the circumstances which is enumerated as specifically removing conduct from the "minor misconduct" category is that "misconduct [which] 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." What is more likely to cause "loss of money, legal rights or valuable property rights" than an untrained, unbridled lay person in a lawyer's office who is not properly supervised?

Here it is uncontested that a secretary was told by the respondent, in effect, to go through the other files in the

office which might contain samples of certain state attorney/defense counsel agreements and turn them over to an outside attorney for his use as documentary evidence in court. The respondent gave no instructions that he was to screen such documents, just turn the documents over to another lawyer for his use.

The ultimate result was that at least four of his former clients wound up back in court with the threat of renewed prosecution of their previously settled traffic cases. Only the fact that a lawyer friend of the respondent took over their defenses without charging fees to the clients prevented them from being prosecuted all over again. This is a minor offense?

Furthermore, the complaint alleges, the respondent admits, and the evidence clearly shows, that in certain cases where the respondent had not previously made copies of the pleas for his files he would borrow the original documents from the court files and have his secretary make copies. She was allegedly told to take these important documents back to the clerk of court for filing. This direction was not always carried out. Had the respondent properly supervised his secretary, he presumably would not have permitted this situation to exist.

But exist it does, and had the truth not been discovered by the State Attorney, false documents would have been admitted into

evidence in an unrelated case. This is a minor offense?

It simply defies logic for the respondent to now argue that he ought to receive only a reprimand because his lack of supervision of his non-lawyer personnel was only "minor misconduct". Misconduct which could have caused former clients to be retried in court with all the expenses appurtenant thereto. Misconduct which could have seriously affected the outcome of another trial by the use of forged documents. How dare he to proclaim this as "minor misconduct"? To proclaim to this very same Honorable Court, which in another case has taught that an attorney's non-lawyer personnel are considered to be agents of the attorney and that that attorney is responsible for ensuring that their actions do not violate the Code of Professional Responsibility. See The Florida Bar v. Rogowski, 399 So.2d 1390 (Fla. 1981).

The grievance committee never considered a finding of minor misconduct and unanimously voted to find probable cause after holding three extensive hearings on the matter. The respondent presented a memorandum in support of a private reprimand to the referee at the final hearing. (See Appendix) His initial brief is basically a restatement of the argument made in his memorandum. Clearly the referee considered the respondent's argument in making his recommendation of a fifteen day suspension because The Florida Bar recommended a forty-five day suspension

and the respondent made a pitch for a private reprimand.

The respondent cites only two cases dealing with an attorney's failure to supervise nonlawyer employees. In The Florida Bar v. Armas, 518 So.2d 919 (Fla. 1988), an attorney received a public reprimand and two years' probation for failing to properly supervise his office manager concerning trust funds. The office manager mishandled the monies because the attorney failed to instruct him or her concerning the regulations governing trust account operations. In addition, the attorney was found to have failed to maintain the minimum required trust accounting records. There was no indication that the attorney had a prior disciplinary history.

Public reprimands are the appropriate level of discipline for isolated instances of neglect, technical violations of trust accounting rules without willful intent or lapses of judgment. In The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980). Therefore, the discipline in Armas, supra, was appropriate because of the technical violations of the rules concerning trust accounts. The respondent's actions in the case at bar, however, were not an isolated instance of neglect. His failure to supervise his legal secretary made it possible for forged documents to be proffered to a court. It is not known how many clients may have been affected by the respondent's inadequate office procedures regarding the disposition of closed files.

The respondent also cites The Florida Bar v. Sheppard, 529 So.2d 1101 (Fla. 1988). There the accused attorney entered into a guilty plea for a consent judgment and received a public reprimand because he permitted his name to be added to the letterhead stationery of a deceased attorney and allowed a nonlawyer to sign correspondence which did not disclose his nonlawyer status. Consent judgments are not precedential in arguing the appropriate level of discipline.

The respondent cites The Florida Bar v. Samaha, 407 So.2d 906 (Fla. 1981), and states that the attorney received a public reprimand for back dating a quit claim deed. A review of the case, however, indicates that the attorney received a public reprimand for withholding an unapproved fee from a workman's compensation claimant. There is no indication that the accused attorney failed to supervise any of his employees or engaged in any misconduct analogous to the respondent's. Similarly, the remaining cases cited by the respondent do not charge failure to supervise and the errant conduct described is clearly not as serious as the admitted conduct in the case under consideration. Therefore, they are of little value in determining the appropriate level of discipline in the instant case. Furthermore, the respondent argued the same cases in his memorandum submitted to the referee. (See Appendix).

A case that is more like the respondent's is The Florida Bar v. Fischer, 549 So.2d 1368 (Fla. 1989), where the attorney received a ninety-one day suspension. Although similar, Fischer is clearly a more aggravated situation. The attorney requested a legal secretary to call a highway patrol officer, pose as a clerk of the court, and tell the officer that he need not appear at the attorney's civil infraction trial for a speeding ticket because the hearing had been cancelled. The trooper received the message and did not attend the hearing. As a result, the attorney's ticket was dismissed. The attorney denied he told his legal secretary to take the action that she did but he admitted he was aware that she had done something which caused the hearing to be cancelled. He took no steps to rectify the fraud perpetrated upon the court until after the Bar grievance committee found probable cause. The referee noted that even if the attorney's story were true, his failure to take steps to correct the problem was a violation of the Disciplinary Rules. This Court stated that the attorney's actions in perpetrating a fraud on the court evinced "a total disregard for the justice system he [was] sworn to uphold. We cannot countenance manipulating the courts in this manner." At p. 1370.

In The Florida Bar v. Neely, 502 So.2d 1237 (Fla. 1987), an attorney received a three month period of suspension followed by two years probation for his failure to forward payments in accordance with a client's wishes, demanding that a client sign an exculpatory letter requesting withdrawal of the complaint to

The Florida Bar as a condition of refunding those payments, and engaging in other misconduct related to trust account deposits and record keeping. The attorney was also charged with either failing to adequately supervise his nonlawyer personnel or to take responsibility for the work delegated to them. The attorney had a prior disciplinary history.

In The Florida Bar v. Gold, 526 So.2d 51 (Fla. 1988), an attorney received a public reprimand for his actions in obtaining a judgment on a fee dispute. The attorney had represented a client in a dissolution of marriage proceeding and filed a small claims action to recover the unpaid balance of his legal fees. Prior to the scheduled hearing the client contacted the attorney's office to propose a payment plan but was unable to talk with the attorney. The secretary had been delegated full responsibility for billing and collection and agreed with the client to hold the small claims action in abeyance if a partial payment was made. The secretary led the client to believe that the attorney approved the agreement and this was confirmed by a letter. The attorney, however, apparently was unaware of his secretary's commitment and appeared at the hearing and obtained a judgment against the client. The referee found that the attorney had delegated full authority to his secretary in billings and collections and that he exercised virtually no control over the means of collection. Furthermore, the attorney conditioned future pay raises for his secretary on her success in

making collections. It does not appear that the attorney had a prior disciplinary history and he was found not guilty of making any actual misrepresentations.

In The Florida Bar v. Chase, **467** So.2d **983** (Fla. **1985),** an attorney received a public reprimand due to the failure of his nonlawyer employee to pass along messages. The attorney represented a client in connection with a misdemeanor charge. The client was unable to communicate with the attorney because the messages she left were not forwarded by the attorney's law clerk. As a result, the attorney failed to attend an arraignment and a warrant was issued for the client's arrest. The client continued to be unsuccessful in her attempts to directly contact the attorney despite leaving numerous messages with his nonlawyer employee. The attorney had previously discovered that his employee was failing to keep him informed concerning messages. Despite this discovery he continued to employ the person and took no steps to rectify the situation.

The Florida Standards For Imposing Lawyer Sanctions support the Bar's position that the appropriate level of discipline in this case is a suspension. Standard **6.13,** under False Statements, Fraud and Misrepresentation, calls for a public reprimand when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld.

Under the heading Violations of other Duties Owed as a Professional, Standard 7.2 calls for a suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Standard 7.3 calls for a public reprimand when a lawyer negligently engages in conduct that is a violation of a duty owed as professional and causes injury or potential injury to a client, the public, or the legal system.

Although the respondent argues that Standard 7.4 calling for a private reprimand is applicable, that standard is appropriate only when a lawyer is negligent in determining whether his conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system. Clearly, the respondent, had he been aware of what his legal secretary had done in forging documents, would have known that this violated the duties he owed as a professional. Furthermore, it is merely a fortunate circumstance that no clients were seriously prejudiced due to Ms. Hallum's actions. The potential for great prejudice certainly did exist and no doubt the affected clients experienced a great deal of worry and concern about their cases being reopened by the state. In addition, the state incurred an unnecessary expense in appealing these cases.

Standard 9.0 addresses aggravating and mitigating factors which are considered in determining the appropriate level of discipline. In aggravation, the respondent has a prior disciplinary history. Although its remoteness in time diminishes its weight as an aggravating factor, it cannot be dismissed out of hand as the respondent suggests. See The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982). In addition, there were multiple offenses involving a number of clients and the respondent has substantial experience in the practice of law.

In mitigation, the respondent argues several factors which are not actually applicable to the facts of the instant case. For example, he maintains that he did not act out of a dishonest or selfish motive. Perhaps had the respondent personally presented the forged documents to the court, this factor would be applicable. He was not, however, charged with engaging in conduct involving fraud, dishonesty, or deceit. Furthermore, although the respondent did admit the allegations contained in the Bar's complaint, he did so only after an extensive investigation was conducted by the grievance committee.

In determining the appropriate level of discipline three considerations must be made as laid out in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). First, the judgment must be fair to both society and the respondent, protecting the former from unethical conduct without unduly denying them the services

of a qualified lawyer. While the respondent is most certainly qualified, the offense plainly merits the recommended suspension. The Bar submits that the public will not be unjustly deprived of legal services if this Court imposes the short term suspension recommended by the referee.

Second, the discipline must be fair to the respondent with it being sufficient to punish the breach and at the same time encourage reform and rehabilitation.

Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misconduct. A suspension would put other members of the Bar on notice that failure to supervise nonlawyer employees can have serious and far reaching effects and that conduct such as the respondent's is not acceptable. An attorney must remain responsible for the conduct of his nonlawyer employees in order to protect his clients.

The respondent also requests in the event this Court should impose a suspension that it waive the requirement under Rule of Discipline 3-5.1(h) that he furnish his clients with a copy of the order of suspension and forego taking any new business for thirty days preceeding the suspension. The respondent fails to provide any reasons why he should be exempted from the requirements of the Rule which other members of the Bar must comply with. The provision concerning not taking any new

business prior to the commencement of the suspension is to protect the public from hiring the services of an attorney who may not be able to adequately represent their interests due to the impending suspension of his license to practice law.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Court will review and approve the Referee's findings of fact, recommendation of guilt, and approve the recommendation of a fifteen day suspension with automatic reinstatement and further order the respondent to pay costs in these proceedings currently totaling $3,299.02.

Respectfully submitted,

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By: _____
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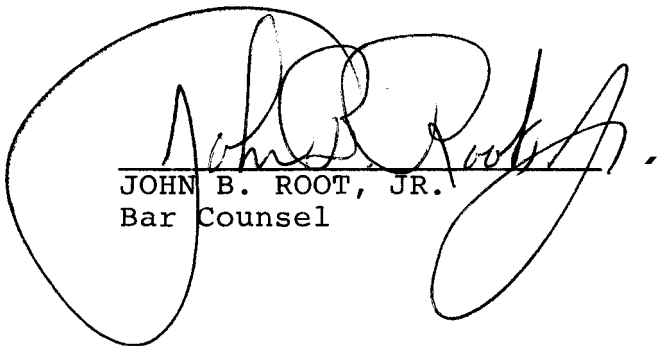
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing have been furnished by oridinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, **32399-1925**; a copy of the foregoing has been furnished by ordinary mail to Joe M. Mitchell, Jr., Respondent, at 111 South Street, Melbourne, Florida **32901-1262**; and a copy of the foregoing has been furnished by oridinary mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, **32399-2300**, on this 16th day of May, **1990.**



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