IN THE SUPREME COURT OF FLORIDA

JOE M. MITCHELL, JR.

Respondent/Appellant,

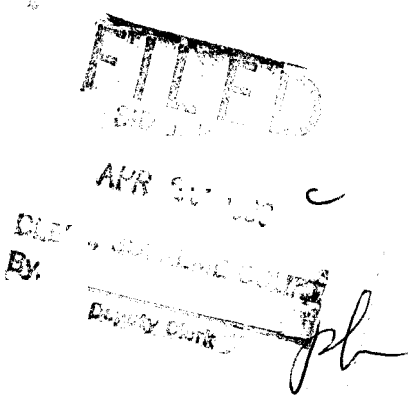
vs.

CASE NO. 73,940
(TFB NO. 88-31,458 (18C))

THE FLORIDA BAR,

Complainant/Appellee.

_____/



RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

ANDREW A. GRAHAM, ESQ.
1825 S. Riverview Drive
Melbourne, Florida 32901
407/724-4450
Attorney for Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

RULES

INTRODUCTION

The parties in this brief will be referred to as they appeared before the referee: Compainant; and, Respondent, respectively.

An appendix is attached to this brief under separate cover. The letter "A" followed by a number will refer to the Appendix and its appropriate section.

STATEMENT OF THE CASE

On June 22, 1988, a formal investigation by South Brevard County Grievance Committee was instigated against the Respondent.(A-1) As a direct result of that investigation a hearing before the Grievance Committee was held on November 7-8, 1988. **(A-2)**

On November **22**, 1988, the Respondent was notified of a "Finding of Probable Cause for Further Disciplinary Proceedings and Record of Investigation" by the Eighteenth Judicial Circuit Grievance Committee "C". (A-3) Predicated upon these findings a Complaint was filed by The Florida Bar against the Respondent on March 30, 1989. (A-4) On April 19, 1989, the Respondent filed his answer admitting all the allegations contained in the Complaint.(A-5)

The matter was duly assigned to the Honorable Joe Wild, County Judge, as appointed Referee, and the Final Hearing was scheduled to be heard on September 18, 1989. **(A-6)** On October 9, 1989, The Florida Bar filed its Affidavit of Costs in the amount of $3,299.02. (A-7)

The initial Report of Referee was signed on November 7, 1989. (A-8) The Respondent filed his Motion for Rehearing and Amendment of Report of Referee on November 17, 1989. (A-9) The Florida Bar filed its Response to Motion for Rehearing and

Amendment of Report of Referee on November 22, 1989. (A-10) The Referee submitted his Order on Motion for Rehearing, denying Respondent's Motion for Rehearing on January 18, 1990. (A-11) The Referee filed his "Amended Report of Referee" on January 18, 1990. (A-12)

On March 21, 1990, The Florida Bar directed its letter to the Honorable Sid J. White, Clerk, referencing the meeting of the Board of Governors of The Florida Bar on March 16, 1990, and their consideration of the Referee's report in this case. (A-13) The Florida Bar declined to file a Petition for Review in this case. (A-14) On March 30, 1990, the Respondent forwarded his Petition for Review to this Court. (A-15)

FACTS OF THE CASE

The Respondent admitted to the facts alleged in the Complaint, and no further testimony was taken by the Referee concerning the factual allegations. The facts as set forth in the Complaint are set forth as follows:

COUNT I

3. In or around 1987, while preparing a driving under the influence (DUI) case for trial, an assistant State Attorney in the Eighteenth Judicial Circuit, discovered that the defendant had previously plead guilty to reckless driving in this case and that there was no information in the file to reflect that. Further investigation of the matter showed that a number of other DUI cases had been resolved by pleas in absentia to reckless driving. A check of the Court files indicated that the required written plea in absentia had not been filed. Pleas in absentia were required to be reduced to writing and placed in the Court file. It was discovered that the respondent had represented the defendants in each case.

4. Based on the examination of the Court files, motions were filed in State v. Michael E. Riley, Case No. 87-77346/7-PU, requesting production of the original documents and requesting that the plea in absentia be set aside. The alleged plea agreement had been entered into between the respondent on behalf of his client and Michael Hunt, an assistant state

attorney in charge of the Titusville Felony Intake Division.

5. Although the respondent had represented Mr. Riley in the original DUI matter, he could not represent him concerning this motion because he expected to be called as a witness.

6. Instead, local attorney, Aaron Jerrold Bross, represented Mr. Riley.

7. A hearing on the motions was held on or about October 1987. Mr. Bross successfully argued that the Court lacked jurisdiction because service had been made upon the respondent even though he was not representing Mr. Riley in this matter. As a result, the defendant had not been properly noticed. During the testimony at the hearing, it became apparent that Mr. Hunt was taking the position that he had never signed any plea agreement to reduce the DUI to that of reckless driving.

8. After the hearing, the respondent, Mr. Bross, and the respondent's legal secretary Brenda Sue Hallum, spoke outside the courtroom. During this conversation, it was suggested that it would be helpful if the respondent could provide copies of plea agreements he had entered into with Mr. Hunt in the past where DUI charges were reduced to reckless driving.

9. Mr. Bross intended to use the documents to impeach Mr. Hunt's testimony.

10. After reviewing his files, the respondent could only locate negotiated plea documents contained in the files of Bernadette Reynolds and Allen Zee Lauderdale. These were the original signed plea agreements which should have been filed with the Clerk of the Court but were not.

11. The respondent and Ms. Hallum testified that in those cases where the respondent had not previously made copies of the pleas for distribution to the State Attorney's Office or his own, he would "borrow" the originals to have Ms. Hallum make copies and that Ms. Hallum was instructed to take them back to the Clerk of Court for filing. The respondent learned as a result of this investigation that this instruction was not always carried out.

12. The respondent then requested Ms. Hallum to continue searching the files for more plea agreements and to turn any useful ones she found over to Mr. Bross.

13. Ms. Hallum discovered six files that contained plea agreements entered into between the respondent and Mr. Hunt to reduce DUI charges to reckless driving. Four of the files, Christine Alice Lyons, Lori J. Adams, Karenanne Patricia Janik, and William Mark Newsom, contained copies of what

appeared to be the original plea agreements.

14. The respondent did not review the files prior to turning them over to Mr. Bross.

15. At the November 12, 1987, hearing in State v. Riley, Case No. 87-77346PU, Mr. Bross entered the negotiated plea documents that he had obtained from the respondent's office into evidence.

16. Shortly thereafter, the State Attorney's Office examined the copies of the documents and determined that Mr. Hunt's signature on the Lyons, Adams, Janik, and Newsome agreements was suspect. A review of the Court files indicted that the original plea agreements were missing.

17. Randall J. Hagge, a Florida Department of Law Enforcement questioned document analyst, examined the copies of the four plea agreements. Mr. Hagge determined that Mr. Hunt's original signature had been xeroxed onto the signature page for Lyons, Adams, Janik, and Newsome, and that all four documents contained copies of one authentic signature.

18. Neither the respondent nor Mr. Bross apparently were aware that Mr. Hunt's signature on the four documents was not legitimate. They became aware that the documents were in fact copies of copies in or around May, 1988, after Mr. Bross examined the signatures more closely and made the discovery on his own.

19. Allegedly, Ms. Hallum xeroxed Mr. Hunt's signature onto the signature page of the four documents in question without the knowledge of the respondent.

20. The respondent failed to properly supervise his legal secretary and allowed a condition to exist whereby at least two original documents were not returned to the Court and the signature on at least four documents were fabricated. When the four documents were presented to the Court in the Riley case, it certainly created the appearance that a fraud may have been perpetrated upon the Court.

21. Wherefore the respondent has violated the following:

1. Rule of Professional Conduct:

A) **4-5.3(b)** for failing to ensure the conduct of nonlawyer personnel is compatible with the professional obligations of the lawyer:

22. The respondent had an office policy of not maintaining closed misdemeanor files.

23. Two to three times a year Ms. Hallum would go through the closed files and destroy the misdemeanor files. Closed felony files were not handled in this manner.

24. As she was purging them, she occasionally found

original documents in the files which should have been filed with the Clerk of the Court. When she made such a discovery, Ms. Hallum would take the document to the Clerk's office and file it without advising the respondent.

25. The original documents discovered in the Lauderdale and Reynolds files were ones she apparently had neglected to file with the Clerk of the Court as directed by the respondent.

26. On occasion, **Ms.** Hallum would throw away misdemeanor files without looking through them.

27. The respondent failed to properly supervise his legal secretary and as a result case files were disposed of without the knowledge or consent of the respective clients.

28. By reason of the forgoing, respondent has violated the following:

1. Rules of Professional Conduct:

A) 4-5.3(b) for failing to ensure the conduct of nonlawyer personnel is compatible with the professional obligations of the lawyer:

B) 4-5.3(c) for failing to properly supervise nonlawyer personnel which results in a violation of the Rules of Professional Conduct where the lawyer should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ISSUE FOR REVIEW

WHETHER THE REFEREE'S RECOMMENDATION THAT THE RESPONDENT BE SUSPENDED FROM THE PRACTICE OF LAW FOR A PERIOD OF FIFTEEN (15) DAYS WITH REINSTATEMENT AT THE END OF THE SUSPENSION AS PROVIDED IN RULED 3-5.1(E), RULES OF DISCIPLINE IS WARRANTED UNDER THE TOTALITY OF THE CIRCUMSTANCES

ARGUMENT

The Referees's recommendation that respondent be suspended from the practice of law is unwarranted.

PROFESSIONAL ACCOMPLISHMENTS

The Respondent was admitted to practice before The Florida Bar in **1968.** He is Board Certified in Criminal Law and designated in Appellate Practice. He formerly held a designation in Personal Injury and Wrongful Death, this designation having been abolished by The Florida Bar in **1989.**

He has been an active member of: The National Association of Criminal Defense Lawyers: Florida Association of Criminal Defense Lawyers (serves as a member on the Board of Directors); Officer in the Brevard County Association of Criminal Defense Lawyers: Association of Trial Lawyers of America; and, Academy of Florida Trial Lawyers.

He served as seminar coordinator for Post Conviction Relief for The Florida Bar in **1986.** He was appointed and served on The Florida Bar Commission for: Traffic Rules:

Sentencing Guidelines; and, Individual Rights and Responsibilities.

ADMISSION OF GUILT

In response to the Complaint filed by the Florida Bar the Respondent has admitted all the allegations, and has effectively admitted guilt to the minor misconduct of violating Rules of Professional Conduct 4-5.3(b) and (c)(2), to wit: 1. Respondent failed to insure the conduct of his secretary was compatible with the professional obligations of the Respondent; and, 2. Respondent failed to properly supervise his secretary which resulted in a violation of the Rules of Professional Conduct where the Respondent should have known of the conduct at a time when its consequences could be avoided or mitigated but failed to take reasonable remedial action.

CRITERIA APPLICABLE AS GUIDELINE TO DETERMINE APPROPRIATE DISCIPLINE

In consequence of Respondent's admitting his alleged misconduct, in violation of the Rules of Professional Conduct, it became the responsibility of the referee to recommend the appropriate disciplinary sanction to be imposed upon the Respondent by this Honorable Court. In making this recommendation there exists certain criteria that serves as a

guideline to assist the referee in formulating his recommendation of discipline.

The types of discipline which can be meted out for professional misconduct is presented in Rules Regulating the Florida Bar 3-5.1. Under this Rule we are told that a private reprimand is the appropriate disciplinary sanction for "minor misconduct". The Rule expands upon its definition of such conduct as follows:

> (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 exist:
>
> 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.

In November, 1986, the Board of Governors of the Florida Bar approved: Florida Standards for Imposing Lawyer Sanctions (F.S.I.L.S.). Set forth in the Standards are the factors to be considered by the referee in imposing sanctions, to wit:

> 3.0 Generally
> In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factions:
> (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.

The Respondent's negligent misconduct, as alleged in the complaint, falls within sanctions as set out of the F.S.I.L.S. which define Violation of Other Duties Owed as a Professional, as follows:

> 7.2. Suspension is appropriate 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. (emphasis supplied)
>
> 7.3 Public reprimand is appropriate when a lawyer negligently 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. (emphasis supplied)

> 7.4 Private reprimand is appropriate when a lawyer is negligent in determining whether the lawyer's 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. (emphasis supplied)

Once the referee has decided upon the appropriate sanction, he is then required to apply any aggravating or mitigating circumstances as factors to either increase or decrease the severity of the sanction he determines to be appropriate. The aggravating factors are set out in Section 9.22 and the mitigating factors are set out under Section 9.32 as follows:

> 9.22 Factors which may be considered in aggravation. Aggravating factors include:
>
> (a) prior disciplinary offenses;
>
> (b) dishonest or selfish motive;
>
> (c) a pattern of misconduct;
>
> (d) multiple offenses;
>
> (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
>
> (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
>
> (g) refusal to acknowledge wrongful nature of conduct;
>
> (h) vulnerability of victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution.

9.32 Factors which may be considered in mitigation. Mitigating factors include:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical or mental disability or impairment;

(i) unreasonable delay in disciplinary proceedings, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay;

(j) interim rehabilitation;

(k) imposition of other penalties or sanctions;

(1) remorse;

(m) remoteness of prior offenses.

The Respondent has had only one (1) prior discipline, a private reprimand in **1974**, which was for conduct not involved in this complaint. Therefore, it does not come within the

purview of the conditions proscribed under the Rules Regulating The Florida Bar 3-5.1(c) and (d) infra (conduct involving prior discipline) which would elevate the discipline for minor misconduct from a private reprimand to a more serious sanction. Although, a prior discipline apparently may be considered as an "aggravating factor" in assessing the imposition of discipline under Section 9.22(a) F.S.I.L.S. infra. Thus, the only other aggravating factor the referee could have considered under this criteria was: Respondent's substantial experience in the practice of law.

However, the Respondent's misconduct was "negligence" in the supervision of his nonlawyer personnel, i.e. his secretary's, failure to carry out the Respondent's implicit instructions that she make copies of the original documents he handed her for forwarding to the respective parties, and then file the originals with the Clerk of the County Court. It is suggested, that this duty the Respondent imposed upon his secretary was purely clerical and did not warrant direct supervision. Though the Respondent shoulders the responsibility for his secretary's nonfeasance in performing the undertaking he had assigned her; he would assert in defense, that it is nigh impossible for an attorney to police, with constant vigilance, all the actions of his nonlawyer

personnel. "Experience teaches slowly, and at the cost of mistakes". (James Froude).

Furthermore, the referee was required to consider a number of mitigating factors which were present. He would then be required to factor in and give them their due weights, in mitigation of the "aggravation factors", in assessing the degree of recommends discipline. Thus, the two (2) aggravating factors considered by the referee should be effectively decreased by the following mitigating factors: Respondent has demonstrated a good prior disciplinary record; he did not act out of a dishonest or selfish motive; he tried to rectify the consequences of the misconduct by insuring that original documents got to the Court file; cooperated through every phase of these proceedings; by admitting the allegations in the Complaint and he has demonstrated full and free disclosure to the disciplinary board and a cooperative attitude throughout the proceeding; and, has demonstrated remorse for his misconduct and a willingness to take such measures as necessary to insure the misconduct is not repeated.

It is suggested that the Respondent's misconduct was minor and the appropriate disciplinary sanction warranted would be a private reprimand. In order to support the Referee's recommendation of the imposition of a fifteen (15) day

suspension, he was required to make a finding that the Respondent "knowingly engages" in conduct in violation of his professional duty, Section 7.2 F.S.I.L.S. infra, or , failing this, to find other "aggravating factors" adequate to support the recommended sanctions. There is no allegation in the Complaint filed by The Florida Bar that the Respondent knowingly engaged in conduct which was in violation of a duty he owed the legal system. Nor did the Respondent negligently engage in conduct which was in violation of his professional responsibility as required under Section 7.3, F.S.I.L.S., infra, to support a public reprimand. The criteria that most befits the Respondent's negligent conduct is: Section 7.2 F.S.I.L.S., infra, which recommends a "private reprimand " when a lawyer is "negligent in determining" whether his conduct is a violation of his professional responsibilities.

In the case at bar, the Respondent's admitted negligent conduct was clearly manifested in his not determining the negligent manner in which his nonlawyer secretary was carrying out the responsibilities he entrusted to her.

It is further suggested that the Respondent's mitigating factors forcefully out weigh the aggravating factors of: a prior private reprimand in 1974; and his twenty two (22) years of practicing law and are not compelling enough to

support an upward departure of punishment. Thus, the facts giving rise to Respondent's discipline juxtaposed and the criteria set forth by the Court for imposition of discipline, inevitably establishes that the appropriate discipline in this case should be a private reprimand.

FINAL DISPOSITION OF RESPONDENT'S CLIENTS APPEALS

Prior to the Referee's ruling in this case, the State of Florida attempted to set aside previous entered Judgments and sentences in three (3) DUI cases, in which the Respondent represented the Defendants. The County Court ruled in favor of the State of Florida and set aside the pleas. The ruling was attacked in the Circuit Court by filing of a Suggestion for Writ of Prohibition. The case was assigned to Circuit Judge John Dean Moxley who granted the writ. The State appealed Judge Moxley's order to the Fifth District Court of Appeal. At the time of the hearing before the referee on September **18, 1989**, the Fifth District had not yet rendered a decision on the State's appeal.

That on September **26, 1989**, the District Court of Appeal, Fifth District, in a "per curiam affirmed" decision, upheld the lower Court's ruling which exonerated the Respondent's clients: Christine Lyons; Karenanne Janik; and,

Lori Adams, from further prosecution by the State of Florida on the DUI charges. (A-16)

Thus, this decision reinstated the respective initial pleas of Respondent's clients and restored the original Judgments and Sentences that the Trial Court imposed upon them. It is submitted that the end result of these judicial proceedings have clearly demonstrated that Respondent's clients endured "little or no injury" as a result of Respondent's admitted failure to adequately supervise his non-lawyer secretary. Furthermore, the total costs and expenses incurred by the attorneys who represented Respondent's clients throughout the Judicial process, initiated by the State to set aside their respective Judgments and Sentences, have been totally borne by the Respondent.

The Respondent does not intend to suggest or insinuate that the decision of the Fifth District is a vindication for his admitted misconduct. However, Respondent would suggest that the appropriate and recommended discipline for negligent conduct that causes "little or not injury" to the client or the Court is: a private reprimand. See, Florida Standards for Imposing Lawyer Sanctions; paragraph **7.4** which reads:

> Private reprimand is appropriate when a lawyer is negligent in determining whether the lawyer's con-

duct 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.

RESPONDENT'S CHARACTER WITNESSES

The Respondent called two (2) attorney witnesses to speak in his behalf: Robert E. Stone; and, Jerrold A. Bross. Mr. Stone testified that he had known Mr. Mitchell in a professional capacity for eighteen **(18)** years. Most of his contact with Mr. Mitchell took place from **1972** thru **1985** when he served as the elected State Attorney for the Nineteenth Judicial Circuit. He testified that based on his experience and knowledge of Mr. Mitchell during that period of time, his opinion as to Mr. Mitchell's character and reputation was excellent, and that he "Never had reason at all to ever question his (Mr. Mitchell's) ethics, his character, his ability." He further testified:

Q. Was there any irregularities of any sort concerning Mr. Mitchell's conduct involved in any those cases?

A. None. I always found him to be a hard-bargaining lawyer, but he was a man if he told you something, you could count on it.

Jerrold A. Bross, testified that he had known Mr.

Mitchell for twenty two (22) years. He further testified:

I came to Brevard County in 1967 from Miami. My history and knowledge of Mr. Mitchell is I was the city prosecutor in Cape Canaveral. I was then the elected prosecutor for Brevard County.

It was called the county solicitor at that time.

I was chief assistant to the public defender for four years, and then I was chief assistant to Doug Cheshire who was the subsequent state attorney.

I've handled cases with Mr. Mitchell; as a matter of fact I was his partner at one time, so I have extreme knowledge of him. Never found the slightest flaw in his competency, in his integrity, in his honesty.

Dealing with my office we had 11 attorneys on staff and negotiated God knows how many cases with him.

Same thing the cases I've worked with him, the cases I've co-handled my same period when I was Doug Cheshire's chief assistant.

When we were partners and we would discuss cases, his integrity was the highest. I've never seen the slightest first flaw in him.

I found him to be -- do pro bono work for people that couldn't afford it. I know his reputation among the rest of the defense bar because I've been both in those counties.

The court may know I had five offices at one time, with a lot of operation. and many attorneys that I know here, I've never found any defense counsel that has other than the highest regard, and I know that to be true among a number of the member of the bench.

I think the Court should know that. That's on of the reasons I'm in the case. And one of the reasons I'm here today is out of my respect for Mr. Mitchell not only as a friend but as an attorney, and any friendship evolved from that respect as an attorney.

The Florida Bar called no witnesses to refute the testimony of former State Prosecutor's Robert E. Stone and Jerrold Bross as to Mr. Mitchell's "good character, honesty and ability." The Bar did call Robert Wayne Holmes, Assistant State Attorney in Brevard County, Florida, who had very actively negotiated pleas with Mr. Mitchell for the past eight (8) years. He testified:

Q. You yourself have negotiated please on many multiple occasions with Mr. Mitchell. Isn't that correct?
A. I have.
Q. You haven't had any problems with any of those pleas.
A. Nothing in the -- you know, along the nature of these. He's never deceived -- you know, any type of deceit in the sense of forging a name to something or anything of that nature.
Mr. Mitchell attempts to get the best deal he can for his client, so occasionally you have to be very careful of Mr. Mitchell. But it's nothing that would go to the -- you know, what you would call deceit, it's what you would call he's trying to hammer out the best bargain he has, and if you haven't covered all the bases, you know, he will take advantage of whatever the plea situation may be. But that's something that you would deal with most any attorney.

CASE LAW

There are two (2) reported cases wherein an attorney was disciplined for his failure to adequately supervise his nonlawyer personnel. In each of these instances the recommended and approved discipline was a public reprimand. For obvious reasons, there are no cases reported wherein a private reprimand was the discipline imposed.

In The Florida Bar v. Armos, **518** So.2d **919** (Fla. **1988),** this Court approved the referee's recommended discipline of a public reprimand for the failure of the attorney to properly and adequately instruct law office manager concerning regulations governing trust account operations which inevitably led to office manager's mishandling trust accounts. He was further found guilty of violating Disciplinary Rule **9-**102(B)(3), in failing to maintain complete records of **all** funds of clients coming into his possession and render appropriate accounts regarding them.

The Respondent's case is distinguishable in that Armos negligently engaged in conduct that was a violation of a duty owed to his client's as a professional. Furthermore, neither Armos or The Florida Bar sought a petition for review of the Referee's report.

In The Florida Bar v. Sheppard, **529** So.2d **1101** (Fla.

19881, a lawyer who permitted his nonlawyer employee to sign correspondence which did not disclose his nonlawyer status, together with permitting his name to be added to letterhead stationary of a deceased attorney warranted a public reprimand.

Sheppard entered a guilty plea for a consent Judgment and The Florida Bar petitioned the Court for approval of same. The Sheppard case is further distinguishable in that: Sheppard knowingly permitted his nonlawyer to sign correspondence without disclosing her status; and, Sheppard knowingly added his name to stationary of a deceased attorney with whom he had never associated.

There exists a wealth of cases where the discipline imposed for misconduct was a public reprimand. A study of some of these cases is helpful in determining the type of lawyer misconduct which has warranted a public reprimand.

In The Florida Bar vs. Holmes, 356 So.2d 796 (Fla. 19781, the Court approved the referee's recommended discipline of a public reprimand where the attorney was found guilty of a technical but not willful violation of the Code, stemming from the mishandling of a $300.00 retainer.

A public reprimand was warranted for mishandling a client's trust account and trust monies. The Florida Bar v. Holmes, 353 So.2d 85 (Fla. 1977).

The failure to file a federal income tax has warranted a public reprimand. The Florida Bar v. Ryan, 352 So.2d 1174 (Fla. 1977).

A reprimand, rather than a six (6) month suspension, was appropriate where the attorney failed for six (6) month to deliver to his client a status report and refused to respond to his client's inquiries. The Florida Bar v. G.B.T., 399 So.2d 357 (Fla. 1981).

Public reprimand was warranted where an attorney back dated a quit claim deed. The Florida Bar v. Samaha, 407 So.2d 906 (Fla. 1981).

Misuse of client's trust account, conduct adversely reflecting on fitness to practice, business transactions with client where interests differed; and, failure to promptly deliver client funds warranted public reprimand. The Florida Bar v. Pino, 526 So.2d 67 (Fla. 1988).

Falsely representing he had partnership with another attorney, improper payment of referral fees, improper assessment against clients of costs and directly or indirectly providing financial assistance to clients during course of representation warranted public reprimand. The Florida Bar v. Hastings, 523 So.2d 571 (Fla. 1988).

Violation of trust account procedures and failure to

account adequately for client's money warranted public reprimand. The Florida Bar v. Johnson, 530 So.2d 306 (Fla. 1988).

Conduct involving deceit, dishonesty, fraud or misrepresentation and acquiring property interest in course of subject matter of litigation attorney was conducting for client. Referee's recommendation of thirty (30) days suspension not warranted where attorney did not knowingly intend to violate the canon of ethics, and despite his prior public reprimand. Attorney given a public reprimand. The Florida Bar v. McLawhorn, 535 So.2d 602 (Fla. 1988).

Investment of substantial trust account funds without disclosure in ventures in which attorney held potentially conflicting interest warranted public reprimand. The Florida Bar v. Dougherty, 541 So.2d 610 (Fla. 1989).

CONCLUSION

Provided with the criteria as adopted by the Board of Governors in the F.S.I.L.S., together with an analogy of appropriate sanctions to be applied by a reading of the Florida Supreme Court decisions, one is compelled to conclude that to warrant a sanction of suspension - the attorney must have knowingly engaged in misconduct that resulted in injury to the client, the public, or the legal system. The distinction

being: he attorney's conduct was done kno/ingl as opposed to negligently. Furthermore, if the attorney did not negligently engage in the misconduct; but, as here was negligent in determining the misconduct of his nonlawyer secretary only a "private reprimand" is a warranted sanction. Also, the injury endured by the clients was little more than inconvenience, which was more the product of the action taken by the Brevard County State Attorney than the Respondent. Perhaps it is apt to recall the words of Samuel Johnson: "The power of punishment is to silence, not to confute."

WHEREFORE, Respondent would respectfully urge the Court that the Referee's recommended discipline is inappropriate in this case. That this Honorable Court impose a private reprimand as the appropriate discipline under the facts presented in this case. Or, in the alternative, if the Court is inclined to believe the Respondent's negligence reached the point where it could be interpreted as negligently engaging in the misconduct that the Court impose a public reprimand. On the other hand, if the Court decides to follow the Referee's recommended discipline that the Court would waive the requirement under Rule 3-5.1(h), i.e. that Respondent be required to furnish his clients a copy of the order of suspension and that he forgo taking any new business

for thirty (30) days proceeding the suspension.

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to John Root, Esq. Staff Counsel, The Florida Bar, this 25th day of April, 1990.

ANDREW A. GRAHAM, ESQ.
1825 S. Riverview Drive
Melbourne, Florida 32901

JERROLD AARON BROSS, ESQ.
111 S. Scott Street
Melbourne, Florida 32901