IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Case No. 76,250
[TFB Case No. 89-30,750 (07C)]

ROBERT E. KRAMER,

Respondent.
_____/

COMPLAINANT'S REPLY BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the complainant, The Florida Bar, will be referred to as "the Bar".

ARGUMENT

The respondent's several arguments do not have merit. The Bar reiterates and stands on its initial argument as to all matters.

Bar Counsel believes a brief note is in order to clarify terminology. The respondent's brief dated March 4, 1991, titled a "Reply Brief" should have been titled as the respondent's answer brief. The respondent's brief dated March 8, 1991, titled a "Reply Brief" should have been titled the respondent's answer brief.

AS TO POINT ONE

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

The criteria set forth in Rule of Discipline 3-5.1(b)(1) are to be utilized by a grievance committee in determining whether or not misconduct qualifies for the finding of minor misconduct. The existence of one or more of these criteria does not mean that a finding of minor misconduct by the committee is automatically prohibited any more than the absence of all the criteria automatically means that a grievance committee must find minor misconduct. Subparagraph (2) of the Rule allows the committee discretion in making its findings based upon the facts of each individual case.

In the instant matter, the committee elected not to recommend minor misconduct after hearing the testimony and

considering the evidence presented. The respondent's misconduct could have prejudiced his client's interests. This is true regardless of whether or not Mr. Flanary got a "good deal" from the respondent or if he would have lost his property even if the respondent had not loaned him the money. The existence of this criteria clearly marks this case as being inappropriate for a finding of minor misconduct.

Business dealings with clients, although not prohibited, are fraught with conflict problems as this case clearly demonstrates. This point cannot be emphasized enough to members of the Bar who are tempted to enter into potentially profitable business dealings with clients where, despite good intentions, an attorney's personal interests conflict with those of an unsuspecting client who may be harmed as a result. Human nature, being what it is, makes such problems almost inevitable. It is for this very reason that the Rules now require attorneys to reveal a potential conflict in writing to their clients and encourage their clients to seek the advice of independent counsel.

ARGUMENT

AS TO POINT TWO

THE REFEREE'S RECOMMENDATION FOR DISCIPLINE OF A PRIVATE REPRIMAND, IN A PUBLIC PROBABLE CAUSE CASE, IS ERRONEOUS IN LIGHT OF RULE 3-5.1(b) OF THE RULES OF DISCIPLINE WHICH PROVIDES THAT MINOR MISCONDUCT IS THE ONLY TYPE OF MISCONDUCT FOR WHICH A PRIVATE REPRIMAND IS AN APPROPRIATE DISCIPLINARY SANCTION; AND RULE 3-7.5(k)(1)(3) WHICH PROVIDES THAT A REFEREE MAY ONLY RECOMMEND A PRIVATE REPRIMAND IN CASES OF MINOR MISCONDUCT.

The respondent's argument under Point Two is somewhat confusing. It is the grievance committee's recommendation of probable cause that, under the Rules, prevents a referee from recommending a private reprimand for admonishment. If the Board of Governors rejects the Report of Minor Misconduct, then under Rule 3-5.14 the matter proceeds to a trial before a referee who may recommend any level of discipline including a private reprimand or admonishment. This is contrary to the respondent's statement in his brief that a referee may never recommend a private reprimand. It should be noted, however, that complaints of minor misconduct are the only time that the Rules authorize a referee to make a disciplinary recommendation of private reprimand or admonishment.

Also contrary to the respondent's statement in his brief, a referee may not find an attorney not guilty of any wrongdoing and still recommend that he or she be disciplined.

The respondent fails to understand that it is the Rules Regulating The Florida Bar and not "some unknown reason" which

prohibits a referee from recommending a private reprimand or admonishment in a probably cause case. Furthermore, a private reprimand or admonition is not a middle ground level of discipline but rather is the lowest form of discipline, short of simple probation, that can be imposed. In fact, probation is not a form of discipline in the truest sense of the word and is very rarely imposed independent of some other form of discipline such as a public reprimand or short-term suspension.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court to review the Report of Referee, the findings of fact and recommended discipline, and impose a public reprimand as well as order payment of costs in this proceeding, currently totalling $2,616.52.

Respectfully submitted,

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BY:  for
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Reply Brief have been furnished by regular 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 regular U.S. mail to Robert E. Kramer, respondent, at Post Office Box 2356, Daytona Beach, Florida 32115; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 14th day of March, 1991.

for
DAVID G. McGUNEGLE
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