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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

PAUL JOHN DUBBELD,

Respondent.
_____/

Case No. 77,340
[TFB Case Nos. 90-30,934 (07A)
and 90-31,307 (07A)]

INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as the Bar.

The transcript of the final hearing shall be referred to as "T".

The Report of Referee shall be referred to as "RR".

STATEMENT OF THE CASE

The Seventh Judicial Circuit Grievance Committee "A" voted to find probable cause in The Florida Bar case numbers 90-30,934 (07A) and 90-31,307 (07A) on October 19, 1990. The committee earlier had considered these two cases and had voted on June 15, 1990, to place them on monitor status with the requirement that the respondent provide a copy of the contract he had with the Florida Lawyers Assistance, Inc. and provide the Bar with a monthly status report or a release so that Mr. Kilby of Florida Lawyers Assistance, Inc. could provide it to the Bar. Because the respondent furnished only one monthly status report, the committee recalled both cases and voted to find probable cause.

The Bar filed its two count complaint on February 5, 1991. The final hearing was held on June 17, 1991, and the referee submitted his report on August 13, 1991. The referee recommended the respondent be found guilty of violating the following rules in Count I of the Bar's complaint: Rule of Discipline 3-4.3 for engaging in conduct that is contrary to honesty and justice; and Rules of Professional Conduct 4-8.4(a) for violating the Rules of Professional Conduct; and 4-8.4(b) for engaging in criminal conduct that reflects adversely on his fitness as a lawyer in other respects. As to Count II, the referee recommended the

respondent by found guilty of violating the following Rules of Professional Conduct: 4-4.4 for using means that have no substantial purpose other than to embarrass, delay, or burden a third person; and 4-8.4(a) for violating the Rules of Professional Conduct.

The referee recommended the respondent be admonished and placed on an unsupervised two year period of probation with the sole condition that the respondent not imbibe to the excess in alcoholic beverages and that he not operate any motor vehicle within four hours after imbibing any alcoholic beverages. As reasoning for his recommendation, the referee stated that Bar Counsel had advised him there were other instances where referees had recommended admonishments or private reprimands in probable cause cases and the Supreme Court of Florida had upheld these recommendations as to discipline. The referee believed the mitigating circumstances in this case were sufficient to warrant the recommendation of a lesser form of discipline than a public reprimand. In mitigation, the referee found that the circumstances leading to the complaint concerning the respondent's DUI conviction were thoroughly covered by the local news media and an additional public reprimand would have served only to republish the event in the minds of the citizenry of the county where the respondent practices law. In effect, the

referee opined that the respondent would be subjected to discipline twice. Furthermore, the respondent testified that he had voluntarily completed alcohol abuse courses, attended Alcoholics Anonymous, and voluntarily entered himself into a twenty-nine day in-house alcohol rehabilitative program and successfully completed same. The referee found the respondent's unacceptable conduct was a direct result of his abuse of alcohol. The referee stated he took into account the respondent's prior disciplinary history, including the fact that one case may have arisen due to the respondent's abuse of alcohol at the time.

The referee's report was considered by the Board of Governors at its September, 1991, meeting. The Board voted to appeal only the referee's recommendation as to discipline.

The Bar filed its petition for review on October 14, 1991, which, due to inadvertence, was somewhat overdue.

STATEMENT OF THE FACTS

Except as otherwise noted, the following facts are taken from the Report of Referee.

In The Florida Bar case number 90-30,934 (07A), the respondent was involved in a traffic accident in Daytona Beach Shores on or around January 7, 1990. He drove into the path of an oncoming car and caused a collision. Although there were no injuries sustained in the accident, there was approximately $6,000.00 worth of property damage. The respondent was arrested after he failed a field sobriety test and refused to submit to a breath-alcohol test. He was charged with driving while under the influence of alcohol resulting in property damage, careless driving, failure to yield at an intersection, and failure to carry and exhibit a driver's license on demand. The case ultimately proceeded to a jury trial which resulted in the respondent being found guilty of driving while under the influence of alcohol. The other charges were dismissed. A judgment and sentence was filed in open court on October 25, 1990. The respondent was ordered to pay $475.00 in fines and costs. He was placed on probation for six months during which time he was to perform fifty hours of community service, consume no alcohol, and provide an alcohol screening report to the

Salvation Army within seventy-two hours. The respondent's driver's license was suspended for six months. On November 2, 1990, the respondent moved the court to convert his fifty hours of community service to a five hundred dollar fine due to his heavy work schedule. The court granted his motion on November 5, 1990.

In The Florida Bar case number 90-31,307 (07A), the respondent engaged in telephone harassment of Mrs. Laurie Bonk. On or around March 18, 1990, Mrs. Bonk received a message on her answering machine at home. This answering machine was also used for her husband's business. The caller identified himself as Paul Dubbeld. The respondent swore and called Mrs. Bonk an obscene, or at least patently offensive, name during the call.

Apparently, Mr. and Mrs. Bonk had a friend whose ex-wife had an affair with the respondent. During the time the affair occurred, the respondent was married. The respondent apparently believed Mrs. Bonk was the source of telephone calls to the respondent's wife regarding the respondent's affair. The respondent made the telephone call to Mrs. Bonk while under the influence of alcohol and for the purpose of harassing Mrs. Bonk.

Although criminal charges were filed against the respondent, they were later summarily dismissed.

SUMMARY OF THE ARGUMENT

The respondent has previously received two private reprimands (now known as admonishments) for engaging in similar misconduct. One of the reprimands was for behavior that resulted from the respondent's abuse of alcohol. Both cases, like the instant matter, demonstrate the use of poor judgment and improper behavior with respect to the respondent's personal life. Although none of these incidents involve the respondent's practice of law, they clearly have a negative impact on the public's perception of attorneys. The respondent's DUI conviction is well known locally and the issuance of a private admonishment would not serve the purposes of discipline as enumerated in The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991). In fact, an admonishment would probably serve only to reinforce in the public's mind the belief that attorneys protect their own. This and the cumulative nature of the respondent's misconduct dictate that the grievance committee's recommendation should be respected and the respondent ought to be denied a third "bite at the apple".

Furthermore, Rules of Discipline 3-5.1 and 3-7.5(k)(1)(3) do not authorize the referee to recommend an admonishment in a public probable cause case absent the filing of a complaint of

minor misconduct. The rules clearly indicate that at the referee level, a recommendation of a the local grievance committee should be respected concerning the decision not to find minor misconduct. This Court, as the final decision maker concerning the appropriate level of discipline, is the only entity which may authorize an admonishment in a probable cause case. The referee simply lacks the authority to transcend the rules adopted by this Court.

ARGUMENT

POINT I

THE CUMULATIVE NATURE OF THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY WARRANTS A PUBLIC REPRIMAND RATHER THAN AN ADMONISHMENT.

The Bar does not take issue with the referee's findings of fact or recommendations as to guilt. It does, however, contest his recommendation as to discipline. This Court's scope of review on a referee's recommendations as to discipline is broader than that afforded to his findings of fact because the ultimate responsibility for entering an appropriate order rests with this Court. The Florida Bar v. Patarini, 548 So.2d 1110 (Fla. 1989).

The respondent's difficulties, in both the past and present matters, stem from the effects of alcohol abuse and it appears the respondent may still have to effectively deal with his addiction problem. In fact, his sworn testimony before the referee at the final hearing clearly indicates he consumed alcoholic beverages after completing his rehabilitation program. (T. p 32)

In light of the respondent's prior disciplinary history, the Bar maintains nothing less than a public reprimand is sufficient. Standing alone, the respondent's misconduct might have resulted

in the grievance committee recommending an admonishment. This Court, however, deals more harshly with cumulative misconduct than it does with isolated misconduct. The Florida Bar v. Coutant, 569 So.2d 442 (Fla. 1990). The respondent has twice been admonished or privately reprimanded for engaging in improper personal behavior. One of these cases involved the respondent's abuse of alcohol.

In The Florida Bar v. Dubbeld, The Florida Bar case number 89-30,523 (07A), the respondent appeared before the grievance committee to receive a private reprimand. He had been stopped by a police officer after attempting to make an unlawful turn. He refused to comply with the officer's instructions that he back his car out of the intersection and became verbally abusive. The respondent spoke loudly enough for onlookers to hear his profane comments. The committee believed the respondent could have been charged with disorderly conduct which is a misdemeanor offense. A copy of the report of minor misconduct is included in the Appendix.

On February 20, 1990, the respondent was again privately reprimanded although no Board appearance was required. He was placed on an indefinite period of probation during which time he was to continue therapy until his therapist deemed it no longer

necessary and he was required to furnish The Florida Bar with quarterly reports from his therapist as to his progress. The misconduct involved an incident of domestic violence which occurred in September, 1989. The respondent had been drinking and a marital dispute with his wife escalated to the point where the respondent struck his wife. She became fearful and called the police from a neighbor's home. When they officers arrived, they detected the odor of alcohol on the respondent's breath and placed him under arrest. Ultimately, the respondent entered into a plea and sentencing agreement where he plead no contest to battery, a first degree misdemeanor, and disorderly intoxication, a second degree misdemeanor. A copy of the report of minor misconduct in The Florida Bar v. Dubbeld, The Florida Bar case number 90-30,386 (07A) is included in the Appendix.

The misconduct charged in the case at bar occurred after the respondent received the report of minor misconduct in case number 90-30,386 (07A). Because the respondent was on probation, the grievance committee decided to table the matter and monitor the respondent's progress with Florida Lawyers Assistance, Inc. (T. pp 19-21) The respondent, however, failed to comply with the terms set out by the grievance committee. Although he filed one monthly progress report, he did not file any others. (T. pp. 21,23) For this reason, the committee revisited the instant

matters and voted to find probable cause. (T. p. 23)

Attorneys have a responsibility to conduct themselves in a manner that is consistent with the standards of the profession. Although the respondent's misconduct did not involve the practice of law, it does have an impact on the public's view of the profession as a whole, especially when a attorney is arrested for driving while under the influence. As this Court stated in The Florida Bar v. Bennett, 276 So.2d 482 (Fla. 1973), "'An attorney is an attorney is an attorney' much as the military officer remains 'an officer and a gentleman' at all times." This Court recently further elaborated on this position in The Florida Bar v. Della-Donna, 583 So.2d 307 (Fla. 1989).

> The practice of law is a privilege which carries with it responsibilities as well as rights. That an attorney might, as it were, wear different hats at different times does not mean that professional ethics can be "checked at the door" or that unethical or unprofessional conduct by a member of the legal profession can be tolerated. (At p. 310)

Case law also supports the Bar's position that the respondent's misconduct does not qualify as minor misconduct.

Although consent judgments have little, if any, precedential value, due to the paucity of cases involving DUI convictions, the Bar finds it necessary to use them in an illustrative manner.

In The Florida Bar v. Hooper, 564 So.2d 1080 (Fla. 1990), an attorney was suspended for one year. He had been convicted of engaging in indecent exposure. While on probation, he committed another similar offense. He then repeatedly failed to appear in court for appearances arising from both the new offense and his violation of probation charges. The referee concluded that the accused attorney had a penchant for engaging in a type of behavior which caused him to be unable to effectively perform his duties as an attorney. The court ordered the attorney to undergo psychiatric or psychological evaluations and submit himself to any treatment recommended as a result of the evaluations.

In The Florida Bar v. Finkelstein, 522 So.2d 372 (Fla. 1988), an attorney was suspended for one year and placed on a three year period of probation for his conviction of felony possession of illegal drugs and the misdemeanor offense of driving while under the influence. The attorney plead no contest to the felony and misdemeanor charges. Adjudication of guilt was withheld on the felony charges and he was placed on probation for five years. The attorney filed a conditional guilty plea in the

Bar disciplinary proceedings wherein he acknowledged violation of the Rules Regulating The Florida Bar by virtue of his criminal behavior. The terms of the disciplinary probation required that the attorney comply with all the conditions of his criminal probation, comply with all recommendations made by Florida Lawyers Assistance, Inc. and continuously participate in a program prescribed by that organization, abstain from the use of alcohol and illegal drugs, subject himself to random drug screening, and pay the costs of evaluation, counseling and testing arranged for and provided to him by Florida Lawyers Assistance, Inc. Failure to comply with any of the conditions of the probation would constitute grounds for its termination and he would be held in contempt or suspended.

In The Florida Bar v. Allen, 518 So.2d 916 (Fla. 1988), an attorney entered into a conditional guilty plea for consent judgment after he was twice adjudicated guilty of driving while under the influence of alcohol. The attorney was ordered to appear before the Board of Governors of The Florida Bar to receive a public reprimand and was placed on a three year period of probation. In addition to the DUI conviction, the attorney was held in contempt of court and incarcerated because he arrived late for a client's court appearance and appeared in court while under the influence of alcohol. This also resulted in the

attorney being incarcerated because he had violated the terms of his criminal probation imposed in connection with his DUI conviction. The terms of the attorney's disciplinary probation were as follows: the attorney was required to be evaluated by and participate in and abide by any and all recommendations of treatment as outlined by Florida Lawyers Assistance, Inc. He could not be released from probation until Florida Lawyers Assistance, Inc. certified to The Florida Bar that his alcoholism was under control and would not impair his ability to practice law. The attorney was required to refrain from the consumption of alcohol and abide by all conditions of the probation in his criminal case.

In The Florida Bar v. Milin, 517 So.2d 20 (Fla. 1987), an attorney was suspended for ninety days and placed on a one year period of probation pursuant to the terms of a conditional guilty plea. The attorney was charged in a multiple count complaint of making misleading statements to the court in a motion to disqualify a judge, neglecting to prepare a settlement agreement for incorporation in a marital dissolution decree, advising the client that the document had been filed when, in fact, it had not, misleading a client as to the filing of a bankruptcy petition on behalf of the client and eventually filing said petition without signing as attorney because she was not admitted

to practice before the federal court, and being convicted of driving while under the influence of alcohol. The attorney also appeared in court as an attorney at a time when she had been suspended for non-payment of dues and misrepresented her status to the judge.

In determining the appropriate level of discipline, three considerations must be made as most recently laid out in The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991). First, the judgment must be fair to both society and the respondent, protecting the former from an unethical attorney without unduly denying them the services of a qualified lawyer. A public reprimand would not deny the public the respondent's services.

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. The respondent's prior disciplinary history shows a disturbing pattern where alcohol abuse plays a major role. One of the basic tenets of alcohol recovery programs is that the alcoholic must experience the adverse consequences which flow from his addictive behavior. The recovery process is a long and arduous one for most addicts. A public reprimand would best serve to encourage the respondent's continued efforts toward rehabilitation rather than hinder them.

The respondent's past disciplinary history and his testimony before the referee at the final hearing shows that his recovery is not complete.

Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misconduct. Perhaps the respondent's public reprimand will cause other attorneys who engage in unprofessional behavior, even in their personal lives, to pause and reflect upon their own conduct.

In addition, the creation and protection of a favorable image of the legal profession is an equally important consideration. The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984).

POINT II

THE REFEREE'S RECOMMENDATION FOR DISCIPLINE OF AN ADMONISHMENT, 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 Rules Regulating The Florida Bar divide misconduct into

two separate categories: findings of minor misconduct which are to be handled and disposed of at the grievance committee level subject to the approval of the Board of Governors of The Florida Bar and probable cause findings which are to be handled by the filing of a formal complaint with this Court and appointment of a referee. Minor misconduct is a term of art which refers to a specific type of discipline that results in an admonishment (formerly known as private reprimand). The Rules of Discipline define minor misconduct in a negative sense. The term normally refers only to offenses of minor significance. The criteria in Rule 3-5.1(b) state what types of cases will not be considered minor misconduct absent unusual circumstances.

The dichotomy created by of the Rules of Discipline clearly shows that minor misconduct is a finding made by the local circuit grievance committees and ratified by either the designated reviewer or the Board of Governors subject to rejection by the accused attorney. In the event an attorney rejects minor misconduct, then, after trial before a referee, the matter is reviewed by this Court. In that case, the rules specifically empower the referee to impose any discipline ranging from an admonishment to disbarment.

A referee has certain constraints imposed upon him by the

rules. He is authorized to recommend a private reprimand only when a complaint of minor misconduct has been filed. See Rule of Discipline 3-5.1(b)(4). Allowing a referee to recommend a private reprimand in a probable cause case in direct contravention to the Rules of Discipline is no different than allowing a referee to recommend an indefinite period of suspension, a suspension in excess of ninety days with automatic reinstatement, a suspension of more than three years, or permanent disbarment. The rules do not allow recommendations of such disciplines and this Court should correct the referee's erroneous recommendation in this case as it has done in the past when other referees have made disciplinary recommendations that were erroneous. See for example, The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984).

The Bar recognizes this Court may choose to exercise its discretion and impose any level of discipline it deems appropriate under the circumstances of the case. See The Florida Bar v. Doe, 550 So.2d 1111 (Fla. 1989).

In the case at hand, the grievance committee, after hearing all of the testimony and reviewing the evidence, voted to place the matter on monitor status. After the respondent failed to comply with the terms outlined by the committee, (i.e.:

submitting monthly reports to the Bar) the committee revisited the matter and voted to find probable cause rather than minor misconduct. Under the rules, therefore, the Bar submits the referee, in making his recommendation as to discipline, should have deferred to the grievance committee with respect to its decision not to find minor misconduct in this case. The Bar submits it is necessary to correct what is an obviously erroneous recommendation under the rules and that a public reprimand by personal appearance before the Board of Governors is the appropriate discipline to impose along with payment of costs now totalling $1,414.58.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, recommendation of guilt, and recommendation as to discipline, and accept the findings of fact and recommendation as to guilt, but reject the recommendation as to discipline and order the respondent be publicly reprimanded by personal appearance before the Board of Governors and tax costs against the respondent now totalling $1,414.58.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by Airborne Express mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by certified mail, return receipt requested, number P 832 289 933, to respondent, Mr. Paul John Dubbeld, 444 Seabreeze Boulevard, Suite 942, Daytona Beach, Florida, 32118-3952; 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 29th day of October, 1991.

Respectfully submitted,

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