IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 77,837
[TFB No. 89-30,129 (09E)]

v.

HURLEY P. WHITAKER,

Respondent.
_____/

REPLY BRIEF

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SUMMARY OF ARGUMENT

While it is within the referee's discretion to recommend discipline based on his findings of fact, the Rules of Discipline explicitly prohibit a referee from recommending an admonishment in a public probable cause case.

ARGUMENT

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

Respondent argues that it is within the referee's province to recommend an admonishment in a probable cause case. Although the Florida Bar does not disagree that the referee has wide discretion with respect to what discipline is appropriate in probable cause cases, we disagree that an admonishment is among them and contend that it is prohibited by the Rules Regulating the Florida Bar. Further, the Florida Supreme Court is not bound by a referee's recommendations in determining an appropriate discipline. The Florida Bar v. Langston, 540 So.2d 118 (Fla. 1989).

Respondent argues that since the grievance committee found probable cause, he was not afforded the opportunity to reject its finding as set forth in Rule 3-5.1(b)(4). However, respondent misreads the rule to mean that if the respondent rejects a finding of **probable cause**, the referee can recommend any discipline, including an admonishment. The rule states and means that if the respondent rejects a report of **minor misconduct**, it is then deemed a finding of probable cause **for minor misconduct** and the referee can impose any discipline from an admonishment to greater discipline.

Rule 3-5.1(b)(4) does not permit the respondent to reject the grievance committee's finding of **probable cause**. However, respondent fails to recognize that had he wanted to reject the grievance committee's finding of probable cause, although there is no express rule provision therefor, he could have admitted minor misconduct as set forth in Rule 3-5.1(b)(5) which allows a respondent 15 days after the committee's finding of probable cause to tender an admission of minor misconduct. Respondent failed to do so.

As further support for his contention that the referee can recommend an admonishment after a finding of probable cause, respondent cites Rule 3-7.6(d). However, Rule 3-7.6(k)(1)(3) explicitly states that "an admonishment may be recommended **only** in cases on a complaint of **minor misconduct**" (emphasis added). To accept the respondent's view that a referee has the discretion to make such a recommendation renders such language virtually meaningless. In this instance the Referee found the respondent guilty of misconduct based on a complaint of **probable cause** and erroneously recommended an admonishment.

Throughout his argument respondent refers to rules governing minor misconduct and admonishments. These rules are inapplicable in this case because it is based upon a finding of probable cause and the respondent failed to tender an admission of minor

misconduct. Respondent argues that under Rule 3-5.1(b)(1) minor misconduct may be punished by an admonishment if it does not involve certain types of misconduct. Again respondent misreads the rule to mean an admonishment is the only appropriate discipline as long as these elements are not present. The rule is intended to exclude such conduct from the minor misconduct classification, not to mean that it is the only conduct that is not considered minor. This Court has confirmed that an admonishment (formerly private reprimand) is the appropriate sanction when the misconduct can be categorized as minor, or in other words, "only for the most **insignificant** of offenses" (emphasis added). The Florida Bar v. Kirkpatrick, 567 So.2d 1377, 1379 (Fla. 1990). The Court has further stated that "public reprimand should be reserved for such instances as isolated instances of neglect...; or lapses of judgment." The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980); The Florida Bar v. Price, 569 So.2d 1261 (Fla. 1990). The Bar recognizes that the Court has not specifically addressed this issue in The Florida Bar v. Kramer, No. 76,250 (Fla. Jan. 30, 1992) wherein the Court found the respondent's conduct not to be minor and therefore imposed a public reprimand rather than an admonishment as recommended by the referee.

The respondent disagrees with some of the Referee's findings of fact. The Florida Supreme Court accepts the

referee's findings of fact as correct unless they are clearly erroneous, or lacking in evidentiary support. The Court has stated that the "referee's findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990); The Florida Bar v. Bajozky, 558 So.2d 1022 (Fla. 1990). The Referee's findings are supported by the record and the respondent has admitted guilt as to the violations found based thereon.

In this instance the Referee found that the respondent violated Rules 4-1.3 and 4-1.4 for neglecting his client's case and for failing to keep her informed. The respondent admitted such failures but attempts to mitigate his client's injury by taking issue with the Referee's finding of facts and by assessing blame on his client for not seeking other legal counsel if she was dissatisfied with his services. Further, the respondent erroneously and speculatively argues that by letting the statute of limitations run his client's only prejudice is that she would have to sue the respondent and still prove the case he was hired to pursue.

Respondent argues that since he has no prior disciplinary record that no greater discipline that an admonishment should be imposed. However, prior discipline is not a pre-requisite to,

just as a lack thereof does not preclude, imposition of a public reprimand. Respondent mistakenly justifies a discipline less than a public reprimand by citing cases where such discipline has been imposed and arguing that "usually in a case in which a public reprimand is issued one of the overriding issues is some misleading or intentional misleading..., some falseness...to avoid responsibility for actions." This is a blanket statement without support as public reprimands have been imposed for many types of misconduct, many of which involve issues of unintentional neglect and lack of communication. The Florida Bar v. Grant, 432 So.2d 53, 54 (Fla. 1983) - Public reprimand for failing to take action for two years resulting in dismissal of case; The Florida Bar v. Knowlton, 527 So.2d 1378 (Fla. 1988) - Public reprimand for neglectful conduct very similar to instant case; The Florida Bar v. Castle, 512 So.2d 162 (Fla. 1987) - Public reprimand for failure to refile dismissed action - no showing of intentional neglect; The Florida Bar v. Riskin, 549 So.2d 178 (Fla. 1989) - Public reprimand for neglect - failing to file suit until after expiration of statute of limitations; The Florida Bar v. Stein, 484 So.2d 1233 (Fla. 1986) - Public reprimand for failure to follow up on legal matters; The Florida Bar v. Cervantes, 476 So.2d 668 (Fla. 1985) - Public reprimand for failure to conclude dissolution.

Respondent has failed to provide any viable support for his

position that a public reprimand is an inappropriate discipline in this instance. The Supreme Court has taken the position that important purposes of discipline include protection of the public, punishment and rehabilitation of the attorney who commits ethical violations. In addition, deterrence of other members of the Bar and creation of a favorable image of the profession are equally important, which "will not occur unless the profession imposes visible and effective disciplinary measures...". The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984); The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991).

The Florida Bar reiterates its position as set forth in its Initial Brief that anything less than a public reprimand under caselaw and current standards for imposing disciplinary sanctions is clearly inappropriate.

Therefore, The Florida Bar requests this Court to find the respondent in violation of the rules as recommended by the Referee and to impose the public discipline warranted in this case.

CONCLUSION

WHEREFORE, The Florida bar respectfully requests this Honorable Court to review the Report of Referee, findings of fact and recommended discipline and to impose nothing less than a public reprimand and payment of costs in this proceeding totaling $1,192.83.

Respectfully submitted,

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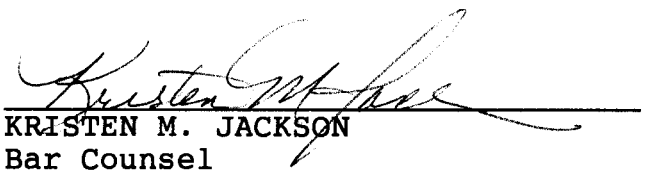
BY: 
KRISTEN M. JACKSON
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing have been furnished by ordinary 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 Mr. R. Lee Dorough, 45 West Washington Street, Post Office Box 1906, Orlando, Florida, 32802-1906, Attorney for Respondent; and a copy of the foregoing has been furnished by ordinary mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 11th day of February, 1992.

Kristen M. Jackson

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