IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case No. 89,111

v.

ROBERT PAUL. JORDAN, II,

Respondent.
_____/

On Petition for
Review of the Referee's Report
in a Disciplinary Proceeding.

REPLY BRIEF OF RESPONDENT

ROBERT P. JORDAN, II
1975 Palm Bay Rd., #5
Palm Bay, Florida 32905
407-725-1122

'TABLE OF AT JTHORITIES

OTHER AUTHORITIES

ARGUMENT

I. THE REFEREE IMPROPERLY CONSIDERED THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY

The Referee improperly considered the Respondent's prior disciplinary history. The Florida Bar properly concedes that the Court's Orders rendered in The Florida Bar v. Jordan, 682 So. 2d 548 (Fla. 1996) and in The Florida Bar v. Jordan, 682 So. 2d 547 (Fla. 1996), were entered after the alleged instant misconduct and would therefore be excluded as "prior discipline" or "cumulative misconduct" under The Florida Bar v. Carter, 429 So, 2d 3 (Fla. 1983) and therefore could no be used by the referee in making a recommendation of discipline. Knowing this to be the case, the Bar now argues that the past conduct shouldn't be excluded as an aggravating factor under Standards 9.22 © and (d), Florida Standards for Imposing Lawyer Sanctions.

The Bar cites The Florida Bar v. Adler, 589 So. 2d 899 (Fla. 1991) in support of its position. However, Adler is quite distinguishable from the present case. The case is that the referee in Adler made specific finding of both mitigating and aggravating factors in making his decision. No such fmdings were made in the present case. In the absence of such findings, the Court is not obligated to affirm that recommendation.

Secondly, the Bar argues, citing The Florida Bar v. Golden, 566 So. 2d 1286, 1287, that "cumulative misconduct can be found when the misconduct occurs near in time to the other offenses, regardless of when the discipline is imposed". (Emphasis added) However, again this argument fails because there was no such fmding by the referee in the present case.

Thirdly, the Bar argues because it is this Court's ultimate responsibility to determine the appropriate level of discipline, it is appropriate for this Court to consider in aggravation, discipline imposed which can't be considered prior discipline. The Bar in effect argues that this Court

should ignore its own decisions and consider a prior history this Court has said should not be considered.

Lastly, the Bar argues that a course of conduct has been shown. Again, no such finding was made by the referee. To support its argument, the Bar cites in its brief reference to the case of The Florida Bar v. Jordan, 690 So. 2d 1301 (Fla. 1997) which is not part of the record having been rendered after the hearing before the referee.

I. THE REFEREE'S DECISION IS NOT SUPPORTED BY THE EVIDENCE

The Respondent's misconduct warrants no more that a six-month suspension.

The Bar argues that such a punishment is not appropriate because of Respondent's prior disciplinary history. However, if the Court agrees that the cases involving the suspension of the Respondent should not be considered, then the only history the Court could consider would be a private and public reprimand.

This Court in The Florida Bar. Whitaker, 596 So. 2d 672 (Fla. 1992) found that a public reprimand was appropriate when Whitaker neglected a matter allowing the statute of limitation to run and failed to deep the client reasonably informed.

Even in Florida Bar v. Morrison, 669 So. 2d 1040 (Fla. 1996) where the Court ruled that a one (1) year suspension was proper, the Referee had made numerous findings in aggravation. No such findings were made in the present case. Specifically in Morrison, the Court found that he failed to cooperate in the Bar's disciplinary proceeding, showed indifference to making restitution and refused to acknowledge the wrongful nature of his misconduct.

The Referee found just the opposite in the present case. The Referee found that the Respondent admitted his wrong doing except for one count, and found that the Respondent was

attempting to make arrangements for restitution, which in fact caused the Referee to Find Respondent guilty of count IV.

In Morrison, a statute of limitations had expired, and the attorney had collected over thirty-two thousand dollars ($32,000) in fees which he failed to return. In the second case against Morrison, no action was taken on a matter for over four (4) years. The facts of the present case do not compare with those in Morrison.

The other cases cited by the Bar are inapplicable. The Florida Bar v. Greenspahn, 396 So. 2d 182 (Fla. 198 1) and The Florida Bar v. King, 242 So. 2d 705 (Fla 1971) both were rendered prior to the Florida Standards for Imposing Lawyer Sanctions were adopted by the Board of Governors in November, 1986.

In The Florida Bar v. King, 664 So. 2d 925 (1995) there was a finding of aggravating factors and the Respondent was on probation at the time of the alleged misconduct.

III. THE REFEREE IMPROPERLY RECOMMENDED STJSPENSION UNTIL PROOF OF PASSAGE OF THE ENTIRE BAR EXAM

The Referee improperly recommended that Respondent take and pass the entire bar examination. It is true that the referee has wide latitude in recommending sanctions, there must still be a finding to support such a recommendation. The Florida Bar v, Moran, 462 So. 2d 1089 (1985)

In Moran, the Court rejected the referee's recommendation that the Respondent obtain substance counseling when there was no finding or evidence to support that recommendation. There was no finding of fact to support the recommendation of the referee in the present case.

Despite the findings in Morrison, the Court only required passage of the ethics portion of the bar examination. The same held true in The Florida Bar v. Flowers, 672 So. 2d 526 (Fla. 1996).

CONCLUSION

The Florida Bar concedes that the two cases of discipline rendered against the Respondent could not be used as prior discipline and urges the Court to ignore its own rulings and use them as aggravating factors against the Respondent. The facts being what they are, those cases cannot be used as either prior discipline or aggravating factors. As a result, the one (1) year suspension is unduly harsh and improper

Respondent should only have to pass the ethics portion of the Florida Bar Exam based on Morrison and Flowers.

Respectfully Submitted,

ROBERT P. JORDAN, II
1975 Palm Bay Rd., #5
Palm Bay, Fl 32905
407-725-1122

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the original and seven copies of the Reply Brief of Respondent was sent by regular U.S. mail to Clerk, Supreme Court of Florida, Supreme **Court** Building, Tallahassee, Florida, 32399-1927 and a copy to John T. Berry, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl 32399-2300 and to James Keeter, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801-1085 this 24th day of September, 1997

ROBERT P. JORDAN, II