

# REFEREE SEMINAR

25 MARCH 2008

This outline is heavily based on the PowerPoint overview referenced in Appendix D, as updated and reorganized March 7, 2008, by Judge Diana L. Moreland, Circuit Judge, Twelfth Judicial Circuit.

Unless otherwise indicated, all Rule xxx references in this document are to the Rules Regulating The Florida Bar. These rules are available at [www.flabar.org](http://www.flabar.org). If you are reviewing this document online, you may [access the Rules Regulating The Florida Bar by clicking this link](#).

## A. Pre-Appointment of Referee:

1. Florida Bar Staff
  - a. Investigation/Intake
    - Jurisdiction?
    - True Violation?
    - Response
    - Rebuttal
    - Recommendation/Action:
      - Referral to Attorney/Consumer Assistance Program
      - Diversion Program
      - Fee Arbitration or Mediation
      - Close File
      - Referral to Branch Office
  - b. Disciplinary Investigation (Branch Office)
    - Further investigation
    - Recommendation/Action:
      - Diversion Program
      - Fee Arbitration or Mediation
      - Close File
      - Referral to Grievance Committee
2. Grievance Committee (82 grievance committees, lawyers and non-lawyers)
  - a. Investigator Assigned
  - b. Additional Investigation
  - c. Hearing or Review?
  - d. Recommendation/Action:
    - Diversion Program
    - Fee Arbitration or Mediation
    - Finding of no Probable Cause
    - Finding of no Probable Cause with a Letter of Advice
    - Finding of Minor Misconduct

- Finding of Probable Cause- a finding by an authorized agency that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action. See Rule 3-2.1(j).
  - Recommendation sent to the Designated Board of Governor Reviewer. See Rule 3-7.5.
3. Board of Governors:
- a. Review of Report of Grievance Committee by Designated Reviewer
  - b. Recommendation (by Designated Reviewer) to Board of Governors Disciplinary Review Committee. Alternatives are:
    - Fee Arbitration or Mediation
    - Closure of File by diversion to a component of the practice and professionalism enhancement program
    - Finding of No Probable Cause
    - Finding of No Probable Cause with Letter of Advice
    - Finding of Minor Misconduct
    - Finding of Probable Cause
  - c. Board of Governors Disciplinary Review Committee:
    - Review and make Recommendation Report to Board of Governors. Action may be any of those available to the Designated Reviewer.
    - Recommendation Report shall be final unless overruled by the Board.
  - d. Board of Governors
    - The Board of Governors, by a majority vote, may confirm, reject or amend the Disciplinary Review Committee's Report. Action may be any of those available to the Disciplinary Review Committee.
    - A Finding of No Probable Cause shall be final, and no further proceedings shall be had in the matter by The Florida Bar. See Rule 3-7.5(e).

## **B. Appointment of Referee:**

1. After a finding of Probable Cause and the Complaint is filed, the Chief Justice or his Delegated Chief Judge of a Judicial Circuit will appoint a Circuit or County Judge as "Referee." See Rule 3-7.6(a).
2. A Delegated Chief Judge should appoint a County or Circuit Judge as Referee within fourteen (14) days. See Appendix A.
3. The Circuit or County Judge appointed as Referee will receive a Letter of Appointment. See Appendix B.

## C. Pre-Trial:

1. **Nature of Proceedings:** Quasi-judicial administrative proceeding, which is neither civil nor criminal. See Rule 3-7.6(f).
2. **Participants:**
  - a. Bar Counsel: is an employee or an appointed lawyer who is charged with investigating, preparing and prosecuting with due diligence any case assigned. See Rule 3-7.6(g)
  - b. Respondent: is a lawyer, usually a member of The Florida Bar, charged with misconduct.
  - c. Complaining Witness: is not a party and shall have no rights other than those of any other witness. Unless impractical the complaining witness may be granted the right to be present when the Respondent is also present if he/she has already testified in the case in chief. See Rule 3-7.6(k).
3. **Pretrial Conference/Case Management:**
  - a. Shall be set by the Referee within sixty (60) days of appointment. See Rule 3.7.6(c).
  - b. The conference shall include but not be limited to issues surrounding venue, discovery deadlines and a final hearing date.
  - c. The Referee shall enter a written order.
  - d. A copy of written order shall be sent to the Clerk of the Supreme Court. Original in record kept by referee.
4. **Venue:** See Rule 3-7.6(d)
  - a. The county where the offense occurred;
  - b. The county where the Respondent resides;
  - c. The county where the Respondent practices law or last practiced law in Florida; or
  - d. If the Respondent is not a resident of Florida and if the offense did not occur in Florida then as designated by the Chief Justice.
  - e. The parties may stipulate to having the hearing held where the referee presides.
5. **Rules of Procedure:**
  - a. Florida Rules of Civil Procedure apply except where they conflict with the Rules Regulating the Florida Bar. See Rule 3-7.6(f)(1)
  - b. Discovery shall be available to the parties in accordance with the Florida Rules of Civil Procedure. See Rule 3-7.6(f)(2)
6. **Pleadings:** See Rule 3-7.6(h)
  - a. Complaint: See Rule 3-7.6(h)(1)
    - Required:
      - Probable Cause determined. See Rule 3-3.2(b)
      - After an Emergency Suspension or probation. See Rule 3-5.2(d)

- After a felony conviction suspension. See Rule 3-7.2(i)(2)
  - (d) After a suspension in another jurisdiction. See Rule 3-7.2(j)(2)
  - After a felony charge with concurrence. See Rule 3-3.2(b)
  - After a Respondent rejects a finding of Minor Misconduct.
  - Prepared by The Florida Bar Counsel
  - Filed with the Supreme Court of Florida
  - Shall set forth the particular act(s) of conduct for which discipline is sought
- b. Answer and Motions: See Rule 3-7.6(h)(2)
- Required within twenty (20) days of service of complaint. Mailbox rule applies.
  - May include in Answer or by separate motion:
    - challenges to sufficiency of complaint
    - challenges to jurisdiction
    - defenses
    - invocation of privilege, immunity or disability.

*The Respondent may be called as a witness by The Florida Bar to provide specific and complete disclosure of all matters material to the issue. **NOTE:** The Courts have continually held that Bar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts. To protect the public the Bar is mandated to inquire into an attorney's conduct when even the appearance of impropriety exists. For these reasons, the vast weight of judicial authority recognizes Florida Bar proceedings are therefore “remedial” not “penal” and any invocation by the Respondent of his Fifth Amendment Right is generally improper. See Rule 3-7.6(j). **DeBock v. State**, 512 So. 2d 164 (Fla. 1987); **Florida Bar v. Massfeller**, 170 So. 2d 834 (Fla. 1967).*
- c. Reply: See Rule 3-7.6(h)(3)
- Should be filed within ten (10) days of service of the answer.
  - Failure by the Bar Counsel to respond shall not be prejudicial and all affirmative allegations deemed denied by The Florida Bar.

- d. Request for Admissions: If a Respondent fails to respond, admissions may be deemed admitted. Finding of guilt may be based on the tacit admissions. **The Florida Bar v. Weil**, 575 So. 2d 202 (Fla. 1991); **The Florida Bar v. Hollingsworth**, 376 So. 2d 394 (Fla. 1979).
- e. Disposition of Motions: See Rule 3-7.6(h)(4)
  - Motion hearings may be deferred until final hearing
  - Rulings on Motions may be reserved until termination of the final hearing.
- f. Subpoena: See Rule 3-7.11(d)(1)
  - A subpoena for attendance of a witness or production of documents shall be issued only by the referee.
  - Service of process shall be as required by law or by an investigator employed by The Florida Bar.
  - Failure to comply, without adequate cause, may result in a finding of contempt. See Rule 3-7.11(d)(7).
- g. Notice of Final hearing: See Rule 3-7.6(i)
  - The cause shall be set for trial by either party or the referee upon ten (10) days' notice.
  - The cause shall be held as soon as possible following the expiration of ten (10) days from the filing of the Respondent's answer.
  - Extensions of time by the Referee:
    - File prior to expiration
    - File original Motion with Clerk of Supreme Court
    - Note any party's objections

## D. TRIAL/FINAL HEARING

1. Public Proceedings: Matters which reach a referee are public information. NOTE: A referee may seal portions of the record. See Rule 3-7.1(d).
2. Termination of Proceedings:
  - a. Consent Judgment:
    - See The Florida Bar Referee Manual, pp. 18-19
    - A Respondent may enter into a plea of guilty after a formal complaint has been filed. Bar counsel, with approval of designated reviewer of the Board of Governors, will inform the Respondent of disciplinary action sought. See Rule 3-7.9(b).
    - Referee may accept or reject the consent judgment.
  - b. The Board of Governors may terminate disciplinary proceedings prior to receipt of evidence. See Rule 3-7.5(f).
  - c. Summary Judgment may be granted as in ordinary civil hearing. **The Florida Bar v. Gold**, 937 So. 2d 652 (Fla. 2006).

- d. Disciplinary Resignation. See Rule 3-5.1(j)
- 3. Court Reporters: Reporters are required to record all testimony. See Rule 3-7.6(n)(1)
- 4. Bifurcated Hearing: It is permissible to have a noticed Guilt Phase followed by a noticed Sanction Phase. If a Referee finds the Respondent guilty of any single rule violation, a hearing must be held to determine appropriate discipline. The discipline hearing may be immediately following the Guilt Phase or at some other reasonable date.
- 5. Evidence:
  - a. The grievance committee record may be introduced to establish a prima facie case against the Respondent. NOTE: If sufficient the grievance record may sustain a charge. **The Florida Bar v. Schneiderman**, 285 So. 2d 392 (Fla. 1973).
  - b. A Referee is not bound by the technical Rules of Evidence. **The Florida Bar v. Tobkin**, 944 So. 2d 219 (Fla. 2006); **The Florida Bar v. Vining**, 707 So. 2d 670 (Fla. 1998); **The Florida Bar v. Rendina**, 583 So. 2d 314 (Fla.1991).
  - c. The Right of Confrontation is limited. **The Florida Bar v. Vannier**, 498 So. 2d 896 (Fla. 1986). Hearsay Evidence is admissible. **The Florida Bar v. Centurion**, 801 So. 2d 858 (Fla. 2000); **The Florida Bar v. Weed**, 559 So. 2d 1094 (Fla.1990).
  - d. Parole Evidence is admissible. See Rule 3-7.6(l).
  - e. The Exclusionary Rule does not apply. **The Florida Bar v. McClure**, 575 So. 2d 176 (Fla. 1991); **The Florida Bar v. Lancaster**, 448 So. 2d 1019 (Fla. 1984).
  - f. Character Evidence is not permissible in the case in chief, but may be used for mitigation in the sanction hearing. **The Florida Bar v. Prior**, 330 So. 2d 697 (Fla. 1976).
- 6. Burden:
  - a. The Florida Bar, through its Bar Counsel, has the burden.
  - b. The Florida Bar must establish its charges by **Clear and Convincing** evidence. **The Florida Bar v. McCain**, 361 So. 2d 700 (Fla. 1978); **The Florida Bar v. Rayman**, 238 So. 2d 594 (Fla. 1970).

## E. REPORT AND RECOMMENDATION

- 1. Completion Date:
  - a. Original Appointment will indicate entire process, including Report and Recommendation, shall be completed within 180 days except as provided by Rule 3-5.2(g).

- b. The Chief Justice may extend this time upon motion by the referee. NOTE: All original Motions for Extension of Time shall be filed with the Clerk of the Supreme Court and include any objections.
- c. Rule 3-7.6(m) and (l) further provide that the Report and Recommendation shall be filed:
  - Within thirty (30) days after the conclusion of the hearing (Guilt and Sanction Phase); or
  - Within ten (10) days after the referee has received the transcript of all hearings, whichever is later.

2. Prepared by:

- a. Referee
- b. Bar Counsel or Respondent as directed by Referee.
- c. The Referee **should always** make it clear that he or she used independent discretion in all aspects of his Report and Recommendation.

3. Sample Report: See The Florida Bar Referee Manual pp 14-17; as well as Appendix C.

4. Contents of Report:

- a. Findings of Fact as to each item of charged misconduct
- b. Recommendation of whether the defendant should be found guilty, or not, of each misconduct charged
- c. Recommendations as to the disciplinary measures to be applied:
  - Weigh all aggravators and mitigators
  - Review relevant case law for similar case scenarios
  - and previous disciplines found appropriate,
  - Review The Standards for Imposing Lawyer Sanctions
  - Understand
  - Familiarize yourself with the types of discipline:
    - Probation See 3-5.1(c)
    - Admonishment See 3-5.1(a) &(b)
    - Public Reprimand See 3-5.1(d)
    - Suspension See 3-5.1(e)
    - Disbarment See 3-5.1(f)
    - Forfeiture of Fees See 3-5.1(h)
    - Restitution See 3-5.1(i)
    - Costs See 3-7.6(q)
- d. A statement as to any past disciplinary measures with reference to the Respondent that are on record
- e. A statement of costs incurred and recommendations as to the manner in which such costs should be taxed
- f. Certificate of Service or *cc*: certifying the Report and Recommendation has been sent to parties and The Florida Bar Staff Counsel

5. Record

- a. Prepared by the Referee. See Rule 3-7.6(n)
- b. The Record includes:
  - Index
  - Pleadings
  - Recorded and Transcribed Testimony
  - All Exhibits received as evidence
  - Report and Recommendation of Referee; Voluntary Dismissal or Consent Judgment
- c. The complete, well-organized properly indexed record shall be sent to Supreme Court of Florida via the Supreme Court Clerk of Court. Bar Counsel will make copies of the record available to other parties. See Rule 3-7.6(m)(2)
- d. The same day the original record is forwarded to the Florida Supreme Court, the Referee shall e-mail the Report and Recommendation to [e-file@flcourts.org](mailto:e-file@flcourts.org), in Microsoft Word.
- e. The Report and Recommendation shall be prepared in 14-point Times New Roman type.

6. Resources See Appendix D