IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. 63,642

v.

WILLIAM T. FUSSELL,

Respondent.

_____/

RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Complainant makes at least seven factual allegations in its statement of the facts which are not supported by reference to page numbers of the transcripts. (See pp. vii and xi) Such allegations are impossible to respond to without re-reading the entire record, which would constitute an onerous and unfair burden upon Respondent. Moreover, Complainant makes other statements and allegations which are dehors the record, such as an alleged stipulation between Bar counsel and previous counsel for Respondent, found in Complainant's Statement of the Case. Such uncorroborated statements are clearly improper and Respondent respectfully requests this court to disregard such unsupported statements.

THE REFEREE'S FINDING OF GUILT AS TO COUNT I IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

Complainant first seeks to establish the correctness of the Referee's findings as to Count I by claiming that, because the Referee entered an Order Deeming Matters Admitted, all allegations of the Complaint were sufficiently proven. Of course, Complainant fails to explain the necessity for two evidentiary hearings and curiously does not seek review of the Referee's not guilty finding as to Count IV, the allegations of which were also, supposedly, deemed admitted.

Furthermore, in stressing the eighteen (18) month time period during which Respondent prepared the post-conviction motion, Complainant fails to appreciate the volume of work performed by Respondent. It is clear from the record below that Complainant did not perform a similar quantity of work during the twenty-one (21) month period which transpired between conducting the final referee hearing in December, 1982, and providing Respondent with the record in October, 1984. Complainant's failure to diligently pursue this case belies the importance it now attaches to Respondent's conduct with regard to Count I. We respectfully suggest that Respondent's alleged neglect pales in comparison to the neglect exhibited by Complainant in handling this disciplinary cause.

THE WEIGHT OF THE EVIDENCE DID NOT SUPPORT THE REFEREE'S FINDING IN COUNT II THAT RESPONDENT DISCLOSED A CONFIDENCE OR SECRET OF JOHN NEWMAN IN VIOLATION OF DISCIPLINARY RULE 4-101(B)(1).

At the outset, Complainant makes a palpable and impuissant attempt to bolster the Referee's findings by reference to some alleged promises that Respondent made to Mr. Newman with regard to the sentence he would receive upon his entry of a guilty plea to the five felonies with which he was charged. Complainant then represents that Mr. Newman did not receive the promised sentence. The obvious implication in Complainant's inclusion of these facts is that Respondent acted improperly or misled his client to induce him to enter a guilty plea. However, it is essential to note that the Referee made no such finding; indeed, Complainant did not even charge Respondent with any misconduct in this regard. It is clear that Complainant includes such testimony in its brief to attempt to buttress the findings of the Referee and to paint an even more nefarious portrait of Respondent. Of course, we would remind Complainant and this court that the factual allegations made by Complainant were in total reliance upon the "word" of a drug-dealing, gun-toting, attempted murderer, [R.I. 189], and Kathleen Mast, a woman who lived with Mr. Newman's brother but admitted to having sexual relations with Mr. Newman. More importantly, Miss Mast's testimony was contradictory and inconclusive as to Respondent's conduct. Nevertheless,

Complainant would have this court believe that the testimony of these two questionable individuals is clear and convincing.

THE REFEREE'S RECOMMENDATION OF GUILT AS TO COUNT III SHOULD NOT BE ACCEPTED BASED UPON THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

In answer to Respondent's argument that the record fails to support the essential finding that Respondent was entrusted with the duty to file a post-conviction motion, The Florida Bar argues that the client believed this to be true. Also, the Bar offers testimony concerning Respondent's representation of the client at trial level. Finally, the Bar suggests that the testimony of Ms. Madurski corroborates this conclusion.

Analysis, however, of these arguments identifies the absence of an evidentiary basis for this finding. The belief of the client, although arguably circumstantial evidence of an attorney-client relationship, is not clear and convincing evidence of Respondent's duty to perform a specific legal service. This is particularly true when, as here, there is testimony which directly contradicts and explains the client's alleged belief.

Clearly, Respondent's purported conversations concerning plea negotiations have no relevancy to the issue of whether Respondent unequivocally agreed to file a post-conviction motion.

Furthermore, the testimony of Ms. Madurski is not corroborative of the circumstantial testimony of the client. Her testimony cited by the Bar is not evidence that Respondent agreed to file a post-conviction motion. Instead, her testimony is circumstantial evidence of almost any fact other than a specific agreement for

the handling of a specific legal matter without qualification or condition.

The Bar argues that the record supports the finding of neglect because no motion was filed within sixty (60) days after sentencing, because Respondent was the client's trial counsel, and because Respondent admittedly did no investigation of a Rule 3.850 motion.

These efforts logically fail to defend the Referee's erroneous findings of guilt. They are not dispositive of the necessary issue. The Florida Bar's evidence, if credible and accurate, shows that Respondent did not file a Motion for Reduction of Sentence within sixty (60) days and that Respondent never filed a motion under Rule 3.850. The evidence, therefore, tends to show inaction - not neglect. If Respondent never agreed to file a motion within sixty (60) days, or if Respondent never agreed to file a motion pursuant to Rule 3.850, or if Respondent was never provided the necessary information to allow him to do either in good faith, then Respondent cannot be guilty of neglect. The arguments here do nothing to change the lack of clear, convincing, relevant evidence which proves punishable neglect. The arguments show the logical fallacy and inadequacy of the evidence.

A more clear statement of the lack of clear and convincing evidence supporting the Referee's finding of guilt on

D.R. 1-102(A)(4) cannot be found than The Florida Bar's following statement:

> "Likewise, the Referee's findings as to Respondent's breach of . . . D.R. 1-102(A)(4) . . . were shown from Respondent's lack of diligent effort on his client's behalf."

This statement summarizes the entire evidence produced at trial to prove Respondent guilty of dishonesty, fraud, deceit, or misrepresentation. No evidence of a lack of diligent effort is logically relevant to dishonesty, fraud, deceit, or misrepresentation. Each of these prohibited acts requires proof of a specific mental intent. No evidence was presented to the Referee, circumstantial or direct, indicating such intent by Respondent. Accordingly, the Referee's finding of guilt as to D.R. 1-102(A)(4) is improper.

THE REFEREE IMPROPERLY FAILED TO RECUSE HIMSELF UPON THE LEGALLY SUFFICIENT MOTION OF THE RESPONDENT.

Complainant attempts to justify the Referee's failure to recuse himself by claiming a technical deficiency exists in Respondent's motion, by reason of counsel for Respondent failing to state that the motion was made in good faith. Certainly, where an otherwise valid motion exists, this court would overlook such a meaningless, technical requirement. See e.g., Layne v. Grossman, 430 So2d 525 (Fla. 3d DCA 1980).

Moreover, although Complainant characterizes the prejudicial statement of the Referee as a "simple, well-meaning pleasantry", Respondent and counsel for Respondent did not take the Referee's statement as such. Parenthetically, it is critical to note that the Referee who made this "pleasant" statement to Respondent is the same Referee who recommended twice the punishment requested by Bar counsel at sentencing. (p.8 transcript of sentencing hearing, December 5, 1983)

THE REFEREE'S FINDINGS OF FACT, RECOMMENDATIONS OF GUILT, AND RECOMMENDATION OF DISCIPLINE SHOULD NOT BE ACCEPTED BY THIS COURT IN VIEW OF THE REFEREE'S DENIAL OF RESPONDENT'S MOTION FOR CONTINUANCE.

The Florida Bar cites several cases which ostensibly support its argument that the Referee's denial of Respondent's Motion for Continuance was not an abuse of discretion. Although these cases all reflect an appellate court's decision to uphold a trial judge's refusal to grant a continuance, none are factually similar to the facts of the case sub judice. In Padgett v. First Federal Savings and Loan Association of Santa Rosa County, Florida, 378 So2d 58 (Fla. 1st DCA 1979), the moving party offered no evidence to explain or corroborate the facts making a continuance necessary. Also, the court found that it was vital to the opposing party that no delay occur. Here, the fact necessitating the continuance was not in dispute. Also, the record is devoid of any vital necessity in the Bar proceeding to trial.

The counsel for appellants in Smith v. Hamilton moved for a continuance at the trial based upon the absence of his clients. There was no unusual circumstance resulting in prejudice to the clients as was present here. Also, the attorney for the movant did not file his motion prior to trial. Furthermore, there was no previous continuance granted for opposing counsel's unavailability. Smith v. Hamilton, 428 So2d 382 (Fla. 4th DCA 1983).

The facts in the case of Kasper Instruments, Inc., v.

Maurice, 394 So2d 1125 (Fla. 4th DCA 1981) are substantially different from those upon which the Referee here ruled. In that case, the continuance was requested due to the absence of a witness. However, the deposition was available to replace the testimony and there was no indication of an anticipated change in testimony. Therefore, prejudice to the movant was nonexistent.

Finally, the holding of the court in Wash-Bowl, Inc., v. Wroton, 432 So2d 766 (Fla. 2d DCA 1983) was apparently based upon the fact that the moving party had been granted both previous continuances. Again, the facts there are importantly different than those before this court.

Accordingly, the cases and argument propounded by the Bar are not dispositive of the issue before this court. Here, Respondent's necessity of a continuance was vital, was unavoidable, was based upon undisputed facts, and followed a continuance by the Bar on the same grounds. Nothing argued or cited as authority by the Bar supports a conclusion other than that this referee, based on these facts, acted beyond his discretion.

THE REFEREE'S FINDINGS OF FACT, RECOMMENDATIONS OF GUILT, AND RECOMMENDATION OF DISCIPLINE SHOULD NOT BE ACCEPTED BY THIS COURT DUE TO THE DELAY IN PROSECUTING RESPONDENT.

Integration Rule 11.06(9)(a) requires the Referee's Report to be made within thirty (30) days after the conclusion of the trial. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a). In this case, the Referee's Report was made one year after the conclusion of the trial.

The Bar argues for an interpretation of this rule totally inconsistent with the language of the specific section or with the spirit of the Integration Rule. Furthermore, the Bar offers no authority for its argument that a report made one year after conclusion of the trial, but after sentencing, is tantamount to a report made within thirty (30) days of the conclusion of the trial. Also, neither the Integration Rule nor the Rules of Civil Procedure require or provide for a separate sentencing hearing. Therefore, the Bar's position is without merit and the Referee's Report was untimely and a direct cause of substantial, unnecessary, and prejudicial delay.

The Bar further argues that Respondent's request for an extension of time within which to file its initial brief obviates the effect of its own substantial delay. Respondent suggests that Rules 11.06(9)(b), 11.06(10)(a), and 11.06(10)(b) clearly place the responsibility of transmitting the transcript and all pleadings and exhibits, along with the Referee's Report, to this

court on The Florida Bar. Fla. Bar Integr. Rule, art. XI, Rules 11.06(9)(b), 11.06(10)(a), and 11.06(10)(b). Also, these rules require that the record be made available to Respondent. These rules relieve the Respondent of the obligation and duty imposed upon a civil appellant to cause transmittal of the record to an appellate court. Here, the Bar's failure to have a transcript and complete record available to Respondent from which he could adequately seek review is violative of its duty. Therefore, the fact that Respondent sought and assisted in obtaining the complete record does not relieve the Bar of its responsibility to insure Respondent a speedy determination of his disciplinary case. Accordingly, this court should substantially reduce and mitigate the recommended discipline.

IN VIEW OF THE PURPOSES TO BE ACCOMPLISHED BY DISCIPLINARY PROCEEDINGS, AND DUE TO THE ABSENCE OF AGGRAVATING CIRCUMSTANCES AND THE PRESENCE OF MITIGATION, THE REFEREE'S RECOMMENDATION OF DISCIPLINE SHOULD NOT BE APPROVED.

The Florida Bar argues that this court is prohibited from considering the negotiated plea of a sixty-day suspension as evidence of the appropriate discipline in this case. In support of its position, the Bar cites Section 90.410, Florida Statutes, (1983).

This argument is without merit. The rule cited is one of evidence, primarily designed to protect a criminal defendant or civil party from impeachment at trial by the use of confessions or admissions made during negotiations. See: Commentary on 1978 Amendment, 6B Florida Statutes Annotated 441 (1979). The reason for the rule is not applicable here as trial impeachment is not at issue.

Furthermore, Respondent himself submits this plea negotiation to this court for the relevant purpose of indicating what was believed to be fair discipline by Staff Counsel after its investigation of the facts, circumstances, and Respondent's prior record.

CONCLUSION

Complainant seeks to suspend Respondent for two (2) years for inter alia, failure to have a complex post-conviction motion heard within an eighteen (18) month period. However, if such a period of time constitutes neglect, Complainant is more culpable in the handling of the instant cause for its failure to schedule the sentencing hearing for a period of twelve (12) months, and its further failure to provide Respondent with the record until ten (10) months after sentencing. We respectfully submit that this court should continue to require Complainant to turn square corners in the conduct of its affairs and dismiss all charges against Respondent.

C E R T I F I C A T E O F S E R V I C E

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Reply Brief has been furnished by Hand Delivery this 20th day of December, 1984, to: STEVE RUSHING, ESQUIRE, BAR COUNSEL, The Florida Bar, Airport Marriott Hotel, Suite C-49, Tampa International Airport, Tampa, Florida 33607.

SCOTT K. TOZIAN, Esquire