IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,)
Complainant,)
v.)
TERRENCE E. ROSENBERG,)
Respondent.)

Supreme Court Case No. 62,710
Florida Bar Case Nos. 11E81105 and 11E81M75

COMPLAINANT'S ANSWER BRIEF

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INTRODUCTION

The Florida Bar, Complainant, will be referred to as either "The Florida Bar", "The Bar", or "Complainant".

Terrence E. Rosenberg, Respondent, will be referred to as either, "Respondent", or "Mr. Rosenberg".

"R" is for Record or Record of Proceedings before the Referee on April 26, 1984.

References to "exhibit" by number, rather than by alphabetical letter, refer to the exhibits which are part of the Grievance Committee transcript dated March 10, 1982, which is identified as Exhibit A.

STATEMENT OF THE CASE

The two-count complaint was filed with this Court by The Florida Bar on October 5, 1982. On October 27, 1982, the Honorable Robert C. Abel, Jr., Circuit Judge of the 17th Judicial Circuit was appointed referee. The Respondent waived his right to contest venue and agreed to trial at the Broward County Courthouse. (R. 4-5)

On July 17, 1984, the Report of Referee and the Record were filed with this Court. The Board of Governors approved the report at a meeting held September 19-22, 1984. The Respondent's Petition for Review and Brief were originally due at the Supreme Court "within 15 days of the termination of the meeting of the Board of Governors," to wit: on or before October 8, 1984. Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(a) and (c). However,

this Court granted Respondent several extensions of time, the latest being March 11, 1985, on which date Respondent mailed his brief.

STATEMENT OF THE FACTS

The Statement of the Facts in the Initial Brief of Respondent are not supported by the exhibits which he cites. Therefore, The Florida Bar is compelled to give its own version of the facts.

As to Count I, the facts are as follows: The Respondent agreed to represent Capital Cycle Corp. in a lawsuit concerning the purchase of defective merchandise (Exhibits 7 and 8). The client made repeated inquiries concerning the status of the case, and it took the Respondent approximately ten months before he responded to the client's inquiries (Exhibits 12, 14, 15, 17, 18, 20 and 21). The Respondent sent the client a set of Defendant's Interrogatories and Request for Admissions. However, they were lost. The client made numerous requests of the Respondent to send copies of Defendant's Interrogatories, Request for Admissions and other pleadings (Exhibits 20, 26, 27, 29 and 34). However, the delays by the Respondent were inordinate and the suit was dismissed due to lack of prosecution (Exhibit D). Nevertheless, the Complaint was refiled. However, the case was again dismissed due to lack of prosecution. (Exhibit C).

Although the Respondent claims he was discharged by the client, the Respondent never filed a Motion to Withdraw as Counsel (R. 45, lines 17-23).

The Respondent, in his Statement of the Facts, says the case was dismissed because of the client's "failure to provide the cost bond timely."

This is not correct, as the costs for the non-resident bond and anticipated deposition costs were mailed to the Respondent on January 12, 1978 (Exhibit 32). Four months later, Respondent informed the client that he was "proceeding with the non-resident cost bond." (Exhibit 35). The case was dismissed on May 18, 1978 (Exhibit D), approximately four months after Respondent received the money for the non-resident cost bond.

Although the client requested a set of the Interrogatories on July 20, 1977 (Exhibit 26), it took Respondent approximately five months to comply with his client's request for another copy of the Interrogatories (Exhibit 32). The client was advised that the interrogatories did not have to be completed "until sometime subsequent to posting the bond." (Exhibit 31).

As to Count II, on February 2, 1981, the Respondent was convicted by the Dade County Court, of five misdemeanors, concerning violations of Chapter 17B, Section 22 of the City of Miami Beach Code. These violations pertain to failure to comply with minimum housing standards, or failure or refusal to comply with requirements of a Final Order. (R. 37-40; Exhibits E, F, G, H and I). The conviction was appealed to the Circuit Court, Eleventh Judicial Circuit, Appellate Division. However, the conviction was affirmed. (R. 39-40; Exhibit J).

SUMMARY OF ARGUMENTS

The Florida Bar submits that the Referee's findings and recommendations should be approved, as the Respondent has not met his burden to demonstrate that the Report of Referee is erroneous, unlawful or unjustified. Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(e). The findings of the Referee should be accorded substantial weight and should not be overturned unless clearly erroneous or lacking in evidentary support. The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968). The Respondent has failed to make the required showing that the findings of the referee are clearly erroneous or lacking in evidentary support.

The Referee's finding of neglect is supported by clear and convincing evidence. Despite repeated requests from the client, the Respondent neglected the case, which was dismissed for lack of prosecution, on two occasions. (Exhibits C and D).

The five misdemeanor convictions constitute conduct adversely reflecting on Respondent's ability to practice law. The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984). In addition, the Referee's recommendation for a ninety-day suspension is not excessive, due to Respondent's cumulative misconduct. The Florida Bar v. Vernell, 374 So.2d 473, 476 (Fla. 1979).

ARGUMENTS

I.

THE REFEREE'S FINDINGS OF GUILT SHOULD NOT BE OVERTURNED ABSENT A SHOWING THAT SUCH FINDINGS ARE CLEARLY ERRONEOUS OR LACKING IN EVIDENTIARY SUPPORT

Findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in the civil proceeding.

Fla. Bar Integr. Rule art. XI, Rule 11.06(9)(a), The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981).

Florida Bar Integration Rule art. XI, Rule 11.09(3)(e) states:

> Burden. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified.

This Court stated in The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968), "In disciplinary matters, the ultimate judgment remains with this Court. However, the initial fact-finding responsibility is imposed upon the referee. His findings of fact should be accorded substantial weight. They should not be overturned unless clearly erroneous or lacking in evidentiary support."

In The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978), this Court stated:

> It is our responsibility to review the determination of guilt made by the Referee upon the facts of record, and if the charges be true, to impose an appropriate penalty for violation of the Code of Professional Responsibility. Fact-finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence.

The Respondent has failed to make the required showing that the findings of the Referee are clearly erroneous or lacking in evidentiary support. Therefore, the findings of guilty by the Referee should be approved.

II.

THE REFEREE'S FINDING OF NEGLECT IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

The Referee's finding Respondent guilty of violating Florida Bar Code of Professional Responsibility, Disciplinary Rule 6-101(A), neglect of a legal matter (RR. 2), is supported by clear and convincing evidence and should be approved by this Court.

The Respondent admitted to all of the allegations in Count I of the Complaint, except for Paragraphs 4, 12 and 15 through 19. (See Answer to Request for Admissions; R. 6 and 12). The allegations in the paragraphs that were denied by Respondent, were proven by clear and convincing evidence. For example, Paragraph 4 of the Complaint alleges:

> Despite repeated inquiries by Capital Cycle Corporation and its Washington, D.C. attorneys, the Respondent failed to advise his client about the status of the case for approximately (10) months, until January 20, 1977. (R. 16, lines 23-25).

(See Exhibits 17, 18, 20 and 21). These exhibits show a series of letters which begin with a letter to the Respondent, dated April 26, 1976 (Exhibit 17), but Mr. Rosenberg didn't respond until January 20, 1977 (Exhibit 21).

Paragraph 12 of the Complaint alleges:

> Despite frequent requests by his client, the Respondent failed to send a copy of the defendant's answers until May 1, 1978, thereby delaying completion of responses to the Interrogatories and Request for Admissions.

The following exhibits show Respondent's neglect in his failure to respond to his client's requests in a timely manner:

Exhibit 20 - "If you will be so kind to provide me with copies of any and all pleadings and motions, in the above, I will be appreciative of same." September 21, 1976.

Exhibit 26 - "Please send me at your earliest convenience an additional copy of interrogatories." July 20, 1977.

Exhibit 27 - "I still haven't heard anything from you regarding my answer to your letter of July 10, 1977." September 19, 1977.

Exhibit 29 - "...Accordingly, I would be grateful if you would send me a copy of all the pleadings relative to this action including the complaint, the defendant's answer, and all interrogatories. I should note that Mr. Moore has not yet received a copy of the interrogatories he requested from you in his letters dated July 20, 1977, September 19, 1977, and October 21, 1977..."

Exhibit 34 - "When we spoke on March 10, you stated that you would send me a copy of the defendant's answer in the case... on Monday, March 13. I have not received it yet." March 20, 1978.

On or about June 6, 1978, the client's attorney sent a letter to the Respondent enclosing the answers to the interrogatories and requesting that the complaint be amended to include fraud as an additional cause of action, (Exhibit 36).

Despite numerous requests by the client and his Washington attorney, the Respondent failed to send a copy of the amended or refiled complaint, and in fact, did not file the complaint until early 1979. (Exhibit 42). The Respondent's failure to respond may be shown by the following exhibits:

Exhibit 36 - "...I trust you will comply with this request and would appreciate your sending me a copy of the complaint as amended." June 6, 1978.

Exhibit 37 - "...I would appreciate your sending me a copy of the amended complaint." June 26, 1978.

Exhibit 38 - "You were to have amended complaint to include fraud re: Greater Hemispheres. May I have a copy of the amended complaint as soon as possible?" August 25, 1978.

Exhibit 40 - "If memory serves me correctly, you were to have amended the complaint against Greater Hemispheres Corporation to include fraud. That was in 1978. Now that we are in the new year, you still have not acknowledged this, nor have you sent a copy of the amended complaint." January 10, 1979.

"If you do not feel comfortable with this matter, or if for some reason you cannot conscientiously represent me in this matter, please let me know so I can make some other arrangements."

Exhibit 42 - "Why was this amended complaint not filed until 1979?" March 1, 1979.

After sending a copy of the amended complaint sometime in February 1979, the Respondent thereafter failed to communicate at all with his client. (Exhibit A, Grievance Committee Transcript, p. 118, lines 18-20).

Furthermore, the client lost his day in court as his case was dismissed due to lack of prosecution (see Exhibits C and D). The original complaint was dismissed, as was the refiled complaint. The client or his Washington counsel, made numerous requests of Mr. Rosenberg for status reports and important documents but there were inordinate delays in Mr. Rosenberg's responses.

It is noted that Mr. Rosenberg contended that he was discharged by his client on January 26, 1979. However, Mr. Rosenberg never filed a motion to withdraw as counsel (R. 45, lines 17-23; see also, Mr. Moore's comments concerning this matter in Exhibit A, Grievance Committee Transcript, p. 127-131, in particular, where Mr. Moore says, "We assumed that Mr. Rosenberg was still active in the case." Exhibit A, p. 130, lines 24-25).

Accordingly, The Florida Bar submits that a reading of Mr. Moore's testimony in Exhibit A and the reading of all the exhibits show by clear and convincing evidence that the Respondent violated Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility, to wit: "Neglect of a legal matter entrusted to him."

III.

RESPONDENT'S CONVICTIONS OF FIVE MISDEMEANORS CONSTITUTED CONDUCT ADVERSELY REFLECTING ON HIS FITNESS TO PRACTICE LAW

The Respondent has admitted that he was found guilty of the five misdemeanors alleged in Count II of the Complaint (R. 37-40). In addition certified copies of said convictions were admitted into evidence as Exhibits E, F, G, H and I. Also, the Circuit Court of the Eleventh Judicial Circuit, Appellate Division, affirmed the convictions. (R. 39, lines 16-25; R. 40, lines 1-2).

According to the Supreme Court decision in The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), a referee could not go behind the convictions in deciding whether or not a respondent is actually guilty of the offenses.

Although Mr. Rosenberg was entitled to, and did in fact, present mitigating circumstances to show why he should not be disciplined for the misdemeanor convictions (R. 59-66), he did not have the right to a trial de novo before the Referee for the purpose of showing that his convictions were erroneous. Also, it is noted that the Supreme Court, in the Vernell case, upheld the referee's finding that Mr. Vernell violated Disciplinary Rule 1-102(A)(6) concerning his conviction of failure to file income tax returns, which offenses are misdemeanors. Therefore, we submit

that Mr. Rosenberg's five misdemeanor convictions constitute violations of Disciplinary Rule 1-102(A)(6), conduct that adversely reflects on his fitness to practice law.

In The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984), the Supreme Court disciplined an attorney who had pleaded nolo contendre to misdemeanors of altering the identification number of a boat and of possessing a boat with an altered identification number. Although adjudication of guilt was withheld on these offenses, the Supreme Court stated, "an attorney's pleading nolo contendre to a misdemeanor is related to his fitness to practice law." See The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1980).

In view of the above, The Florida Bar contends that Mr. Rosenberg's five misdemeanor convictions are relevant to his fitness to practice law and are in violation of Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility.

A lawyer is an officer of the Court and as such, he is expected to comply with the laws. Therefore, when an officer of the Court is convicted of five misdemeanors, he shows a disrespect for the law and as such, his conduct adversely reflects on his fitness to practice law.

IV.

THE REFEREE'S RECOMMENDATION FOR A NINETY-DAY SUSPENSION AND PAYMENT OF COSTS IS NOT EXCESSIVE

The Referee recommends Respondent be disciplined by suspension from practicing law for ninety days and payment of costs (RR. 3). However, the Respondent contends that a ninety-day suspension is

unusually severe and harsh under the facts of this case. Initial Brief, Page 8.

While a ninety-day suspension might be considered harsh for any one of the offenses of which Respondent was found guilty, we submit that this Court deals more severely with cumulative misconduct than with isolated misconduct. The Florida Bar v. Rubin, 362 So.2d 12, 15 (Fla. 1978); The Florida Bar v. Vernell, 374 So.2d 473, 476, (Fla. 1979); See State ex rel. The Florida Bar v. Murrell, 74 So.2d 221, 223, (Fla. 1954).

The official records of The Florida Bar show that the Respondent has been disciplined on two (2) prior occasions, to wit: (see Complainant's Memorandum Concerning Discipline). Respondent admits to prior discipline (Initial Brief of Respondent, Page 8)

(a) A PRIVATE REPRIMAND was imposed on September 28, 1978. (Exhibit "A" to Complainant's Memo).

(b) A PUBLIC REPRIMAND was imposed on August 28, 1980. The Florida Bar v. Rosenberg, 387 So.2d 935 (Fla. 1980).

Therefore, when considering the Respondent's prior disciplinary record and the violations described in Counts I and II of the Complaint, it is apparent that cumulative misconduct is present, as described in The Florida Bar v. Vernell, supra. Accordingly, the Bar submits that this Honorable Court should deal more severely with the Respondent's cumulative misconduct.

While Mr. Rosenberg's five misdemeanor convictions do not involve attorney-client relations, they do reflect upon his fitness to practice law -- especially when considered with his neglect of a legal matter and his prior Public and Private Reprimands.

Since Mr. Rosenberg's prior reprimands did not deter him from committing the violations in the case at hand, it is the Bar's view that the Referee's recommendation for a ninety-day suspension and payment of costs is an appropriate form of discipline in this case.

CONCLUSION

The Referee heard the testimony of the accused, read the pleadings, memoranda of law, and saw the exhibits. Therefore, he was in the best position to make a determination concerning the facts. In view of this, and considering the information in this brief, The Florida Bar respectfully requests the Report of Referee be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief has been furnished by mail to Terrence E. Rosenberg, Respondent, at 79 North Hibiscus Drive, Miami Beach, Florida 33139, on this 28th day of March, 1985.

Paul A. Gross

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Bar Counsel