IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LYDIA S. CASTLE,

Respondent.

_____/

CONFIDENTIAL
CASE NO. 63,497
TFB No. 06A85H12

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RESPONSE TO BRIEF FOR RESPONDENT

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DISCIPLINARY RULES

STATEMENT OF THE FACTS AND THE CASE

Respondent's Statement of the Facts and the Case is supplemented by the following is a chronology of the progress of the complaint before the referee:

4/12/83 Respondent received complaint and never filed an answer or response to the complaint.

3/30/84 Respondent served with Notice of Hearing on Petitioner's Motion to Perpetuate Testimony.

4/12/84 Motion to Perpetuate testimony of Gunter Toney, Esquire, heard and granted by the referee. Respondent failed to appear or contact The Bar of the referee.

2/20/85 Respondent served with Notice of Taking Deposition to Perpetuate Testimony.

3/8/85 Deposition of Gunter Toney, Esquire, held in Tallahassee, Florida. Respondent did not appear after notice and did not contact The Bar or the referee.

3/20/85 Respondent served with Notice of Hearing on 5/6/85 for Pre-Trial Conference and referee's review of all pending cases.

5/6/85 Pre-Trial Conference before referee. Respondent did not appear or respond.

7/31/85 7/5/85 Request for Admissions received by respondent. After thirty (30) days elapsed without response, The Florida Bar filed a Motion for Order Deeming Matters Admitted.

7/31/85 Respondent served with Notice of Hearing on 11/26/85 for Final Hearing before referee.

8/29/85 Notice of Hearing on Motion for Order Deeming Matters Admitted and return receipt requested served on respondent with a copy of the Motion for Order Deeming Matters Admitted.

9/11/85 Hearing on Motion for Order Deeming Matters Admitted heard by referee. Respondent did not show and referee orally ruled that paragraphs one (1) through (9) were deemed admitted pursuant to The Florida Bar v. Hollingsworth, 376 So.2d 394 (Fla. 1979) and Hanrahan v. Barry, 363 So.2d 54 (Fla. 3d DCA 1978).

9/23/85 Referee signed Order Deeming Matters Admitted.

11/26/85 Respondent failed to show for Final Hearing and never contacted the referee or bar counsel, but the referee

continued and reset the final hearing in order to give respondent one last opportunity to appear. Referee called respondent's office from his chambers and left a message for respondent to call him. The respondent never called and spoke with the referee.

11/27/85 Notice of Hearing mailed to respondent for 12/30/85.

12/30/85 Final Hearing held and respondent failed to appear. Referee found respondent guilty based on Order Deeming Matters Admitted and continued sanction hearing to allow respondent a chance to appear. Since respondent had failed to attend even one hearing before the referee during the pendency of the complaint.

8/6/86 Respondent made her final and only appearance in the matter at the sanction hearing, offered an apology for her actions and sanctions were ordered.

SUMMARY OF ARGUMENT

The referee did not err in relying upon the order of the Honorable John A. Rudd, Circuit Judge for the Second Judicial Circuit, the Order Deeming Matters Admitted, and respondent's refusal to participate at the referee level, in finding guilt and recommending the sanctions enumerated in the instant Report of Referee.

ARGUMENT

I. THE REFEREE DID NOT ERR IN THE FINDING OF FACT THAT RESPONDENT'S NON-APPEARANCE AT A MOTION TO VACATE DEFAULT RESULTED IN AN ORDER TO VACATE DEFAULT.

The Honorable John A. Rudd, Circuit Judge for the Second Judicial Circuit, entered his Order of May 14, 1981, in Case No. 80-1628 dismissing the plaintiff's cause without prejudice. Portions of that Order directed against respondent are as follows:

> Plaintiff's attorney filed a Motion to Set Case for Trial on December 18, 1980, and this court sent out a Notice of Trial Setting on December 23, 1980, indicating that said trial setting would occur February 11, 1981, in chambers. The record does not reflect whether plaintiff's attorney was present or not. In any event, on that date - February 11, 1981, this court entered an order for a Pre-Trial Conference and trial in which Pre-Trial Conference was set in chambers Wednesday, April 22, 1981, at 1:00 p.m., and directing that the attorneys were to confer on or about April 13, 1981, preparatory for subject pre-trial. Plaintiff's attorney did not confer with opposing counsel April 13, 1981, nor did she appear for Pre-Trial Conference April 22, 1981.
>
> As the trial neared, this court attempted three or four times to contact plaintiff's counsel by telephone, but was unable to do so until the court suggested to plaintiff's attorney's secretary that said attorney was bordering on contempt of court, after which said attorney did contact the court, but did not enlighten the court to any degree regarding her neglect.
>
> It is therefore,
>
> ORDERED AND ADJUDGED that said cause be and is hereby dismissed without (sic) prejudice. (emphasis supplied)

The Bar's Request for Admissions, which went unanswered by respondent and was ordered deemed admitted stated, in part as follows:

> 1. You failed to attend the hearing on the Motion to Vacate Default, and Order

Vacating Default was issued September 2, 1980.

2. You filed a Motion to Set Case for Trial. Trial was set for May 18, 1981, with a Pre-Trial Conference set for April 22, 1981.

3. You again failed to appear at the April 22, 1981, conference. You did not inform the court or your client that you would not attend, and did not arrange for a substitute.

4. The trial judge dismissed the cause without prejudice on May 14, 1981.

Thus, it is clear that the referee did not err in the holding in paragraph II(e) of his Referee Report:

> That respondent failed to appear at the Pre-Trial Conference on April 22, 1981, and as a result, the trial judge dismissed the case without prejudice on May 14, 1981. Respondent never refiled the cause.

II. THE REFEREE DID NOT ERR IN THE FINDING OF FACT THAT RESPONDENT SET THE CAUSE FOR TRIAL MAY 18, 1981, WITH A PRE-TRIAL CONFERENCE SET FOR APRIL 22, 1981.

Initially, it should be noted that respondent's "ISSUE II" is not an accurate paraphrase of the referee's findings of fact.

Respondent attempts to argue that the referee ruled that respondent set <u>both</u> the trial and pre-trial dates, while the Referee's Report reflects that respondent <u>only</u> set the May 18, 1981, trial date. The Referee's Report makes no reference to <u>who</u> set the Pre-Trial Conference of April 22, 1981, just that it was set.

Again, a review of the portion of the language of the Order of the Honorable John A. Rudd, Circuit Judge, and the Referee's Order Deeming Matters Admitted, demonstrates the correctness of the Referee's findings of fact as follows:

> Plaintiff's attorney filed a Motion to Set Case for Trial December 18, 1980, and this court sent out a Notice of Trial Setting on December 23, 1980, indicating that said trial setting would occur February 11, 1981, in chambers. The record does not reflect whether plaintiff's attorney was present or not. In any event, on that date - February 11, 1981, this court entered an Order for a Pre-Trial Conference and trial in which the Pre-Trial Conference was set in chambers Wednesday, April 22, 1981, at 1:00 p.m., and directing that the attorneys were to confer on or about April 13, 1981, preparatory for subject pre-trial. Plaintiff's attorney did not confer with opposing counsel April 13, 1981, nor did she appear for pre-trial conference April 22, 1981. (emphasis supplied)

III. THE REFEREE DID NOT ERR IN FINDING THAT THE DISMISSAL OF THE CASE WITHOUT PREJUDICE RESULTED IN INTENTIONAL DAMAGE TO THE CLIENT.

Initially, it should be observed that respondent admits that "...there might be some theoretical prejudice or damage due to the necessity of refiling the case, such as payment of an additional filing fee and delay in bringing the matter to trial". See Respondent's Brief, page 12.

Secondly, Respondent's client was prejudiced in that respondent aggravated her client's problems in several other areas:

A. The language of the complaint filed by respondent for her client shows or requests damages of two thousand five hundred dollars ($2,500) stating as follows:

> 1. That this is an action for damages that exceed TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500).
>
> * * * * *
>
> 7. That defendant's original estimate of the cost of said repair was $225.00.

8. That approximately one month later, defendant informed plaintiff that the car had been repaired, but when plaintiff and her friend arrived in Tallahassee to pick-up said auto, the engine "blew-up" due to negligence in the original repair.

9. That defendant then informed plaintiff that more repair work would be needed. Therefore, plaintiff returned to Pinellas County without her automobile, after incurring much expense in travel and lodging costs and lost time from her employment.

10. That plaintiff telephoned defendant on a great number of occasions through the summer of 1979, expending a great deal of money on said telephone calls, inquiring about the condition of her automobile, and was told variously that parts were not available, but not had been ordered by defendant; and that defendant had to "manufacture special tools" to work on the car.

* * * * *

13. That defendant finally contacted plaintiff to pick-up said automobile in late January, 1980, whereupon plaintiff traveled to Tallahassee and picked up said auto on January 31, 1980, and was forced to pay a further large sum of money, in cash, before the auto would be released to her.

14. That plaintiff had to pay for a number of items which were damaged as a proximate result of defendant's negligence.

15. That plaintiff never received the "clutch tool" which allegedly was "manufactured" by defendant solely for working on plaintiff's automobile, and for which plaintiff paid $90.00.

16. That the paint on plaintiff's car was badly oxidized as a direct result of sitting with no care in the sun and other elements for approximately 8 and 1/2 months.

17. That defendant caused significant damage to the hood of plaintiff's automobile.

18. That a spare tire and rim were missing from plaintiff's automobile when she received it from defendant.

19. That defendant charged plaintiff with the cost of a

new battery, although he actually replaced her new battery with a used one; said battery needing replacement only because of the length of time the automobile was left sitting in defendant's shop without adequate care and attention.

20. That plaintiff's automobile has depreciated substantially as a result of defendant's callous disregard and negligent repair of said auto.

21. That upon driving said automobile to Pinellas County, plaintiff discovered that defendant had not "sealed" the engine properly, but had stuffed rags in to stop certain oil leaks which were a proximate result of defendant's own negligence.

22. That during the 8 and 1/2 months mentioned hereinabove, plaintiff was forced to rely on sporadic public transportation thereby limiting her opportunities for lucrative employment.

23. That within a matter of a very short time, plaintiff has had to pay a substantial amount of money to have the said automobile repaired in Pinellas County as a proximate result of defendant's negligence in not repairing said auto properly.

B. Despite, respondent's knowledge of the financial and emotional costs to her client, respondent failed to refile the dismissed complaint, failed to withdraw from the representation, failed to communicate the dismissal with her client or inform her client when the statute of limitations would run and failed to contact her client in an effort to correct or mitigate her client's damages after the case was dismissed (even after respondent was aware of the filing of the complaint with The Florida Bar in August of 1981, well before the statute of limitations had run).

IV. THE REFEREE DID NOT ERR IN FINDING VIOLATIONS OF DR 1-102(A)(5) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE).

A review of Judge Rudd's Order of Dismissal dated May 14, 1981, clearly shows that respondent's failure was not isolated, simple neglect.

First, respondent failed to follow the court's direction to confer with opposing counsel by or about April 13, 1981, preparatory to the Pre-Trial Conference. Second, respondent chose to not appear for the Pre-Trial Conference on April 22, 1981, without giving prior notice to the court or opposing counsel. Third, the lower court stated in its order dismissing the complaint as follows:

> As the trial neared, this court attempted three or four times to contact plaintiff's counsel by telephone, but was unable to do so until the court suggested to plaintiff's attorney's secretary that said attorney was bordering on contempt of court, after which said attorney did not contact the court, but did not enlighten the court to any degree regarding her neglect.

In respondent's brief, it appears that the reason respondent did not appear was due to the failure of her pro bono client to advance travel costs. Thus, it appears that respondent's decision not to attend the hearing was an intentional, economic decision.

Respondent's excuse before the Referee on August 6, 1986, for not appearing at the hearing in question was as follows:

> I didn't go to Tallahassee and the only way, the only reason I can give now is because I really didn't think that it would make any difference because no matter what I did for

these people they really wanted more than was reasonable for them to expect from the judicial process. Then, from the collection process afterwards, I tried to explain that once we got a judgment that that would not be the end of it. There would still be the problem of collecting on the judgment and I figured out probably early that Spring, before the Pre-Trial Conference or before the trial was held, I think probably before I even spoke, had that lengthy conversation with Mr. Tobey, that given all the long-distance phone calls I had made and the pleadings and research and whatever, that I have probably put forty or fifty hours into the case and had received $250.00 for the costs, which we used up filing the Complaint and getting service. But I certainly would be more than willing to return those funds to Mrs. Vaccaro. (transcript of Sanction Hearing, page 24-25)

V. THE REFEREE DID NOT ERR IN FINDING RESPONDENT GUILTY OF VIOLATING DR 1-102(A)(6) (CONDUCT WHICH ADVERSELY REFLECTS ON HER FITNESS TO PRACTICE LAW).

In addition to the facts presented in issue IV above, the referee could certainly take into consideration the failure of respondent to attend the instant hearings before the referee or to even communicate her intention not to attend to the referee hearings. This course of conduct, in connection with the failure to appear and failure to communicate with the court and opposing counsel in the underlying suit, clearly demonstrated a disrespect or disregard for the judicial process which adversely reflected on the fitness of respondent to practice law.

Again, in summary, it is clear from respondent's admissions of improper conduct and remorse before the referee at the sanction hearing on August 6, 1985, and her admission that she did not attend the Pre-Trial Conference or take other actions due to purely economic decisions, that respondent's actions were an intentional failure to carry out her contract of employment.

VI. THE REFEREE DID NOT ERR IN FINDING RESPONDENT GUILTY OF VIOLATION OF DR 7-101(A)(2) (INTENTIONAL FAILURE TO CARRY OUT CONTRACT OF EMPLOYMENT)

The respondent intentionally did not appear at the Pre-Trial Conference, did not refile the complaint after the dismissal, did not appeal the lower Court's dismissal, did not withdraw from the case, and did not notify client on passage of the statute of limitations. It is clear that respondent was paid by her client and did not carry out the contract of employment. Respondent admitted the following at the Sanction Hearing on August 6, 1986:

> That one just, that was going to happen whether I showed up or not and on the original, the underlying case, Judge, if I had stood on my head I couldn't have gotten for the client what she wanted and after speaking to Mr. Tobey and Mr. Rushing, confirmed that yes, indeed, in the deposition Mr. Tobey gave, he did state that he and I discussed the matter by telephone and he told me his client had a big IRS lient and was not going to be in a position to satisfy a judgment even if one was entered against him.
>
> When I told my client that she just went crazy. At that point, I should have just withdrawn or told her to find antoher and that was where I made my really big mistake in that case. There was nothing I could have done for her, at that stage, and I believed at that point that I more than earned my $200.00, on an hourly basis. It didn't come out to much more than minimum wage with all the work I had done. (transcript of Sanction Hearing, page 45-46)

VII. THE REFEREE DID NOT ERR IN FINDING RESPONDENT GUILTY OF VIOLATION DR 7-101(A)(3)(PREJUDICE OR DAMAGE TO CLIENT).

Again, respondent admitted in the instant brief herein that

the dismissal of the complaint, due to her failure to appear or communicate with the court, would prejudice her client. Additionally, respondent's failure to notify her client of the dismissal, failure to withdraw and failure to take remedial steps to inform her client of the dismissal or mitigate her client's prejudice due to passage of time or statute of limitations, are clearly prejudicial to her client.

VIII. THE REFEREE DID NOT ERR IN FINDING THE RESPONDENT GUILTY OF A VIOLATION OF DR 6-101(A)(3)(NEGLECT OF A LEGAL MATTER).

The entire course of respondent's individual acts of intentional misconduct or of negligence taken together clearly show neglect of her client in the instant case.

Indeed, Judge Rudd's Order of May 14, 1981, labeled her conduct as "neglect" "bordering on contempt of court" as follows:

> As the trial neared, this court attempted three or four times to contact plaintiff's counsel by telephone, but was unable to do so until the court suggested to plaintiff's attorney's secretary that said attorney was bordering on contempt of court, after which said attorney did contact the court, but did not enlighten the court to any degree regarding her neglect. (emphasis supplied)

Additionally, it should be noted that respondent admitted her neglect at the sanction hearing on August 6, 1986 as follows:

> I mean, there were a lot of reasons I didn't follow through on the case but, basically, I was negligent. There's just no getting around that and that if we could go back more or less in terms of that, but in addition to the $250.00 to repay the client, I would be glad to do it. (transcript of Referee Sanction hearing, page 51)

* * * * *

> THE COURT: And yet, from the standpoint of the rules she already been adjudicated to be negligent. Not to have done a --

MISS CASTLE: I can't contest that. (transcript of Referee Sanction hearing, page 52)

XI. THE RECOMMENDED DISCIPLINE BY THE REFEREE IS WARRANTED.

The referee recommended discipline as follows: (A) Public Reprimand, (B) Restitution of $250.00 in attorneys' fees, (C) Restitution of the amount of $345.00 in auto repairs, which were the subject matter of the complaint, (D) Eighteen months probation under the supervision of an attorney, (E) and payment of costs of proceedings in the amount of $938.17.

Although a short suspension may have been warranted under the facts, the referee's recommendation already considered and included mitigation for "No prior grievance record and respondent was remorseful".

It should be noted that in addition to the conduct included in the matters deemed admitted, the referee and this Court may properly aggravate a sanction based upon respondent's failure to appear or respond to grievance matters. Clearly, this is a textbook example of open disregard for the grievance procedures. Thus, it is just and proper for the referee to have considered the fact that respondent only made one (1) appearance throughout the entire grievance process spanning over four (4) years; and including at least eight (8) failures to appear.

Respondent admitted to the referee at the Sanction Hearing on August 6, 1986, that at least some of her failure to respond or appear during the grievance proceedings because she was "really frightened" and "didn't use good judgment". (transcript

of Sanction Hearing page 28).

The restitution of legal fees and auto repairs is certainly reasonable given the two thousand five hundred dollar ($2,500.00) demand in her complaint on her client's behalf and her client's out-of-pocket expenses and legal fees. Again, it should be noted that respondent, contrary to the argument presented in her instant opening brief, agreed to reimburse her client her attorney fee of $250.00, as well as certain out-of-pocket expenses at the sanction hearing of August 6, 1986 as follows:

> There's just no getting around that and that if we could go back more or less in terms of that, but in addition to the $250.00 to repay the client, I would be glad to do it. The out-of-pocket expenses that she incurred, as well. I don't know if I could do that right away. I could certainly do that within a period of thirty days. (transcript of Sanction Hearing August 6, 1986, page 51) (emphasis supplied)

Given the neglect at the trial level and during the grievance procedures, the recommendation for an eighteen month probation period under the supervision of an attorney is certainly a reasonable safeguard, both for respondent and future clients. Additionally, respondent agreed to the supervised probation at the Sanction Hearing on August 6, 1986, as follows:

> THE COURT: I should think also somebody on probation, that is some motivation to be sure you don't make another mistake and not diligently represent your client.
>
> MISS CASTLE: I wouldn't.
>
> THE COURT: While on probation --

MISS CASTLE: I would be happy to submit three names and they would be of people -- one person in mind who is the Chair of the ACL in St. Petersburg whom I know, I don't have a personal relationship with him, he's been a lawyer a long time, Gardner Beckett, I could try to come up with the names of two other people and submit those. If you think that would be appropriate. I hesitate to even put this on the record but we have had a lot of problems with, especially our receptionist and the people that answer the telephone. We've had alot of complaints and the person who has been our receptionist for about the last two-and-a-half years is a, quote, member of the client population, and is just not really good about messages. We've had a lot complaints from people, especially people who say this is very important, that the messages are not getting through, and I just apologize. If there was any way I could just go back to Square One on this I would and that, you know, conditional guilty plea I would certainly have done that because I didn't do everything I could have an should have done on the case. After I got involved in it, saw what was happening, I should have told the client to get another attorney. (transcript of Sanction Hearing, page 54-56)

CONCLUSION

The referee did not err in finding respondent guilty of violating the Code of Professional Responsibility Discipline Rules DR 1-102(A)(5), DR 1-102(A)(6), DR 6-101(A)(3), DR 7-101(A)(2), and DR 7-101(A)(3) and imposed the proper sanctions under all the facts and circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Brief for Respondent has been furnished by regular U.S. mail to Donald J. Schutz, attorney for respondent, One Beach Drive, S.E., Suite 205, St. Petersburg, Florida, 33701, and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301-8226, this 26th day of February, 1987.

STEVE RUSHING