IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LYDIA S. CASTLE,

Respondent.

_____/

CONFIDENTIAL

Case No. 63,497

(TFB #06A82H12)

BRIEF FOR RESPONDENT

PETITION FOR REVIEW OF THE REFEREE'S REPORT AS APPROVED BY THE BOARD OF GOVERNORS

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TABLE OF CASES

Code of Professional Responsibility

Integration Rules of the Florida Bar

Other Authorities

STATEMENT OF FACTS IN THE RECORD

The factual record which was before the Referee consists primarily of a Request for Adminissions of Fact, which went unanswered by Respondent and were deemed admitted, provided the following facts:

1. You, Lydia Castle are, and at all times hereinafter mentioned were, a member of the The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. In November 1979, you were hired to represent Patricia Vaccaro in a civil suit. You were paid $250.00 for the representation.

3. On June 2, 1980, you filed a civil suit in the Second Judicial Circuit Court in behalf of Ms. Vaccaro against The Motor Man, Inc., of Tallahasee, Florida.

4. On July 15, 1980, a default judgment was entered on Plaintiff's behalf.

5. Defendant, Motor Man, Inc., filed a Motion to Vacate the Default. A hearing on the motion was scheduled for August 26, 1980.

6. You failed to attend the hearing on the Motion to Vacate Default, and Order Vacating Default was issued September 2, 1980.

7. 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.

8. 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.

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

RESPONDENT'S NARRATIVE OF FACTS

The Respondent, a St. Petersburg attorney, was retained to represent a Plaintiff in a civil action against an auto repair company in Tallahassee, Florida. The Plaintiff, (hereinafter "client") had taken an automobile for repair to an auto repair company in Tallahassee, Florida (hereinafter Defendant). The substance of the client's complaint was alleged negligence in repairing her automobile.

The Respondent accepted a $200.00 retainer and $50.00 for filing fees to institute a civil action, and file a complaint. No fees were paid following the initial payment, although prior to the dismissal without prejudice, the Respondent had discussed the necessity to pay transportation costs and the client had stated her refusal and inability to fund continued litigation. Following the acceptance of the retainer, and the subsequent filing of the lawsuit, the Respondent terminated her private practice and accepted work as a full-time Staff Attorney for Gulfcoast Legal Services. Under her employment agreement, she was allowed to complete matters which she had undertaken if she deemed it appropriate. Given the client's financial status and the fact that Respondent felt the client could not find replacement counsel in the matter, the Respondent decided to attempt to complete the matter. Upon her employment with legal services the Respondent intended to complete this matter on a pro-bono basis regarding fees, but did need expense money for travel. The client was unable to provide expense money.

The Respondent filed a Complaint in Tallahasee, the Defendant defaulted, and prior to the final evidentiary hearing on damages, the Defendant retained counsel who filed a Motion to Vacate Default. Prior to the hearing on the Motion to Vacate Default, Respondent discussed the matter with client and advised client that in light of existing case law the Motion to Vacate Default would probably be granted, and could not recommend the expenditure of money for travel expenses. Accordingly, the Respondent did not appear at the hearing on the Motion to Vacate Default and has a recollection that she may have telephoned the judge and communicated her contemplated non-appearance, as well as cancelling the final evidentiary hearing on damages.

Following the filing of an Answer and Affirmative Defenses by the Defendant, Respondent and counsel for the Defendant had some discussions regarding possible settlements which did not appear to be fruitful, and Respodent filed a Notice to set the matter for Trial. The matter was set for Pre-Trial on April 22, 1981, and Trial on May 14, 1981. Following the setting the Trial, Respondent discussed with the client the necessity to pay travel costs, and the client advised the Respondent that she was unable to pay for any further costs. However, Respondent did not attempt to withdraw from the matter. Prior to the Pre-Trial hearing, Respondent telephoned the Court and requested a continuance of the Pre-Trial which was subsequently denied. Unfortunately, the Respondent had taken for granted the fact that the Trial Court would continue the Pre-Trial and had not made arrangements either to be in Tallahassee for the Pre-Trial or arrange substitute

counsel. The Trial Court did not continue the Pre-Trial and went forward with the Pre-Trial Conference on April 22, 1981 in Respondent's absence. The Trial Court thereafter dismissed the complaint without prejudice and the Respondent advised her client that the suit had been dismissed and that she could refile the action, but that Respondent could no longer represent her and that Respondent would be well advised to obtain the services of an attorney in Tallahasee.

Following the filing of the dismissal without prejudice, the client instituted bar grievance matters. The record reflects that there was difficulty with serving some pleadings, but the Respondent acknowledges that she had sufficient notice of the pendency of the proceedings to take more action than she did. However, apparently the primary facts upon which the Referee relied in entering the Order was the Request for Admissions of Fact which were deemed admitted as a result of the Respondent's not answering the same, and the Order on the dismissal of the civil action.

The Respondent did appear at a sentencing at which time the recommendations of the Referee were discussed, and at that time she understood through statements of Bar Counsel that it was too late to address the factual points which she had failed to raise to that date. Based upon the record, the Referee entered his recommendation which included a finding of guilt for violations of DR1-102(A)(5), DR1-102(A)(6), DR6-101(A)(3), DR7-101(A)(2), and DR7-101(A)(3). The Referee recommended a public reprimand, restitution in the amount of $250.00 for attorneys' fees and $345.00 for auto repairs, which were the subject matter of the

complaint, and eighteen months probation under the supervision of an attorney, and payment for the Court of the Bar proceedings.

The Referee found certain aggravating factors in this recommendation, primarily the failure of Respondent to appear in bar proceedings and failing to answer Request for Admissions.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Referee erred in the finding of fact that the Respondent's non-appearance at a Motion to Vacate Default resulted in an Order Vacating the Default.

2. Whether the Referee erred in the finding of fact that Respondent set the case for Trial for May 18, 1981, and the Respondent set the Pre-Trial Conference for April 22, 1981.

3. Whether the Referee erred in the finding of fact that the dismissal of the case without prejudice resulted in prejudice or damage to the client.

4. Whether the Referee's recommendation that the Respondent's conduct violated DR 1-102(A)(5) is justified based on the facts in the record.

5. Whether the Referee's recommendation that the Repsondent's conduct violated DR 1-102(A)(6), conduct which reflects on fitness practice of law, is justified based on the facts of the record.

6. Whether the Referee's finding that the Respondent violated DR 7-101(A)(2), intentional failure to carry-out contract of employment, is justified based on facts of the record.

7. Whether the Referee's finding that the Respondent violated DR 7-101(A)(3), intentional prejudice or damage to client, is justified based on facts of the record.

8. Whether the Referee's finding that the Respondent violated DR 6-101(A)(3), neglect of a legal matter, is justified based on facts of the record.

9. Whether the Referee's recommendation of punishment is unwarranted or justified based on the absence of previous bar violations and the nature of this incident.

ARGUMENT

I. THE REFEREE ERRED IN THE FINDING OF FACT THAT RESPONDENT'S NON-APPEARANCE AT A MOTION TO VACATE DEFAULT RESULTED IN AN ORDER TO VACATE DEFAULT.

The facts which related to the Referee's finding of fact that Respondents' non-appearance at a hearing on a Motion to Vacate Default resulted in the vacating of the Default is reflected in a Request for Admissions of Fact which the Respondent did not answer and were deemed admitted by the Referee. Request for Admission 6 states:

You failed to attend the hearing on the Motion to Vacate Default, and Order Vacating Default was issued September 2, 1980.

The finding that the Respondent's non-appearance at this motion hearing resulted in the granting of Defendant's Motion is unwarranted based on the facts in the record, in that the Motion to Vacate Default sets forth facts which are generally recognized as sufficient to constitute excusable neglect to vacate a default. The Motion sets forth that the Defendant had attempted to represent himself, had taken acts to contact both the Plaintiff and Respondent prior to the expiration of the time to respond, and the Motion to Vacate Default was filed on a timely basis shortly after the Default was entered, and prior to the entry of a Final Default Judgment.

In Maniscalco v. Hollywood Federal Savings & Loan Association, 397 So.2d 453 (4th DCA 1981), a Defendant was sued and due to his contact with a mortgage company, the Defendant was

unintentionally misled to believe that it would be unnecessary for him to file responsive pleadings. Similarly in Wentnick v. European American Bank and Trust Company, 487 So.2d 382, (Fla. 4th DCA 1986), a party did not understand that he had been served with a Writ of Garnishment personally rather than as President of a Corporation and failed to file a responsive pleading on behalf of himself. This court, stating, "Florida Courts liberly set aside Defaults so that controversies may be decided on their merits", Id., at 383, vacated the Default based on its determination that the defaulted party demonstrated excusable neglect, meritorious defenses, and due diligence in seeking relief. Given the allegations of the Motion to Vacate Default and the general tendency of the Florida courts to be liberal where clients have moved expediently in vacating the Default, the Referee's finding that the non-appearance of the Respondent resulting in the vacating of the Default is unwarranted and unjustified.

The Florida Bar has the burden of proof by the presentation of clear and convincing evidence to establish all factual elements of its case, The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978), and there are no facts from which it can be reasonably concluded that the Respondent's non-appearance resulted in an Order Vacating Default. Accordingly, the Referee erred in making that finding.

II. THE REFEREE ERRED IN THE FINDING OF FACT THAT RESPONDENT SET THE CASE FOR TRIAL MAY 18, 1981, AND THAT RESPONDENT SET THE PRE-TRIAL CONFERENCE FOR APRIL 22, 1981.

The Referee erred in finding that the Respondent set

the case for Trial May 18, 1981, and set the Pre-Trial Conference for April 22, 1981.

The facts before the Referee, as stated in the Request for Admissions of Fact, state:

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

This is the sole and exclusive fact that was before the Referee and the conclusion of the Referee that the Respondent set the dates is unwarranted, particularly because the substantive allegation of the Bar Complaint, and the alleged objectionable behavior on the part of Respondent, was the non-appearance at the April 22 Pre-Trial. The record is devoid of facts which indicates that the Respondent in any way participated in selecting this date, and accordingingly, the Referee's finding of fact is erroneous and unwarranted. While the Referee, as finder of fact, may make fair interpretations of facts presented, and may resolve ambiguities, the Referee's finding must be supported by the record, see, e.g. Malt v. Deese, 399 So.2d 41 (4th DCA, 1981). The instant record is devoid of any fact from which the Referee could fairly conclude that the Respondent was involved in agreeing, selecting, or setting the dates for Pre-Trial or Trial.

III THE REFEREE ERRED IN FINDING THAT THE DISMISSAL OF THE CASE WITHOUT PREJUDICE RESULTED IN INTENTIONAL DAMAGE TO HER CLIENT.

Based on the findings of fact, the Referee concluded that "... the Repondent (is) guilty of neglecting a legal matter, prejudicing or damaging her client and failing to carry-out a contract of employment.

While Respondent acknowledges that she did not appear at

a Pre-Trial Conference, based on her mistaken assumption that the Trial Court would not mandate her appearance at the Pre-Trial Conference, there is no factual basis to support the Referee's finding that the dismissal of the action without prejudice constituted intentional prejudice or damage to the client.

The Respondent acknowledges that there might be some theoretical prejudice or damage due to the necessity of refiling the case, such as the payment of an additional filing fee and delay in bringing the matter to Trial. However, the prejudice or damage contemplated by DR7-101(A)(3) is actual, and intentional as opposed to theoretical and negligent, damage or prejudice. The client complained of improper auto repair, and the attorney for the Defendant testified at deposition in Bar proceedings that his client was uncollectable. Indeed, the attorney for the Defendant set forth in the Motion to Vacate Default, that the Defendant was contemplating a liquidation, and the client was therefore fully advised of the outset that the possibilities of collecting any ultimate judgment on a matter involving questionable liability was far from guaranteed.

Given the amount in controversy, the travel expenses and the cost of litigating the case, the more likely deduction from the facts is that the client actually saved the expenditure of travel expenses through the dismissal. This is not stated facetiously, but to underscore the fact that the record must be fairly interpreted and the deduction that the client was in any manner intentionally prejudiced or damaged by a dismissal without prejudice of an action with questionable liability and collectability is speculative and further unjustified and unwarranted.

Although Respondent acknowledges that, in retrospect, she

would have been well advised to simply withdraw from the representation instead of attempting to accomodate an individual on a pro bono basis who could not afford further litigation, especially in light of the total amount claimed in the Complaint, it is unwarranted to presume that, had the Respondent attended the Pre-Trial Conference, that the client would have proceeded to Trial, won, and collected a judgment. This aspect of the bar proceedings was more akin to a summary malpractice action. As stated by this court, "the rights of clients should be zealously guarded by the bar, but care should be taken to avoid the use of disciplinary action under Canon 6 as a substitute for what is essentially a malpractice action," The Florida Bar v. Neale, 384 So.2d 1264, 1265 (Fla. 1980).

IV THE REFEREE ERRED IN FINDING VIOLATIONS OF DR1-102(A)(5), CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

In retrospect, the Respondent acknowledges that the fact of her non-appearance at the Pre-Trial Conference, based on her assumption that the trial court would voluntarily grant a continuance, was unfortunate. However, the Respondent respectfully suggests that her conduct on this isolated case does not rise to the level of behavior required for violations involving conduct prejudicial to the administration of justice. Conduct which is prejudicial to the administration of justice contemplates a type of behavior which goes beyond ordinary neglect. For example, in the Florida Bar v. Oxner, 431 So.2d 983, (Fla. 1983), the Respondent was found quilty of engaging in conduct that is prejudicial to the administration of justice for lying to a Trial Court to obtain a

continuance. Similarly, in The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982), the Respondent therein made derogatory statements to a trial court in a Motion to Recuse. In the matter of the State of Florida v. Calhoon, 102 So.2d 604 (Fla.1958), this Court stated

> "Admitting, therefore, the human weaknesses of judges as individuals but affirming our belief in the essentially of the chastity of the goddess of justice, we are impelled to the inescapable notion that any conduct of a lawyer which brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties."

The Court went on to define the actions of the impairment of administration of justice as actions which exceed the bounds of decency or truth and are aimed at the destruction of public confidence in the judicial system as such.

While theoretically, the concept of administration of justice might be broad enough to include such actions as tardiness or non-appearance at hearings, the spirit of this section, and the case law interpreting it, contemplates behavior which exceeds mere negligence, and instead, contemplates actions which contain elements of deceit and/or dishonesty.

As stated by this Court in The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982):

> As for Disciplinary Rule 1-102(A)(5), conduct prejudicial to the administration of justice, The Bar likewise argues that engaging in illegal conduct by an officer of the court is ipso facto conduct prejudicial to the administration of justice. The Bar, however, has failed to cite any case law or other authority to substantiate its position and bald assertions on its part are not persuasive. One definition of "obstructing the administration of justice" defines the term as "hindering witnesses from appearing, assaulting process sever [sic], influencing jurors, obstructing court orders or criminal investigations." Black's at 972. The term is not so broad as to include all conduct which is ille-

> gal but rather those activities for example, more directly associated with "bribery of jurors, subornation of perjury, misrepresentations to a court or any other conduct which undermines the legitimacy of the judicial processes." Polk v. State Bar of Texas, 374 F.Supp. 784, 788 (N.D. Tex. 1974). The recent case of an attorney theatrically appearing in the courtroom on a stretcher dressed in bedclothing is a prime example of conduct prejudicial to the administration of justice. See The Florida Bar v. Burns, 392 So.2d 1325 (Fla. 1981). The participation of the respondent in the five overt acts (involving importation of fifteen thousand pounds of marijuana) is not. The referee was also in error in his finding of guilt of violation of Disciplinary Rule 1-102(A)(5).

Accordingly, the factual record of non-appearance at a Pre-Trial hearing which resulted in a dismissal without prejudice does not rise to the standard of behavior which is generally attributed to interfering with the administration of justice. This is particularly true in this case, where the Respondent had terminated her private practice, undertaken a Staff Attorney position as a legal services lawyer, and agreed to complete the representation of the client on a pro bono basis solely to preclude the client from being unrepresented in pending litigation. Although the continuation of the litigation did not take place as initially contemplated by the Respondent, her efforts to remain involved on the behalf of an indigent client for no monetary benefit does not conform with the suggestion that an ultimate non-appearance reverts this otherwise admirable effort into conduct which interferes with the administration of justice.

V THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATING DR 1-102(A)(6), CONDUCT WHICH REFLECTS ON THE FITNESS TO PRACTICE LAW.

The Respondent respectfully suggests that the record is

entirely devoid of facts which reflect that the non-appearance at this Pre-Trial in any way reflects on her overall fitness to practice law. The case which is the result of this Bar Complaint was a civil action which was instituted prior to her association with Gulfcoast Legal Services. She remained involved in the case solely to accommodate an indigent client, and has not engaged in the private practice of law since her association with Gulfcoast. Indeed, one of her motivating factors in moving into legal services was her acknowledgment that her tendency to assist poor people who could not afford litigation was not conducive to a successful private practice. The Supreme Court of Florida, in The Florida Bar v. Hotaling, 454 So.2d 555 (Fla. 1984), recognized that an inability to turn down clients from lower economic levels acted as a mitigating factor in Bar matters. Significantly, when reflecting on the isolated incident that stemed from a civil action prior to association with legal services, and her record of commitment to the legal services program in absence of other Bar Complaints or problems, it is respectfully suggested that her overall fitness to practice law cannot fairly be questioned by an admitted mistaken non-appearance at a Pre-Trial Conference.

In comparing behavior which courts have reviewed conduct which adversely reflects on the fitness to practice law, the nature of Respondent's infraction simply does not rise to that level. For example, in The Florida Bar v. Routh, 414 So.2d 1023 (Fla. 1982), the behavior involved filing a false Affidavit in a judicial proceeding and shooting into an unoccupied vehicle. See

also, The Florida Bar v. Ball, 46 So.2d 459 (Fla. 1981), (intentionally and unjustifiably attempting to injure clients in an adoption proceedings), The Florida Bar v. Morris, 452 So.2d 545 (Fla. 1984) entering into business transactions with client with differing interest without full disclosure, The Florida Bar v. Hawkins, 450 So.2d 483 (Fla. 1984), conduct involving misrepresentation, The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984), conduct involving lack of candor, Florida Bar v. Harden, 448 So.2d 1017 (Fla. 1984), misusing trust funds and engaging proper trust accounting, The Florida Bar v. Martell, 446 So.2d 1058 (Fla. 1984), knowingly and unlawfully hiring a detective to cause physical injury to an individual, and The Florida Bar v. McKenzie, 432 So.2d 566 (Fla. 1983), which involves varies actions of neglect and the retention of clients funds without an express fee agreement.

In all, the undersigned counsel could locate no reported cased which held that an isolated act of single neglect constituted a violation of DR-1-102(A)(6), and as such, the Referee's recommendation of this finding is unwarranted based on the facts in the record. The Respondent has been a member of the Bar since 1976, has operated under an intense legal services/litigation case load, on behalf of indigent clients facting difficult problems, and has never been sued for malpractice or had any record of Bar proceedings. Accordingly, it is unfair and unwarranted to conclude that an isolstated non-appearance at a hearing in any way reflects on this attorneys' overall ability to practice law.

6. THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATIONS DR 7-101(A)(2) INTENTIONAL FAILURE TO CARRY-OUT A CONTRACT OR EMPLOYMENT.

The record is devoid of facts that indicate that the client could reasonably have understood that the Respondent would pay for transportation to Tallahassee from her own funds and otherwise continue the litigation through its termination regardless of additional contributions from the client, and accordingly, a finding that the non-appearance at the Pre-Trial Conference violated any employment contract with the client is unwarranted on the facts before the Referee, because the record does not reflect the scope of the employment contract and it cannot fairly be deducted that Respondent had entered a contract which required Respondent to advance travel costs, and more importantly, the record is devoid of any facts which support the necessary elements of intent which seems to have been overlooked by the Referee.

To support a finding of intent to breach the contract, the record must show facts which can fairly support that conclusion. In discussing intention in criminal law, this Court has held "...there can be no intent to commit an unlawful act when the underlying conduct constitutes culpable negligence," Taylor v. State, 44 So.2d 931 (Fla. 1984).

There are no facts which establish that Respondent intentionally breached the contract, and therefor, the Referee erred in finding a violation of DR 7-101(A)(2). Indeed, in light

of the circumstances, the suggestion that this non-appearance is an intentional breach of contract is totally unjustified. Of particular note is the fact that the Referee's report completely ignores the element of intent, which is necessary under DR 7-101, and there is no finding of fact which supports a finding of intent.

VII THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATING DR 7-101(A)(3), PREJUDICE OR DAMAGE TO CLIENT.

The Respondent acknowledges that the dismissal of the Complaint without prejudice would constitute some theoretical prejudice to the client in the necessity to pay additional filing fees and delay in bringing the matter to Trial. However, there was no evidence of substantive prejudice or damage to the client, since the negligence which was the subject of the civil action occured sometime between 1979 and 1980, there existed no procedural bar,

such as the Statute of Limitations, from immediately refiling the action. Indeed, the client filed her Bar Complaint against Respondent prior to the expiration of the Statute of Limitations. There is the possiblity that the dismissal was not in her client's interest, but, the dismissal in no way affected her substantive ability to litigate her claim against the Defendant had she chosen to refile and proceed to judgment. While acknowledging the fact that it was unfortunate that the matter was dismissed at the Pre-Trial stage, the Respondent respectfully suggests that to attribute any intentional damage to the Respondent is particularly unfair since she stayed involved on a pro-bono basis for no personal gain or involvement solely to accommodate the client and attempt to assist a client who she perceived would be otherwise left without an attorney due to her financial situation. The record is barren of any fact shown by clear and convincing evidence that the client would have prevailed in the case, and collected any resulting judgment. Accordingly, the finding that the Respondent caused intentional damage or prejudice to the client is speculative, at best, and not supported by clear and convincing evidence. Again, DR 7-101 requires a showing of intent, and the findings of fact and the Referees report are silent on this element.

VIII THE REFEREE ERRED IN FINDING THE RESPONDENT GUILTY OF A VIOLATION OF DR 6-101(A)(3) NEGLECT OF A LEGAL MATTER.

This Court has recognized that simple neglect is insufficient to warrant a finding of a violation of DR 6-101(A)(3), and indeed has previously exonerated other attorneys for actions more egregious than those of this Respondent.

In The Florida Bar v. Neale, 384 So.2d 1264 (Fla. 1980), the attorney had intentionally dismissed a case under the mistaken belief that it could be refiled with a punitive damage count. However, the Statute of Limitations had expired, and the client's subsequent lawsuit was dismissed.

This Court, in finding that the attorney's neglect did not constitute the type of neglect contemplated by DR 6-101(A)(3); stated;

> The power to disbar or suspend a member of the legal profession is not an arbitrary one to be exercised lightly, or with either passion or prejudice. Such power should be exercised only in a clear case for weighty reasons and on clear proof. State ex rel. The Florida Bar v. Bass, 106 So.2d 77 (Fla. 1958).
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> There is a fine line between simple negligence by an attorney and violation of Canon 6 that should lead to discipline. The rights of clients should be zealously guarded by the bar, but care shold be taken to avoid the use of disciplinary action udner Canon 6 as a substitute for what is essentially a malpractice action.
>
> Neale had prepared to go to trial on his original complaint. Late in the proceeding he discovered a theory upon which he might have obtained a larger recover for his client but then made the mistake of dismissing the action. His conduct might well be the basis of a negligence action against him, but, in our minds, it is insufficient to warrant a disciplinary action.
>
> We therefore reject the recommendations of both the referee and the bar and dismiss the charges against the respondent. Id. at 1265.

Similarly, in The Florida Bar v. Nemec, 390 So.2d 1190 (Fla. 1980), this Court reviewed the admitted neglect of an attorney which resulted in the dismissal of a case with prejudice. This Court stated in that case,

> Even though the respondent overlooked or misconstrued the Statute of Limitations and was thereby negligent, and possibly subjected himself to a malpractice action, the facts of this case do not appear of sufficient magnitude to warrant conviction of an ethical violation under Canon 6. Id, at 1191.

The Court has recognized that perfection is not required by the Code, and some forms of neglect do not, in and of themselves, constitute Code violations. The non-appearance of an attorney which resulted in a dismissal without prejudice cannot reasonably be argued to exceed by degree the negligence of the attorneys in Neale and Nemec, which resulted in dismissal with prejudice, and therefore, the record is devoid of clear and convincing evidence that this Respondent violated DR 6-101(A)(3).

SUMMARY REGARDING ALLEGED DR VIOLATIONS

As stated in Rule 11.02(3)(A) of the Integration Rule of the Florida Bar,

> (3) Moral Conduct.
>
> (a) Standards. The standards of professional conduct to be observed by members of the Bar are not limited to the observance of rules and avoidance of prohibitive acts, and the enumeration herein of certain categoreis of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission by a lawyer of any act contrary to honesty, justice, or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline.

The actions of the Respondent herein cannot fairly be portrayed as being contrary to honesty, justice, or good morals, which the Integration Rule contemplates as cause for discipline. Absent these factors, the Respondent's behavior falls within the tolerable variation from perfection which has previously been recognized by this Court as not warranting disclipline.

Accordingly, the report of the Referee finding violations of the Professional Code was erroneous, unlawful, and unjustified, and therefore, this Court should reject that report and dismiss the pending action.

IX The Recommended Discipline is Unwarranted.

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.

The non-appearance of Respondent at a Pre-Trial Conference and her assumption that the trial court would take no adverse action, in light of her previous record of good conduct and in light of the obvious good intentions of the Respondent in remaining involved in this matter on a pro bono basis, if it rises to the level of a Code violation, justifies punishment not to exceed restitution of the initial filing fee and legal fees in the amount of $250.00 and a private reprimand.

The Respondent has been an active Staff Attorney for Gulfcoast Legal Services since June 30, 1980. In that capacity, she has appeared as counsel for hundreds of indigent clients at a salary level considerably lower than the average income of members of the Bar of her age and experience. It was the same driving force that led her to legal services which also kept her involved in this case for no pecuniary gain to attempt to preserve the rights of an individual who could not afford alternate counsel or costs of transporation or litigation. However ill advised, Respondent suggests that her motives, coupled with the fact that the only prejudice to the client was the necessity to refile the case does not warrant a public reprimand and the concurrent embarassment of this attorney and her organization. She has had no prior or subsequent record of discipline, her action was not taken

for pecuniary gain or in any manner intentionally designed to prejudice her client. Her motives were pure, and a public repirmand would not serve to notify other members of the Bar that this type of activity is not condoned.

Punishment in excess of a private reprimand is unwarranted. In The Florida Bar vs. Rendina, 467 So.2d 734, (4th DCA, 1985), the Court, in discussing the Fifth Amendment as it related to Bar proceedings stated, "...Bar disciplinary proceedings are remedial, not punitive; they are designed to determine the lawyer's fitnesss to practice so as to protect the public, not to punish the lawyer in question."

This case cites with approval the case of In Re Daley, 549 F. 2nd 469 (7th Cir. 1977) which cited with approval the following language from In Re Echels, 430 F. 2nd 347, 349-50 (7th Cir. 1970);

> "Disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis, and a result from the inherent power of Courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the ocnduct of the Respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the Court to continue in that capacity and to protect the Court and the public from the official administrations of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest in the attorney's right to continue to practice a profession imbued with public trust."

The Referee's recommendation goes beyond the appropriate punishment and indeed, awards the client damages which were the subject matter of the client's complaint without either a successful

termination of the client's litigation or a showing that the lawyer's action or inaction was the proximate cause of the damage. The award to the client of actual damages in the amount of $345.00 was a summary finding that the Respondent's non-appearance at the Pre-Trial Conference precluded the client from obtaining damages on her Complaint against the Defendant, and as such, addressed a matter of liability, causation, and damages which would be the subject of a civil professional malpractice action between the client and the Respondent. This finding indeed indicated that this proceeding turned into a "lawsuit between parties litigant" and a summary award of liability and damages without the client eing a party to the lawsuit. The effect of this is to turn the Florida Bar into an advocate on behalf of clients in civil malpractice actions, which is beyond the scope of the role of Bar Counsel and the scope of punishment of the Supreme Court, The Florida Bar v. Neale, 384 So.2d 1264, (Fla. 1980).

The California Bar publishes the factual basis for private reprovals in its monthly magazine. The California Lawyer, February, 1987, p. 60, contains the following discussion of a private reproval which was issued by that Bar:

> Any attorney, hired to prepare a Will, included a provision naming himself as remainderman of his client's life estate. In doing so, he acquired an interest adverse to his client. However, the client was able to obtain new counsel, who successfully deleted the remainderman provision from her Will.
>
> In mitigation, the attorney included the provision to solve a technical problem rather than in anticipation of any pecuniary benefit.

> In another matter, after receiving an advanced fee, and attorney filed a civil action complaint on behalf of his client. Thereafter, the attorney abandoned the client and failed to respond to her attempts to communicate with him. In a second matter, the attorney signed a medical lien form on behalf of his client. After the settlement was reached, he delivered the proceeds to his client and neglected to make payment to the physician pursuant to the terms of the medical lien. In mitigation, both parties received the funds due them from the attorney. Also, the attorney had been incapacitated by a medical condition.
> The attorney must pass the Professional Responsibility exam within one year.

These examples are presented solely to compare the Respondent's behavior in failing to appear at a Pre-Trial Conference. The type of neglect appears to be substantially less than that of the attorney who on two occasions abandoned his clients in the aforereferenced matters, and as such, the public reprimand appears to be unduly harsh.

The Integration Rule of the Florida Bar, Article 11, Rule 11.04(6)(c)(ii), supports this position with the following language:

> (ii) Minor misconduct for which a recommendation of a private reprimand might be appropriate is a relative rather than a precise term. In the absence of unusual circumstances expressly described in detail in the grievance committee report, misconduct shall not be regarded as minor if any of the following conditions exist:
>
> (A) The accused has been disciplined by private reprimand more than once in the preceding 10 years.
>
> (B) The accused has been disciplined by a measure more severe than a private reprimand in the past 10 years.
>
> (C) The accused is the subject of other pending disciplinary proceedings at the time of the order.

> (D) The misconduct involves any of the following: dishonesty, misrepresentation, deceit, fraud, commission of a felony, failure to account for money or property, performance of the offending act with knowledge and intent that such would breach the standards of ethical and professional conduct, and misconduct similar to that for which the accused has been previously punished.

The factors of Paragraphs A, B, and C are admittedly not applicable to the Respondent, and her actions do not rise to the level of misconduct itemized in Paragraph D. Accordingly, the appropriate description of her actions, if it is misconduct, is minor misconduct and the suitable punishment is a private reprimand.

This Court has affirmed the general proposition that the disciplinary penalties should be fair to the Respondent for punishing him for misconduct while encouraging rehabilitation. Indeed, in light of the Respondent's legal services activities, an appropriate case for review is the Florida Bar v. Neale, 372 So.2d 89 (Fla. 1979), in which the Court reviewed the situation of a Respondent who took advantage of a istuation involving his client's real estate for his personal gain. The Referee in the matter recommended a private reprimand, and the Surpreme Court imposed a harsher penalty due to the intentional nature of the breach for the pecuniary gain of the attorney through self dealing. In this matter, the Court stated:

> A disciplinary penalty must be fair to society and protect it from the unworthy while not denying the public the services of a qualified lawyer by an undly harsh discipline. It must be fair to Respondent by punishing him for the misconduct while at the same time encouraging rehability and it should be sever enough to deter others from similar misconduct.

Eighteen Months Probation under the supervision of an Attorney. The otherwise unblemished record of the Respondent and the circumstances of her non-appearance at an out-of-town court do not indicate that the Respondent is in need of direct supervision for one and one-half years. The Respondent has been practicing law since 1976, has had no civil malpractice actions or other Bar proceedings brought against her, and has been in active litigation during this period of time. If her capacity was such that she was in need of active supervision, her many years at the Bar, coupled with an extremely burdensome case load for indigent clients in difficult litgation would have produced more than this single, isolated incident.

The Respondent is presently operating in a legal environment of checks and balances where her work is regularly reviewed by an Executive Director and a Managing Attorney, and the input of other attorneys is regularly available. Thus, there is already direct supervision in place over her case load. Accordingly, the addition of an additional monitor would serve no purpose, and indeed will hinder the administration of the legal services program with delay, will embarass the Respondent before her co-workers, associates, and staff; and will serve to inhibit the delivery of legal services to the poor.

SUMMARY

The Supreme Court is not bound by the Referee's recommendations, The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978), and for the foregoing reasons, the Respondent respectfully requests this Court to exercise its discretion and reject the findings of fact and recommendations of the Referee, and enter a judgment dismissing the Complaint and this proceeding.

Respectfully submitted,

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