IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LYDIA S. CASTLE,

Respondent.
_____/

CONFIDENTIAL

CASE NO. 63,497
TFB No. 06A85H12

RESPONDENT'S REPLY TO BRIEF OF COMPLAINANT

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REPLY ARGUMENT

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

The Referee, in its report, Finding II(c) found as follows:

> That on August 26, 1980, a hearing was set on a cause on a Motion to Vacate the Default of which hearing the Respondent failed to attend, resulting in an Order Vacating Default being entered.

The sole and exclusive fact upon which is the finding was based, as confirmed by the Brief for the Florida Bar, was from a Request for Admission that states as follows:

> 1. You failed to attend the hearing on the Motion to Vacate Default, and Order Vacating Default was issued September 2, 1980.

The Brief of the Florida Bar no where states any facts other than the Request for Admissions of Fact upon which to base finding II(C), due to the lack of the element of causation to support the findings that Respondent's Non-Appearance resulted in vacating the Default Judgment. As stated in the Respondent's brief, the Florida Bar has the burden of proof by the presentation of clear and convincing evidence of all elements of its case, The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978), and there are insufficient facts in for the present record to conclude that the Respondent caused the default to be vacated.

II. THE COMPLAINANT'S BRIEF FAILS TO CONTROVERT THE RESPONDENT'S ARGUMENT THAT THE REFEREE ERRED IN FINDING THAT THE RESPONDENT SET THE CASE FOR TRIAL MAY 18, 1981, AND THE RESPONDENT SET THE PRE-TRIAL CONFERENCE FOR APRIL 22, 1981.

The Florida Bar takes the position that Issue II of the Respondent's Brief does not accurately paraphrase the Referee's finding of fact.

Finding of Fact II(b) states as follows:

> That Respondent set the case for trial May 18, 1981, with the Pre-Trial Conference set for April 22, 1981.

The Florida Bar takes the position that this is not a finding that the Respondent set the Pre-Trial Conference of April 22, 1981, but is limited to a finding that the Respondent set the May 18, 1981, Trial date.

Regardless of the interpretation of this Finding of Fact, the Court order entered by the Honorable John A. Rudd, which is quoted at length in the Brief for the Florida Bar, clearly states that the Trial Court set the Pre-Trial Conference date, and the Request for Admissions add nothing to controvert this.

The Florida Bar simply cannot produce any facts to support a finding that the Respondent set the Trial date, and the Referee's finding of fact in this regard is therefore without a factual basis. She merely filed a request that the matter be set for trial, and had nothing to do with the actual selection of the dates on the basis of the record.

III. THE FLORIDA BAR FAILS TO CONTROVERT THE BRIEF OF RESPONDENT IN ITS ARGUMENT THAT THE REFEREE ERRED IN FINDING THAT THE DISMISSAL OF THE CASE WITHOUT PREJUDICE RESULTED IN INTENTIONAL DAMAGE TO THE CLIENT.

The Florida Bar, in its Brief, confirms and underscores the fact that the Florida Bar has instituted a proceeding that effectively turned into a summary malpractice action and is unable to exhibit any actual damage, as opposed to theoretical damage, to the client. More importantly, the Florida Bar is yet unable to exhibit a factual basis to show that the element of intent was present in the instant situation.

As stated in Respondent's Brief, it is clear that the client could have been theoretically damaged due to the dismissal without prejudice. In light of the uncontroverted facts at both the trial level and the Bar Proceedings, that the Defendant was going through a liquidation and was, in all probability, uncollectable, there was also a possibility that a dismissal without prejudice minimized damage to the client due to the savings of additional litigation expenses.

It is for this reason that the Florida Bar must be able to point to some facts which exhibit actual damage, as opposed to speculative damages based on the assumption that any Plaintiff that sues someone is not only going to win a case, but it is going to collect a judgment. The fact that the Florida Bar has seen fit to set forth the entire complaint in the civil action with the presumption that these allegations would have been accepted by a trial court

and damages awarded underscores the fallacy of the Bar's argument. This is the type of damage which is not appropriately the subject of Bar Proceedings, but is appropriately the subject of a civil malpractice action.

On Page 8, Paragraph B. of the Brief for the Complainant, a series of facts are set forth with no indication of the factual basis for the allegations by citations to the record. The Florida Bar makes the statement that, "Despite respondent's knowledge of the financial and emotional costs to her client, ...", without stating exactly where there is a factual basis to show:

1. That there was a financial cost to the client;

2. That there was an emotional cost to the client;

3. That the respondent had any knowledge of either the financial or emotional costs.

In addition, the entire litany of allegations is unsupported by facts in the record and is not listed in the Complaint against the Respondent as a basis for the alleged disciplinary Code violations. The Complaint is limited solely to the non-appearance at the Motion to Vacate Default and the Pre-Trial. The remaining allegations in the Brief of the Florida Bar of misconduct are irrelevant to the issue of whether the Report of the Referee is warranted based on the Complaint and the evidence presented by the Complainant in support of that Complaint.

A review of the facts before the Referee indicates a complete absence of any evidence of intent, and only a speculation as to damage. This showing is insufficient to support the Referee's finding of fact, and the report of the Referee should therefore be rejected.

IV. THE BRIEF OF THE COMPLAINANT FAILS TO CONTROVERT THE ARGUMENT OF THE RESPONDENT THAT THE REFEREE ERRED IN FINDING VIOLATION OF DR1-102-(A)(5) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

The brief for the Complainant fails to set forth a factual basis to establish that the Respondent's behavior constitutes conduct prejudicial to the administration of justice.

As set forth in the Respondent's brief, this Court has held that a violation of the Code section requires a showing of behavior on the level of hindering witnesses from appearing, assaulting process severs, influencing jurors, obstructing court orders or criminal investigations, bribery of jurors, subordinantion of perjury, misrepresentations to a court or any other conduct which undermines the legitimacy of the judicial process. The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982).

This Court has held that an attorney appearing in Court on a stretcher dressed in bedclothing is in violation of this section, The Florida Bar v. Burns, 392 So.2d 1325 (Fla. 1981).

Hypothetically, a lawyer who is unintentionally

late for a hearing exhibits conduct prejudicial to the administration of justice. A court docket backs up, lawyers are left waiting, and the administration of justice is delayed. However, this type of behavior would generally be condoned as a tolerable deviation from perfection not constituting a disciplinary code violation. Somewhere on a continuum between the hypothetical behavior, and appearing in a courtroom on a stretcher, is the behavior of this Respondent.

There are no reported Florida cases which undersigned counsel has located, as set forth in the brief, that have held that behavior less onerous that this inaction of Respondent constitutes a violation of DR 1-102(A)(5). The Florida Bar has cited no cases to the contrary.

If the Respondent is guilty of a violation of this section, this behavior would be the least onerous behavior which has been held to violate this section, and as such, would constitute the minium standard of behavior. The issue presented to the Court is whether this conduct, in light of all the circumstances, is a violation of this section. In light of the definitional standard embraced by this Court, and the prior cases, it appears that some element of undermining the legitimacy of the judicial process is necessary, and the instant case presents an absence of this element. For this reason, the Respondent submits that her behavior was not sufficiently onerous as to constitute a violation of this section, and the interference with the

administration of justice which results from the non-appearance at a Pre-trial is insufficient to warrant a violation of this Code Section.

V. THE BRIEF OF COMPLAINANT DOES NOT CONTROVERT THE RESPONDENT'S ARGUMENT THAT THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATING DR 1-102(A)(6) (CONDUCT WHICH ADVERSELY REFLECTS ON A FITNESS OF PRACTICE OF LAW.

In the Respondent's Brief on Pages 16 to 17, the Respondent sets forth eight cases decided by this Court in which this Court found that the behavior of the subject attorneys was such that DR 1-102(A)(6) was violated. The Florida Bar has cited no cases to support its bald assertion that the Respondent's actions adversely reflect on her fitness to practice law, or in any manner attempted to rebut the Respondent's argument that the Respondent's behavior cannot be compared to the cases set forth on Pages 16 and 17 of the Brief.

Of particular note is the fact that the Florida Bar suggests that this Court take into consideration the Respondent's non-appearance at Bar proceedings to support this finding of guilt. The Complaint charging her with violating DR 1-102(A)(6) does not allege that her non-appearance at Bar proceedings was a factual basis for this charge. Somewhere through this process, the Referee, and the Florida Bar seems to have become more concerned with the fact that the Respondent did not participate in Bar proceedings than with the Complaint and the facts produced to support the substantive allegations of that complaint.

This is confirmed by the statement of facts which the Florida Bar has set forth, with no citations to the record, in which the point in almost every paragraph is a lack of response or involvement of the Respondent in Bar Grievance proceedings.

The Respondent was not charged with these facts in the Complaint, and as such, the Florida Bar cannot point to behavior which is irrelevant to the factual allegations of the Complaint to support a finding of guilt.

The Respondent had absolutely no affirmative obligation to become actively involved in Bar Grievance proceedings. In no way can the noninvolvement of the Respondent be utilized to support the factual finding of a code violation in lieu of proof of the violation set forth in the Complaint.

The Respondent submits that it is vital to the integrity of the Bar Disciplinary Proceedings that this Court insure that a Referee's finding is the result of facts presented by the Florida which are relevant to the Complaint lodged against an attorney, and not the result of the attorney's noninvolvement in the Bar proceedings. The record presented to the Referee indicates that this attorney did not appear at a Pre-trial Conference. There is admittedly no evidence that the Respondent's behavior is on the level of the behavior exhibited by attorneys in cases cited on Pages 16 and 17 of the Respondent's Brief, and it is unfair and unwarranted to suggest that her non-appearance

at this Pre-trial Conference reflects on this attorney's overall ability or fitness to practice law. There are simply no facts to support the Referee's finding, and as such, the Referee's report on this Count must be rejected.

VI. THE BRIEF OF THE COMPLAINANT DOES NOT CONTROVERT RESPONDENT'S ARGUMENT THAT THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF DR 7-101(A)(2) (INTENTIONAL FAILURE TO CARRY THE CONTRACT OF EMPLOYMENT.

The Brief of the Complainant fails to address the argument set forth in the Respondent's Brief on Pages 18 through 19 that the record fails to reflect the scope of the contract of employment, and in addition, that this Respondent intentionally failed to carry out that contract.

Again, on Page 11 of the Brief for Florida Bar, the Florida Bar repeats a litany of allegations which are irrelevant to the Complaint filed against this attorney, and not based on the record, suggesting that the fact that she did not refile a complaint after dismissal, did not appeal the lower Court's dismissal, did not withdraw from the case, and did not notify the client of the passage of Statute of Limitations, supports the Referee's finding that she intentionally failed to carry out a contract of employment.

The factual allegations in the Complaint against the Respondent, in no way charged the Respondent with the allegations on Page 11. Moreover, the Florida Bar does not cite to the record where these facts were before the Referee, and as such, these allegations have absolutely nothing to do with the question of whether the Referee had a

sufficient factual basis to find that the Respondent intentionally failed to carry out a contract of employment.

In order to support a finding for a violation of this section, the Florida Bar must show the following elements:

1. That there was a contract between an attorney and a client, and the nature and scope of the contract.

2. That the attorney failed to carry out the contract of employment.

3. That the attorney's failure was intentional.

The two elements which were lacking in the presentation of evidence on this Count are (1) the scope of the contract, and (2) the intentional failure to carry out the contract. There is no evidence to suggest that it was the Respondent's obligation to fund and advance travel expenses to pursue this litigation as part of her contract of employment, and if it was, whether the attorney knew or realized it was and thereby intentionally breached the contract by not complying with that term of the contract.

It is unfair an unwarranted to suggest that the client in this matter should have reasonably understood that the attorney would fund costs of litigation in this matter. In addition, there are no facts that indicate the Respondent understood the contract to require her to do that, and as such, that there was a meeting of the minds between the attorney and the client creating a contract on this issue.

This factual evidence is vital to support the

position of the Florida Bar, since it cannot show that the Respondent intentionally breached a contract unless it first shows that the Respondent knew what the contract was. The Florida Bar failed to present the substantive evidence necessary to support a violation of this section, and fails to cite any cases to support its position. Without a factual basis to support this violation, the Referee's report must be rejected.

VII. THE BRIEF OF THE FLORIDA BAR FAILS TO CONTROVERT THE ARGUMENT OF RESPONDENT THAT THE REFEREE ERRED IN FINDING THE RESPONDENT GUILTY OF VIOLATION OF DR 7-101(A)(3) (PREJUDICE OR DAMAGE TO THE CLIENT).

The Respondent's Brief again simply ignores the element of intent which is required in a violation of DR 7-101(A)(2), and the element of prejudice or damage. The Florida Bar cites no cases, and simply makes the statement that certain acts, ". . . are clearly prejudicial to her client."

Importantly, the Florida Bar attempts to suggests that the Brief of the Respondent admits that prejudice was caused.

The Brief of the Respondent clearly sets forth that a dismissal without prejudice possibly constitutes some theoretical prejudice, but the Florida Bar must show that the client was actually prejudiced or damaged, as opposed to a showing that there was some theoretical possibility that the client was damaged. As stated in the Respondent's brief, it may well have been that the client was better off

with a dismissal due to the uncontroverted indication that any judgment rendered against the Defendant would possibly be uncollectable. At this stage of the proceeding, one can only speculate as to whether or not the Plaintiff in this case was prejudiced or damaged, and speculation alone is insufficient to support a finding of fact that the client was indeed prejudiced or damaged. The Florida Bar must show by clear and convincing evidence that a client was prejudiced or damaged, and the speculative assumption that a dismissal without prejudice is a sufficient factual basis to support this finding is unwarranted.

As importantly, the Florida Bar again totally ignores the element of intent. To support this DR violation, the Florida Bar must present evidence that the attorney intentionally damaged the client. In its Brief the Florida Bar no where suggests or provides the facts upon which it contends it has shown that this Respondent intentionally caused damaged to the client.

The record is devoid of facts which support a finding of the violation of this section, the Brief of the Florida Bar is barren of any information to the contrary, and accordingly, the Referee's report on this finding must be rejected.

VIII. THE FLORIDA BAR HAS FAILED TO CONTROVERT THE RESPONDENT'S ARGUMENT THAT THE REFEREE ERRED IN FINDING THE RESPONDENT GUILTY OF VIOLATION OF DR 6-101(A)(3) (NEGLECT OF A LEGAL MATTER).

Again, without citing any cases in support of its

contention, the Florida Bar makes an unsupported statement that the Respondent's acts, ". . . clearly show neglect of her client . . .", Page 12, Brief of Florida Bar.

As presented in the Brief for Respondent, the question is not whether the Respondent was negligent, but whether the negligence rises to the level of a disciplinary code violation.

It is without dispute that this Respondent did not appear at a Pre-trial Conference, and it is without dispute that a Trial Court filed an Order labeling her behavior as neglect. That is not the issue. A deviation from perfection does not, ipso facto, constitute a violation of DR 6-101(A)(3).

As set forth on Pages 21 and 22 of the Respondent's Brief, this Court has clearly embraced the concept that simple negligence does not constitute a disciplinary code violation. As stated by this Court in Florida Bar v. Neale, 384 So.2d 1264 (Fla. 1980), "There is a fine line between simple negligence by an attorney and violation of Canon 6 that should lead to discipline." The question presented is whether this Respondent crossed that fine line, and the Florida Bar has stated nothing in its brief to controvert the Respondent's argument that she did not.

The Respondent did not attend the Pre-trial hearing. There is no civil rule of procedure or case law which mandates a dismissal of an action through non-appearance at a Pre-Trial hearing. If the Respondent's non-

appearance at this Pre-trial conference was negligence, the question presented to this Court is whether the negligence is of a, ". . . sufficient magnitude to warrant conviction of an ethical violation under Canon 6,", The Florida Bar v. Nemec, 390 So.2d 1190, 1191 (Fla. 1980).

The behavior exhibited by this Respondent appears to be less onerous or damaging than the behavior exhibited in Nemec and Neale which was tolerated by this Court as negligence not of a sufficient magnitude to warrant a disciplinary code violation.

The Florida Bar does not even address the case law in its brief, or this Court's determination that simple negligence does not always rise to the level of the Disciplinary Code Violation. The Florida Bar makes absolutely no attempt to distinguish these cases, discuss this issue, or in any way rebut the argument of the Respondent.

Accordingly, the Brief fails to controvert the argument of the Respondent, and fails to set forth facts which exhibit that the Respondent's were of a greater magnitude than those of Nemec or Neale to warrant and justify the report of the Referee. Accordingly, The report of the Referee as to this Count must be rejected.

IX. THE FLORIDA BAR HAS FAILED TO CONTROVERT THE ARGUMENT OF RESPONDENT THAT THE RECOMMENDED DISCIPLINE IS UNWARRANTED.

On Pages 23 through 29 of the Respondent's Brief, the Respondent sets forth facts and law to support the

contention that, if the Respondent's behavior is a disciplinary code violation, punishment in excess of a private reprimand and reimbursement for fees received from the client is unfair and unwarranted.

The Florida Bar again cites no cases which support its contention that the recommended discipline is warranted, and indeed, makes a bold, unsubstantiated assertion that, "Although a short suspension may have been warranted . . .", Complainant's Brief, Page 13. The Florida Bar does not even attempt to set forth cases wherein attorneys, with no history of any Bar proceedings exhibiting behavior either equal or less onerous to that of Respondent's, have been suspended. Indeed, as set forth in Respondent's Brief on Page 27 to 28, the acts of the attorney can in no way be read to exceed the level of minor misconduct.

Instead of presenting a legal argument in support of the recommended sentence, the Florida Bar takes the position that the Respondent either stipulated or agreed to supervised probation.

The Florida Bar's reading of the transcipt set forth on its brief at Pages 14 to 15 does not accurately paraphrase or characterize the discussion.

The Brief of the Florida sets forth the following colloquy in support of its contention that the Respondent "agreed" to supervised probation:

> THE COURT: I should think also somebody on probation, that is some motivation to be sure you don't make another mistake and no 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 receiptionist 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 that was happening, I should have told the client to get another attorney.

It is clear that the Court indicated that he thought that probation would be appropriate to which the Respondent replied, "I wouldn't." Thereafter, the Respondent volunteered submit names of people if the Judge thought that would be appropriate. To conclude or argue that this was a stipulation or agreement by the Respondent is unwarranted. Indeed, a literal reading of this colloquy indicates that Miss Castle disagreed with the Court's thinking but agreed to volunteer names of potential probation candidates. In addition, this was not a stipulated disposition, but a sentencing, in which the

Referee prepared a recommendation based on the facts presented, and accordingly, the violations must support the punishment.

The Florida Bar, having failed to set forth any case law or argument to substantiate its position, and the record not supporting its contention that the punishment was agreed to or stipulated by the Respondent, has failed to rebut the argument of the Respondent and the Referee's recommendation of punishment should therefore be rejected by this Court.

SUMMARY

In reading the Brief of the Florida Bar as a whole, it is clear that the proceedings before the Referee did not focus on the elements of the charges against this Respondent, and the facts to support these charges. This is underscored by the fact that the Bar has cited no cases on any issue presented in this appeal. In addition, the Bar has not even addressed the fact that two counts of the Complaint require a showing of intent, and has not even attempted to set forth the factual basis for the finding of the intent. Indeed, when read as whole, the Brief appears to mirror the facts that the grievance procedures became more concerned with the Respondent's noninvolvement in the grievance process than with the allegations of the Complaint and the facts presented to support those allegations. This is emphasized by the fact that the Florida Bar has even gone to the extent of suggesting that the noninvolvement in grievance procedures can support a substantive finding of guilt of conduct which adversely reflects on the Respondent's fitness to practice law, even though the Respondent has never been factually charged with a violation based on those facts.

For the reasons stated herein, the Referee's recommendations should be rejected by this Court and the Complaint be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to STEVE RUSHING, Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607, and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226, this 13th day of March, 1987.

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