

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,
v.
DAVID M. PORTER,
Respondent.

FILED

CONFIDENTIAL

SID J. WHITE

JUL 9 1984

CASE NO. 64,031
(18B83C01)

CLERK, SUPREME COURT

By

Chief Deputy Clerk

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, a hearing was held on June 19, 1984. The pleadings, notices, motions, orders, transcripts and exhibits all of which are forwarded to the Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: David G. McGunegle

For The Respondent: In pro se

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all of the pleadings and evidence before me, pertinent portions of which are commented upon below, I find that:

1. At all times material, the respondent was a member of The Florida Bar and subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida. He practiced law in Brevard County, Florida.

2. In November, 1981, the respondent was retained by Eugene M. Maloney who had been charged with several felony charges of uttering bad checks. Mr. Maloney had previously

entered pleas of nolo contendere in two cases while being represented by the Public Defender's office.

3. He paid the respondent \$1,200.00 which would cover his representation at the sentencing hearing, for the filing of motions and the cost of filing a timely notice of appeal. It is disputed as to whether \$500.00 of the total amount was to cover filing a timely notice of appeal to preserve a possible appellate remedy as averred by respondent or whether it would cover the entire appeal as urged by Mr. Maloney.

4. Mr. Maloney received two, five year prison terms to run concurrently at the sentencing hearing. Thereafter, the respondent filed a notice of appeal and a motion to extend time to file a brief. No record on appeal or index was prepared and the appeal was ultimately dismissed by the Fifth District Court of Appeal.

5. Beginning in December, 1981, Mr. Maloney attempted to contact the respondent on several occasions by letter. None of the letters were returned or answered. Respondent, avers he never received the letters.

6. After Mr. Maloney complained to The Florida Bar, a hearing was held before the Eighteenth Judicial Circuit Grievance Committee "B" on November 8, 1982. At that hearing, it was agreed the cause would be continued until the December meeting upon respondent's promises under oath that he would provide Mr. Maloney with a motion to vacate the sentence, an accounting of his funds and a statement as to what had been done in his behalf and a status report on the case.

7. The respondent failed to act in accordance with the promises made to the grievance committee primarily due

to his debilitating illness. After the December meeting, respondent was sent a letter from the chairman giving him an additional 15 days to provide written proof of a reasonable explanation for his failure to act as promised. Respondent did not respond within the 15 days and the committee found probable cause against him on January 17, 1983.

8. Respondent avers his noncompliance with the committee's request to provide the information promised to Mr. Maloney or to provide a reasonable explanation why he could not do so was due to his debilitating illness.

9. As of the final hearing in this cause on June 19, 1984, the respondent had submitted nothing in writing to Mr. Maloney. At the final hearing, the respondent again agreed and promised to furnish a pro se motion for Mr. Maloney should he wish to file a motion to vacate the sentences, an accounting of the funds, a statement as what had been done in his behalf and a status report on the case.

III. Recommendations as to Whether or not the Respondent Should be Found Guilty:

I recommend the respondent be found guilty of violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(6) for engaging in misconduct reflecting adversely on his fitness to practice law and 6-101(A)(3) for neglect in failing to provide the information to his client as requested and as promised to the grievance committee. I recommend the respondent be found not guilty of violating Disciplinary Rule 1-102(A)(4) for conduct involving misrepresentation or deceit and of Article XI, Rule 11.02(3)(a) of The Florida Bar's Integration Rule for conduct contrary to honesty, justice or good morals. It is apparent that the respondent's initial failure to provide the information promised to the

grievance committee was not caused by an intent to deceive or mislead the grievance committee but rather due to his then-debilitating illness which is not as acute at the present time.

IV. Recommendation as to Disciplinary Measures to be Applied:

I recommend that the respondent be privately reprimanded by personal appearance before the Board of Governors as provided in Rule 11.10(2) so long as he provides to Mr. Maloney a pro se motion to vacate the sentences for his possible use, an accounting to him for his funds and their use, what was done in his behalf and the present status of his case. If the respondent fails to provide said information with copies to the referee and Bar counsel within 30 days of my recommendation made orally at final hearing on June 19, 1984, then I recommend he receive a public reprimand with a required personal appearance before the Board of Governors.

V. Personal History and Past Disciplinary Record: After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 11.06(9)(a)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 54

Date Admitted to The Florida Bar: November 6, 1959

Prior Disciplinary Convictions and Disciplinary

Measures Imposed Therein: Respondent received a grievance committee level private reprimand for minor misconduct in October, 1978 in Case 18A77020 on dissimilar facts.

Other Personal Data: Respondent is in the process of obtaining a divorce and has two minor children.

Respondent's health is not good. He has a severe crippling arthritic condition, diabetes and coronary problems. He is presently retired on Social Security Disability.

VI. Statement of Costs and Manner in Which Cost Should be Taxed:

I find the following costs were reasonably incurred by The Florida Bar:

A. Grievance Committee Level Costs	
1. Administrative Costs	\$ 150.00
2. Transcript Costs	51.20
3. Bar Counsel/Branch Staff Counsel Travel Costs	25.00
B. Referee Level Costs	
1. Administrative Costs	150.00
2. Transcript Costs	87.20
3. Bar Counsel/Branch Staff Counsel Travel Costs	32.25
4. In-house Court Reporter Travel Costs	2.23
C. Miscellaneous Costs	
1. Telephone Charges	8.97
2. Staff Investigators' Expenses	
a. Col. James D. Larson	34.00
b. Charles R. Lee	71.10
c. Claude H. Meadow, Jr.	46.00
d. Coleen Rook	<u>144.29</u>
TOTAL ITEMIZED COSTS	\$ 802.24

It is apparent that other costs have been or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 5 day of July, 1984.

C. McFerrin Smith
C. McFerrin Smith, Referee

Copies to:

Bar Counsel
Respondent
Staff Counsel, The Florida Bar, Tallahassee, Florida 32301