IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v. CASE NO. 64,091

JOHN MONTGOMERY GREENE, (05A83C31)

Respondent.
_____/

COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

Table of Authorities

Cases

Table of Authorities - continued

Other Authorities

STATEMENT OF THE CASE

Following a complaint to The Florida Bar in late November, 1982, the Fifth Judicial Circuit Grievance Committee "A" held a hearing on February 27, 1983, and subsequently found probable cause on March 31, 1983 after certain promises were not fulfilled.

The Bar filed its formal complaint on August 11, 1983. Final hearing was held on March 1, 1984 with a further discipline hearing held April 16, 1984. The referee thereafter submitted his report to both parties dated April 25, 1984. It was subsequently determined that the record and report had not been forwarded to the Court which was thereafter done by letter dated June 11, 1984.

The referee recommends 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 other misconduct adversely reflecting on his fitness to practice law and 6-101(A)(3) for neglecting a legal matter entrusted to him. The referee recommends he be found not guilty of violating Disciplinary Rules 1-102(A)(4) for conduct involving misrepresentation, 3-104(D) for failure to control nonlawyer personnel, 7-102 (A)(2) for intentionally failing to carry out a contract of employment with the client and 7-101(A)(3) for inten-

tionally prejudicing or damaging the client. Finally, the referee recommends the respondent be found not guilty of violating Article XI, Rule 11.02(3)(a) of The Florida Bar's Integration Rule for conduct contrary to honesty, justice or good morals.

As discipline, the referee recommends the respondent be publicly reprimanded and placed on one year's probation with quarterly caseload reports required to be submitted to The Florida Bar. He also recommends the respondent refund to Mrs. Vandenberg, through her attorney, $300.00 which was overcharged to her on two foreclosure actions and $30.00 due her due to lack of prorations on land sales. The referee further indicated that the repayment was to be made within 30 days of his recommended order and that land title problems involved in this case were to be cleared by the respondent within 90 days of the recommendation. Failure to repay the monies or to prepare and record the corrective deeds within the timeframes set forth in the report shall result in a revocation of the recommended discipline and change it to a recommendation for a 90 day suspension with automatic reinstatement. Finally, the referee recommends respondent pay the costs of these proceedings currently totalling $539.40.

Prior to the referee forwarding his report to the

Court, the Board of Governors of The Florida Bar considered the case at their May, 1984 meeting. The Board voted to approve the referee's findings of fact and recommendations of guilt but seeks review of the recommended discipline which the Board considers to be erroneous and unjustified under the circumstances. Instead, the Board of Governors believes that the appropriate discipline would be a suspension for at least 90 days, completion of the deed corrections and repayment of the monies to Mrs. Vandenberg within the timeframes set forth in the referee's report and payment of costs. The Board also urges if this Court does not suspend the respondent, it order him to personally appear before the Board to receive the public reprimand. The Bar's petition for review as supplemented by the amended petition were thereafter filed.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND, PAYMENT OF COSTS, CORRECTION OF PROBLEMS AND THE REPAYMENT OF OVERCHARGES WITHIN A STIPULATED TIME PERIOD IS ERRONEOUS AND UNJUSTIFIED GIVEN RESPONDENT'S PRIOR DISCIPLINARY RECORD AND WHETHER THE BOARD OF GOVERNORS' RECOMMENDED SUSPENSION FOR AT LEAST 90 DAYS, PAYMENT OF COSTS, CORRECTION OF PROBLEMS AND REPAYMENT OF $330.00 WITHIN THE RECOMMENDED TIMEFRAMES IS THE APPROPRIATE MEASURE OF DISCIPLINE.

STATEMENT OF THE FACTS

In 1980, Eileen S. Vandenberg hired the respondent to prepare closings on the sale of 22 adjoining lots in Marion County. In preparing the deeds, he made a mistake in their description which was common for all 22 lots. Mrs. Vandenberg, who resides in North Carolina, subsequently became aware of the mistake in January, 1982. She immediately contacted and advised the respondent who acknowledged the mistake and promised to correct same.

When, after many requests and reminders, the respondent had failed to correct the deeds by November, 1982, Mrs. Vandenberg filed a complaint with The Florida Bar. The corrections were not accomplished by February 17, 1983 when the grievance committee held its probable cause hearing. At that hearing, respondent agreed to correct the title problems and also to repay to Mrs. Vandenberg monies from overcharges on two foreclosure actions and from his failure to prorate taxes on a couple of the sales as set out below. (Bar Exhibit 2, Pages 21-34). When the corrections and repayments were not forthcoming, the committee found probable cause on March 31, 1983, having previously notified Mr. Greene by letter dated February 24, 1983. (Note, the referee report indicates the hearing was March 1. That is in error.)

At the time of the referee's hearing on March 1, 1984, the respondent had not taken action to correct the title problems nor had he repaid Mrs. Vandenberg the monies. There was evidence that at some point Mrs. Vandenberg had refused to sign a corrective deed necessary to enable the respondent to correct matters. The referee noted that even in light of this failure by Mrs. Vandenberg, it did not appear the respondent ever sufficiently explained the necessity of the corrective deed to her or her North Carolina attorney, Mr. Perdue.

The respondent had failed to prorate the 1980 tax bill as to some of the lots for sales which closed in that year. Although there was only a small amount of money involved, the referee noted the respondent should have computed same and explained to Mrs. Vandenberg how to obtain the proration if she thought it was worthwhile. The referee found that instead, respondent appears to have ignored her request for the proration.

Respondent had also agreed orally to handle foreclosures for her at approximately $250.00 an acre. Instead, he charged her by oversight $400.00 per acre on two foreclosures, resulting in an overcharge of $300.00. Mrs. Vandenberg did not complain about the overcharges or the proration problem until she complained to the Bar.

The referee noted the respondent had agreed to correct the problems and repay the money at the grievance committee hearing but had failed to take any affirmative steps to comply with his agreement as of the time of the final hearing before the referee. Respondent had also not completed same at the time of the discipline hearing on April 16, 1984.

ARGUMENT

THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND, PAYMENT OF COSTS, CORRECTION OF PROBLEMS AND THE REPAYMENT OF OVER-CHARGES WITHIN A STIPULATED TIME PERIOD IS ERRONEOUS AND UNJUSTIFIED GIVEN RESPONDENT'S PRIOR DISCIPLINARY RECORD AND THE BOARD OF GOVERNORS' RECOMMENDED SUSPENSION FOR AT LEAST 90 DAYS, PAYMENT OF COSTS, CORRECTION OF PROBLEMS AND REPAYMENT OF $330.00 WITHIN THE RECOMMENDED TIMEFRAMES IS THE APPROPRIATE MEASURE OF DISCIPLINE.

Respondent was hired to handle the closings on 22 lots. He made a malpractice error in preparing the deeds in their description which was common to all 22 lots. Although he promised to correct the problem when it was brought to his attention in January, 1982, he failed to do so. He next promised the grievance committee he would correct the errors as well as refund $300.00 in overcharges to his client for two foreclosures and certain proration charges and again failed to act. He compounded the problem by failing to act between finding of probable cause on March 31, 1983 and the referee's hearing on March 1, 1984. He promised the referee he would accomplish these corrective measures but failed to take any affirmative steps between the hearing and the discipline hearing on April 16, 1984.

As part of the referee's recommended public reprimand, he directed that the respondent repay Mrs. Vandenberg $330.00 within 30 days of his April 25, 1984 order and correct the title problems in the lots still afflicted with same within 90 days of the recommended order. Failure to

accomplish these tasks will turn the referee's recommended discipline into a suspension for 90 days with automatic reinstatement. The Bar disagrees only with the public reprimand, preferring that along with the corrective measures, the respondent should be suspended for a period of at least 90 days.

Although this case focuses on neglect misconduct and one client, it involves more than one problem. First is the acknowledged mistake and failure to correct same for over two years despite promises to the client, the grievance committee and the referee. Second is the over-payment and failure to repay $300.00 relative to the fore-closures after it was brought to his attention and promises made. Third is the similar failure to prorate the 1980 taxes and deliver over those prorations after it was also brought to his attention and promises made.

This Court has written that even a public reprimand should be reserved for cases involving isolated instances of neglect. The Florida Bar v. Welty, 382 So.2d 1220, 1223 (Fla. 1980) citing The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979). Larkin had accepted retainers from two clients but failed to take action before the Statute of Limitations expired on a labor claim. He was also placed on probation for one year. The Bar does not concede that this case involves an isolated instance of neglect.

Rather, it involves but one client with more than one problem.

Moreover, single cases of neglect have resulted in suspensions depending upon the degree of aggravation and the attorney's prior record. In a recent opinion, this Court suspended an attorney for four months with proof of rehabilitation required based on a single complaint where the attorney had neglected a simple legal matter for almost three years. He was paid to form a nonprofit corporation for his clients. It should be noted that the Bar was involved for approximately half of that time. Even so, the respondent failed to correctly accomplish the task he was hired to do by the time of the referee's hearing. The Florida Bar v. Collier, 435 So.2d 802 (Fla. 1983). That attorney previously had been suspended for 60 days and placed on two years probation for his gross dilatory handling of an estate causing prejudice to the client. The Florida Bar v. Collier, 385 So.2d 95 (Fla. 1980).

In The Florida Bar v. Neale, 432 So.2d 50 (Fla. 1983), an attorney was suspended for neglecting a legal matter. He had previously been reprimanded on two occasions. The referee found and the Court noted,

> An attorney accepting a retainer must take appropriate and reasonable action to further his client's best interests, to do so promptly and to keep his client advised at all times. Respondent's actions involve indifference and a conscious disregard for the responsibility owed to the client. (At Page 51).

Similarly, in The Florida Bar v. Lee, 403 So.2d 1336 (Fla. 1981), an attorney was suspended for three months and one day with proof of rehabilitation required prior to reinstatement for failing to complete representation of a client in a dissolution of marriage action, ceasing the representation and failing to communicate with the client that he was withdrawing. The attorney also had prior discipline. See The Florida Bar v. Lee, 397 So.2d 921 (Fla. 1981).

In The Florida Bar v. Gunther, 390 So.2d 1192 (Fla. 1980), an attorney was suspended for a year with proof of rehabilitation required prior to reinstatement for failing to notify his client of incorporating the client's corporation, to accept or return the client's calls, to issue stock, to name the client as president as agreed or to deliver to him the Articles of Incorporation. In The Florida Bar v. Fuller, 389 So.2d 998 (Fla. 1980),

an attorney was suspended for 30 days for accepting a retainer and failing to communicate with the client, to proceed with the action as originally agreed or to return the $1,100.00 retainer as he indicated to the grievance committee he was willing to do but had not done as of the date of the referee's hearing. In that action, the Court noted that the respondent had no prior record and that the referee thought him to be genuinely remorseful. It also conditioned reinstatement upon return of the money within one month.

This respondent has been previously reprimanded by this Court. In The Florida Bar v. Greene, 235 So.2d 7 (Fla. 1970), respondent was reprimanded by the Supreme Court and placed on one year's probation for failure to file income tax returns and to pay some $85.000.00 in income taxes resulting in his federal conviction upon his guilty plea. In 1980, the respondent received a private reprimand in Case 05A78-T11. He had represented the wife in 1976 in a dissolution of marriage action with judgment entered in October. As part of the property settlement, his client agreed to purchase her husband's half share of the marital home. Part of the purchase price was paid in cash and the funds placed in respondent's trust account. By agreement, certain payments on a judgment and taxes were to be made by the respondent and the balance to be remitted to the ex-husband. Although the judgment lienor had authorized

his attorney to enter into a partial release on March 10, 1977, the respondent failed to obtain the release until November 29, 1978 and only after repeated urgings by the ex-husband including a complaint to The Florida Bar in January, 1978. The remaining balance due to the ex-husband was not sent to him until May 5, 1979. Respondent's failure to timely accomplish the duty he undertook is strikingly similar to his determined inactivity in this case.

This Court has often stated the cumulative misconduct, especially of a similar nature, warrants more severe discipline. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982) and the cases cited therein. See also The Florida Bar v. Harrison, 398 So.2d 1367 (Fla. 1981). In that matter, the Court approved the referee's recommendation that neglect of a legal matter and misrepresentation to the client following a previous private reprimand for similar problems warranted a public reprimand. In this case, the Bar submits that respondent's prior record and particularly the similar misconduct for which he received a reprimand in 1980 warrant more than a public reprimand. The discipline here should include the suspension for at least 90 days as urged by the Board of Governors.

The referee's recommended discipline is simply unjustified given the respondent's prior record particularly the

most recent reprimand for similar misconduct. This case could be viewed as an isolated instance of misconduct only if his prior record is ignored. Despite the prior episode and the history of this one, The Florida Bar submits it has been unable to impress upon the respondent the need to handle his client's affairs in a timely manner and that mere promises without action are not sufficient under the Code of Professional Responsibility. Only a suspension as urged by the Board of Governors will be sufficient to impress upon respondent his responsibilities as a member of The Florida Bar.

As stated in Rule 11.02 of Article XI of the Integration Rule,

> The primary purpose of discipline of attorneys is the protection of the public, and the administration of justice, as well as protection of the legal profession through the discipline of members of the Bar.

Most recently in The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983), the Court again underscored the three purposes involved. The discipline must be fair to society to both protect it from unethical conduct and not deny it the services of a qualified lawyer as a result of an unduly

harsh penalty. Second, it must be fair to the respondent, both sufficient to punish the breach and to encourage reformation and rehabilitation. Third, it must be severe enough to deter others who might also be prone or tempted to become involved in similar misconduct. See also The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

In this case, a conditional public reprimand will not encourage reformation and rehabilitation. Further, the previous reprimand obviously had little deterrent impact on his handling of this particular matter which is strikingly similar in certain respects. The Bar submits that the discipline needed in this case is a suspension for at least 90 days along with the restitution and correction of the deed problems within the timeframes recommended by the referee and payment of costs which now total $539.40.

CONCLUSION

Wherefore, The Florida Bar prays this Court will approve the referee's finding of fact and recommendation of guilt, conditions of repayment and correction of deeds within the timeframes set forth and payment of costs but reject the public reprimand with one year's probation and; instead suspend the respondent with the referee's conditions of repayment and deed corrections for a period of at least 90 days and if the suspension is not adopted by the Court, order the respondent to appear before the Board of Governors to receive any public reprimand as part of the disposition of this case.

Respectfully submitted,

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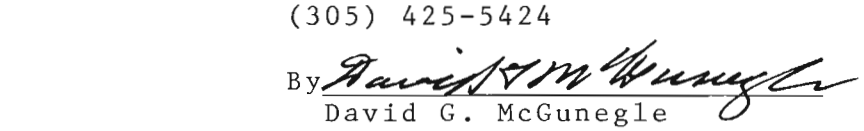
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief and accompanying Appendix have been furnished, by Certified Mail No. P 407 715 274, return receipt requested, to John Montgomery Greene, Respondent, at his record Bar address, Post Office Box 1777, Ocala, Florida 32678; and a copy of the foregoing Brief and accompanying Appendix have been furnished, by mail, to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 on this the 26th day of June, 1984.

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