FILED
JUN
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOSE A. GARCIA,

Respondent.
_____/

CASE NOS. 65,468
(1084C35, 1084C40)

65,936
(1084C71, 1084C76)

COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF THE CASE

These cases were spawned by four complaints. In Supreme Court Case No. 65,468, Gloria Stanley (1084C35) complained to The Florida Bar in October, 1983 and Jacqueline Staton (1084C40) in December, 1983. A Grievance Committee hearing was held April 12, 1984, resulting in findings of probable cause. The Bar's complaint was filed with this Court on June 20, 1984. The Honorable Ted P. Coleman, Circuit Court judge in the Ninth Judicial Circuit, was appointed referee.

In Supreme Court Case No. 65,936, Peggy Ann Haroon (1084C71) complained to The Florida Bar in March, 1984 and Richard Cannon (1084C76) complained in April, 1984. A Grievance Committee hearing was held August 9, 1984, resulting in findings of probable cause. The Bar's complaint was filed with this Court on September 28, 1984. The Honorable Ted P. Coleman also was appointed referee in these cases, and final hearing of all four cases was held on January 25, 1985. These reports dated February 27, 1985 (65,468) and March 4, 1985 (65,936) were later forwarded to this Court.

The referee recommended the following violations of the Disciplinary Rules of The Florida Bar's Code of Professional Responsibility:

(A) In Case No. 65,468, Count I (1084C35), 2-106(E) for entering into a personal injury case on a contingent fee arrangement without a written contract, 2-110(A)(2) for abandoning his client, 6-101(A)(3) for neglecting a legal matter, 7-101(A)(1) for intentionally failing to seek the lawful objectives of his client and 7-101(A)(2) for intentionally failing to carry out a contract of employment; Count II, 6-101(A)(1) for undertaking a legal matter he knows or should know he is not competent to handle and 6-101(A)(2) for attempting to handle the legal matter without adequate preparation; Count III (1084C40), 6-101(A)(3) for neglecting a legal matter; Count IV, 6-101(A)(1) for handling a legal matter he knows or should know he is not competent to handle and 6-101(A)(2) for attempting to handle a legal matter without adequate protection;

(B) In Case No. 65,936, Count I (1084C71), 1-102(A)(4) for engaging in conduct involving misrepresentation, 1-102(A)(6) for engaging in conduct adversely reflecting on his fitness to

practice law, 6-101(A)(3) for neglecting a legal matter, 7-101(A)(1) for intentionally failing to seek the lawful objective of his client; 7-101(A)(2) for intentionally failing to carry out a contract of employment, as well as Article XI, Rule 11.02(3)(a) of The Florida Bar's Integration Rule for engaging in conduct contrary to honesty, justice and good morals; Count II (1084C76), 9-102(A) for commingling personal and trust account funds, 9-102(B)(3) for failing to maintain proper trust account records as well as Article XI, Rule 11.02(4) for misuse of trust funds and 11.02(4)(c) with its corresponding Bylaws for improper trust account recordkeeping.

As discipline, the referee recommends the respondent be publicly reprimanded and placed upon probation for one year, consecutively for both cases, and pay costs totalling $1,734.45. At their May, 1985 meeting, the Board of Governors of The Florida Bar considered the referee's report and recommendations. They approved the referee's findings of fact and recommendations of guilt but voted to appeal the referee's recommended discipline as erroneous and unjustified given respondent's actions. Instead, the Board of Governors of The Florida Bar seeks review by this Court and urges it adopt a discipline of suspension for <u>at least</u>

sixty days with automatic reinstatement followed by two years of supervised probation in a public opinion order and tax costs now totalling $1,734.45 against the respondent with interest accruing at the legal rate beginning thirty days after this Court's order becomes final. Reference to contempt findings during the probationary period also should be omitted.

The Bar's petition for review was filed on May 20, 1985 along with a motion for extension of time to file this brief.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND FOLLOWED BY TWO YEARS' PROBATION AND PAYMENT OF COSTS IS UNJUSTIFIED AND ERRONEOUS GIVEN RESPONDENT'S ACTIONS AND WHETHER A SUSPENSION FOR AT LEAST SIXTY DAYS WITH AUTOMATIC REINSTATEMENT FOLLOWED BY TWO YEARS'SUPERVISED PROBATION AND PAYMENT OF COSTS IS THE JUSTIFIABLE AND APPROPRIATE DISCIPLINE.

STATEMENT OF THE FACTS

Case No. 65,648 (1084C35). Respondent was retained by Gloria Stanley in April, 1982 to prosecute a personal injury claim against Pepsi Cola on behalf of her daughter who had consumed a bottle of the cola, become ill and was hospitalized for several days. She had been offered $250.00 in settlement. During their initial discussion, respondent had Ms. Stanley sign an authorization for release of medical information. Respondent finally exercised this authorization for discovery purposes about six months later, simply reviewing hospital records and speaking with nurses at the hospital. After being retained, the only contact respondent had with his client consisted of two letters; one requesting her minimum settlement amount in September, 1982 and another informing her of his relocation to Lakeland in October, 1982. He did not inform her of his subsequent move to Tampa in June, 1983 which she discovered only after making several phone calls. Respondent had no contact with his client after October, 1982 until the Grievance Committee hearing on April 12, 1984. He effectively abandoned his client.

Respondent claims at some point he determined Ms. Stanley did not have a viable claim and informed her of his decision not

to represent her further. However, he did not advise her of the applicable statute of limitations and if she wished to pursue the claim she should obtain other counsel. The referee noted that for a long period of time respondent continued to have minimal activity in the matter rather than simply advising his client she had no case. The referee further noted that respondent had never handled an adulterated food case previously and was not adequately trained or experienced to handle it himself.

Case No. 65,468 (1084C40). Jacqueline Staton retained respondent in May, 1982 to prosecute her claim agaist Prudential Insurance Company following the burglary of her home in December, 1981. She paid respondent $145.00 as a retainer. Respondent submitted her claim on May 6, 1982. Beginning later that month through October, 1982, the Prudential claims representative sent letters to respondent requesting additional information to evaluate the claim. In a July, 1982 letter, the claims representative indicated to respondent that if a response was not received by August 6, 1982, the file would be closed. Respondent replied on August 5, 1982 enclosing an authorization for release of mortgage information, indicating he had spoken with his client about the other requested information.

On August 19, 1982, the claims representative wrote respondent indicating there were several remaining discrepancies, all of which had been mentioned in previous correspondence, requiring clarification. Respondent did not respond to this inquiry. The referee noted respondent did have some problems communicating with his client, causing some delay.

In October, 1982, respondent advised his client he was moving to Lakeland and gave his new address. While he did not inform her of his subsequent move to Tampa, she was able to learn of it through a third party.

On October 28, 1982, the claims representative again contacted respondent seeking response to the information requested in her August, 1982 correspondence and to several messages left between that date and September 24, 1982 when she spoke directly with him and indicated what was needed to settle the claim. In an October 11, 1982 conversation, respondent advised the claims representative he would send a letter explaining the discrepancies. This was not done.

On December 8, 1983, respondent forwarded a copy of an amended police report to the claims representative but provided no other information. By letter dated December 28, 1983, the claims representative informed respondent that if the information previously requested was not received before February 1, 1984, no further consideration would be given to the claim. On January 30, 1984, respondent filed a two-count complaint against the insurance company because he thought the December, 1983 letter from the claims representative might cause complete loss of the claim. The referee noted respondent apparently became disenchanted and through his feeble efforts effectively abandoned his client. He further noted the lawsuit respondent filed on her behalf was so meager as to be of virtually no benefit whatsoever.

Case No. 65,936 (1084C71). In April, 1983, respondent was retained by Peggy Ann Haroon to represent her in the prosecution of a dissolution of marriage action. About one month later, she met with respondent and signed some forms relating to the action. In September, 1983, respondent mailed his client a second set of the same forms along with a letter requesting she sign and return them so he could proceed.

Respondent subsequently advised his client the dissolution action was being advertised in Pakistan, where her husband was living, and it would be several weeks before a hearing could be held because the judge was old and slow. Ms. Haroon then called the clerk of the Circuit Court in Polk County and was advised no dissolution had been filed on her behalf. The referee noted respondent had represented to her, at least by implication, that the dissolution action had been filed and was progressing.

In January, 1984, she dismissed respondent and requested return of her $100.00 deposit. Respondent then sent her a copy of a previous letter and a new bill. After she complained to The Florida Bar, respondent refunded $80.00.

The referee noted respondent did little for Mrs. Haroon apart from taking her money and that he was apparently ill-equipped to prosecute the dissolution. Their marital domicile was maintained in Florida and she was not seeking personal relief from her husband. By advising his client the action was being advertised in Pakistan, the referee noted respondent was either making excuses for his neglect or did not know how to obtain the dissolution under the circumstances.

Case No. 65,936 (1084C76). In March, 1984, Donnis Foster, a former employee of respondent, paid Cannon Buick, Inc. for repairs to his car with one of respondent's trust account checks in the amount of $830.00. It was returned by the bank marked account closed. Mr. Foster had taken a number of respondent's trust account checks, forged respondent's signatures and used them for his own benefit. The complaint to The Florida Bar by Mr. Cannon led to review of respondent's trust account.

Respondent maintained a trust account at NCNB National Bank of Florida in Winter Haven, No. 4006707601, which was closed March, 1984. Review of the account records beginning in January, 1983 shows respondent was not maintaining the account in substantial minimum compliance with the rules. Many monthly bank statements, cancelled checks and checkstubs were missing. Numerous deposit slips failed to list the client involved and no client ledger sheets were maintained except for one overall sheet and some index cards indicating amounts received. No record of trust fund disbursements and recipients was kept.

During 1983 and 1984, respondent's account experienced numerous negative balances and overdraft charges. On at least

one occasion in 1983, money was transferred from his office account to his trust account to cover overdrafts. The negative balances in later 1983 and early 1984 were primarily caused by the former employee's misconduct. Respondent claims he was not aware of these problems until examination of his January 2, 1984 bank statement showing severe overdraft charges and a negative balance of $343.12. The next statement displayed eleven charges and a negative balance of $213.72. The statements for the two preceding months were missing.

Respondent also misused funds within the trust account by paying clients prior to the clients' checks clearing requiring a subsequent deposit. Respondent paid client Wilson Davis $150.00 on August 18, 1983, and $200.00 to his paralegal on August 29, 1983 for work on the Davis matter prior to receiving and depositing $200.00 on August 30, 1983. Respondent claims he received other cash from Mr. Davis, but did not deposit it into his trust account. Respondent also advanced costs out of his trust account prior to making corresponding deposits.

Respondent did not maintain the minimally required quarterly reconciliations. Throughout this period of time, respondent had

checked and signed his Bar dues statement stating he had read the applicable rules and was in substantial minimum compliance.

The referee noted that although many of the problems in the trust account were apparently the fault of respondent's former employee, respondent still was not maintaining or operating the trust account as required by the rules.

ARGUMENT

THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND FOLLOWED BY TWO YEARS' PROBATION AND PAYMENT OF COSTS IS UNJUSTIFIED AND ERRONEOUS GIVEN RESPONDENT'S ACTIONS AND A SUSPENSION FOR AT LEAST SIXTY DAYS WITH AUTOMATIC REINSTATEMENT FOLLOWED BY TWO YEARS' SUPERVISED PROBATION AND PAYMENT OF COSTS IS THE JUSTIFIABLE AND APPROPRIATE DISCIPLINE.

These cases involve multiple instances of incompetence, inadequate handling and neglect of legal matters as well as misrepresentation, minor misuse of funds and inadequate trust account recordkeeping. On at least two occasions, respondent undertook representation he knew or should have known he was not competent to handle on his own. His feeble attempt at prosecuting Ms. Stanley's adulterated food claim against Pepsi Cola, consisting only of half-hearted discovery, is one illustration of his incompetence. Respondent failed to arrange for other counsel to assist him in the matter or otherwise protect his client's interest. More important, even after respondent determined Ms. Staton's claim had little merit, he failed to advise her of the applicable statute of limitations and that she should contact another attorney if she wished to pursue the claim any further. He simply continued with minimal activity, effectively neglecting the matter.

The second instance of respondent's incompetence involves his supposed representation of Ms. Staton in which he failed to cooperate fully with the insurance company for over a year-and-a-half, frustrating the processing of her claim. He intentionally neglected his client. It was not until he felt he had been backed into a corner and was faced with the "possible" loss of his client's claim, that respondent finally filed suit on her behalf. Even then the complaint as filed did very little on behalf of his client since its allegations fell far short of the standard pleading required to achieve the relief requested.

In the third case, respondent not only neglected Mrs. Haroon, but misrepresented to her the dissolution had been filed and was progressing when he had filed nothing in her behalf. Respondent did nothing more than take her money, tossing forth empty excuses.

Respondent's trust account maintenance lacks totally in all the standard minimum requirements for that period. He did not conduct quarterly reconciliations, had numerous overdrafts, misused trust funds, commingled personal and trust funds and kept inadequate trust account records. Granted, many of his overdraft

problems stemmed from his former employee's misconduct. However, his mishandling of the trust account and poor recordkeeping are independently egregious.

The referee has recommended respondent be publicly reprimanded and placed upon probation for one year for each case, running consecutively. In making that recommendation, the referee considered several matters in mitigation and aggravation. This was respondent's first disciplinary action. Also, several weeks' delay can be attributed to Ms. Staton in that she failed to promptly sign and return an authorization needed by the insurance company to evaluate her claim. He also considered the fact that many of respondent's negative balances and overdrafts were caused by illegal conduct of the former employee. However, it was respondent's haphazard recordkeeping that slowed discovery of the mess. The referee also noted respondent lacked adequate experience and/or training to handle the cases appropriately and accepted the matters without making any effort to insure proper representation of his clients.

A referee's findings of fact are given the same weight as a civil trier of fact. See Fla. Bar Integr. Rule, Art. XI, Rule

11.06(9)(a)(1). The Florida Bar v. Hawkins, 444 So.2d 961, 962 (Fla. 1984). The findings must be supported by clear and convincing evidence which is the case here. This Court reviews the report and if the recommendation of guilt is supported by the record, imposes the appropriate penalty. See The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980) and The Florida Bar v. Hirsch,359 So.2d 856, 857 (Fla. 1978). In this case, the Board of Governors of The Florida Bar believes the recommended public reprimand and probation is erroneous and unjustified for the misconduct committed. Instead, the Board believes the appropriate penalty should be a suspension for at least sixty days with automatic reinstatement followed by two years' probation and payment of costs. Reference to contempt findings during the probationary period should also be deleted.

The discipline often used in cases dealing with neglect of legal matters is the public reprimand, especially if prior discipline is present. See The Florida Bar v.Merrill, 462 So.2d 827 (Fla. 1985); The Florida Bar v. Guard, 448 So.2d 981 (Fla. 1984) and The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982); The Florida Bar v. Harrison, 398 So.2d 1367 (Fla. 1981); The Florida Bar v. Shannon, 398 So.2d 453 (Fla. 1981); and

The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979). The Bar notes that Messrs. Guard, Neely and Harrison had previous disciplines. The public reprimand coupled with 18 months of probation has also been deemed appropriate in cases involving both neglect and failure to carry out a contract of employment in a timely manner. The Florida Bar v. Alford, 400 So.2d 458 (Fla. 1981). This Court has even allowed imposition of a public reprimand for improper trust account recordkeeping and improper business transactions with a client. The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981). However, a stricter discipline is warranted in the present case due to the fact that respondent engaged in many instances of misconduct, not simply one instance of neglect or improper trust accounting. He was not only incompetent and neglectful, but also engaged in misrepresentation and improper trust account handling and recordkeeping.

In The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), an attorney received a six month suspension for maintaining large deficits in his trust accounts extending over a two-year period. Moreover, the Court wrote:

> Public reprimand should be reserved for such instances as isolated instances of neglect,

> The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979); or technical violations of trust accounting rules without willful intent, The Florida Bar v. Horner, 356 So. 2nd 292 (Fla. 1978); or lapses of judgment, The Florida Bar v. Welch, 369 So.2d 343 (Fla. 1979). (At page 1223).

Respondent's misconduct here far exceeds such limits for these instances of neglect were not isolated, but occurred on at least three occasions. Additionally, respondent misrepresented facts to a client. Moreover, not only does respondent have poor trust account recordkeeping habits, but he also misused the funds on occasion. In a recent case a thirty day suspension was ordered for improper use of small amounts of trust funds, commingling, improper trust accounting and overdrafts in The Florida Bar v. Bartlett, 462 So.2d 1087 (Fla. 1985). The respondent is guilty of the same misconduct and more.

Neglect combined with other improper conduct has called for the more severe discipline of suspension. Neglecting two separate dissolution cases after collecting a fee, joining in the approval of the sale of a client's home without her consent or notifying her, claiming an authorized fee, failing to initiate suit after demanding an additional fee and failing to attend a

final hearing warranted suspension for sixty days and three years' probation in The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981). See also The Florida Bar v. Kates, 387 So.2d 947 (Fla. 1980) in which a three months and one day suspension with proof of rehabilitation was levied for neglecting an estate matter, failing to account for a small amount of trust funds and improper trust account recordkeeping. In The Florida Bar v. Glick, 397 So.2d 1140 (Fla. 1981) a three month and one day suspension was appropriate for handling a matter the attorney knew or should have known he was not competent to handle, neglect, failure to carry out a contract of employment and causing prejudice or damage to a client. The Bar does note those attorneys had received prior disciplines whereas this respondent has no disciplinary record. Kates' and Glicks' were for similar problems. More recently, a public reprimand and probation were issued in The Florida Bar v. Hawkins, 444 So.2d 961 (Fla. 1984) for neglect and misrepresentation in a criminal case.

Finally, this Court observed in The Florida Bar v. Brigman, 307 So.2d 161 (Fla. 1975) that a six months suspension and proof of rehabilitation was warranted for a series of misconduct cases. The attorney was found guilty of accepting representation of the

beneficiaries of an estate while advising the executor who had a controversy with the beneficiaries without disclosure to them; receiving a fee in a divorce case, doing nothing and refusing to discuss it with the client; refusing to account for funds received in a real estate closing for several months and; accepting an accident case for out-of-town clients, failing to communicate with them and later entering a voluntary dismissal of their case without informing the clients. Two other counts were dismissed. The Court concluded that although individually the offenses were not of great magnitude, in the aggregate they constituted a serious breach of ethics thus warranting sterner sanctions. This principle was more recently reiterated in The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981) citing Brigman, supra, at page 1153. The same can be said of the present case. Respondent engaged in several instances of misconduct that standing alone would not appear too severe. However, when considered together they create a collage of inadequacy which requires a suspension. Respondent's acceptance of matters he was not competent to handle, his failure to adequately protect his clients' representation, his overall neglect of matters once undertaken, his mishandling of trust funds and his poor trust

account maintenance clearly demonstrate he is not presently fit to practice law.

The Bar submits this referee's recommended public reprimand and two years' probation is clearly erroneous, unjustified and grossly insufficient. It does not meet the test of the purposes of discipline most recently set forth in The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). First, the judgment must be fair to both society and the respondent, protecting the former from unethical conduct and not unduly denying them the services of a qualified lawyer. Because respondent's present capabilities are questionable, these offenses merit at least a sixty day suspension followed by two years' supervised probation. The public will not be unjustly deprived if this Court imposes a stiffer discipline as recommended by the Board of Governors. In fact, the public will more likely benefit from such discipline as it would allow respondent to rectify his misconduct and rebuild his practice on more competent grounds while not subjecting the public to respondent's inadequacies. Second, it must be fair to the respondent both sufficient to punish the breach and at the same time encourage reform and rehabilitation. The Board of Governors submits the referee's recommendation is overly fair to

respondent and his offenses demand a suspension so he may sufficiently contemplate the total unacceptability of his conduct prior to automatic reinstatement. Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misdeeds. The suspension and probation will also satisfy this test.

Finally, it is without question that the public has a vital interest in an effective attorney disciplinary program. See Fla. Bar Integr. Rule, art. XI, Rule 11.02 which states in part, "The primary purpose of discipline of attorneys is the protection of the public, and the administration of justice, as well as the protection of the legal profession through the discipline of members of the Bar." In The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984) this Court adopted a referee's statement that:

> Protection of the public, punishment, rehabilitation of an attorney who commits ethical violations are three important purposes of disciplinary measures. Equally important purposes, however, are a deterrence to other members of the Bar and the creation and protection of a favorable image of the profession. The latter will not occur unless the professional imposes visible and effective disciplinary measures when serious violations occur. (At page 1341).

The Board has recommended suspension for a period of at least sixty days with automatic reinstatement and two years' supervised probation. It will better enhance the public confidence in the discipline process than will the referee's current recommendation. Accordingly, the Board of Governors strongly urges this Court to adopt its recommendation in lieu of the referee's.

CONCLUSION

WHEREFORE, the Board of Governors of The Florida Bar respectfully prays this Honorable Court will review the referee's findings of fact, recommendations of guilt and discipline and support the findings of fact and recommendations of guilt, but reject his recommended public reprimand and one year probation and instead impose as discipline a suspension for a period of at least sixty days with automatic reinstatement followed by two years' probation and order payment of the costs in this matter currently totalling $1,734.45.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Brief in Support of Petition for Review have been furnished, by mail, to the Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Brief has been furnished by Certified Mail, Return Receipt Requested No. P 632 389 880, to Jose A. Garcia, Respondent, 410 Ware Boulevard, Suite 600, Tampa, Florida 33619; and a copy of the foregoing Brief has been furnished by mail to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 on this 12th day of June, 1985.

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