IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

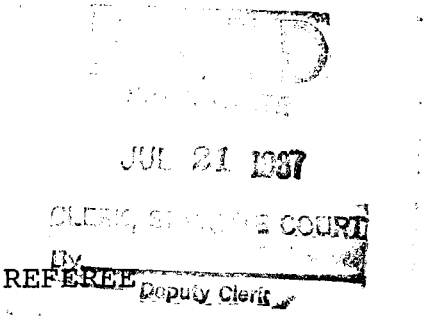
VS.

JAMES C. BURKE,

Respondent. //

CASE NO. 66, 640

TFB NO. 11HB84124



ON REVIEW FROM THE REPORT OF REFEREE

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The Florida Bar filed charges against the Respondent on February 25, 1985. The one count, 41 paragraph Complaint alleged in essence the following:

1. The Respondent failed to maintain complete records of all funds coming into his possession in violation of Disciplinary Rule 9-102(B)(3);

2. The Respondent failed to promptly pay or deliver to the client funds; securities or other properties which the client is entitled to receive in violation of Disciplinary Rule 9-102(B)(4);

3. The Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Disciplinary Rule 1-102(A)(4);

4. The Respondent engaged in other conduct adversely reflecting on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(6); and

5. The "Respondent also violated The Florida Bar Integration Rule, article XI, Rule 11.02(4), the trust accounting rule".

The Referee held three (3) hearings on the Complaint, the first on January 16, 1986, followed by the second on February 19, 1986 and the last on March 24, 1986. The Bar and the Respondent presented numerous

witnesses and exhibits.

By letter to the Respondent's former counsel, Robert McKinney ("former counsel"), the referee informed former counsel and the Bar's counsel, Paul Gross, that she had found Respondent guilty of Disciplinary Rules 9-102(B)(3), -102(B)(4) and Integration Rule article XI, Rule 11.02(4). Conversely, the referee specifically found Respondent had not committed the more serious violations under Disciplinary Rule 1-102 (A)(4) and 1-102(A)(6). The referee requested that Mr. McKinney submit a memorandum suggesting or recommending the appropriate discipline. Since more than six (6) months had passed after the first hearing and numerous exhibits and witnesses had testified, such a request was reasonable.

After a conference with the Respondent, former counsel agreed to submit recommendations on the appropriate discipline based upon supportive research conducted by the Respondent, which is cited in his Argument, as well as the Respondent's discussion with former counsel, which drew upon Respondent's knowledge of the Bar procedure resulting from his nearly three (3) years service on the Bar Grievance Committee.

Respondent discussed the status of the recommending

memorandum with former counsel who informed Respondent that he was in the process of submitting the memorandum as well as negotiating this matter with the Bar's counsel. During this time the Bar's counsel submitted a memorandum concerning Discipline (attached). Respondent's former counsel, sadly, did not respond.

Prior to the Respondent's leaving for the 1987 Legislative Session, his former counsel communicated to him the Report of referee, which completely adopted the discipline penalty recommended by the Bar's counsel, even though said recommendation was based on findings which the referee had specifically discounted.

Soon thereafter, on March 23, 1987, the Florida Bar mailed to the Respondent's former counsel the notice that a petition for review was due by April 6, 1987. The Respondent filed a motion for continuance, which was granted until June 22, 1987. The legislative session ended on June 6, 1987, but the Respondent's duties kept him involved with legislative appropriations intent language and other staff items until June 9, 1987. Respondent's second motion for continuance was filed by Respondent's retained undersigned counsel, who was retained not as an appellate specialist, as the Bar's counsel indicated in his Response to this second (rather than fourth) motion to continue, but as a necessary substitute

for the former counsel, which Respondent had intended to use throughout this process.

The Court granted this second continuance until July 21, 1987.

This Petitioned for Review was filed.

SUMMARY OF ARGUMENT

Respondent argues only that the Discipline imposed by the referee is primarily a punishment or penalty to the Respondent while not serving to protect the public, the administration of justice or the protection of the legal profession.

The referee's discipline was based solely upon the proposed penalty recommended by the Bar's counsel in his memorandum of August 6, 1987. It was, in fact, the exact same penalty!

The Bar counsel's penalty was adopted even though the Bar counsel contained as support for the discipline, allegations which has been specifically dismissed by the referee, including the assertion that despite the referee's finding to the contrary an "unauthorized conversion" occurred. The Bar's counsel also asserted that the Respondent manifested a "reckless disregard of the consequences as (sic) affecting the money of his clients" although the allegations in the complaint had been proven not to have been substantiated.

The referee's Report clearly stated, despite the Bar counsel's allegations that the Respondent's conduct was not "simple neglect or inadvertence", that "Many of the Respondent's problems arose from trying to maintain

his law practice by himself while attending to legislative duties, and extremely shabby accounting procedures". The refereee followed this statement with a listing of how the Respondent had remedied the conditions which lead to his problem.

If the condition which lead to the Respondent's problem has been remedied, neither the public, justice or the Bar is served by the discipline imposed. Further, if lesser discipline has been imposed on other Bar members found to have committed more serious violations, the imposed discipline is unjustified, unduly harsh, unfair and serves no purpose other than to demonstrate that the Bar has worked its will, notwithstanding, and in contravention of, the findings of the referee.

ARGUMENT

THE REFEREE ERRED IN IMPOSING THE DISCIPLINE OF SUSPENSION.

Respondent does not contest the major findings of facts by the referee,although review of the evidence would clarify some of the statements cited in her Report. THE FLORIDA BAR v. Fields, 482 So.2d 1354 (Fla. 1986).

The Respondent requests review solely on the issue of the discipline imposed, which, from a strictly legal perspective, is unnecessarily puntative, unfair and unjustified. It is even more harmful to the interests of the public and the Respondent in its practical application.

The law is clear that discipline is not designed as a penalty or punishment for breaches of ethical conduct, but for nobler purposes, such as service to the public. The Florida Bar v. Loveland, 249 So.2d 19 (Fla. 1974). Furthermore, a disciplinary penalty serves two purposes: it must not only be fair to society and protect it from unethical conduct, while still not denying the public the services of a qualified lawyer by an unduly harsh discipline; also it must, at the same time, be fair to a disciplined lawyer by not just punishing him for his conduct, but simultaneously encouraging rehabilitation. The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979).

The discipline recommended for the Respondent cannot, remotely, be perceived as fair to either the public or the Petitioner. The recommended penalty is neither fair or appropriate. The Florida Bar v. Hirsh, 359 So. 2d 856 (Fla. 1978). It is obviously based solely upon the Bar's counsel's recommendation, which, steadfastly, refused to accept the referee's finding. The Bar continued to insist that Respondent was guilty of moral turpitude, despite the fact that the referee's findings were clearly and unequivocably to the contrary.

The Court imposed the exact penalty recommended by the Bar's counsel. The Respondent's former counsel did not respond although it is clear that he informed the referee that he would submit a memorandum (Report of Referee, page 1). He also informed the Respondent that he was in the process of doing so. While the miscommunication between Respondent and his former counsel is not attributed to the Bar, the Court should consider whether the consequence (the penalty) of the Respondent's former counsel's absence of input into the penalty process is fair to the Respondent. The Florida Bar v. Saphirstein, supra.

A review of the Bar's counsel's memorandum of August 6, 1986, which was adopted, shows the basis of the proposed penalty to be inconsistent with the duty

of the Bar's counsel to accept the findings of the referee, as required by The Florida Bar v. Fields, supra, and other cases. On page 5 of his memorandum, the Bar's counsel asserts that "even though the referee found the Respondenn not guilty of dishonesty, fraud, deceit or misrepresentation, there nevertheless was an unauthorized conversion of the clients' funds". The referee heard the evidence and specifically found to the contrary. The referee found, based upon the evidence, undesired accounting procedures and failure of the Respondent to follow the prescribed process of delivering funds of his clients. The specific findings by the referee negated and rendered meaningless the opposite assertion as a basis of discipline, unless the finding was clearly erroneous and lacking evidentary support. The Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978).

On page 2 of his memorandum, the Bar counsel contents that Respondent's actions constituted "reckless disregard of the consequences as (sic) affecting the money of his clients". However, the referee had specifically found that Respondent's problems "arose from trying to maintain his law practice by himself while attending to his legislative duties" and "extremely shabby" accounting procedures". Supporting the referee's findings were statements by both complainants stating that they were satisfied with the Respondent's representation from 1980,

when he began the representation, until after he was elected to the legislature and after October, 1983, when he had begun to assume additional legislative duties. (R. 88; 93).

The Bar's memorandum completely disregarded the paragraph which followed the referee's statement of Respondent's problems. That paragraph notes that the Respondent has remedied the conditions which caused his problems "by having an accountant monitor his accounting procedures and his books and by forming a partnership so that other lawyers can handle his cases for him while he is attending legislative sessions". (Report of Referee, page 4). The Respondent's independent accountant and secretary testified at the hearing (R. 199-240). The Bar's counsel did not cross-examine either, nor did he present any evidence to contradict their testimony or evidence presented by their testimony.

The Bar has aggressively sought to portray Respondent as a dishonest person long after the referee rejected such allegations. From the very inception of the complaint, its counsel has continuously sought to open these proceedings to the public even though the complaint contained serious allegations which the evidence did not support. This was done even though the Bar was obviously aware of the political and business consequences to the

Respondent. Such continued aggressive assertions of moral turpitude should not serve as the basis of the discipline penalty once the referee has found that the basis does not exist. The Florida Bar v. Fields, supra.

The continuous aggressiveness is as surprising as it is unwarranted, because the Bar's counsel personally served with the Respondent when the Respondent was a member of the Grievance Committee in Dade County. In fact, the Bar stipulated, during these proceedings, that not only had the Respondent served without financial rewards, and devoted a considerable amount of his own time to help The Florida Bar, but that Respondent did "an excellent job". Equally important to this proceeding, was the Bar's stipulation that the Respondent's reputation for truth and veracity is good. (R. 242-243).

The Bar's recommendations, which were incorporated into and made a part of the referee's order, flies in the face of its own stipulations and makes a mockery of the process.

For the Bar to now take the position that Respondent's conduct prior and subsequent to this particular matter, was an aberration to be discounted and that his conduct in this one case supports such a strong, puntative penalty is unfair and unintended by our rules of ethics. On the contrary, Respondent's good character and reputation, as well as his service to the community and to the legal profession should

mitigate, not aggravate, the discipline. The Florida Bar b. Goodrich, 212 So.2d 764 (Fla. 1968). State ex rel Florida Bar v. Evans, 94 So.2d 730 (Fla. 1957).

That the recommended discipline is not fair is highlighted by its comparison to other cases in which attorneys receive much milder discipline for much more serious violations. Compare the following with the Respondent's penalty.

The Florida Bar v. Graves, 12 FLW 308 (June 26, 1987). Failed to appear in court on behalf of a client; failed to prepare necessary documents in litigation on behalf of a client; failed to appear for a deposition in a matter in which he was a party and held in contempt; issued a check to a physician for an evaluation and the check was returned; and held in contempt for arriving late for an appearance on behalf of a client. Discipline: 10 days suspension. The Florida Bar v. Brooks, 12 FLW 161 (April 10, 1987). Deceived and misrepresented his client in that he knowingly and willfully represented to his client the false status of her case; neglected his client's case allowing the case to be dismissed; failed to zealously seek the lawful objectives of his client. Violated Disciplinary Rules 1-102(a)(4), 6-101(a)(3) and 7-101(a)(1). Discipline: public reprimand through the publication of the opinion and suspension for a period of five days with automatic

reinstatement. The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986). Failed to keep adequate trust account records and commingled personal funds with trust funds. Discipline: The referee recommended a private reprimand, but because of a prior 1978 discipline for similar violations, the Court disciplined the attorney with a public reprimand followed by a two year probation conditioned on submission of quarterly trust account reports to the Bar. Also, the Respondent failed to file a brief. The Florida Bar v. Bell, 493 So.2d 457 (Fla. 1986). Falsely notarized and acknowledged deeds he had prepared as a witness and caused another to sign falsely as a witness. Discipline: public reprimand. The Florida Bar v. Schulman, 484 So.2d 1247 (Fla. 1986). Followed unethical practice of purchasing confidential hospital records and accident reports; used the confidential records as source of potential clients; solicited clients from the confidential records; violated Disciplinary Rules 1-102(A)(2), (4) and (5)1 1-103(B), (C) and (E). Discipline: public reprimand by publication of the order and judgement. The Florida Bar v. Capodilupo, 482 So.2d 1367 (Fla. 1986). Pled guilty and was adjudicated guilty in federal court for obstruction of mail; sentenced to one year in jail for two federal misdemeanors. Violated Disciplinary Rule 1-102(A)(6). Discipline: three months and one day. (Bar's co-counsel is the same Bar's

co-counsel in this proceedings). The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986). Abused his status as an attorney to secure loans from his relatives; overreached his relatives in his dealings with them. Disciplinary Rule 11.02(3)(a), 1-102(A)(4) and 1-102(A)(6). Discipline: public reprimand. The Florida Bar v. Weil, 373 So.2d 659 (Fla. 1979). Gross negligence in failing to close an estate for a period of 12 years, although ordered to do do on three occasions. Discipline: public reprimand. The Florida Bar v. Tobin, 377 So.2d 690 (Fla. 1979). Failed to maintain records of a client's funds; failed to promptly deliver funds to a client; neglected a legal matter entrusted to him. Discipline: public reprimand. The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979). Attempted to influence a referee's decision in a disciplinary matter; knowingly filed a false response accusing the referee whom he has sought to influence of lying about what had happened. Discipline: 60 days suspension. The Florida Bar v. Ryan, 352 So.2d 1175 (Fla. 1977). Pled guilty to failing to file a federal income return. Discipline: public reprimand and payment of costs. The Florida Bar v. Penn, 351 So.2d 979 (Fla. 1977). Improperly circulated a soliciting letter on his letterhead; failure to maintain a trust account and improperly placing funds in a joint tenancy account. Discipline:

public reprimand.

One particular comparison case involved an attorney who borrowed a client's money, failed to repay it for nearly two years and failed to keep adequate records of his trust accounting procedures; yet this attorney received no penalty to repay interest, nor did the Bar seek suspension. Imposed upon him was a public reprimand, although a dissenting opinion thought his conduct warranted only a private reprimand. The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981).

The Bar's position equates Respondent's conduct with that of many persons who have violated criminal drug or traffic laws, neglected their clients' substantive rights and cases which may warrant such puntative measures. The Florida Bar v. Thompson, 500 So.2d 1335 (Fla. 1986). Respondent's exemplary conduct and commitment to the ethics of Bar and the rule of law have been outstanding and history making. Such conduct should be considered by this Court. The Florida Bar v. Goodrich, 212 So.2d 764 (Fla. 1968).

To punish a member of the Bar who has remedied the problems underlying one incident over a fourteen (14) year practice, who has served his community and the legal profession in an "excellent" manner, as stipulated by the Bar, and whose harsh discipline will serve neither the public, the administration of justice or the attorney, would compound a tragedy. Respondent's

behavior subsequent to the charged incident should also be considered. The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978).

The Bar has expended $1,904.49 in costs. The Respondent obtained transcripts resulting in similar costs during the course of these proceedings, in addition to lost productivity, time and attorney's fees paid by the Respondent. Yet, except for the penalty issue, these proceedings are where they were when the Respondent, almost four years ago, admitted to his accounting problems and to a delay caused by him in submitting the complainants' money to them.

Because he was concerned about the complainants' plight, the Respondent performed admittedly excellent legal work for a three year period of approximately $2,000.00. It is also important to note that Respondent continued to represent the complainants even though upon their receipt of the initial $15,000.00, which resulted from the Respondent's legal skills, he was not paid what was due him (R. 88-91).

Such considerations, now seem to escape the Bar in proposing discipline, and the referee, in determining the amounts which should be paid to the complainants.

The Respondent's violations, as found by the referee, were due to good political fortunes that required changes of which the Respondent was unaware. The Report of referee and the complainants noted the difference in Respondent's ability to meet his clients' wishes (R. 93). There is no law school or continuing legal education course on how an attorney's practice is impacted by election to public office. There is even less preparation for a member of the Bar who does well in public service, for he/she, like the Respondent, will receive even more responsibilities without foreknowledge of the impending impact on his/her business and client affairs.

A proper discipline for Respondent would be to work with the Bar to originate such a course so that other attorneys, particularly sole practitioners, will have a practical understanding of "part-time" public service and its consequences for one, who prior thereto practiced law full-time.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the discipline in this case be modified to a private reprimand and instructions, in the Court's wisdom, for creation of a program as outlined in the Argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Petition for Review were mailed on this 21st. day of July, 1987, to Paul A. Gross, Esquire, Bar Counsel, The Florida Bar, 211 Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 and to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226.

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