IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

V.

JAMES C. BURKE,

Respondent. //

SUPREME COURT CASE NO.
66, 640

(TFB CASE NO. 11H84124)

ON PETITION FOR REVIEW OF
REPORT OF REFEREE IN A DISCIPLINARY PROCEEDING

REPLY BRIEF OF RESPONDENT

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INTRODUCTION

Since this is a reply to the Bar's Brief, Respondent will use the same designation of parties, transcrip and pleadings of parties, as the Bar listed in its Introduction.

STATEMENT OF THE CASE

The Respondent will not restate the case other than to note that the Complainant on page 3 of its statement of the case state that the "Respondent filed another (my emphasis) Motion for Continuance", although the Respondent had not sought a first continuance to file his Petition for Review.

This is noteworthy only because throughout these proceedings, Complainant has sought to portray the Respondent as seeking to delay. The second and third sentence of the last paragraph of Complainant's Statement of the Case follows this direction by reemphasizing that the "Respondent again filed a Motion for Continuance..." The Complainant, while seeming to acknowledge the time availability impact of the Respondent's leadership position in the legislature and the extraordinary importance of these proceedings on his legal as well as public life, has continued throughout these proceedings to portray a character defect which the evidence submitted and the public scrutiny of Respondent's life have shown not to exist.

THE FACTUAL CIRCUMSTANCES OF THE CASES AND ARGUMENT CITED BY THE COMPLAINANT ARE CLEARLY DISTINGUISHABLE FROM THE RESPONDENT CIRCUMSTANCES

The Complainant in these proceedings has taken a position analogous to an assistant state attorney who by information accuses a person of several ominous and exceptionally serious offenses as well as another serious charge which is not of the weight of the other offenses. Yet, when the Defendant is acquitted of the more serious offenses and is convicted of the less serious offense, which the Defendant had initially admitted with an explanation, the prosecutor asks the Court to sentence the Defendant to a sentence as severe as it was seeking for all the offenses and as if he was convicted of all the offenses.

An example of this prosecutorial position is evident where the Complaint reargues contested facts of the case on page 8 and 9 of its brief and then concludes on page 10, as it began on page 8, by asserting "while this may not be a violation" of DR-1-102(A)(4), it should still be considereed by the Court under a different name.

The Referee specifically found, based upon the evidence at the hearings, that Respondent did not violate this rule which Complainant had filed against him. Yet, Complainant argues to this Court that it should disregard the fact finder's decisions, accept its contented facts and sentence as it recommends by labeling contested and out of context facts as "aggravation" or under any other name.

If the Court accepted the assistant state attorney's sentence contention at an exparte hearing because the Defendant's attorney did not attend and present argument or evidence, that sentence would not stand or the Defendant would be entitled to post conviction remedies.

The Respondent does not seek such extraordinary relief herein. He does seek a discipline which is fair to the public and to the Respondent. The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979).

The cases cited in the Complainant's brief to support its position are clearly distinguished from this Respondent Burke's circumstances. Respondent will list the cases and note their distinction as opposed to reqrguing the facts.

Complainant cited the case of The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986), where an attorney was suspended for sixty (60) days. The Complainant emphasises that Respondent's clients were harmed because they were deprived of their money for ten (10) month citing the Referee's Report, as the basis for a ninety (90) days rather than lesser suspension.

The Referee's Report listed the ten months time period as the basis of its finding that the clients' funds were not promptly delivered as required by D.R. 9-102(B)(4). Respondent has never contented otherwise. The Referee, because of the ten (10) months, recommended that the Respondent pay interest to the clients for that time period.

The Respondent contented and the record states factual circumstances which caused him to issue a first check in March, 1984. However, the Referee Report, which contains facts that Respondent contents are incomplete, is now the basis for these briefs, and Respondent will not reargue opposite of what the Referee has concluded.

The evidence presented at the hearings and found by the Referee (R.R. 3) were not that Respondent intentionally kept the money from his clients or that they were harmed by the absence of use of their money, but that the Respondent's inability to maintain a young solo law practice - begun in 1980, while attending to legislative duties - which begun in 1982. The Referee also found from evidence and testimony at the hearings that the Respondent has tried to remedy the condition which caused the problem for his clients. (R.R. 4).

Neely is distinguishable from this case, however, for other reasons. Like most of the cases cited by the Complainant, the circumstances were aggravated by prior serious rules violations. Neely is a case where the attorney had received two (2) prior public sanctions, a suspension and a reprimand. Furthermore, the attorney had signed his client's name to a check.

Complainant also cited The Florida Bar v. Ragano, 403 So.2d 40 (Fla. 1981). In that case, the attorney had two consolidated cases before the Court, and the Court specifically considered the Respondent's disciplinary history on page 405 of its opinion. Furthermore, the Court noted on page 406 of its opinion that portion of the

Referee's Report in which a separate disciplinary action was proceedings as well as the existence of outstanding judgements against the Petitioner.

The Court in Ragano also, at page 406, noted the Respondent had rehabilitated himself and that the passage of additional time from the date of such practices would be of no useful purpose to either the Petitioner or to the Court in denying the attorney's readmittance. The passage of time in this case has resulted not only in acceptable accounting practices as cited in the Referee's Report, but has also manifested Respondent's image and activities of which the Bar and the public have expressed gratitude. (R. 252)

The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981) is also clearly distinguishable. The attorney therein while being prosecuted for violation of one trust account violation, admitted to another more serious violation. The Bar sought disbarment; however, the Court issed a two year suspension because of the attorney's cooperation, noting that "it is appropriate in determining the discipline to be imposed to take into consideration circumstances surrounding the incident, including cooperation and restitution." Pincket at page 803.

The Complainant also misinterprets the application of the Court's decision in The Florida Bar v. Padgett, 481 So.2d 919 (Fla. 1986). The Complainant stated two of the charges of which the attorney was found guilty. However,

not stated is that the attorney was also found guilty of violating disciplinary rules 1-102(A)(6) - conduct reflecting adversely on his fitness to practice law and 6-101(A)(3) - neglecting a legal matter entrusted to him. These were considered by the Court in its final penalty.

Also distinguishable is the manner in which Padgett used his trust account for his personal and business expenses as well as client matters. At page 919, the Court noted that numerousness of the checking transactions.

The Complainant attempts to use this case on the proposition that the Respondent commingled his clients' funds with his own for his convenience. There was no evidence presented to substantiate such a conclusion as there was in Padgett, who used his trust account as a combination personal, office and trust account. To the contrary, Respondent's circumstance is that he did not initially place the funds in a trust account and then disburse the funds but that he may have used the wrong account (office account) for a deposit. The absence of adequate recordkeeping and trust procedures was admitted by the Respondent, who produced evidence on how he remedied the problems (R.R. 4).

Contrary to the Complainant's repeated contention that the clients were harmed financially, there was no evidence to support that conclusion, other than that ten (10) months passed from the date of the delivery of the check to the Respondent until the clients received the funds. The

absence of prompt delivery is a separate offense for which the Respondent is being penalized. Furthermore, the clients admitted that due to the Respondent's representation, they resided in a house rent free for almost two years and received their $22,000 which had been kept from them. (Tr 103-104).

The Florida Bar v. Ruskin, 126 So.2d 142 (Fla. 1961) is used to cite a proposition on which the Respondent agrees. However, the factual application to Ruskin and the Respondent are noticeably different. Over a period of time in 1958, Ruskin commingled his own funds with substantial sums belonging to various clients.

The Complainat admits the distinguishable misconduct in The Florida Bar v. Hunt, 441 So.2d 618 (Fla. 1983). However, Complainant's admission is greatly understated. Prior to the case cited by Complainant, Hunt had received two private reprimands, one six (6) months suspension for neglecting a client's affairs and had been disbarred. The principle cited by the Complainant is stated in the case. However, its use as a guidance in this case is misplaced. Further, Hunt grossly neglected his trust accounts, which is not the case with the Respondent.

On several occasions Complainant applies the term "gross negligence" to Respondent's actions in order to infer that he committed a conversion and that his conduct is similar to the gross negligence of someone like Hunt

or Neely. However, the Referee did not find on any occasion that Respondent's conduct was grossly negligent. The absence of such finding would preclude or greatly mitigate most of the Complainant's argument and authorities. In order to set the premise for its argument and authorities, Complainant engages in the double negative logic stated on page 15 of its brief. Complainant stated "...the Referee did not state there was no gross negligence." If this foundation falls, then Complainant argument and authorities lose their basis and their value as a guide to this Court. That is the case herein.

Regretfully, much of Complainant's brief is based upon factual matters which have been found not to have occurred by the Referee or which by the nature of the Referee's findings are eliminated because of a requirement for a specific finding, (for example, simple versus gross, dishonesty vs. honesty). The continued use of terms such as "apparently", "should have known", "in effect" (Pages 5, 8, 9, 12, 16") are indicators of the absence of clear evidence and the use of "logic fillers" to lead the reader to reach a conclusion which is not based on a clear foundation.

Complainant is correct in clarifying that Representative Gustafson would have testified about Respondent's reputation, truth and veracity. The Complainant did not challenge or present directly contrary evidence on either Representative

Gustafson's or Mr. George Allen's contentions of Respondent's reputation for truth and veracity.

However, it should remain clear that the Bar stipulated to Respondent's excellent job during his tenure as a member of the Grievance Committee and his devotion of a "considerable amount of his own time to help the Florida Bar and the public as a member of the Grievance Committee." (Our emphasis)

The evidence that the Complainant submitted on this issue centered on the Elections Committee finding of a technical violation wherein Respondent signed a campaign report. However, Respondent testified that he did not receive notice of a hearing on the complaint (R.) Respondent's statements are supported by the Elections Commissions Order, which reflects no appearance by Respondent, (R.) and the news article attached to this brief as an appendix, in which the Elections Division of the Secretary of State's office, which is the staff for Elections Commission, is proceeding with its civil fine process because it cannot find such people as former Governor Bob Graham or Board of Regents member Raleigh Green, Jr.

CONCLUSION

The factual circumstances in the authorities cited by the Complainant are clearly distinguishable from the Respondent's circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of September, 1987, a true copy of the foregoing Reply Brief of Respondent was furnished by mail to Paul A. Gross, Esquire, Bar Counsel, The Florida Bar, 444 Brickell Avenue, 211 Rivergate Plaza, Miami, Florida 33131 and to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226.

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