

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,

PUBLIC

Complainant,

Case Nos. 67,135 (05A85C42/PARR)
67,720 (05A85C31/DOTSON)
67,903 (05A86C09/DUNCAN)

V.

Gary E. Wagner,

Respondent.

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, hearings were held on May 28, 1986. 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, Esquire
For the Respondent: Gary E. Wagner, Esquire, appeared upon his own behalf.

- II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After reading all pertinent portions of which are commented upon below, I find:

As to 67,135
(05A85C42/PARR)

This matter involved Respondent's representation of Edward Parr. The following dates are undisputed:

- 2/13/84 - Parr arrested for a felony, leaving the scene of an accident, plus being issued a traffic infraction citation;
- 3/6/84 - State Attorney's Office conducted a pre-file investigation with potential witnesses;
- 4/19/84 - Felony arraignment; defendant failed to appear; a *capias* issued with a bond set at \$2,000;
- 5/3/84 - Felony *capias* set aside by Circuit Judge;
- 5/10/84 - Felony *nolle prosequi* by State Attorney;
- 5/11/84 - Misdemeanor information filed for leaving the scene of accident;
- 5/15/84 - Misdemeanor summons issued for defendant Parr; Sheriff unable to serve summons;
- 5/30/84 - *Capias* issued on misdemeanor charge with a \$1,000 bond.

There is no dispute that Respondent, Gary E. Wagner, accepted a \$500.00 retainer plus \$1,500.00 from Parr to represent Parr on the charges. Respondent admits that he knew the charges had been reduced to the misdemeanor level when he accepted the \$1,500.00 payment. Respondent admits he never filed a Notice of Appearance with the court. Respondent doesn't recall ever reviewing the court file. In May, 1984, Respondent knew Parr went to Ohio, and states he expected Parr to contact the Respondent upon his return. There is no dispute that by the end of 1984, Respondent was having problems with his law practice, including being evicted from his law office and possible Bar disciplinary proceedings.

Respondent claims he obtained two continuances for Parr through the Chief Investigator at the State Attorney's Office with the permission of the arresting Highway Patrol Trooper. Both the Chief Investigator and the trooper deny such contacts by Respondent. The State Attorney file, and the court file do not reflect continuances, and the Assistant State Attorney in charge of the case denies such continuances. Respondent claims he filed no Notice of Appearance because it would stir up the State Attorney's Office, and that the State Attorney's Office should already know he represented Parr through his contacts with the Chief Investigator of that office. Respondent states he did review the State Attorney file, but was unaware a *capias* issued for Parr until after it had been issued.

Although Respondent believes that he was influential in having the charges reduced to a misdemeanor, the State Attorney's Office claims Respondent had no effect upon the charges, and that the charge was reduced based upon proof problems and a plea offer from a different attorney who eventually disposed of the case. It should be noted the misdemeanor case was handled by another attorney, who Parr paid, resulting in a fine of \$250.00.

As to 67,720
(05A85C31/DOTSON)

The facts are not in dispute. Respondent was retained and paid by Ruth Elizabeth Dotson to represent her subsequent to her marriage dissolution in order to resolve a problem with her ex-husband vacating a building. The Respondent obtained an Order to Show Cause, and on November 1, 1984, in court, a settlement was reached which would result in Mrs. Dotson receiving \$400.00 plus costs. Mrs. Dotson thereafter wrote letters to the Respondent's office, called the Respondent, and went to his office, which was locked, all in an attempt to obtain the money granted her at the court hearing. The Bar investigator was informed that opposing counsel wrote a letter to Respondent on November 8, 1984, and received no response.

Mrs. Dotson eventually wrote The Florida Bar, and was contacted by opposing counsel, which resulted in opposing counsel submitting an order to the judge for signature, and Mrs. Dotson receiving her money on April 22, 1985.

Respondent claims he was not in his office when opposing counsel wrote him the letter. Respondent further claims that the circuit has no policy as to which attorney is responsible for drawing the proposed order. Respondent further states that information "leaking" from the Grievance Committee caused significant problems with his law practice that he was not in a position to handle the Dotson matter.

As to 67,903
(05A86C09/DUNCAN)

David Duncan paid Respondent \$500.00, plus by contract sold his automobile to Respondent to cover additional fees and costs. In return, Respondent filed a suit in Circuit Court, Citrus County, in February, 1985, alleging wrongful termination of employment of Duncan against the Inverness Elks Lodge.

The Bar alleges, and Duncan confirms through testimony, the following:

1. Respondent never told Duncan of the contents or the scheduling of motions to dismiss and motions to strike the complaint;
2. Respondent did not explain to Duncan, Duncan's continuing liability under the automobile contract or explain to Duncan that Duncan should seek independent legal advice because of the possible conflict of interest in Respondent acting as attorney and contracting party regarding the automobile;
3. Respondent failed to defend the motion to dismiss, and to timely file an amended complaint;
4. Respondent failed to attend the motion to dismiss with prejudice and failed to notify Duncan of the hearing;
5. Respondent failed to tell Duncan about appeal rights Duncan might have as a result of the order of dismissal.

Respondent testified and refuted each of these allegations. There were no other witnesses called by either the Bar or Respondent.

III. Recommendations as to whether or not the Respondent should be found guilty: As to each case, I make the following recommendations as to guilt or innocence:

As to 67,135
(05A85C42/PARR)

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating the following Integration Rules of the Florida Bar and/or the Disciplinary Rules of the Code of Professional Responsibility, to wit:

Rules 1-102(A)(4); 1-102(A)(5); 1-102(A)(6);
2-106(A); 2-106(B); 2-110(A)(2);
2-110(A)(3); 6-101(A)(3); 7-101(A)(1);
7-101(A)(2); 7-101(A)(3).

It is clear that Respondent accepted a substantial fee from his client, and failed to adequately represent that client. By failing to file a Notice of Appearance in the court file, and relying upon his contact with a Chief Investigator in the State Attorney's Office to keep him apprised of the events to occur in a criminal file, based upon a felony arrest, was clearly inadequate, causing the client to have to resort to finding another attorney and paying additional fees to resolve a matter which was the Respondent's professional responsibility.

The lack of diligent follow-up by Respondent, shows by clear and convincing evidence that the Respondent is guilty of the above violations of Disciplinary Rules of the Code of Professional Responsibility.

As to 67,720
(05A85C31/DOTSON)

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following Integration Rules of the Florida Bar and/or the Disciplinary Rules of the Code of Professional Responsibility, to wit:

Rules 1-102(A)(6); 1-101(A)(3); 7-101(A)(1);
7-101(A)(2); 7-101(A)(3);

It is evident, by clear and convincing evidence that the Respondent failed his client. Even without a circuit policy as to which attorney should prepare a proposed order following a hearing, the Respondent had a responsibility to ensure that his client was protected through preparation of a proposed order, or contacting the opposing counsel to ensure opposing counsel was preparing same. Following a hearing which resulted in a settlement, where no issues were left except the submission of a proposed order, the client should not have to call, write, and visit Respondent's office, notify the Florida Bar and thereafter wait six months for an award which was available immediately after the hearing date.

As to 67,903
(05A86C09/DUNCAN)

I recommend that the Respondent be found not guilty of violating Integration Rules of the Florida Bar and/or the Disciplinary Rules of the Code of Professional Responsibility.

This case is a one upon one swearing contest as to what did or did not happen between the Respondent and his client Duncan. Duncan admits a discussion with Respondent concerning a civil rights suit in Federal Court, admits that Respondent travelled to Tallahassee to do research in his case, and admits a second attorney he saw advised his only avenue left was a Federal Court action. All of this rings true with Respondent's position that he filed an action in Circuit Court, Citrus County, explaining to Duncan that it would get dismissed, and their eventual avenue for any success would be in Federal Court. Further, concerning the contract for purchase of the automobile, there is no independent evidence, and both Respondent and Duncan are diametrically opposed as to the version of that transaction.

For the above reasons, the Bar has not convinced this Referee by clear and convincing evidence that Respondent is guilty of the rule violations set forth in the complaint.

- IV. Recommendation as to Disciplinary measures to be applied:
As to Case Numbers 67,135, and 67,720, I recommend that the Respondent be suspended for a period of six (6) months and thereafter until he has proven his rehabilitation as provided in Rule 11.10(4).

As to Case Number 67,903, having found the Respondent not guilty, no disciplinary action is recommended.

- 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: 38 years
 Date admitted to Bar: 1972
 Prior disciplinary convictions and disciplinary
 measures imposed therein: none
 Other personal data:
 Divorced;
 Four minor children;
 Previously served on Grievance Committee, Ocala, Florida,
 in the 1970's.

VI. Statement of costs and manner in which costs should be taxed:
 I find the following costs were reasonably incurred by The
 Florida Bar:

A. Grievance Committee Level Costs (As to 67,135 (05A85C42/PARR))	
1. Administrative Costs	\$ 150.00
2. Transcript Costs	
3/14/85	198.70
4/14/85 (Parr Depo)	71.40
3. Branch Staff Counsel	
Travel Costs	44.80
*4. Investigator's Expenses	
a. Transportation	95.74
b. Meals	16.79
c. Lodging	36.63
d. Copies	23.25
TOTAL	\$ 637.31
B. Grievance Committee Level Costs (As to 67,720 (05A85C31/DOTSON))	
1. Administrative Costs	\$ 150.00
2. Transcript Costs	
6/13/85	63.80
3. Branch Staff Counsel	
Travel Costs	7.08
*4. Investigator's Expenses	
a. Transportation	30.48
b. Meals	10.47
c. Lodging	36.63
d. Copies	5.00
TOTAL	\$ 303.46
C. Referee Level Costs	
1. Administrative Costs	\$ 150.00
2. Transcript Costs (Final Hearing May 28, 1986)	
a. Case 67,135 (PARR)	193.71
b. Case 67,720 (DOTSON)	101.67
3. Bar Counsel	
Travel Costs	107.30
4. Witness Fees	
a. Case 67,135 (PARR)	20.32
TOTAL	\$ 573.00
TOTAL ITEMIZED COSTS:	\$ 1,513.77

*Includes Grievance Level and Referee Level Costs

It is apparent that other costs have 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 thirty (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 24th day of June, 1986.


 J. R. PARKER, REFEREE

cc:
 David G. McGunegle, Esquire, The Florida Bar
 Gary E. Wagner, Esquire
 The Florida Bar, Tallahassee, Florida