IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN T. CARLON, JR.

Respondent.
_____/

CONFIDENTIAL

Supreme Court Case
No. 67,544

TFB Case No. 17C85F27

ANSWER BRIEF OF THE FLORIDA BAR

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PREFACE

For purposes of this brief, the Complainant, The Florida Bar, will be referred to as The Florida Bar and John T. Carlon will be referred to as the Respondent. Abbreviations utilized in this brief are as follows:

"T." refers to the Transcript of final hearing held on April 16, 1986, to be followed by page numbers.

"EX." refers to The Florida Bar's exhibits admitted into evidence, to be followed by exhibit number.

"R.R." refers to the Report of Referee, to be followed by page number.

STATEMENT OF THE CASE

The Florida Bar is compelled to submit a Statement of the Case as The Florida Bar disagrees with the Respondent's portrayal of same.

A formal complaint was filed on August 26, 1985, by The Florida Bar against John T. Carlon, Jr., Respondent. Additionally, on August 26, 1986, The Florida Bar filed its First Request for Admissions.

The Honorable Philip Cook was appointed Referee in this cause by Order dated September 5, 1985.

On September 11, 1985, Respondent submitted his Motion to Maintain Confidentiality and his Motion to Dismiss. On September 13, 1985, Respondent submitted his Response to The Florida Bar's First Request for Admissions. On October 7, 1985 The Florida Bar filed its Responses to Respondent's Motion to Maintain Confidentiality and Motion to Dismiss.

By letters dated October 7, 1985 and December 19, 1985 The Florida Bar requested that the Referee schedule hearings as to Respondent's pending motions and a final hearing in the cause.

On December 26, 1985, Respondent forwarded a letter to the Referee advising that he felt The Florida Bar's request for a final hearing to be scheduled was premature. On January 6, 1986, The Florida Bar forwarded a letter to the Referee regarding the Respondent's December 26, 1985 letter.

At the Referee's request, a hearing was scheduled for and held on February 11, 1986 on Respondent's pending motions. On February 11, 1986 the Referee issued Orders granting Respondent's Motion to Maintain Confidentiality and denying Respondent's Motion to Dismiss. Additionally, this cause was set for final hearing on April 16, 1986.

On or about February 11, 1986 Respondent served Interrogatories to The Florida Bar. Said Interrogatories were answered by The Florida Bar on March 6, 1986 and updated on March 18, 1986.

The final hearing was held in this cause on April 16, 1986. On May 14, 1986, the Referee requested that each party submit a Proposed Report of Referee and a Memorandum of Law regarding discipline.

On May 20, 1986, the Respondent forwarded a letter to the Referee. On May 22, 1986 The Florida Bar submitted its Memorandum of Law, Proposed Report of Referee and Statement of Costs.

A hearing as to discipline to be imposed was scheduled for and held on June 30, 1986. On August 18, 1986 The Honorable Philip Cook, Referee, submitted his Report of Referee and file in this cause.

The Respondent filed his Petition for Review, Initial Brief, Request for Oral Argument, Motion to Strike Report of Referee and Motion to Dismiss on or about September 17, 1986.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY THE RECORD AND BY CLEAR AND CONVINCING EVIDENCE AND SHOULD BE UPHELD BY THIS COURT.

II. WHETHER THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS CLEARLY APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.

III. WHETHER RESPONDENT'S ALLEGATIONS OF VIOLATIONS BY THE FLORIDA BAR AND THE REFEREE SHOULD HAVE NO EFFECT IN THE DETERMINATION OF THIS CAUSE.

STATEMENT OF THE FACTS

The Florida Bar is compelled to submit a Statement of the Facts as The Florida Bar disagrees with the Respondent's portrayal of same.

The Referee's findings of fact are as follows:

1. Respondent, John T. Carlon, is a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. In or about April, 1982, Respondent accompanied Attorney Marie S. Hotaling to a meeting with her clients who were members of the Tam-O-Shanter Condominium Association.

3. Respondent accompanied Marie S. Hotaling because she requested him to assist in her representation of the condominium association.

4. Respondent was aware that the agreement between Attorney Marie S. Hotaling and the condominium association was for compensation at the rate of $75.00 per hour.

5. Respondent did not enter into any verbal or written fee agreement with these condominium association clients of Attorney Marie S. Hotaling.

6. Marie S. Hotaling, her clients, and Respondent agreed that the only fees to be charged for attorney services would be by Attorney Marie S. Hotaling. Respondent confirmed at the meeting that he would assist Ms. Hotaling at no additional charge to the condominium association.

7. A complaint on behalf of the clients was filed on or about March 10, 1982, with Attorney Marie S. Hotaling and Respondent as counsel.

8. On March 24, 1983, Respondent withdrew as co-counsel in the above-referenced case.

9. On or about July 8, 1982, Respondent submitted to the condominium association his bill for services, totaling $1,250.00

10. In or about December, 1982, Respondent sued the condominium association for attorney fees concerning his representation in the above-referenced action.

11. Respondent received a judgment against said clients for alleged attorney fees owed as they were represented by Marie S. Hotaling in the action and Ms. Hotaling failed to advise the clients of the hearing date.

12. Pursuant to the judgment, Respondent garnished the condominium association's bank account in the amount of one thousand forty-eight dollars ($1,048.00).

13. There was overreaching in this matter by the Respondent and the Respondent was not entitled to the monies he obtained.

(R.R., pp. 1-2)

The facts of the complaint against the Respondent can be very simply stated. The Respondent agreed that the Tam-O-Shanter Condominium Association would not be responsible to him for any fees, that Respondent would receive part of Marie Hotaling's attorney's fees in the matter, that Respondent would be assisting Marie Hotaling at no additional charge to the client. (See testimony of Virginia Spier, T. 9-13, Felicia Atkinson, T. 28-37, Karen Gargelias, T. 40-52)

In direct contraction of the agreement not to charge for fees, Respondent billed and sued the Condominium Association for fees. The Condominium Association believed that Marie Hotaling was handling same

for them. However, Ms. Hotaling allowed a default judgment to be entered against the client and failed to advise the client of the final hearing date and the necessity to attend same. (T. 9-13, 32, 43-51) Respondent obtained a judgment against the client and garnished the Condominium Association's bank account in the amount of $1,048.00 (See The Florida Bar's Composite Exhibit 1). Respondent admitted at the final hearing that Marie Hotaling had introduced the Respondent to the client as her associate (T. 101). Marie Hotaling billed the Condominium Association and said bills were paid (T. 43).

After hearing all the witnesses for The Florida Bar and the Respondent, the Referee recommended that the Respondent be found guilty of having violated Disciplinary Rule 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

SUMMARY OF ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY THE RECORD AND BY CLEAR AND CONVINCING EVIDENCE AND SHOULD BE UPHELD BY THIS COURT.

"The Referee's findings of fact enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a). Further, this Court has held that the Referee's findings of fact should be accorded substantial weight and should not be overturned unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968).

The record of these proceedings clearly supports the Referee's findings that the Respondent engaged in conduct involving misrepresentation, deceit, fraud and dishonesty and said findings should be upheld by this Court. (T. 9-13, 28-37, 40-52)

II. THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS CLEARLY APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.

The Referee's recommendation of a Public Reprimand by appearance before the Board of Governors of The Florida Bar and restitution to the client is appropriate under the facts of this case and the Respondent's prior case wherein he received a Private Reprimand.

This Court has in the past imposed Public Reprimands for misconduct involving misrepresentation. The Florida Bar v. Bratton, 389 so.2d 637 (Fla. 1980). The Florida Bar v. Gaskin, 403 So.2d 425 (Fla. 1981).

Cumulative misconduct is dealt with more severely than isolated instances. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983).

Therefore, the Referee's recommendation of a Public Reprimand and restitution is appropriate in light of the finding that that the Respondent committed misconduct involving misrepresentations, dishonesty, fraud and deceit and the Respondent's prior discipline.

III. RESPONDENT'S ALLEGATIONS OF VIOLATIONS BY THE FLORIDA BAR AND THE REFEREE SHOULD HAVE NO EFFECT IN THE DETERMINATION OF THIS CAUSE.

Respondent appears to be attempting to cast aspersions on others to camouflage his guilt. Respondent was noticed of the investigation against him shortly after the same was opened. (See Respondent's Appendix 6). Additionally, Respondent had approximately three and one-half weeks notice of the grievance committee hearing and never requested a continuance of said hearing. (See Respondent's Appendix 6). The Florida Bar's Statement of the Case demonstrates the activity of this case. Additionally, The Florida Bar's efforts to have a final hearing set are demonstrated in The Florida Bar's Appendix 2 as well as Respondent's objection that the cause was not ready for final hearing.

An additional hearing was held before the Referee on June 30, 1986 regarding the discipline to be imposed. The Referee Report was then submitted on August 18, 1986, less than two (2) months after the last hearing in this cause.

In this Court's Opinion in the cause The Florida Bar v. Hotaling, 485 So.2d 821 (Fla. 1986), no mention is made regarding the pendency of disciplinary proceedings against the Respondent and there existed no

confidentiality violation.

The fact that the Referee's Report was filed late is not cause for dismissal of this case. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a) provides that failure to enter the report in the time prescribed does not deprive a referee of jurisdiction. See The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981) and The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986).

The Respondent was notified of the outcome of the Board of Governors' meeting regarding this cause after termination of said meeting (See Appendix IV).

Accordingly, the Respondent's allegations are without merit and should have no effect in the determination of this cause.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY THE RECORD AND BY CLEAR AND CONVINCING EVIDENCE AND SHOULD BE UPHELD BY THIS COURT.

The Respondent is required to meet a heavy burden when seeking to overturn a Referee's findings of fact. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a) provides in pertinent part that, "the Referee's findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." Further, Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(e) provides that "Upon review, the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful or unjustified."

The Referee has the advantage, as the trier of fact, of having the witnesses before him when evaluating the evidence which is ultimately presented to this Court. Furthermore, the Referee is in a more suitable position to judge the witnesses' character, truthfulness and candor. The Florida Bar v. Abramson, 199 So.2d 457 (Fla. 1967). "Evidentiary findings and conclusions of the trier of the facts when supported by legally sufficient evidence should not lightly be set aside by those possessing the power of review." Id at 460.

Applicable decisions of this Court are in accord with the aforementioned Integration Rules. The Referee's findings of fact should be accorded substantial weight and should not be overturned unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Hawkins, 444 So.2d 961, 962 (Fla. 1984); The Florida Bar v. Lopez, 406 So.2d 1100, 1102 (Fla. 1982); The Florida Bar v. Carter, 410 So.2d 920,

922 (Fla. 1982); The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981); The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla. 1978); The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978); The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968).

At their April, 1982 meeting Respondent advised Virginia Spier, Felicia Atkinson and Karen Gargelias, officers of the Tam-O-Shanter Condominium Association, that the Condominium Association would not be responsible for fees to him, that the Respondent would be assisting Marie Hotaling at no additional charge to the client. (T. 9-13, 28-37, 40-52) Marie Hotaling billed the Condominium Association and said bills were paid. (T. 43). Said statement of Respondent was a misrepresentation in that the Respondent billed the Condominium Association personally and obtained a default judgment against the client due to the neglect of Marie Hotaling who was representing the Condominium Association (T. 12, 47).

Respondent contends that an attorney is entitled to receive the reasonable value of his services in the absence of a contract. However, the important point in this case is that Respondent had an agreement with the officers of the Condominium Association that he would not be charging them fees in addition to the fees of Marie Hotaling. The officers advised the Respondent that the association could not afford to pay two (2) attorneys (T. 9-13, 28-37, 40-52).

Respondent is correct in page 12 of his brief that Judge Skaf testified that Marie Hotaling appeared in court at the hearing on Respondent's lawsuit against the Condominium Association. (T. 57) Said fact was immaterial to the allegations against the Respondent of misrepresentation.

However, the evidence was clear that Marie Hotaling allowed a default judgment to be entered and did not have her client in Court to testify in defense of its position at the hearing held on the issue of damages (12, 47, 58). Marie Hotaling is not at issue here, but is brought in to explain why the client was not properly represented concerning the Respondent's lawsuit. The issue proved by clear and convincing evidence was that the Respondent made a misrepresentation and perpetrated a fraud upon the Tam-O-Shanter Condominium Association through its officers.

The Florida Bar's complaint certainly put the Respondent on notice of the charges and the Referee's finding was based on allegations of misconduct presented by the complaint. See The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

Respondent in page 14 of his brief expresses concern that his age was incorrectly stated by one year in the Referee Report. Respondent's concern could have been expressed through a Motion to Correct same.

In summary, The Florida Bar has pointed to specific portions of the record which support the Referee's findings while the Respondent, who has the burden of proof imposed on him by virtue of Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(e), has totally failed to rebut the presumption of correctness or demonstrate that the findings of the Referee are without support in the record.

II. THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS CLEARLY APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.

The Referee recommended that the Respondent receive a Public Reprimand to be administered by his personal appearance before the Board of Governors of The Florida Bar and that Respondent make restitution to the Tam-O-Shanter Condominium Association in the amount of $1,048.00.

In The Florida Bar v. Bratton, 389 So.2d 637 (1980), the Respondent received a public reprimand for misrepresentations.

In The Florida Bar v. Gaskin, 403 So.2d 425 (1981), the Respondent initially failed to communicate with his client and when he did he made false statements. The Court said, "(a)bsolute candor to a client by a lawyer is mandated because the very foundation of an effective attorney-client relationship is predicated upon mutual trust. Lawyers should never mislead their clients." Id., at 426. Gaskin received a Public Reprimand.

Additionally, Respondent has previously received a Private Reprimand which constitutes prior discipline (R.R., Paragraph V). Cumulative misconduct is dealt with more severely than isolated instances. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983), The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981) and The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

Accordingly, in light of the finding that the Respondent violated Disciplinary Rule 1-102(A)(4) (conduct involving misrepresentation, dishonesty, fraud and deceit), and Respondent's prior Private Reprimand, The Florida Bar submits that a Public Reprimand and restitution to the injured party is certainly appropriate.

III. RESPONDENT'S ALLEGATIONS OF VIOLATIONS BY THE FLORIDA BAR AND THE REFEREE SHOULD HAVE NO EFFECT IN THE DETERMINATION OF THIS CAUSE.

Respondent's brief appears to be attempting to cast aspersions on others to camouflage his guilt. As indicated in Respondent's Appendix 6 to his brief, the complaint against Marie Hotaling was received by The Florida Bar on April 16, 1984. There was no investigation against Respondent Carlon until the grievance committee determined to also open a file concerning Respondent Carlon in October, 1984 and Respondent was notified of same by letter dated October 11, 1984 (See Respondent's Appendix 6). Accordingly, no investigation was deferred. Furthermore, Respondent was given approximately three and one-half weeks notice of the grievance committee hearing to be held (See Respondent's Appendix 6). Respondent appeared at the grievance committee hearing and defended himself and did not request a continuance of the grievance committee hearing.

Further, the Respondent has incorrectly raised the assertion that The Florida Bar subverted the confidential nature of these proceedings by unnecessarily referring to Respondent in its related case against Marie S. Hotaling. This Court's March 27, 1986 Opinion in The Florida Bar v. Hotaling, 485 So.2d 821 (Fla. 1986) is attached hereto as Appendix I.

First, there is nothing improper concerning Respondent Carlon's name being stated at appropriate places in the Opinion. Secondly, nowhere in the Hotaling Opinion is it stated that Florida Bar proceedings were commenced or pending against Respondent Carlon.

Respondent next asserts that these proceedings should be dismissed because the Referee's Report was filed late. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a) specifically states in pertinent part, "that failure to enter the report in the time prescribed shall not deprive the referee of jurisdiction".

The Florida Bar's Statement of Case presented in this brief details the activity of this cause prior to the hearing before the Referee. Attached hereto as Composite Appendix 2 is correspondence demonstrating The Florida Bar's efforts to have this cause set for final hearing and the Respondent's objection that the matter was not ready to be set for final hearing. Accordingly, The Florida Bar certainly should not be penalized for the fact that the Referee's Report was filed a little late. Additionally, it should be noted that an additional hearing was held before the Referee on June 30, 1986 regarding the discipline to be imposed in this cause. (See Appendix III, Notice of Hearing)

The Referee's Report was then submitted on August 18, 1986, less than two (2) months after the last hearing in this cause. Accordingly, the Referee properly had jurisdiction to submit his report, said report is supported by the record, and should be upheld by this Court. Additionally, this Court has held that a delay in issuing a report by a Referee is not a basis for invalidating the report in absence of a demonstration of discernible prejudice resulting from delay. The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986); The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981). No prejudice has been demonstrated and the delay in the filing of the report was slight, less than two (2) months after the last hearing in the case.

Lastly, the Respondent contends that no notice of the meeting or termination thereof of the Board of Governors was given to Respondent. The Referee's Report was dated August 18, 1986. The next meeting of the Board of Governor's was scheduled for September 18-20, 1986. The Respondent forwarded his brief on September 16, 1986, prior to the meeting of the Board of Governors. John A. Boggs, Director of Lawyer Regulation, forwarded a letter dated September 24, 1986 to Mr. Sid J. White, Clerk, Supreme Court of Florida, with a copy to the Respondent. Said letter is attached hereto as Appendix IV and advised of the termination of the Board's meeting and the fact that The Florida Bar will not file a Petition for Review in the referenced case.

Therefore, for the above-stated reasons the Respondent's allegations of violations by The Florida Bar and the Referee are without merit and should have no effect in the determination of this cause.

CONCLUSION

For the foregoing reasons, the Bar respectfully requests this Honorable Court to uphold the Referee's recommendation as to guilt and recommendation as to disciplinary violations and to enter an order that the Respondent receive a Public Reprimand by appearance before the Board of Governors, make restitution as recommended by the Referee, and assess the costs of these proceedings against the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of The Florida Bar was sent by Certified Mail #P 578 598 239, Return Receipt Requested, to John T. Carlon, Jr., Respondent, 2701-A East Oakland Park Boulevard, Post Office Drawer 923, Ft. Lauderdale, FL 33310, and sent United States Mail to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, FL 32301-8226, on this 6th day of October, 1986.

Jacqueline Plasner Needelman

JACQUELYN PLASNER NEEDELMAN