

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

CASE NO: 67,855
(1985106)

THE FLORIDA BAR
Complainant,

vs.

MARK ORR,
Respondent.

On Appeal from the Report of
A Referee in the Supreme
Court of Florida

Brief of Respondent

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TABLE OF CONTENTS

	<u>PAGE</u>
Statement of the Case & Facts	1-3
Issue	4
Summary of Argument	4-5
Argument	6-12
Conclusion	12-13

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>The Florida Bar v. Bergman,</u> 11F.L.W. 440 (Fla. August 21, 1986)	8
<u>The Florida Bar v. Chase,</u> 467 So.2d 983 (Fla. 1985)	9, 10
<u>The Florida Bar v. Fath,</u> 368 So.2d (Fla. 1979)	8
<u>The Florida Bar v. Garcia,</u> 485 So.2d 1254 (Fla. 1986)	7
<u>The Florida Bar v. Harrison,</u> 398 So.2d 1367 (Fla. 1981)	11
<u>The Florida Bar v. Neely,</u> 417 So.2d 957 (Fla. 1982)	10, 11

Other Authorities

<u>The Florida Bar News,</u> September 15, 1986, at 9, Col. 1	8, 10
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STATEMENT OF THE CASE AND FACTS

The following paragraphs contain the facts relating to this cause before a Grievance Committee and Florida Bar Referee. An appendix accompanies this Brief containing relevant exhibits which have preceded this Brief. References to the appendix will be designated by "App." followed by the appropriate page number and line.

The Respondent, Mark Orr, Esquire, was retained by the parents of Enrique Carbia to assist Mr. Carbia after his conviction and prison sentence imposed in Martin County, Florida. Mr. Orr obtained his client's release from custody by preparing a Notice of Appeal and Motion for Appeal Bond. (App. Exs.A,B,C)

There has been an ongoing difference of opinion between the Respondent and the Carbias as to Mr. Orr's specific function as attorney for Enrique. No employment contract was prepared. The Carbias were under the impression that Respondent's Two-Thousand Dollar (\$2,000.00) fee was to process a "full" appeal, while Mr. Orr thought that his fee was solely to obtain the Defendant's release from custody and to advise his client of future alternatives. The referee has noted that the December 20, 1982 letter from Respondent to his client more fully supports the beliefs of Mr. Orr.(App. Ex.D, Ex.K pg.3, para 5; Ex.K pg 4, para 11)

As no appeal was prosecuted, the Fourth District Court of Appeal dismissed the case on May 4, 1983. Mr. Orr did not notify the Carbias of the dismissal. Due to clerical error,

the order of dismissal was not communicated to the trial court for almost two years. (App. Exs.E,F) Mr. Orr has asserted that he waited to advise his client of the dismissal until the commitment order was prepared. (App. Ex.I pg. 102 line 6-Pg. 103 line 5).

Ultimately, Mr. Carbia was notified of the arrest order and he obtained new counsel and further proceedings were conducted on his case. The Defendant's mother requested a refund from Mr. Orr which was denied. A complaint was filed November 5, 1985 by the Florida Bar which led to a hearing held on May 12, 1986. (App. Exs. G,I)

Mr. Orr was charged in a two count complaint with violating several disciplinary rules of the Florida Bar's Code of Professional Responsibility. (App. Ex.G) In Count I, the Respondent was accused of neglect for failing to process the appeal, to notify his client of the outcome and for a lack of communication with Mr. Carbia. The referee, noting a material misunderstanding between the parties, found that Mr. Orr was not guilty of engaging in other misconduct reflecting adversely on his fitness to practice law, but guilty of neglecting a legal matter entrusted to him for failing to notify the Defendant of the dismissal of the appeal. (App. Ex. K, pgs. 5-6)

In Count II, Mr. Orr plead guilty to violating three disciplinary rules all arising out of the same conduct. The referee ruled that all three violations occurred because the

Respondent knowingly filed a frivolous appeal. (App. Ex.K pg.6)

On May 14, 1986 the referee recommended a public reprimand for Respondent. It was also noted that Mr. Orr has no prior disciplinary convictions or measures. It is from the aforementioned recommendation that the Respondent seeks review and relief. (App. Ex.K, pg.7)

ISSUE

Whether the recommended disciplinary measures are unjustified in light of the totality of the circumstances?

SUMMARY OF ARGUMENT

Mr. Orr admits that he has violated the Code of Professional Responsibility. The recommended punishment of a public reprimand is too severe, however, considering the nature of the complaint and the Respondent's lack of prior disciplinary history. Mr. Orr acted in good faith in his client's behalf though his desire to obtain an optimum result led to his infringement of the applicable disciplinary rules.

The dispute between the Respondent and Mr. Carbia arose as a result of a material misunderstanding between the parties. Mr. Orr's case can be clearly distinguished from previous cases dealing with similar violations of the Code of Professional Responsibility. The facts of the case involving the undersigned are less aggravated than the facts in similar previous cases before this court wherein attorneys received public reprimands.

The recommendation of the referee in the case at bar is not justified in light of the relevant case law and the facts of the case. A private reprimand is a more appropriate sanction for a first offender in a case which includes a material misunderstanding as to the function of the attorney. As the Respondent was not required to take a professional responsibility course in law school, the completion of a paper

on legal ethics along with an appearance before the Board of
Governors are appropriate measures in addition to a private
reprimand.

ARGUMENT

The recommended disciplinary measures are unjustified in light of the totality of the circumstances.

The Respondent concedes that he plead guilty to Count II of the Complaint and that he was found guilty of neglecting a legal matter in Count I of the Complaint. (App. Ex.K pgs.5-6). It is suggested that a public reprimand is too harsh a sanction for the undersigned's first disciplinary conviction in eleven years as a practicing attorney. The facts of the instant case as well as relevant case law dictate a private reprimand, an appearance before the Board of Governors and the completion of a paper on legal ethics approved by the Supreme Court.

It is important to note that this matter is before the court based upon a dispute between the Respondent and one client. Essentially, Mr. Orr has been found guilty of two separate acts or omissions though four disciplinary rules were violated. He neglected to timely notify the Defendant of the Appellate Court's May 4, 1983 dismissal of the appeal and he advanced an unwarranted claim when the Motion for Supersedeas Bond was filed.

It is submitted that the material misunderstanding outlined by the Referee as well as Respondent's overzealous and

compassionate approach to Mr. Carbia's dilemma, led to these proceedings. (App. Ex.K, pg 4, para. 11) While justice was delayed in Mr. Carbia's case, it was not due to any fraudulent intent on the part of the Respondent, but rather out of his desire to accomplish the utmost for a client in an unenviable situation. As Mr. Orr stated in his August 7, 1985 hearing before a grievance committee regarding his representation of Mr. Carbia,

"I think I was acting in good faith in protecting my client's right."

(App. Ex,I pg. 119, Lns 12,13)

In The Florida Bar v. Garcia, 485 So.2d 1254 (Fla. 1986) this court approved a recommendation of a public reprimand and two years probation for an attorney found guilty of at least eighteen separate disciplinary and ethical violations involving four separate clients. The violations included neglect of a legal matter, failing to act competently, misuse of trust funds, failing to represent a client zealously and several other serious actions. The Referee noted the Respondent's lack of prior discipline and relatively recent admission to the bar in 1978. (App. Ex.AA)

The Respondent in the case at bar was cited with misconduct involving only one client. He too has no prior disciplinary record and had been an attorney for only seven years at the time of the initiation of the appeal. (App. Ex.K pg.7) It is

argued that the disparity between the aforementioned case and the case of the undersigned would support a far lesser penalty such as that proposed in the first paragraph of the argument.

An attorney was suspended for six months by this court in The Florida Bar v. Bergman, 11F.L.W.440 (Fla. August 21, 1986). The uncontested report of the Referee showed that Mr. Bergman had been fully compensated to prosecute an appeal and he failed to do so. He was paid a total of Seventy-Five Hundred Dollars (\$7,500.00). There is no discussion in the opinion as to whether the Respondent had previously been the subject of disciplinary actions. Additionally, Mr. Bergman abandoned his law practice and failed to attend any disciplinary proceedings. His current whereabouts are unknown. (App.Exs.X, DD) Mr. Orr's case involves a lawyer with no previous disciplinary convictions. There was clearly a material misunderstanding as to the task of the Respondent who was paid a total of Two-Thousand Dollars (\$2,000.00). (App.Ex.K. pg.4, para. 11) Also, Mr. Orr performed certain functions which were beneficial to the Defendant. Clearly the case at bar can be distinguished from the Bergman case.

Mr. David G. McGunegle, Branch Staff Counsel for the Florida Bar has previously cited The Florida Bar v. Fath, 368 So.2d 357 (Fla. 1979), as being similar in nature to the instant case. (App.Ex.P) Mr. Fath, with no prior disciplinary record was suspended by the Florida Bar for ninety days for neglecting a legal matter and failing to carry out a contract

of employment which damaged his client during their relationship. He was hired to represent a man on several traffic charges. Mr. Fath accepted a fee, (though he denied same) and failed to provide the services agreed upon.

Mr. Fath failed to inform his client of his trial date or to notify the court of said failure. When the Defendant's license was suspended and a bench warrant issued, the attorney failed to notify his client. After the client learned of the sanctions imposed and Mr. Fath agreed to right the wrong, he continued to do nothing and refused to communicate with his client, Mr. Uzat. Mr. Fath even blatantly disregarded all of the disciplinary proceedings which further justified a suspension. (App. Ex.2)

It is quite apparent that Mr. Fath was both dishonest to his client and the Grievance Committee. He did nothing which he agreed to do. On the other hand, the undersigned has been honest with the Grievance Committee, the Referee and his client. He has shown a great interest in these proceedings and has expressed a desire to reform. Mr. Orr also accomplished what he believed to be his function for the Defendant, though he acknowledges that good intentions do not justify a breach of the Code of Professional Responsibility. For all of the foregoing reasons the undersigned believes that his case is dissimilar to Mr. Fath's case.

Gary E. Chase received a public reprimand in The Florida Bar v. Chase, 467 So 2d 983 (Fla. 1985) for neglecting a legal

matter and improper use of non-lawyer personnel. The attorney failed to appear at an Arraignment as agreed upon causing a bond cancellation and arrest warrant to be issued against his client. Mr. Chase also failed to communicate with the court as to his representation of the Defendant and completely failed to communicate with his client despite repeated attempts after she learned of the imposed sanctions.

Mr. Chase was in parts unknown according to his wife and non-lawyer employee, Richard DeToma when contacted by the client, Susan Blecka. The lawyer blamed his assistant, Mr. DeToma for of the errors in this matter. (App. Ex.Y) It should be further noted that Mr. Chase has been suspended for three years by this court effective September 21, 1986 for additional ethical violations. (App. Ex.DD)

Once again, the Respondent's case can be distinguished from the Chase case in several regards. Mr. Orr did provide the services agreed upon from his perspective, though there was a material misunderstanding as previously outlined. There is no evidence in the instant case that the undersigned avoided the Carbias or refused to speak with them. There was no attempt by Mr. Carbia to contact Mr. Orr until he was ordered back to custody. Additionally, the Respondent did not fail to appear in court nor did he disappear from the scene as did Mr. Chase.

Another case submitted for the court's consideration is The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982) Mr. Neely received a public reprimand and a one year probationary term

for neglecting a legal matter by failing to prosecute a criminal appeal. Mr. Neely, unlike the Respondent in the instant case had previously been suspended for ninety days for prior misconduct. Additionally, the attorney failed to comply with several court orders and was ultimately held in contempt of court for his blatant neglect of his obligations. (App Ex.CC)

Clearly the case involving the undersigned is far less aggravated than the Neely case. Mr. Orr has no prior disciplinary record. He did not deliberately ignore direct orders of court, nor was he found to be in contempt of court. The Respondent's case involves an admitted material misunderstanding not found in the aforementioned Complaint. Justice and fairness dictate that Mr. Orr receive a private reprimand in light of the facts of the foregoing case.

The final case cited by the Respondent in The Florida Bar v. Harrison, 398 So.2d 1367 (Fla. 1981). Mr. Harrison was found guilty of neglecting a legal matter, failing to carry out an employment contract and making a materially false statement to a client. He was additionally reprimanded for trust account violations in another case. Mr. Harrison had received a private reprimand in the past for neglect of a legal matter.

The above-named attorney received a retainer from a client to file a civil suit. He never filed same and when asked about the progress of the case by the client, Mr. Neely lied about a fictitious trial date. Incredibly, the Florida Bar recommended

another private reprimand for Mr. Harrison which the Referee rejected by imposing a public reprimand. (App. Ex.BB)

Mr. Orr's violations involving a single client are of a much smaller magnitude than Mr. Harrison's two separate cases. The Respondent in the case at bar did not make a materially false statement to his client and he did provide the services that he contemplated despite a material misunderstanding. It is patently unfair for Mr. Orr to receive the same punishment as Mr. Harrison considering the disparity in their disciplinary history as well as in their respective disciplinary proceedings.

CONCLUSION

The undersigned acknowledges that he has violated several provisions of the Code of Professional Responsibility. He will strive in the future to abide by all of the Canons, Ethical Considerations and Disciplinary Rules. The Respondent only asks that the punishment in his case fit the facts of his case.

As a first offender, a private reprimand is justified in the case at bar. The previously cited case law indicates that a public reprimand is too severe a sanction and hence, unjustified. As the undersigned was not required to take a Professional Responsibility course in law school in the early seventies, the completion of a paper on legal ethics would seem to be in order. An appearance before the Board of Governors would also be beneficial.


While the undersigned admits wrongdoing, much of his

conduct can be attributed to his reputation as a "hard fighter" for his clients. (App. Ex.S) He was admittedly overzealous and too compassionate in Mr. Carbia's behalf. The numerous praiseworthy affidavits of County and Circuit Judges as well as the State Attorney confirm Mr. Orr's dedication to his clients and his career. (App Ex. Q,R,S,T,U,V,W)

Based upon the foregoing arguments and citations, the undersigned respectfully asks this Honorable Court to rule that the recommendation of the Referee of a public reprimand is unjustified. A private reprimand is warranted, coupled with an appearance before the Board of Governors and the completion of a paper on legal ethics.

DATED this 7 day of October A.D., 1986.

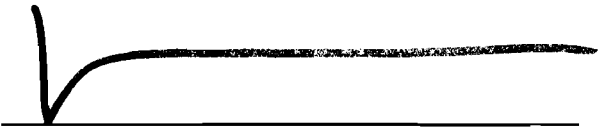
Respectfully submitted,



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to David G. McGunegle, The Florida Bar Branch Staff Counsel, 605 e. Robinson Street, Suite 610, Orlando, Florida 32801, by U.S. Mail this 8 day of October, A.D., 1986.



MARK ORR