IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARK ORR,

Respondent.
_____/

CONFIDENTIAL
CASE NO. 67,855
TFB Case No. 1985106

COMPLAINANT'S RESPONSE BRIEF

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PRELIMINARY STATEMENT

References to the transcript of final hearing on May 12, 1986 will be by (T.).

References to the exhibits will be by Ex.

References to the referee's report will be by RR.

STATEMENT OF THE CASE

Following a complaint to The Florida Bar in May, 1985, probable cause was found on August 7, 1985. The Bar's complaint was filed on November 5, 1985 and a final hearing was held on May 12, 1986.

The referee's report is dated May 14, 1986. Since it was received during the time of the May Board of Governors' meeting, it was not considered until the July Board meeting. At that meeting, the Board of Governors approved the referee's recommended findings and recommendations. Respondent thereafter filed a Petition for Review and a Motion for Extension of Time which was granted allowing him until October 17, 1986 to serve his main brief. After he filed his brief, the Bar requested a short extension and was granted until November 10, 1986 to serve the response brief.

The Bar's complaint was cast in two Counts. In Count I, the referee recommends respondent be found guilty of violating Disciplinary Rule 6-101(A)(3) for neglecting a legal matter entrusted to him. This recommendation is predicated on respondent's failure to notify either the family or his client in a timely fashion of the appellate court's May 4, 1983 order

dismissing the case for want of prosecution. They did not find out until the order eventually made its way to the trial court in April, 1985, and set in the motion a chain of events which led to his client's surrender. He recommends he be found not guilty of violating Disciplinary Rule 1-102(A)(6) for engaging in other misconduct reflecting adversely on his fitness to practice law. This rule was not pursued at final hearing by the Bar given the available evidence.

Respondent pled guilty to Count II. Accordingly, the referee recommends he be found guilty of violating the following Disciplinary Rules: 1-102(A)(5) for engaging in conduct prejudicial to the administration of justice, 1-102(A)(6) for engaging in other misconduct reflecting adversely on his fitness to practice law, and 7-102(A)(2) for knowingly advancing a claim or defense that is unwarranted under existing law and not supported by good faith argument. These violations come from his filing a Motion to Set a Supersedeas bond alleging his client was entitled to an appeal bond and requesting issuance of same when in fact respondent knew there were no grounds upon which to take the appeal. The motion violated the provisions of the Florida Rules of Criminal

procedure, Rule 3.691 in that the appeal was not taken in good faith on grounds fairly debatable and not frivolous.

As discipline, the referee recommends that the respondent receive a public reprimand to be administered by personal appearance before the Board of Governors of The Florida Bar and pay the costs of these proceedings currently totalling $1,368.35.

STATEMENT OF THE FACTS

As noted by the referee, the parties entered into an extensive pre-hearing stipulation which greatly narrowed the areas of factual dispute. (RR, Section II) Respondent was retained by Eileen Carbia on October 20, 1982 to assist her stepson, Enrique Carbia, who had just been sentenced to three years incarceration for the sale and delivery of cocaine and one year for the attempted possession of cocaine, to be served concurrently in a case emanating from the Nineteenth Judicial Circuit. Note the report erroneously lists the Ninth circuit. Respondent was paid a total fee of $2,000.00. He did not have a written employment agreement with the Carbias or his client.

During the initial visit, Mrs. Carbia and respondent discussed her most immediate desire for arranging her stepson's release from jail as soon as possible. The respondent indicated he was familiar with the Judge and the Assistant State Attorney involved and knew a bondsman who would be able to assist them. He also discussed with her the possible issue of incompetent representation for further relief in pursuit of a reduction of the sentence. His client was committed to a state prison facility by order dated October 22, 1982. A few days later the respondent

filed a Notice of Appeal. He also filed a Motion to Set Supersedeas Bond dated October 28, 1982 along with the bond and succeeded in having bond set through agreement with the State. His client was then released on bail. (RR, Section II, paras. 1-3)

During his initial conversations, the respondent advised the Carbias not to be concerned by the passage of a long period of time before the matter was concluded. He advised it could take anywhere from six months to three years for the appellate court to conclude the case. The family and the defendant believe respondent agreed to prosecute a complete appeal whereas the respondent asserts he understood he was only to file a Notice of Appeal to buy his client time. He did send the client a letter dated December 20, 1982 which states in part an appeal but more fully supports his version according to the referee. It also mentions further possible post conviction relief under Rule 3.850. (RR, Section II, para. 5, Respondent's Ex. 1)

Respondent filed nothing further with respect to the Notice of Appeal and the Fourth District Court of Appeals entered an order dated May 4, 1983 dismissing the case for lack of prosecution. Respondent received the dismissal order in a timely fashion, but

did not notify either the defendant or his family. Moreover, several months earlier respondent had met with Enrique Carbia and advised him it was permissible to leave Florida and be married which he did in 1983 when he moved to New York State. Contact between the respondent and his client was basically to be through the Carbias locally. (RR, Section II, paras. 6 and 7)

The appellate court's Order of Dismissal was finally brought to the attention of the trial court in April, 1985. This led to Enrique Carbia's surrender a couple of weeks later and a dispute between Mrs. Carbia and the respondent over what had happened and what he had agreed to do. (RR, Section II, para. 8) Respondent takes the position he was waiting for the trial court's commitment order before notifying either his client or the family that Enrique Carbia would need to put his affairs in order to be ready to begin his sentence. He anticipated the commitment order would come in a reasonable period of time and not languish for almost two years. The referee found the respondent had a duty to notify his client either directly or through his family of the appellate court's order dismissing the "appeal" so that his client could get his affairs in order and take whatever further legal actions which may have been available. (RR, Section II, para. 9) Given

the confusion which resulted following the trial court's April 19, 1985 commitment order and Mr. Carbia's surrender, Mrs. Carbia got into a dispute with the respondent, severed their relationship and requested a refund.

The referee found there was a material misunderstanding between the respondent and the Carbias over exactly what he had agreed to do in their behalf. The referee noted that part of the problem was due to the lack of a written contract. The referee further found that although the December 20, 1982 letter persuaded him that respondent had only agreed to file a notice of appeal and to secure the client's release for an indefinite period of time, the letter also talked of an appeal and probably contributed to the material misunderstanding between the Carbias and the respondent. (RR, Section II, para. 11) Accordingly, the referee recommends that the respondent be found guilty of violating Disciplinary Rules 6-101(A)(3) for failing to notify either the client or the family in a timely fashion of the appellate court's May 4, 1983 order. He recommends he be found not guilty of violating Disciplinary Rule 1-102(A)(6) which was not pursued given the evidence at the final hearing.

The respondent pled guilty to the allegations in Count II. After the respondent filed his Notice of Appeal, he filed a Motion to Set Supersedeas Bond as well as the bond on behalf of Enrique Carbia on October 28, 1982 alleging he was entitled to an appeal bond and requesting the issuance of same. He filed the motion although he believed nothing could be done in the way of an appeal because his client had entered a plea of nolo contendere failing to reserve any right of appeal. He filed the motion before he had reviewed the court file, although he had talked to Mr. and Mrs. Carbia. Paragraph two of the motion states, "That Defendant is entitled to an appeal bond." The motion was filed contrary to the provisions of The Florida Rules of Criminal Procedure, Rule 3.691 in that the appeal was not taken in good faith on grounds fairly debatable and not frivolous. Accordingly, respondent's client was not eligible for bail at the time the motion was filed since there were no grounds upon which to take an appeal. (RR, Section II, paras. 12 and 13; Bar Ex. D)

Accordingly, the referee recommends the respondent be found guilty of violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(5) for engaging conduct prejudicial to the administration of

justice, 1-102(A)(6) for engaging in other misconduct reflecting adversely on his fitness to practice law, and 7-102(A)(2) for knowingly advancing a claim or defense that is unwarranted under existing law and not supported by good faith argument.

SUMMARY OF ARGUMENT

The referee's recommended public reprimand to be administered by a personal appearance before the Board of Governors of The Florida Bar and payment of costs is the minimal acceptable level of discipline. This case involves both neglect of a legal matter in failing to timely notify his client or parents of the dismissal of the case by the appellate court so they could take whatever steps they deemed necessary; and after filing a Notice of Appeal in behalf of the client who had pled nolo contendere in a felony case without reserving any right of appeal, filing a Motion to Set Supercedeas Bond stating the client was entitled to same when said motion was contrary to Rules of Criminal Procedure, Rule 3.691 in that the appeal was not taken in good faith on grounds fairly debatable and not frivolous. Accordingly, the client was not eligible for a bond at the time the motion was filed since there were no grounds upon which to take an appeal. The motion contained a misrepresentation to the Court and was successful in securing the client's release. Respondent's recommendation for a private reprimand as well as an ethics paper and presumably payment of costs is simply insufficient in this matter. Finally, the referee recognized the factual pattern involved needs to be brought to the attention of the entire Bar through a public opinion.

ARGUMENT

THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND WITH A PERSONAL APPEARANCE BEFORE THE BOARD OF GOVERNORS AND PAYMENT OF COSTS IS THE APPROPRIATE DISCIPLINE AND RESPONDENT'S URGED PRIVATE REPRIMAND WITH A REQUIRED APPEARANCE BEFORE THE BOARD OF GOVERNORS AND COMPLETION OF A PAPER ON LEGAL ETHICS IS SIMPLY INSUFFICIENT.

The referee's recommended public reprimand with the required personal appearance before the Board of Governors and payment of costs is the appropriate level of discipline. Respondent's recommendation for a private reprimand with personal appearance before the Board of Governors and submission of an ethics paper is an inadequate discipline.

The sole question is whether the referee's recommended public reprimand to be administered by personal appearance before the Board of Governors and payment of costs now totalling $1,368.35 is excessive. Respondent proposes a private reprimand to be administered by a personal appearance before the Board of Governors and submission of an ethics paper as a preferred level of discipline. Presumably, he recognizes the costs will be taxed against him. The Bar submits that the referee's recommended public reprimand is not excessive and the minimum level of appropriate discipline in this case. The respondent has no prior

record. One issue involves his failure in Count I of the Bar's complaint to timely notify his client or his client's parents of the dismissal of the case by the appellate court for almost two years so that the client could put his affairs in order and take whatever legal steps might have been open to him as a result of the dismissal. More important, the respondent pled guilty to Count II wherein he filed a Motion averring the defendant was entitled to an appeal bond when such was not the case. The motion was filed contrary to the provisions of the Florida Rules of Criminal Procedure, Rule 3.691 in that the appeal was not taken in good faith on grounds fairly debatable and not frivolous. Respondent was well aware there were no grounds for the appeal in that his client had entererd a plea of nolo contendere without reserving any right of appeal. Accordingly, he was not eligible for bond at the time the motion was filed. Under the circumstances in this case, filing the motion constituted conduct prejudicial to the administration of justice and placed the respondent in a position of knowingly advancing a claim or defense that was unwarranted under existing law and not supported by good faith argument. It also involved conduct reflecting adversely on his fitness to practice law.

Concedely, if the neglect aspect were the only issue in this case, a private reprimand would be an appropriate discipline for an attorney with no prior record. However, there is more than the neglect found by the referee. Respondent affirmatively filed a Motion to Set Supersedeas Bond alleging his client was entitled to an appeal bond when he knew such was not the case. He was well aware at the time he filed the motion his client had no grounds upon which appeal could be taken in good faith and on grounds fairly debatable and not frivolous. Respondent misrepresented his client's eligibility in the Motion in order to secure his release on bond which did occur. This aspect of the discipline case alone fully warrants the referee's recommended public discipline which should be supported by this Court.

This aspect of the discipline case alone fully warrants the referee's recommended public discipline which should be supported by this Court. Respondent has cited a number of cases. Some were submitted to the referee at the final hearing. Obviously, there are differences in each from his particular circumstance. Those cases were utilized as illustrative of various aspects of the particular problem. No case with a substantially similar factual pattern could be found. The Bar takes little issue with

respondent's rendition of the cases submitted, except it would point out respondent misread The Florida Bar v. Harrison, 398 So.2d 1367 (Fla. 1981). That case was a second neglect case which occurred at or about the time of the prior neglect case which also included some minor trust accounting violations. There was not a third case as it would appear from reading respondent's brief.

Obviously, a private reprimand is not appropriate for all misconduct cases where the respondent has no prior history. See e.g. The Florida Bar v. Chase, 467 So.2d 983 (Fla. 1985), where the attorney was publicly reprimanded for neglecting a legal matter and improper supervision of nonlawyer personnel. The fact that Mr. Chase was subsequently suspended for other misconduct is immaterial. Admittedly, his failure to appear at an arraignment which caused a bond cancellation and arrest warrant to be issued against his client and failure to communicate as to his representation with the Court or the client presents matters more aggravating than this situation. In The Florida Bar v. Bergman, 492 So.2d 1070 (Fla. 1986), a lawyer was suspended for six months with no apparent prior record for neglecting a legal matter and handling a matter without adequate preparation where he was fully

paid to prosecute an appeal and failed to do so. Obviously his failure to appear in the disciplinary proceedings may have impacted on this Court's decision to approve the referee's recommended suspension. Of course, this respondent did not ignore these proceedings.

The Bar cited The Florida Bar v. Fath, 368 So.2d 357 (Fla. 1979), as being somewhat similar to the present matter at the final hearing. Fath had no prior disciplinary record and was suspended for 90 days for neglecting a legal matter and failing to carry out a contract of employment which damaged the client. After being hired to represent a man on several traffic charges, he failed to provide the services despite being paid. He also failed to advise the client of his trial or notify the Court of said failure resulting in the defendant's license being suspended and a bench warrant issued. He also failed to notify the client of those matters. After the client learned of the problem and that respondent agreed to right the wrong, he continually failed to do anything and refused to communicate with his client. Finally, he disregarded all of the disciplinary proceedings. Obviously, the main similarity is both respondents' failure to keep their respective clients informed. The dissimilarities are

obvious. However, the case does indicate as did Bergman, supra and Chase, supra that public reprimands or more are appropriate disciplines for a respondent who has no prior record in certain circumstances.

Respondent also cites The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982). Neely received a public reprimand and a one year probationary period for neglecting and failing to prosecute a criminal appeal despite several court orders and being held in contempt. That respondent also had a prior suspension. Finally, the respondent cites The Florida Bar v. Garcia, 485 So.2d 1254 (Fla. 1986), where the respondent received a public reprimand as recommended by the referee and two years probation in a consolidated case involving multiple separate problems with four clients including neglect, failing to competently handle cases, misuse of a small amount of funds, and inadequate trust account record-keeping. He also had no prior record. Again, the differences are apparent.

As stated previously, there are no cases directly on point. Other cases for this Court's consideration include The Florida Bar v. Shannon, 398 So.2d 453 (Fla. 1981). Mr. Shannon was

publicly reprimanded where he overlooked a title defect in giving his clients a title opinion and then delayed in filing a quiet title action to correct the mistake causing an increase in the clients' cost to refinance their home to pay medical bills. It appears from the record that he also had advised them at one point to attempt refinancing without divulging the problem. However, the Court noted in issuing the reprimand at page 454:

> This is a case of neglect without any wrongful intent or motive. Respondent has no record of past professional misconduct.

In The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983), the respondent was suspended for 60 days for lying to the trial judge in order to obtain a continuance in a civil case. Justice Adkins dissented and would have imposed a public reprimand. The Court noted at page 986:

> We would emphasize the importance of a judge's being able to rely on representations made by counsel. A lawyer should never mislead the court. This lawyer's image in the eyes of all judges is tarnished for a long time. All attorneys should take heed to avoid making the mistakes he did.

While that was a different situation, in filing the Motion to Set Supersedeas Bond when he knew there were no grounds for an appeal, respondent misled the Court in an affirmative manner.

This respondent notes he was trying to achieve a better result for his client and may have been over zealous. In The Florida Bar v. Moran, 462 So.2d 1089 (Fla. 1985), the record indicates an attorney was suspended for four months with proof of rehabilitation required wherein he made an affirmative misrepresentation as to his status in the prior proceeding involving the same client in an effort to gain essentially a new evidentiary trial for her. He represented to the Court he had not previously represented her when in fact he had and it involved the same circuit judge. He had prior disciplines including a public and private reprimand.

In The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), this Court stated at page 1223:

> Public reprimand should be reserved for such instances as isolated instances of neglect, The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979); or technical violations of trust accounting rules without willful intent, (citation omitted); or lapses of judgment. The Florida Bar v. Welch, 369 So.2d 343 (Fla. 1979).

In the Welch case, the respondent was publicly reprimanded for failing to remain in or near the courtroom while the jury was deliberating and instead leaving to keep a bowling date without leaving a telephone number or address where he could be reached. The client, his parents, and his wife had all assented. However, he did not advise them the jury might come back and ask questions. When they did reach a verdict, respondent could not

be found and the judge proceeded to receive the verdict despite the client asking that the respondent be present. The Court found that it constituted neglect of a legal matter and conduct reflecting adversely on his fitness to practice law. The Court noted the attorney must remain in or near the courtroom while the jury is deliberating and that leave of court is required if an attorney desires to leave. They further noted there was no prejudice to the client in this case.

Clearly the situation in Welch, supra, was less aggravated than the circumstances present here. A private reprimand in this two pronged case is simply unjustified and inappropriate. As seen from the foregoing cases, the Court has issued public reprimands or more for a variety of situations. The focus is on the appropriateness of the recommended discipline and the purpose of discipline. See e.g. The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980) The purpose is defined in part in Fla. Bar Integr. Rule, Article XI, Rule 11.02:

> The primary purpose of discipline of attorneys is the protection of the public, and the administration of justice, as well as protection of the legal profession through the discipline of members of the Bar.

Appropriate discipline in each case should be fair to society. It should protect it from future unethical conduct by the

attorney, but not deny it the services of an otherwise qualified attorney. It should also be sufficient to punish the breach of ethics and to encourage reform and rehabilitation. Finally, it should serve as a deterrent to those members of the Bar who cannot or will not follow the rules. See The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983).

In this instance, the main difference between respondent's recommended discipline and that recommended by the referee is the public aspect of the referee's. It certainly does not deny society from respondent's services should they wish to utilize them. Second, the referee's recommended public reprimand is sufficient to punish this first time breach of the ethics and does encourage reform and rehabilitation through it being administered in a public fashion. Finally, the referee noted the deterrent factor at the final hearing that publication of the facts of this matter would have for the members of the Bar. (T, pp. 61,67) On the latter page, he stated:

> However, the Court is going to order a public reprimand with an appearance before the Board of Governors in the case. Even though Mr. Orr does not have any prior record, both of the failures in this case, I think, are significant. The failure to communicate with a client when the appellate court dismissed the appeal was a significant and serious

> misjudgment, as was the second matter that Mr. Orr has pled guilty to. I think it is important that The Florida Bar, the attoreys in The Florida Bar, be advised of what constitutes a breach of ethics, and that this is one of the matters that is appropriate for such publication.

The Board of Governors of The Florida Bar agrees with the referee's recommended discipline and the need for an opinion. It is the minimally acceptable discipline to the Bar and should be to this Court. The referee's recommended discipline should be accorded considerable deference. The Florida Bar urges that it be fully adopted; that an appropriate opinion outlining the facts giving rise to this case be issued; and that respondent be taxed costs. Respondent's recommended discipline is purely insufficient given the entirety of the case.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, recommendations of guilt and discipline, approve same and impose a public reprimand to be administered by personal appearance before the Board of Governors and tax costs currently totalling $1,368.35 against the respondent in an appropriate opinion setting forth the underlining facts of this matter to further advise the members of the Bar of the ethical problems presented in this particular case.

Respectfully submitted,

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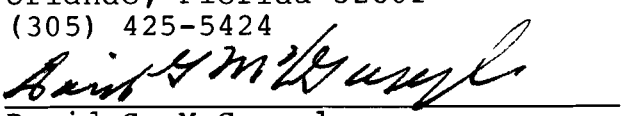
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Response Brief and attached Appendix of The Florida Bar and has been furnished by regular mail to the Supreme Court of Florida, the Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing was mailed by ordinary U.S. mail to Mark Orr, respondent, 133 S. 2nd Street, Ft. Pierce, Florida 33450; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301 on this 6th day of November, 1986.

David G. McGunegle
Bar Counsel