IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DENNIS SLATER,

Respondent.

CONFIDENTIAL

Case No. 67,894

THE FLORIDA BAR'S ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

The Complainant hereby adopts respondent's Statement of the Case and of the Facts.

SUMMARY OF ARGUMENT

Respondent, an experienced personal injury lawyer, failed to sign a contingent fee contract and closing statement in the instant case and, in fact, stated that he had never done so in any of his prior personal injury cases.

The referee's recommendation that respondent receive a Public Reprimand, probation for a period of not less than six (6) months nor more than three (3) years, pending a successful score on the ethics portion on The Florida Bar exam, is an appropriate disciplinary measure due to respondent's substantial experience in personal injury practice and his extensive disciplinary record.

Further, the referee's recommendation that respondent pay $1,296.13 as one-half of the Bar's total costs is not only equitable, but is consistent with case law regarding the apportionment of fees when an attorney is acquitted of some charges, but not others.

Therefore, The Florida Bar requests that this Court approve the referee's recommendation that respondent receive a Public Reprimand, with a probation of not less than six months nor more than three years and, as a condition of that probation, be required to obtain a passing score on the ethics portion of the Bar exam and pay costs as set out in the Amended Statement of Costs.

ARGUMENT

Point I

THE RECOMMENDED DISCIPLINARY MEASURES ARE APPROPRIATE WHEN CONSIDERING RESPONDENT'S PRIOR DISCIPLINARY RECORD AND SUBSTANTIAL EXPERIENCE IN THE PRACTICE OF LAW.

The referee found respondent guilty of violating Disciplinary Rule 2-106(e) due to his failure to sign a contingent fee contract and a closing statement.

The referee reviewed and considered respondent's prior disciplinary convictions and the discipline received therein, prior to making a recommendation regarding the sanction to be imposed. (RR 2). Thereafter, the referee recommended that respondent receive a public reprimand and be placed on probation for a period of not less than six (6) months nor more than three (3) years, with a special condition that respondent attain a passing score on the ethics portion of the Florida Bar examination and upon attaining a passing score and serving at least six (6) months of probation, that the probation terminate.

The Florida Bar contends that the referee's recommended discipline is appropriate due to respondent's past disciplinary history and substantial experience in the practice of personal injury law.

When determining whether or not the referee's recommended discipline is appropriate, The Florida Bar

requests the Court consider The Standards for Imposing Lawyer Sanctions (1986) (hereinafter referred to as The Florida Standards), which provide a guideline for determining the appropriate sanctions for ethical violations by attorneys.

The Florida Standards suggests that four (4) factors be considered when determining the appropriate sanction in an individual case:

1. The first factor to be considered is the duty violated by respondent. According to The Florida Standards respondent's misconduct of failing to sign a contingent fee contract and closing statement, as mandated by Rule 2-106(e) violates a duty owed as a professional. (See The Florida Standards supra at 11).

2. The second factor to be considered is the respondent's mental state in violating a duty owed as a professional. The respondent testified at trial that, although he did not sign the contingent fee contract in question and, in fact, had never signed a contingent fee contract since being admitted to the Bar in 1965, he did not know that the Florida Bar Code of Professional Responsibility required his signature on such contracts. (TT 223, 224). Respondent so stated despite the fact that he also testified that he adhered to the rules of professional conduct at the time.

3. The third factor to be considered by the Court is whether there was potential or actual injury to a client. Respondent's failure to sign the contingent fee contract caused little or no actual or potential injury to his client.

4. The fourth and final factor to be considered is whether any aggravating or mitigating factors exist. The existence of aggravating circumstances may justify an increase in the degree of discipline to be imposed. Further, respondent's prior disciplinary offenses can be considered as an aggravating factor in determining an appropriate sanction for attorney misconduct. (See The Florida Standards, supra at 13.)

At the time the referee considered his recommendation, respondent had several prior disciplinary offenses. In fact, immediately prior to the commencement of the evidentiary hearing before the referee, the respondent tendered to the referee a conditional guilty plea for consent judgment in Case No. 64,891 and Case No. 67,893. The respondent received a Private Reprimand in Case No. 67,891 and, in Case No. 67,893, was disciplined by Public Reprimand and Suspension for two (2) years and four (4) months to run concurrently and co-terminously with the previous Suspension respondent received in case No. 61,689 which was effective October 21, 1981 through February 10, 1984. In case No. 61,689 the respondent was suspended following his adjudication of guilt on nineteen counts

of mail fraud; however, he was subsequently reinstated to the practice of law in February, 1984, when the Eleventh Circuit Court of Appeals overturned that conviction due to fundamental error that occurred at the trial level. (RR 2).

Respondent's extensive prior disciplinary convictions and the disciplinary sanctions imposed therein were considered by the referee prior to his recommendation in the instant case. (RR 2).

A respondent's experience in the practice of law is also considered an aggravating factor in determining an appropriate sanction for attorney misconduct. The respondent has practiced law in the State of Florida since 1965 and has had substantial experience in the area of personal injury law which extensively utilizes contingent fee contracts. During his testimony, respondent detailed his extensive experience with the Fowler-White firm and the firm of Richard Mulholland in the area of personal injury practice. [TR 178-181]. During his suspension, respondent further stated that due to that experience, he served as a consultant to various law firms, teaching lawyers about personal injury and how to run a personal injury office effectively. [TR 181]. He also stated that he prided himself with adhering to the Code of Professional Responsibility. [TR 223].

However, despite his extensive experience in the area of personal injury and despite his professed adherence to

the Code of Professional Responsibility and the obvious provisions of DR 2-106(e), respondent revealed that, in the past, he had never signed a fee contract or closing statement as required by the rule. Had respondent familiarized himself with The Florida Bar Code of Professional Responsibility, he would have been aware that Disciplinary Rule 2-106(e) deals specifically with contingent fee contracts and closing statements and clearly states that such contracts and statements must be in writing, signed by the client and by an attorney, either for himself or for the law firm representing the client.

However, despite this, respondent argues that a private reprimand is the appropriate sanction for his misconduct for failing to comply with this rule. If one were to apply only the first three (3) factors set out above, the Florida Bar would agree with respondent that a private reprimand is the appropriate sanction for his misconduct. (See The Florida Standards, supra at 12). However, when applying the fourth factor, the existence of aggravating circumstances, it is the Bar's position that respondent's prior disciplinary record and his substantial experience in the practice of law, justify an increase in the degree of discipline.

In determining the appropriate sanction in a disciplinary matter, this Court considers prior misconduct and cumulative misconduct as relevant factors. The Florida Bar v. Welch, 272 So. 2so.2d 139 (Fla. 1972).

In The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), this court stated that it deals more severely with cumulative miscoconduct than with isolated misconduct. Based on this premise, this Court disagreed with the referee's recommended discipline of a public reprimand and found that a suspension was appropriate in view of Vernell's prior breaches of professional discipline and his cumulative misconduct.

Further, in The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980), the referee considered Greenspahn's prior disciplinary record which revealed a public reprimand for prior misconduct and, as a result, recommended that he be disciplined by a suspension for three (3) months. In reviewing the referee's decision, this Court found that Greenspahn's cumulative misconduct and prior disciplinary record warranted a six (6) month suspension rather than the referee's recommended three (3) month suspension.

Based upon the case law regarding prior disciplinary records and cumulative misconduct, it is the Bar's position that a public reprimand, probation for a minimum of six months, contingent on a successful score on the ethics portion of the Bar exam, is the appropriate sanction for respondent's misconduct.

Point II

THE REFEREE'S RECOMMENDATION COSTS ASSESSED AGAINST RESPONDENT ARE EQUITABLE.

Upon the referee's finding that respondent violated The Florida Bar Code of Professional Responsibility Disciplinary Rule 2-106, the Bar submitted to the Court, a Statement of Costs which included all costs incurred by the Florida Bar in the prosecution of respondent. The Statement of Costs reflected that the Florida Bar incurred costs in the amount of $2,912.03.

By virtue of the fact that the respondent was found not guilty with respect to one of the charges against him, that being violation of Integration Rule 11.10(e)(c), the referee determined that the Florida Bar's cost needed to be apportioned. (RR 3). As such,the Bar submitted to the referee, an Amended Statement of Costswhich eliminated all Florida Bar Staff Investigator expenses, and halved most of the court reporter expenses. The referee found the Bar's Amended Statement of Costs, to be equitable and assessed costs against respondent for $1,296.13.

In The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982), this Court held that in disciplinary actions the allowance of costs rests in the discretion of the court. Further, in regards to Florida Bar costs, this court stated that "the referee and this Court should, in assessing the amount, be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable". The Florida Bar v. Davis, supra at 328.

The referee did consider the fact that respondent had been acquitted on one of the charges against him and, as a result, apportioned the Bar's costs by reducing the same to less than one-half of the total costs incurred.

In Davis this court found that the referee's recommendation of allowing one-third of certain costs where there has been a finding guilt on one charge but not on two others to have been reasonable. The referee's decision to apportion the Bar's cost by more than half of the total costs is consistent with Davis.

CONCLUSION

There are two issues before this Court, to wit:

1) Whether the referee's recommendation of discipline is excessive for an attorney's failure to sign a contingent fee contract and a closing statement when the attorney has a substantial prior disciplinary history and has extensive experience in the practice of law.

2) Whether assessing less than one-half of the Bar's costs against an attorney who is acquitted on one of two charges is unequitable.

In addressing the first issue, it is the Bar's position that absent aggravating factors, respondent's misconduct would warrant a Private Reprimand. However, the respondent had a prior disciplinary history and substantial experience in the practice of law and, in accordance with The Florida Standards, Welch, Vernell, and Greenspahn, the referee was justified in increasing the degree of discipline.

As to the second issue, it is the Bar's contention that the costs assessed against the respondent are equitable and are consistent with the Court's decision in Davis.

The Bar requests that this Court accept the referee's recommended discipline and costs order that respondent pay costs in the amount of $1,296.13.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to BARBARA MOORE, Smith and Fuller, P. A. P. O. Box 3288, Tampa, Florida 33601 and JOHN T. BERRY, Staff Counsel, The Florida Bar, Tallahassee, FLorida 32301, by regular U. S. Mail on this 12th day of January, 1987.

DIANE V. KUENZEL