IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JAN 2 1987
CLERK, SUPREME COURT
By _____ Deputy Clerk

THE FLORIDA BAR,

Complainant,

v.

Case No. 67,894

DENNIS J. SLATER,

Respondent.

_____/

ON REVIEW FROM A REFEREE FOR THE SUPREME COURT OF FLORIDA
ON A MATTER BEFORE THE FLORIDA BAR

BRIEF OF RESPONDENT

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ON REVIEW FROM A REFEREE FOR THE SUPREME COURT OF FLORIDA
ON A MATTER BEFORE THE FLORIDA BAR

BRIEF OF PETITIONER

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INTRODUCTION

Petitioner, DENNIS J. SLATER, Respondent below, will be referred to herein as "Respondent" or "Respondent SLATER".

The Florida Bar, Complainant below, will be referred to herein as "the Florida Bar" or "the Bar".

The Report of the Referee in this case dated September 26, 1986 will be referred to as "the Referee's Report" in the text, and cited as (RR, part) with the appropriate part number.

The transcript of the hearings below before the Referee will be referred to as (TR-) with the appropriate page number.

Pleadings and Orders in the case below shall be referred to by their title and date.

STATEMENT OF THE CASE AND OF THE FACTS

In November, 1985, Respondent DENNIS J. SLATER, was charged with violations of the Integration Rule 11.10(8)(c) and Disciplinary Rule 2-106(E) of the Code of Professional Responsibility. (See Complaint dated November 14, 1985). Pursuant to hearings held August 1, 1986, the duly appointed Referee made findings of fact and recommendations contained in the Report of the Referee dated September 26, 1986 (hereinafter Referee's Report). In his report, the Referee found Respondent to be not guilty of the charged violation of Integration Rule 11.10(8)(c). (RR, part III). The Referee found that Respondent SLATER had admitted his failure to sign a contingency fee agreement or closing statement, and was therefore found guilty of the charged violation of Disciplinary Rule 2-106(E). (RR, part II, RR, part III).

The Referee then made recommendations as to the disciplinary measures to be applied. The Referee found that as Respondent was not guilty of violating Integration Rule 11.10(a)(c), no disciplinary action should be taken as to that charge. However, the Referee recommended that for the violation of Disciplinary Rule 2-106(E), the Respondent should (1) receive a public reprimand; (2) be placed on probation for a period of not less than six months nor more than three years; and (3) that as a special rule of that probation, Respondent be required to obtain

a passing score on the ethics portion of The Florida Bar Examination. (RR, part IV). Additionally, the Referee recommended that the costs and expenses incurred by the Florida Bar in a successful prosecution for violation of Disciplinary Rule 2-106(E) be charged to Respondent, and such costs were to be apportioned at a later time. (RR, part VI).

Subsequent to the receipt of the Referee's report, Respondent moved for a reconsideration of the penalty, (See Motion for Reconsideration of Penalty dated October 31, 1986), and for a statement of costs apportioned between the charges brought. (See Motion dated October 31, 1986). The Florida Bar filed an Amended Statement of Costs dated October 27, 1986. On December 2, 1986, the Referee issued an Order denying Respondent's Motion for Reconsideration of Penalty and apportioning costs as reflected in the Amended Statement of Costs filed by the Florida Bar on October 27, 1986. (See Order dated December 2, 1986). Respondent SLATER seeks review of the portions of the Referee's Report containing the recommendations detailed above and the portions of the Order dated December 2, 1986 containing those rulings stated above.

SUMMARY OF ARGUMENT

The disciplinary measure recommended by the Referee and adopted by the Board of Governors for Respondent's violation of Disciplinary Rule 2-106(E) is inappropriate to the offense. The recommended disciplinary measures are a severe and disproportionate penalty where the violation is not fundamental to either the attorney/client relationship, or the reputation and integrity of the legal system. The violation also caused little or no injury, and was not a willful or knowing violation. Therefore, Respondent submits that a more appropriate penalty for the violation shown, in light of Respondent's remorse and intent to avoid future violations, is a private reprimand.

The taxation of costs in the amount stated in the Amended Statement of Costs is inequitable where Respondent was found not guilty of the charges requiring the considerable expense detailed on the statement, and the charge upon which Respondent was found guilty was admitted by Respondent, and could have incurred only minimal expense to prosecute.

ARGUMENT

POINT I

THE RECOMMENDED DISCIPLINARY MEASURES ARE INAPPROPRIATE FOR THE NATURE OF THE OFFENSE OF WHICH DEFENDANT WAS CHARGED AND FOUND GUILTY.

The Referee found Respondent to be guilty only of a violation of Disciplinary Rule 2-106(E), failure to sign a contingency fee agreement or closing statement. (RR-2). As a disciplinary measure for this violation, the Referee recommended that Respondent (1) receive a public reprimand; (2) be placed on probation for a period of not less than six months nor more than three years; and (3) as a condition of that probation be required to obtain a passing score on the ethics portion of the Florida Bar. (RR-2). The Referee also recommended that Respondent be assessed with costs incurred in the prosecution of the violation of DR 2-106(E) (DR-3) and entered an Order granting apportionment of costs in the amount of $1,296.13. (Amended Order of December 2, 1986). The Respondent submits that the nature of the offense does not warrant such a severe penalty.

A. The recommended disciplinary measures are disproportionate to the nature of the violation which is not fundamental to the attorney-client relationship, and which caused little or no injury to the client, the public, the legal system, or the legal profession.

In determining whether the recommended disciplinary measure is appropriate, the Court should first consider the American Bar Association Standards for Imposing Lawyer Sanctions (1977) (hereinafter the ABA Standards or the Standards). While the ABA

Standards are certainly not binding on this Court, they do provide a rational basis by which to determine appropriate penalties for ethical violations. In addition, Respondent believes that the Court has recently adopted Standards for Imposing Lawyer Sanctions, however, as of the writing of this brief, those Standards have not been published.

The ABA Standards suggest that the Court examine four distinct criteria each one designed to narrow the range of severity of the violation. Under the first criterion, the ABA has divided violations into four categories based on the duty imposed by the rule of conduct, and to whom the duty is owed. The first and most important category contains violations of those duties owed to the client. These include the duties of loyalty, diligence, competence, and candor. See ABA Standards, supra at 5. The ABA Standards have included in each category the rule from the Model Rules of Professional Conduct or the Code of Professional Responsibility applicable to the category. After the first category, the others follow in descending order of priority and are deemed by the Standards to lead to lesser penalties for violations.

The second category contains the duties owed to the public in general, to ensure general trust and respect of lawyers. This category includes rules prohibiting fraud or dishonest practices in general, or practices which obstruct justice. The third category contains those duties owed to the legal system -- the courts and the system of justice. Lawyers owe their paramount

duty to their client, limited only by concerns of the general reputation, and to represent them within the bounds of the law. The fourth and final category is made up of violations of those duties owed to the legal profession itself. These duties are not inherent to the client/professional relationship and are not basic to the professional's relationship with the public or the courts. Rather, these duties are deemed to relate to the profession itself helping to ensure the professional standards and encourage better practices. This last category of duties includes those restrictions on advertising, fees, unauthorized practice of law, the acceptance and termination of representation, and the maintenance of integrity within the profession.

The remaining three criteria designed by the ABA Standards further define and narrow the violation by considering other factors. The second criterion requires an examination of the lawyer's state of mind in committing the violation -- was it intentional or willful, or negligent? This is obviously a relevant consideration in determining the penalty, because the sanction necessary to prevent future violations merely may be to educate and encourage or, in the case of severe intentional misconduct, may be to prevent that attorney from practicing law. _See_ _ABA Standards_, _supra_, at 6.

The third criterion is equally important in determining the appropriate sanction for a violation because it requires examination of the extent of actual injury or the potential for

injury caused by the violation. Within the category of the entity to whom the duty is owed, the extent of injury caused by the attorney's misconduct is obviously relevant to determine the severity of the violation and the sanction warranted. Obviously, a serious injury to a client would warrant some of the most serious sanctions.

Finally, the fourth criterion brings into play the discretionary factors of aggravating and mitigating circumstances by allowing the court to consider factors which indicate the respondent lawyer's attitude and intent to prevent or avoid any future violation.

The sanctions themselves are scaled by the ABA Standards, from most severe to least severe. Beginning with disbarment, the scale descends through suspension, public reprimand, private reprimand (called as an admonition in the Standards), probation, and then a host of other accompanying remedies including restitution and assessment of costs. Each sanction has a certain effect, some to educate and encourage, some to "watch-dog", some to rid the profession of one who has been determined unfit. Under this system, the Court may reasonably determine and apply the more severe sanctions or disciplinary measures to the more injurious violations.

This Court has previously stated that it is in accord with the purpose of lawyer discipline stated in the ABA Standards, the primary purpose being to protect the public. See ABA Standards, supra at 17; The Florida Bar v. Moses, 380 So. 2d 412 (Fla.

1980). Additionally, however, the courts are generally consistent that other purposes of attorney discipline are: to "protect the integrity of the legal system, and to insure administration of justice;" "to deter further unethical conduct;" "to rehabilitate the lawyer;" and "to educate other lawyers and the public, thereby deterring unethical behavior among all members of the profession." ABA Standards, supra, at 2. The ABA adds, and we believe this Court agrees, that it is not the purpose of such sanctions to impose punishment. See ABA Standards, supra, at 17.

In applying this method of determining an appropriate sanction for the violation committed by Respondent SLATER, Respondent submits that the Referee has recommended, and the Board of Governors has adopted, an inappropriate sanction for this case. An examination and analysis under the ABA Standards will demonstrate the inappropriateness of the penalty recommended versus the violation committed. Using the ABA Standards, the first consideration is to determine the category within which Respondent's violation falls. In this case, Respondent's violation of failing to sign a contingency fee contract falls within the fourth and least injurious of the categories, i.e. duties owed to the legal profession. Disciplinary Rule 2-106(E) of the Code of Professional Responsibility is among those rules which were designed to regulate and ensure integrity and better practices among the legal profession itself. See ABA Standards, supra, at 5. Once the type of violation has been placed within that category, the ABA Standards suggest further inquiry to

determine the seriousness of that misconduct within the category.

The further inquiry suggested by the ABA Standards is an examination of the respondent lawyer's state of mind in committing the violation. In this case, while Respondent SLATER admitted the violation, in that he did not sign the contingency fee agreement which was read and signed by his clients, Respondent did not intentionally or willfully violate the requirement. Rather, his failure to sign the agreement, believing himself to be bound by the arrangement in any case, was a result of his admitted lack of diligence in determining the exact requirements of the rule (TR-224). Thus, while Respondent SLATER was attempting to comply with the spirit of the rule by providing his client with the information appropriate and relevant to contingency fee arrangements, he mistakenly did not sign the agreement as required to further better practices within the profession. Therefore, under Standard 7.0, ABA Standards, supra at 45, Respondent SLATER should not be deemed to have "knowingly engage[d] in conduct that is a violation of a duty owed to the profession" under Standards 7.1 or 7.2, but rather would be in the position of having negligently engaged in such conduct which is a violation of a duty owed to the profession under either Standard 7.3 or 7.4, ABA Standards, supra, at 46.

The next appropriate consideration posed by the ABA Standards is a very important one and examines the extent of injury or the potential for injury to the entity to whom the duty was owed: the client, the public, the legal system, or the legal

profession. In this case, Respondent SLATER's duty was owed primarily to the legal profession. Respondent SLATER cannot conceive of any actual injury created by such violation, and submits that Respondent SLATER's sanction should be appropriately considered under Standard 7.4, applying to those unintentional violations which resulted in "little or no actual or potential injury to a client, the public, or the legal system." ABA Standards, supra, at 46.

The final considerations posed by the ABA Standards are mitigating or aggravating circumstances which are listed in the ABA Standards. See ABA Standards, supra, at 15. Respondent SLATER would submit for this Court's consideration the factors under Standard 9.32(b) absence of a dishonest or selfish motive; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and (l) remorse. Respondent SLATER has already indicated that this violation was not through any intent to benefit himself or to deceive anyone, and Respondent SLATER has made full and free admission to the Disciplinary Board as to this violation; further Respondent SLATER has indicated and would indicate his regret of the violation and intent to avoid any violation in the future. (TR-224)

Following the commentary to Standard 7.4, ABA Standards, supra, at 46, Respondent SLATER submits that an admonition or private reprimand is the only appropriate sanction in this case of a violation of a duty owed to the profession, because there is little to no injury to the client, the public, or the legal

system. A sanction of this type informs the Respondent lawyer of his error and encourages him to correct it. In a case such as this where the violation was due to misunderstanding and lack of knowledge, such sanction would appropriately educate respondent lawyer and encourage him to further educate himself as to the rules, yet fairly not impose more serious and inappropriate sanctions in punishment for violations charged but not proven.

B. The recommended penalty is inappropriate in view of disciplinary measures imposed on other attorneys for similar conduct.

Additionally, this Court should consider in its review of the recommended penalty the sanctions imposed on other attorneys for similar conduct. The Florida Bar v. Breed, 378 So. 2d 783 (Fla. 1980). In researching this issue, Respondent has located no reported case concerning a violation of Disciplinary Rule 2-106(E). Under the current system of disciplinary proceedings, this absence leads to two possible inferences. The first is that there have been no prosecutions for violations of Disciplinary Rule 2-106(E). The second inference is that, if there have been such prosecutions, all of the cases have resulted in a sanction of private reprimand, as any case of public reprimand would have been otherwise published and accessible to research. In either case, the inferences show that the sanction recommended in this case by the Referee is inappropriate because this violation has never resulted in sanctions as severe as those recommended in this case.

Finally, Respondent's research did reveal several cases where penalties such as those recommended in this case were imposed. Without exception, however, those cases involve much more serious violations, both in terms of their "category" and in terms of the actual or potential injury. See The Florida Bar v. Mayo, 419 So. 2d 325 (Fla. 1982) (where intentional failure to disclose trust instruments which were necessary muniments of title which attorney was required by law to reveal warranted a public reprimand); The Florida Bar v. Shapiro, 413 So. 2d 1184 (Fla. 1982) (where improper contact with adverse party, mental instability, commingling of trust funds and general operating funds, engaging in practice under a trade name, contingency salaries to an employee, and use of non-lawyer in a legal position warranted requirement of passing the ethics portion of the Florida Bar, coupled with a 91-day suspension); The Florida Bar v. Toothaker, 477 So. 2d 551 (Fla. 1985) (where fraudulent or dishonest conduct and neglect of a legal matter warranted public reprimand, restitution, and assessment of costs); The Florida Bar v. Shapiro, 456 So. 2d 452 (1984) (where lawyer preparing false sworn statement with forged client signature warrants requirement of passage of ethics portion of the Florida Bar coupled with a 90-day suspension and two year probation.) The Florida Bar v. Sagrans, 388 So. 2d 1040 (Fla. 1980) (where lawyer improperly split fees with chiropractor, the conduct warranted a public reprimand).

Thus, this Court should consider that the violation in this

case had very little potential for injury to the client, the public or, the legal system. As stated in the ABA Standards Commentary to Standard 2.6, a private reprimand or admonition is the appropriate sanction "when the lawyer is negligent, when the ethical violation results in little or no injury to the client, the public, the legal system, or the profession, and when there is little or no likelihood of repetition.

POINT II

THE ASSESSMENT OF COSTS AS STATED IN THE AMENDED STATEMENT OF COSTS WAS INEQUITABLE AS THE COSTS WERE NOT APPORTIONED AMONG THOSE INCURRED TO PROSECUTE THE ONLY CHARGE ON WHICH RESPONDENT WAS FOUND GUILTY.

The Referee granted the apportionment of costs in the amount of $1,296.13as set forth in the Amended Statement of Costs filed by The Florida Bar on October 27, 1986. See Order dated December 2, 1986, and has recommended that these costs be assessed against Respondent. However, this assessment of costs would be in error. The costs may be assessed against a Respondent for a successful prosecution of charges of ethical violations. The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982). However, the Court may use its discretion in assessing costs, and should consider that Respondent was acquitted on some of the charges for which costs were incurred. Id. This discretion should particularly be exercised in the case before the Court because Respondent freely admitted the only violation shown, and the cost to prove such charge could only be minimal. Had this violation been charged and prosecuted on its own, the Respondent would merely have

answered in the affirmative and the only hearing necessary would have been a penalty hearing before the Referee. Certainly, no investigation would have been needed to prove the charge and transcript charges would have been substantially less. Therefore the costs which the Referee recommended to be assessed are excessive.

Additionally the costs as stated were not apportioned among the charges so the Court could, if it so wished, grant only those costs incurred on the prosecution of the violation of Disciplinary Rule 2-106(E). In Davis, 419 So. 2d 325, the Referee assessed only one third of the costs presented by the Statement of Costs because the Bar had prevailed on only one charge of three. Here, the Referee could have assessed only half or one third of the costs presented, but even that would not be equitable in this case because the actual costs to prove the only violation on which Defendant was found guilty are minimal.

In Davis, the Court recommended that the discretionary approach be used in disciplinary actions for the assessment of costs, and stated that "[t]he amount of costs in these circumstances should be awarded as sound discretion dictates." Davis, 419 So. 2d at 328. Thus, this Court is not bound to assess against the Respondent all costs submitted in the Amended Statement of Costs filed by the Florida Bar on October 27, 1986, but may assess those costs which, in its discretion, the Court considers were warranted considering the fact that the Respondent has been acquitted of some charges, or that the incurred costs

were unreasonable for the charge on which Respondent was proven guilty. Respondent SLATER submits that the costs imposed in the amount of $1,296.13 are unreasonable for the prosecution of Respondent's violation of DR 2-106(E). Respondent requests that the costs should either be apportioned among those violations charged, and thereafter properly presented to the Court for assessment; or that the Court should exercise its discretion and grant a minor portion of the costs to be assessed against Respondent based on the fact that only a minor part of the entire 35-paragraph complaint resulted in a finding of guilt.

CONCLUSION

By reference to the American Bar Association Standards for Imposing Lawyer Sanctions, it is apparent that the recommended disciplinary measures are inappropriate for the nature of the offense with which Respondent was charged and found guilty. Further, the recommended penalty is inappropriate in view of disciplinary measures imposed on other attorneys for similar conduct in Florida.

Finally, the taxation of costs as recommended by the Referee and adopted by the Board of Governors of the Florida Bar is inequitable as the costs were not the actual costs incurred in the prosecution of the offense of which Respondent was found guilty, nor were the costs apportioned in an equitable fashion.

For these reasons, the Referee's recommendations relating to penalties should be rejected and the sanction of a private reprimand should be imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief of Petitioner has been furnished by United States Mail to Diane Victor Kuenzel, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Mariott Hotel, Tampa, Florida 33607, this 19th day of December, 1986.

Barbara E. Glover Moore
Attorney

Br of
Resp