IN THE SUPREME COURT OF FLORIDA

FILED
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DEC 10 1986
CLERK, SUPREME COURT
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THE FLORIDA BAR,

Complainant,

vs.

STANLEY B. GELMAN,

Respondent.
_____/

CASE NOS. 68,198
68,512

COMPLAINANT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

Upon appropriate findings of probable cause at the grievance committee level, The Florida Bar filed two formal complaints charging Respondent with a total of three counts of misconduct.

Pursuant to court order, the formal complaints were assigned to the Honorable E. L. Eastmoore as referee. Judge Eastmoore conducted a final hearing on the complaints on July 17 and July 23, 1986. The Referee's Report was filed August 19, 1986.

The Referee found Respondent guilty of misconduct in each case and recommended Respondent be suspended for a period of six (6) months. Upon a timely petition to review, Respondent has appealed the findings of fact and recommendations as to discipline contained in the Referee's Report.

STATEMENT OF THE FACTS

Supreme Court Case No. 68,198

On June 24, 1983, Respondent hand delivered a letter and check to Harold Hart, exercising an option agreement for Respondent's client, Walter Williams (T-75). The option agreement provided for purchase of one-fourth of the outstanding shares of Hart Enterprises (T-76).

Upon Hart's failure to honor the letter and check for the option, Respondent filed suit in circuit court in Duval County, Florida (T-77).

Hart retained counsel, David Lewis, to represent his interest in this action. Lewis' initial response was to file a motion to dismiss based upon Respondent's failure to attach the option and execution documents to his complaint (T-78).

At the motion hearing, Respondent orally requested to be allowed to introduce the documents and, upon request,allowed Lewis to inspect his file copies (T-79). Lewis testified that Respondent's copy of the letter requested transfer of one-third of the shares of Hart Enterprise. Respondent also stated to the court he only had one copy and received permission to late file the documents (T-80). This fact was verified by Lewis' observation (T-84).

Respondent subsequently filed the documents with the court. While the complaint correctly alleged an option to exercise a purchase of one-fourth of the stock, the letter delivered to Hart and that originally shown to Lewis in court stated the amount as being a one-third share of the stock (T-81-84).

The letter filed with the court had a one-third share marked out replaced with a written one-quarter share (T-80). At no time did Respondent notify or inform the court that an altered document had been placed into evidence.

In addition to the original letter delivered to Hart advising of the execution of an option for one-third share, Respondent issued a firm business check which also indicated it was for a one-third share of stock (T-81).

Supreme Court Case No. 68,512

Count I

In 1982, Mr. Leo Meyers was the house counsel for a Florida corporation, Statewide Collection Corporation (henceforth SCC). The primary business of SCC was the collection of judicial judgments owed to Barnett Banks as well as other delinquent account receivables (T-26).

SCC is the recovery arm of the Barnett Banks of Florida, a holding company. Each separate Barnett Bank, such as Barnett Bank of Jacksonville, is also owned by this same holding company (T-27-28).

In 1982, Mr. Meyers was involved with a disputed account that had been forwarded to SCC by Barnett Bank of Jacksonville. The account regarded a judgment held against an individual named Louis Perfetto (T-29).

In the course of his business dealings, Mr. Meyers came to know Respondent and has personal knowledge that Respondent has represented Barnett Bank of Jacksonville in a legal capacity. Respondent handled replevins, foreclosures and bankruptcies for Barnett Banks (T-3-53). Compensation for Respondent's legal services in such matters was paid by Barnett Bank (T-31).

Mr. Meyers copied Respondent with a letter he had sent to the credit bureau referencing the disputed debt of Perfetto. Respondent was copied due to his having represented Perfetto on the judgment (T-31).

At a deposition relating to the referenced judgment, Respondent appeared on behalf of Perfetto (T-32). Subsequent to the deposition, Mr. Meyers wrote Respondent on December 9, 1982 of what he perceived to be a conflict of interest with Respondent representing Barnett Bank and also representing a client with interest directly adverse to Barnett Banks (T-32). Prior to the

above letter, Respondent had been told of the conflict in a telephone conversation with Mr. Meyers (T-33). On numerous occasions Respondent had been informed of this relationship between Barnett and SCC (T-43).

Gelman continued his representation through motion hearings and the deposition of his client, Louis Perfetto. Mr. Meyers had even alleged the conflict's existence in a court motion asking Respondent be held in contempt (T-35).

In 1984, Mr. Meyers was attempting to collect a debt owed Barnett Banks by Mr. J. C. Rohman for SCC (T-36). After filing suit against Rohman, Mr. Meyers was contacted by Respondent in an attempt to settle the lawsuit (T-36). At this time Respondent was again reminded of the same conflict by Mr. Meyers (T-37).

Respondent's firm filed a motion to dismiss on Rohman's behalf that was signed by Tom McKeel (T-37). At this time, Respondent told Mr. Meyers that he had someone in his office file something to slow the system down so that a settlement could be discussed.

Respondent attempted to settle the lawsuit by filing a proposed settlement on Rohman's behalf. At no time did Mr. Meyers ever discuss any aspect of the lawsuit with anyone but Respondent (T-39). Respondent's firm ultimately withdrew from Rohman's lawsuit citing the complained of conflict of interest (T-39).

Count II

In 1973, Respondent acted as a closing agent in a real estate transaction between Helen Sebra, seller, and Gateway Chemical, buyer (T-11).

At the closing, Respondent's closing statement revealed an outstanding judgment against Sebra in the amount of $345.81 (T-7). Respondent withheld these funds from the proceeds for the payment of the lien.

In 1985, Sebra sold her home and discovered that Respondent never paid the judgment and the lien was still on file against her (T-8). Sebra attempted to contact Respondent without success and eventually was required to retain counsel for such action (T-9).

Respondent's trust account records never revealed a surplus of funds belonging to Sebra. Respondent would only examine trust records when there was a particular problem (T-18-20).

Respondent was informed of the problem in 1985 by Sebra's attorney and again by the 4A Grievance Committee in November 1985 (T-21). At this time, Respondent promised to make restitution to Sebra but failed to do so until June 1986.

SUMMARY OF THE ARGUMENT

ISSUE I

The Referee's findings in Case No. 68,198 are to be given substantial weight in that there is clear and substantial evidence to support the findings. Respondent's conduct in filing altered documents without informing the court was violative of the Code of Professional Responsibility.

ISSUE II

The actions of Respondent in dealing with Statewide Collection Corporation were in conflict with an ongoing relationship with Barnett Bank who had a right to expect a duty of Respondent to protects its ultimate interests.

ISSUE III

Respondent completely ignored all the requirements of trust accounting rules of The Florida Bar by withholding proceeds from a real estate sale and failing to satisfy a lien with such funds for thirteen years.

ISSUE IV

The cumulative effect of the misconduct set forth in the complaint when taken with Respondent's past record of two private reprimands justifies a six-month suspension.

ARGUMENT

ISSUE I

THE REFEREE PROPERLY FOUND THAT RESPONDENT'S CONDUCT IN CASE NO. 68,198 CONSTITUTED UNETHICAL BEHAVIOR

Respondent argues that the Referee improperly found that he was guilty of misconduct in the above referenced case since he claims there was an absence of a showing of a motive for such misconduct.

The initial fact-finding responsibility in disciplinary matters is imposed upon the referee and his findings should be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). The findings and conclusions of a referee or circuit judge are accorded substantial weight and will not be overturned unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968).

While Respondent admits that the facts surrounding this matter are undisputed he argues such facts do not support a finding of misconduct.

The basic facts are undisputed that Respondent had only one copy of the letter before Judge Martin and refused to file said copy. Also this letter provided for the purchase of one-third of the stock from Hart.

Respondent argues such substitution would have been beyond the imagination since he knew the original says otherwise. If Respondent's testimony is reviewed he is not sure what the original says since he has no idea what was delivered to Hart. This can be seen in his confusion as to how the letter was corrected or what was actually delivered.

Respondent would have the Court believe that the original letter to Hart was for one-quarter since he claims this mistake was corrected before delivery. A review of the check from Respondent delivered simultaneously also shows a purchase of one-third and this was prepared by Respondent. Respondent, at the grievance committee level, blamed the mistake on faulty dictation equipment (T-97). Since Respondent prepared the check rather than his secretary, such an excuse is not viable.

Complainant would argue that Respondent was not sure what had been delivered to Hart and in an attempt to conform his evidence with the allegations of his complaint, interlineated one-fourth with the one-third in the letter he had present with him before Judge Martin.

Respondent's second "plausible" theory of Mr. Lewis' recollection of the viewing of the letter at the motion hearing is tempered by his having seen the original cannot be considered. Mr. Lewis testified (T-78) that at the time Respondent filed suit he did not have copies of either documents. Therefore, he had not seen the document (letter) before being shown it by Respondent.

Respondent argues that since the actions complained of would be foolhardy that should be sufficient to have the findings of the Referee overturned. Such an argument could be applied to any misconduct where eventual discovery is likely.

Respondent's explanation of how the "mistake" occurred does not satisfy the ultimate questions represented. Respondent's answers at the final hearing are not constant with those given under oath to the grievance committee (T-93-97).

Respondent argues that he was not even aware of the problem until after his deposition was taken by Lewis. Even after this problem was brought to his attention, Respondent failed to notify the Court of the filing of improper evidence. From the evidence and testimony presented to the Referee, it is clear that Respondent did not know exactly what he had delivered to Hart.

It is also apparent that some question was present regarding the alleged initial exercise of the option since Respondent felt that a second execution was needed. In order to assure the validity of the second execution, Respondent felt that it was necessary for the exhibits to comport with the allegations of the complaint.

It is undisputed that Respondent misrepresented certain facts to the court at the Motion to Dismiss and to Mr. Lewis, an officer of the court. These misrepresentations were never corrected or made known to the court by the Respondent. These facts offer clear and

convincing evidence of misconduct. The mere existence of conflicting evidence has never been sufficient in and of itself to negate the findings of a referee.

Respondent's argument is akin to an attack on circumstantial evidence in a criminal case by attempting to show that some other explanation of the "crime" exists. Important to the charges and proofs brought against Respondent herein is the Referee's conception of Respondent as being an attorney who is more concerned with finding ways of getting around the Code of Professional Responsibility than living within it.

Since the findings of the Referee are seen as being based on undisputed facts and are not clearly erroneous, the findings should not be overturned.

ISSUE II

THE REFEREE PROPERLY FOUND THAT RESPONDENT VIOLATED DR 5-105 IN HIS REPRESENTATION OF LOUIS PERFETTO AND J. CHRISTOPHER ROHMAN

Respondent argues that the Referee improperly found him in violation of DR 5-105 in that there was no evidence of a conflict of interest between Respondent's clients, Perfetto and Rohman, and Statewide Collection Corporation (SCC), a wholly owned subsidiary of Barnett Banks of Florida, a holding company.

Respondent's initial statement under its argument begs the question since he believes the conflict lies with SCC when it is clearly evident that the conflict lies with Respondent and his then client, Barnett Bank. This should be clear in that Respondent never worked for or represented SCC in any manner.

As testified to by Mr. Meyers, house counsel for SCC, Respondent was repeatedly made aware of the existence of an apparent conflict in his representing Perfetto in an action by SCC and later he and his firm in representing Rohman. The existence of the conflict stemmed from Respondent's continuing representation of Barnett Banks and his representation of two clients whose interest were adverse to Barnett's best interest.

Through the testimony of Mr. Meyers and the Respondent, it was shown that Barnett Banks was a client of Respondent at the time he

represented Perfetto until his divorce in 1985 which also included the time he represented Rohman.

This Court has ruled that except in exceptional circumstances, an attorney may not represent conflicting interests in the same transaction no matter how well-meaning his motive or however slight such adverse interest may be. The Florida Bar v. Moore, 194 So.2d 264 (Fla. 1966). In this instance, Respondent was being retained on a continuous basis by Barnett Bank to protect their interests in various types of collection cases. In representing both Perfetto and Rohman, Respondent was defending actions being brought on behalf of his client Barnett Banks through SCC.

In Moore, this Court held that a lawyer represents "conflicting interests" when it becomes his duty on behalf of one client to contend for that which his duty to another client would require him to oppose. Supra. The obvious nature of Respondent's representation of Barnett Banks was the protection of their obligations and recovery of outstanding obligations. In representing Perfetto and Rohman, Respondent was attempting to defeat a right belonging to the Barnett Banks. The interest of Barnett Banks is evidently clear here and there is no tenuous attempt to tie in unrelated interests.

The evidence presented to the Referee is sufficient to demonstrate that the ultimate beneficiary of SCC's legal actions was Barnett and not SCC. This is evident from Mr. Meyers'

unrebutted testimony that it was the collection arm of Barnett and was paid for its services rather than owning the obligations it sought to enforce.

Respondent would have the Court believe that he had no knowledge of such potential conflict even during the Rohman matter which succeeded the Perfetto case and the attendant repeated admonitions by Meyers therein. Respondent's contention that he had disclosed such problems to the appropriate officials of Barnett cannot be given substance in the absence of a waiver by Barnett in response to the echoed concerns of Meyers in the Rohman matter.

In dealing with the Rohman action, Meyers testified that the only personal contact with opposing counsel was through the Respondent. Respondent desires the Court to believe that Rohman was not his client but that Rohman was a client of another lawyer with whom he was associated. The testimony and evidence are totally contrary to such an argument since all pleadings went out over the firm name of which Respondent was associated.

To further solidify Complainant's argument of the existence of a conflict of interest, Respondent's firm ultimately withdrew from representing Rohman alleging the conflict that Meyers had alleged since the Perfetto case.

Contrary to the argument presented by Respondent, the evidence showed that Respondent was actively representing Barnett's ultimate

interest during those times he represented the interest of Perfetto and Rohman against Barnett Bank's positions. However slight it may be viewed by Respondent, his primary duty was owed to Barnett. Such a showing supports the correctness of the Referee's findings of misconduct under DR 5-105.

ISSUE III

THE REFEREE'S FINDING THAT RESPONDENT LEARNED IN 1983 THAT HE FAILED TO SATISFY A JUDGMENT FOR WHICH HE RECEIVED TRUST FUNDS IN 1973 IS CORRECT

Respondent places a great deal of importance upon the Referee's apparent mistake as to that date when he learned of his failure to pay off the lien on Ms. Sebra's property. Complainant makes no argument that there was a mistake as to dates concerning Respondent's conduct in this matter, however, such a mistake has no bearing on the ultimate findings of the Referee as to Respondent's misconduct.

Respondent would argue this matter is but a simple oversight and there was no violation of the Code of Professional Responsibility. Complainant would argue that if Respondent was attendant to the rules of discipline in the first place this incident would not have occurred.

Respondent cannot justify not paying off this lien on any of his excuses. he was primarily responsible for satisfying the lien because it was he who withheld the proceeds for that particular purpose. Respondent was responsible for reconciling his trust accounts and this is not something which can only be done "when there's a problem." (T-17).

Respondent's law firm separated in 1974 and resulted in an opportunity for file review which should have uncovered the unpaid lien.

If Respondent followed the trust accounting procedures of the Bar, the remaining money for Ms. Sebra's lien would have appeared each quarter in his reconciliations.

Respondent has argued that he should not be held to the Referee's findings and recommendations since it only took him one year (June 1985 to April 1986) to pay off the lien after notice rather than three years as per the Referee's Report. Respondent was notified by Sebra's lawyer in June 1985 that he had failed in his duty to satisfy the lien. In November 1985, Respondent assured the Grievance Committee hearing this matter he would be happy to satisfy the Sebra judgment (T-21). The formal complaint herein was filed March 26, 1986 and Respondent thereafter promptly satisfied this judgment in April 1986. Such action on Respondent's part clearly shows that he only complies with his duty when it is only absolutely necessary.

Respondent argues that there should be no finding of misconduct under DR 1-102(A)(4) since there is no basis for the Referee's finding. To the contrary, Respondent's mishandling of this matter is replete with dishonesty and misrepresentation throughout. The final payment was made with personal funds since the trust funds were not

available. The only remaining explanation is that the funds were misappropriated.

The remaining violations set forth in the Referee's Report are substantiated by clear and convincing evidence and cannot be categorized as a simple oversight.

ISSUE IV

THE DISCIPLINE RECOMMENDED BY THE REFEREE, SUSPENSION FOR SIX MONTHS, IS NOT UNDULY HARSH IN VIEW OF RESPONDENT'S MULTIPLE VIOLATIONS.

Respondent argues that under the guidelines of The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), the Referee's Recommendation of a six-month suspension is inappropriate since it only focuses on the element of retribution.

Complainant feels that all three elements within Pahules are present herein and were considered by the Referee. Respondent is not new to the disciplinary system having been privately reprimanded on two prior occasions. It would appear that such an attorney who having been forewarned of his conduct on two occasions and continues to run his practice around the rules rather than within them is not qualified to retain the public's trust.

The length of suspension recommended by the Referee is fair and consistent and allows the Respondent a period of time to reflect upon his perception of his duties to the profession.

Under Florida law, this Court has held that discipline is cumulative. The Florida Bar v. Reese, 421 So.2d 495 (Fla. 1982); The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981).

Respondent has been disciplined for similar misconduct on two prior occasions and was forewarned each time that such behavior is not to be tolerated.

As the Referee accurately observed at the final hearing, Respondent has established a pattern where he operates his legal practice under a premise of how he can get around the Code of Professional Responsibility rather than living within it. This is born out in each matter attendant to this appeal - Respondent has an excuse for each instance of alleged misconduct and has no conception of what his professional duties and responsibilities are.

Florida case law does provide for discipline that is parallel t that recommended by the Referee.

In The Florida Bar v. Segal, 441 So.2d 624 (Fla. 1983), an attorney was suspended for twelve (12) months where an attorney neglected a legal matter, failed to carry out a contract of employment, and failed to pay out funds belonging to a client.

Misconduct in handling trust funds and improper trust accounting have justified three-month suspensions. The Florida Bar v. Hoffman, 157 So.2d 137 (Fla. 1963); The Florida Bar v. Davis, 446 So.2d 1072 (Fla. 1984).

In State ex rel. Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958), the Supreme Court held that a six-month suspension was warranted where an attorney engaged in conduct prejudicial to administration of justice.

CONCLUSION

The findings of the Referee are supported by clear and convincing evidence and should not be reversed.

Respondent's misconduct must be evaluated in a cumulative manner both in view of the complaint's allegations and previous misconduct. Taking the cumulative nature of Respondent's misconduct into consideration the recommended six-month suspension is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been forwarded by certified mail #P675 195 051, return receipt requested, to Counsel for Respondent, JOHN A. WEISS, Post Office Box 1167, Tallahassee, Florida 32302, this 10th day of December, 1986.

James N. Watson, Jr.