IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 4 1987
CLERK, SUPREME COURT
By ______ Deputy Clerk

THE FLORIDA BAR,

Complainant/Petitioner,

vs.

JOHN R. WEED,

Respondent.
______________________/

Case No. 68,866

(TFB File Nos.
03-83N21 and 0385N16)

PETITIONER'S REPLY BRIEF AND
PETITIONER'S ANSWER BRIEF ON CROSS PETITION

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ARGUMENT

ISSUE I

THE REFEREE ERRED IN FINDING RESPONDENT NOT GUILTY OF VIOLATING DISCIPLINARY RULE 7-106(C)(7) FOR HABITUALLY VIOLATING ESTABLISHED RULES OF PROCEDURE.

While it is true that a presumption of correctness surrounds a referee's findings of fact, this Court has final authority to review and overrule, if necessary, the recommendations made by a referee. In some cases, this may be a difficult burden, however, where a referee's recommendation or finding is erroneous, unlawful, or unjustified, this Court clearly has authority to overrule a referee's findings.

Respondent is charged in the instant case with violation of Disciplinary Rule 7-106(C)(7) which prohibits an attorney intentionally or habitually violating any established rule of procedure or of evidence. The record is replete with evidence supporting a finding that Respondent has violated this particular rule of discipline. The opinion of the First District Court of Appeal filed by that court on February 12, 1985, states:

> This court will not condone or allow such <u>repeated disregard</u> for the appellate rules and this court's orders. Despite the fact

> that previous violations of the rules have been brought to counsel's attention, he persisted in ignoring the appellate rules and order of this court. (Emphasis added).

(TFB Exhibit 2). Evidence was presented to the Referee, in the form of exhibits and the testimony of the clerk for the First District Court of Appeal, which demonstrate clearly and convincingly that Respondent has habitually violated established rules of appellate procedure.

Merely technical, isolated instances of the violation of rules of appellate procedure might not rise to the level of an ethical violation. However, this is clearly not the type of violation with which Respondent has been charged. To allow such flagrant disregard for the rules of appellate procedure and the orders of a district court of appeal would be a travesty, and would seriously undermine the confidence of the public and the legal profession in the disciplinary process.

Respondent argues in his Answer Brief (styled Reply Brief by Respondent) that the two instances wherein his name was placed on the culpa list in 1978 and 1982 should not be considered as evidence of habitual violation of rules of appellate procedure. At the final hearing, The Florida Bar acknowledged that Respondent was not charged with violations of disciplinary rules for his conduct in those two

instances. However, testimony was elicited from the clerk of the First District Court of Appeal regarding these two instances for the purpose of establishing a pattern or course of conduct on the part of Respondent. Further, this testimony expanded on the First District Court of Appeal's reference to Respondent's having been twice warned about failure to comply with appellate rules (TFB Exhibit 2).

No objection to this testimony was made by Respondent at the final hearing. While there is no indication from the wording of the Referee's report that the Referee considered this testimony in making his findings and recommendations, the evidence is relevant and material to the issues before the Referee and this Court. At the very least, evidence regarding these two instances constitutes an aggravating factor.

Respondent further argues that he testified at the final hearing regarding his handling of "hundreds of cases" before the District Court of Appeal. An examination of the transcript indicates that while Respondent did testify that he has practiced law for sixteen years, there is no indication in the record that he testified to having handled "hundreds of cases"; in fact, Respondent actually testified that less than 1% of his practice was in the area of appeals (TR - 131). In any event, it is unclear how the percentage of violations of the appellate rules based on the number of cases handled, would diminish the gravity of the misconduct with which

Respondent is now charged.

Respondent charges The Florida Bar with failure to present evidence which might have damaged its case. Had The Bar been aware of exculpatory information and failed to bring that to the Court's attention, such failure would be improper. However, The Bar need only present evidence sufficient to prove its allegations by clear and convincing standards. Any evidence which would tend to disprove the allegations should have been elicited by Respondent. It is not incumbent on The Bar to seek out evidence which might tend to disprove its charges against a responding attorney. There was never any intention on the part of The Bar to provide incomplete or misleading evidence in this proceeding, nor has it been demonstrated by Respondent that this was done.

Mr. Raymond Rhodes, Clerk for the First District Court of Appeal, was present as The Bar's witness. Respondent had ample opportunity to cross examine Mr. Rhodes and to bring out any testimony which might have been exculpatory. Respondent did not do this, presumably because there was none to elicit.

Mr. Rhodes testified that the *culpa* list is reserved for the names of those attorneys who have "violated the appellate rules or have failed to comply with an order of [the] court. A violation is considered major when it shows willful and inexcusable neglect of the

client's interest" (TR - 69).

While The Bar does not dispute Respondent's allegations concerning his secretary's illness, it argues that Respondent is still guilty of violating disciplinary rules. Respondent's conduct was both neglectful of client matters and in violation of rules of appellate procedure and of an appellate court order.

Respondent argues that the District Court of Appeal did not find that the five instances of his disregard for appellate rules constituted a pattern of habitual violation. If there is a distinction between habitual violation and the conduct described by the First District Court of Appeal in its order, it is a distinction without a difference. While the District Court of Appeal stopped short of dismissing the three appellate matters before it, it did so only because, as the Court said, "to dismiss the appeals would only serve to penalize the client for shortcomings of counsel" (TFB Exhibit 2). The fact that the District Court of Appeal failed to find Respondent in contempt or to dismiss the appeals of Respondent's clients in no way diminishes the unethical nature of Respondent's misconduct.

ISSUE II

THE REFEREE'S FINDING OF GUILT AS TO DISCIPLINARY RULE 1-102(A)(1), 1-102(A)(4) AND 1-102(A)(3) WAS CORRECT AND WELL SUPPORTED BY THE RECORD.

Findings of fact and conclusions by a referee are presumed to be correct, are accorded substantial weight, and are not to be overturned unless they are not supported by the evidence and are thus clearly erroneous. The Florida Bar v. Wagner, 212 So.2d 302 (Fla. 1968). The evidence contained in the record is clearly sufficient to uphold the findings of guilt made by the Referee.

Respondent challenges the finding of guilt as to Disciplinary Rule 1-102(A)(1) which prohibits a lawyer from violating a disciplinary rule. This particular disciplinary rule sets forth the mandatory minimum standards for maintaining the integrity and competence of the legal profession. It puts lawyers on notice that disciplinary rules are mandatory and that violation of the rules subjects lawyers to disciplinary action.

Respondent also challenges the finding of guilt in Count III as to Disciplinary Rule 1-102(A)(4) which prohibits and attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. This finding, however, is amply supported by the record. In the order filed February 12, 1985, the First District

Court of Appeal noted that at oral argument Respondent was questioned regarding his submission of undated, unverified, and unsigned affidavits. According to the opinion, Respondent answered that one affiant had told him that she would sign and mail a copy of the affidavit directly to the court (this affidavit was never received by the court), and that the other affiant had rejected the proferred affidavit and refused to sign it. This rejected affidavit was submitted to the court, together with the other affidavit, as the sole justification for Respondent's delay in prosecuting the appeal.

The mere submission of unsigned, undated, and unverified affidavits, one of which had been rejected by the proposed affiant, is at the very least misleading to the court. This is especially true in light of the fact that the submission was made without any explanation. Had the court not ordered Respondent to appear in person before them and offer additional explanation, the court would presumably have relied on these affidavits, one of which contained false information. It strains credulity that Respondent would have attached the affidavits had he not intended that the Court rely on the information contained in them.

At the final hearing before the Referee, one of the proposed affiants, Ms. Nancy Nydam, testified that she was not certain whether she had every seen the affidavit in question, but had she been asked to sign it, she would have refused because the information

contained therein was not true or correct (TR - 104, 105).

The other proposed affiant, Ms. Charlotte Pittman, testified that she recalled having been asked to sign an affidavit similar to the one tendered to the First District Court of Appeal, but that she had refused to do so. Ms. Pittman testified that she had not seen the proposed affidavit until the morning of the hearing before the grievance committee and that a Mrs. Cook from Respondent's office had asked her to sign the affidavit at that time (TR 92, 93). Ms. Pittman did not recall having ever been asked to sign such an affidavit prior to the morning of the grievance committee hearing (TR - 93).

On cross examination by Respondent, Ms. Pittman was asked whether she had previously been requested to check her records to ascertain the name of a court reporter. She testified that she had not been asked to do so but had done so on her own (TR - 94). On redirect by The Bar, Ms. Pittman testified that she had checked her records only after the grievance committee hearing because prior to the hearing she had not known what was going on (TR - 97).

Respondent challenges Ms. Pittman's testimony as being confused as to the time she was asked to sign the affidavit. However, a careful reading of the transcript demonstrates that, while Ms. Pittman may have been confused as to the name of the judge in

office at the time she was asked to sign the affidavit, she was clear that she had not been asked to sign the affidavit until the morning of the grievance committee hearing. Respondent's assertion that Ms. Pittman "was certain she had not discussed it with Judge Murphy" cannot be supported by the record.

Respondent argues that he should not be found guilty of violating Disciplinary Rule 1-102(A)(4) because of the Referee's comment that "said violation may have been unintentional." A reading of this disciplinary rule, however, indicates that misrepresentation need not be intentional. Respondent clearly knew or should have known that the information submitted to the First District Court of Appeal was false and misleading. His duty, as an officer of the court, was to take reasonable steps to ensure that no such representations were made in his response. At the very least, Respondent has failed in that regard.

Respondent further challenges the finding of guilt in Counts IV and V as to Disciplinary Rule 6-101(A)(3) for neglecting a legal matter. This argument is centered on Respondent's assertion that no clients complained of neglect or testified as to the neglect of their cases. A client's perception of whether or not there has been neglect of a legal matter is not dispositive of the issue of neglect in a disciplinary proceeding. In many cases, a client may either be unaware of the neglect or, lacking in knowledge of the workings of

the judicial system which would enable them to draw the conclusion that neglect has occurred. Respondent's brief asserts that his clients were aware of what was transpiring and that no complaint was forthcoming from them. The record, however, is devoid of any evidence which would support this assertion. Contrary to Respondent's assertions, whether or not there has been neglect of legal matters is not best determined by the client. The handling of the three appellate cases which form the basis for Counts III, IV and V of The Bar's complaint, clearly demonstrate that Respondent did not meet the duty to his clients to diligently and properly pursue these matters.

Respondent asserts that the First District Court of Appeal made no finding that he had neglected client matters. However, this issue was not before the District Court. The grievance committee for the Third Judicial Circuit found probable cause to believe that Respondent had neglected client matters based solely upon an examination of records from the District Court of Appeal which documented Respondent's handling of the three matters. The Referee then considered similar evidence and made a finding that Respondent was indeed guilty of neglecting client matters. This finding is correct and should be upheld as it is adequately supported by the record.

ISSUE III

THE REFEREE'S DENIAL OF RESPONDENT'S MOTION TO DISMISS COUNTS III, IV, V WAS NEITHER ERRONEOUS NOR UNLAWFUL.

Respondent asserts that because he had been reprimanded by the District Court of Appeal in an order published in the Southern Reporter, that this disciplinary proceeding should have been dismissed by the Referee. The Florida Bar concedes that the factual basis underlying Counts III, IV and V of its complaint are identical to the facts which form the basis for the opinion issued by the District Court of Appeal in Gentry v. Gentry, 463 So.2d 511 (1st DCA 1985). However, the First District Court of Appeal never asserted jurisdiction pursuant to Rule 3-7.7, Rules of Discipline (formerly article XI, Rule 11.14 of the Integration Rule of The Florida Bar). Under this rule, an appellate court may direct the State Attorney to draft formal charges against an attorney. Once formal charges are filed against the attorney, Rule 3-7.7 sets forth a procedure to be followed. A hearing is held and a judgment filed with this Court. Any discipline ratified by this Court becomes part of the attorney's permanent disciplinary record.

However, this procedure was not followed. Instead, the First District Court of Appeal referred the matter to The Bar for "whatever action it shall deem appropriate" (TFB Exhibit 2). Contrary to

Respondent's assertion, the facts in this matter were not relitigated since they had never been litigated by the First District Court of Appeal. The District Court of Appeal's opinion cited no disciplinary rules, and the admonition contained therein did not become a part of Respondent's disciplinary record.

Not only did the District Court of Appeal fail to assert jurisdiction in this matter, they expressly rejected jurisdiction by referring the matter to The Bar for appropriate action. Respondent asserts in his brief that the clear implication of the court's referral of the matter to The Bar was the Court's concern regarding the potential for complaints being filed by clients. A reasonable interpretation of "appropriate action" would be that The Bar should investigate and bring whatever charges were deemed appropriate. This is, in fact, what happened. The grievance committee investigated and found probable cause for those disciplinary rule violations with which Respondent is now charged. Pursuant to the Rules of Discipline, a hearing was held before a judicial referee wherein Respondent was afforded an opportunity to testify and to present witnesses and evidence in his defense. The entry of discipline in this matter would result in a permanent record against Respondent. Contrary to Respondent's assertion, The Bar would be precluded from bringing this particular action against him at a later date. There is, therefore, no duplication and Respondent is not being subjected to a double jeopardy situation.

ISSUE IV

THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND AS DISCIPLINE IS NOT SUFFICIENT DISCIPLINE FOR RESPONDENT'S MISCONDUCT.

This Court has consistently held in other cases that the level of discipline to be imposed in a disciplinary proceeding should be determined by an examination of all the facts in that particular case including any aggravating or mitigating factors. Public protection is paramount. The discipline of attorneys should assure the public of The Bar's ability and willingness to discipline its own members and thereby inspire public confidence in the system. Respondent cites The Florida Bar v. Thomson, 271 So.2d 758 (Fla. 1972) in support of his assertion that a discipline should not be entered for the purpose of punishing the guilty attorney. However, in another case, The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), this Court held that any discipline entered in a disciplinary matter should be sufficient to punish the breach and to encourage reformation and rehabilitation, in addition to protecting the public.

While The Bar did not cite cases in its initial brief, wherein "more serious" misconduct received only a public reprimand, cases were cited which dealt with misconduct similar to Respondent's where the attorney was suspended. As Respondent argued, each case should be judged on its own facts.

The ABA committee which promulgated _Standards for Imposing Lawyer Sanctions_, developed a model which would require any court imposing sanctions to answer the following questions:

> 1. What ethical duty did the lawyer violate? (a duty to the client, public, the legal system, or the profession?)
>
> 2. What was the lawyer's mental state? (did the lawyer act intentionally, knowingly, or negligently?)
>
> 3. What was the extent of the actual or potential injury caused by the lawyer's misconduct? (what there a serious or potentially serious injury?) and
>
> 4. Are there any aggravating or mitigating circumstances?

ABA Standards for Imposing Lawyer Sanctions at 5. In the instant case, Respondent has violated not only his duty to his clients but to the public and the legal system by not following proper appellate rules of procedure and by not responding to a court order. At the very least, Respondent's misconduct was grossly negligent. While no actual injury occurred, the potential for injury was great. But for the District Court of Appeal's decision not to dismiss the case, the legal rights of Respondent's clients might have been prejudiced. Finally, evidence relating to aggravating circumstances was presented to the Referee in the form of Respondent's prior discipline and the existence of multiple offenses.

This Court has discussed the impact of cumulative misconduct in previous cases. One such case, The Florida Bar v. Glick, 397 So.2d 1140 (Fla. 1981) noted that misconduct similar to that for which an attorney has previously been disciplined warrants an increased level of discipline. Glick at 1141. This Court noted that:

> The discipline imposed on a wayward attorney must be fair to both the public and the attorney. The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978). In meeting this responsibility, we must deal more severely with an attorney who exhibits cumulative misconduct. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

Glick at 1141. In the Vernell case, this Court enhanced the level of discipline imposed against the attorney in light of the attorney's prior breaches and his cumulative misconduct in that case.

In the instant case, Respondent has received a private reprimand for neglect, and is now charged with multiple counts of neglect and other misconduct. Contrary to Respondent's assertion, there has been no concurrence by The Bar in the findings of not guilty by the Referee. A decision was made by the Board of Governors not to appeal those findings of not guilty. No other conclusion may be drawn.

Respondent has, by the very arguments made in his brief, reinforced The Bar's assertion that he has either failed or refused to acknowledge the wrongful nature of his misconduct. While the Referee noted remorse on the part of Respondent, the record does not support this conclusion.

CONCLUSION

The charge against Respondent relating to his violation of Disciplinary Rule 7-106(C)(7) is well supported by the record. The Referee's finding of not guilty should therefore be overturned as it is erroneous.

The punishment recommended by the Referee should likewise be rejected. The misconduct with which Respondent has been charged is not sufficient based upon the cumulative nature of the misconduct.

Respondent's cross-petition argues that the evidence does not support a finding of guilt, as recommended by the Referee. An examination of the record however, shows that the evidence supporting these findings was clear and convincing. Any conflicts in the testimony were properly resolved by the Referee.

Respondent's argument regarding dismissal of Counts III, IV and V are without merit. This Court is the only body authorized by Article V of the Florida Constitution to discipline an attorney. The First District Court of Appeal's order admonishing Respondent is therefore not dispositive of the issue of discipline against Respondent. The Referee did not err in his refusal to grant Respondent's motion to dismiss.

Respectfully submitted,

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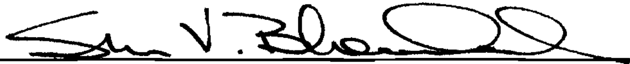
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by certified mail # P675 195530, return receipt requested, to JOHN R. WEED, Respondent, at his record Bar address of 605 South Jefferson Street, Perry, Florida 32347, this 4th day of JUNE, 1987.



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