IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN M. GREENE,

Respondent.
_____/

Case No. 68,938
(TFB Case No. 05B86C21)

INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar:

The Florida Bar Integration Rules, Article XI, Rules:

SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "the Bar", respondent, John M. Greene, will be referred to as the respondent, and the complainant to The Florida Bar, Mr. Thomas A. Nutt, be referred to as "Mr. Nutt". The symbol "R" will denote the record of the transcript of final hearing, while "Ex" will refer to the exhibits submitted at final hearing.

STATEMENT OF THE CASE AND FACTS

Mr. and Mrs. Thomas A. Nutt sought respondent's representation regarding the pending sale of six lots of real estate in the Ocala area in November of 1982, R-25-26. However, the real estate transaction was delayed because of several judgment liens against the property which had been placed there prior to Mr. and Mrs. Nutt receiving title. Mr. and Mrs. Nutt had obtained the lots when mortgages they held on the property went into default, and rather than foreclose on the property, they took and recorded warranty deeds in full satisfaction of the notes and mortgages, R-28-35. On December 10, 1982, respondent wrote to Mr. and Mrs. Nutt and advised them of the defects in the title, Ex-A of Request for Admisssions. Pursuant to Mr. and Mrs. Nutt's authorization, respondent agreed to act to clear the title to the lots, R-35. Despite Mr. and Mrs. Nutt's continued urgings to quickly complete this matter, respondent admits that he neglected to pursue this action, R-53-55. As a result of this neglect, the pending sale of the lots fell through in June of 1983. The evidence indicates that respondent had made assurances to Mr. Nutt and to the real estate associate representing Mr. and Mrs. Nutt the title defects would be cleared by June, 1983, R-36-38. See Exhibit E, attached to Bar's Request for Admissions.

Throughout the remainder of 1983 through October, 1984, Mr. Nutt had several conversations with the respondent. Respondent continued to assure the parties involved that he would be able to clear the title in short order. This did not occur, R-36-38. Respondent recommended another realtor who succeeded in lining up a buyer for the lots in 1984, R-38. Respondent handled the closing in which three of the lots were sold for a total sale price of $36,000, or $12,000 per lot. At the time the closing was being prepared, respondent turned over the duty to search the title to a young employee in his office who failed to note the outstanding judgments on the property, R-55, R-62-64. Although respondent had promised the buyer a title binder and title policy as part of the closing deal, respondent was unable to deliver same due the outstanding judgments. In September of 1985, respondent personally refunded the $24,000 to the purchasers out of his own funds effectively purchasing two of the lots. The third lot was sold subject to a purchase money mortgage held by Mr. and Mrs. Nutt, R-14-16, R-38-40.

Therefore, Mr. and Mrs. Nutt are currently left with four of the original size lots. Although respondent stated at the final hearing that he hoped to work with Mr. and Mrs. Nutt's new lawyer to make efforts to refund Mr. and Mrs. Nutt's expenses caused by his actions, R-15, R-51, this was unsuccessful and therefore the

Referee's Report, prepared after he was advised of the lack of success, reflects no further restitution.

Mr. Nutt complained to The Florida Bar regarding these circumstances in December of 1985. A grievance committee hearing was held in the Fifth Judicial Circuit Grievance Committee "A" on March 13, 1986, in which probable cause was found for the following rules by unanimous vote: Integration Rule of The Florida Bar, 11.02(3)(a) for conduct contrary to honesty, justice, and good morals, and the following Disciplinary Rules of The Florida Bar: 1-102(A)(4) for conduct involving misrepresentation, fraud, deceit, or dishonesty in advising Mr. Nutt that the title to the properties had been cleared; 1-102(A)(6) further misconduct reflecting adversely on his fitness to practice law; 3-104(A), 3-104(C), and 3-104(D) for failing to properly supervise nonlawyer personnel in respect to the defective title search; 6-101(A)(3) for neglecting a legal matter entrusted to him, The Florida Bar Exhibit A, R-13. A complaint was prepared and filed with the Court and assigned to a referee. The Florida Bar filed a Request for Admissions on July 10, 1986. The respondent failed to respond to the Request for Admissions in any manner, and a final hearing was held on December 15, 1986.

In addition to the admissions deemed admitted pursuant to the Rules of Civil Procedure, The Florida Bar presented evidence,

including the testimony of Mr. Nutt at final hearing. The referee made a basic acceptance of the facts as pled, yet failed to find the respondent guilty of any violations of the rules charged except for 6-101(A)(3) regarding neglect of a legal matter. The referee further recommended that respondent receive as discipline a public reprimand and be placed on probation for a period of two years with the terms of probation requiring the respondent to furnish The Florida Bar with a quarterly list of all legal matters left in his care which have not been fully completed within six months from the time they initiated. The referee also recommended the respondent pay the costs in these proceedings. The referee filed his initial report on February 27, 1987, and an Order amending the prior Referee's Report on March 24, 1987, which amended his original Referee's Report to reflect the fact that respondent had four previous incidents of discipline by the Supreme Court of Florida. It is from the recommendation of discipline and the recommended violations of the rules that review is herein sought.

SUMMARY OF ARGUMENT

It is the position of The Florida Bar that while the referee's basic findings of fact must be accepted, review is sought regarding the recommendations to this Court that the respondent be found not guilty of all but one of the alleged violations of rules. The reasons for this are twofold. First, the respondent admitted all allegations of the complaint including all of the alleged rule violations by his failure to respond to the Request for Admissions served on him by The Florida Bar some five months prior to final hearing. Second, the respondent reiterated his acknowledgement of his guilt at final hearing and failed to present any evidence to the contrary save for a few comments in mitigation. Further, The Florida Bar presented evidence and testimony at final hearing which proved the alleged violations. The referee's recommendations of not guilty apparently stem from the referee's interpretation of the rules, which is contrary to caselaw cited herein.

The Florida Bar also seeks review of the referee's recommended discipline and requests this Court to impose more serious discipline than the public reprimand and probation suggested by the referee. Respondent has a significant prior record of disci-

plinary action including discipline for actions quite similar to the case at hand. In addition, respondent failed to abide by a term of probation as recently as 1986 and was held in contempt of this Court for that failure. Therefore, The Florida Bar requests that a six month suspension be ordered requiring respondent to prove his rehabilitation prior to being reinstated by The Florida Bar.

ARGUMENT

POINT ONE

WHETHER VIOLATIONS OF THE INTEGRATION RULE OF THE FLORIDA BAR, ARTICLE XI, RULE 11.02(3)(a), DISCIPLINARY RULES 1-102(A)(4), 1-102(A)(6), 3-104(A), 3-104(C), AND 3-104(D) ARE PRESENT IN THIS CASE INVOLVING MISREPRESENTATIONS TO THE CLIENT AND FAILURE TO SUPERVISE A LAW CLERK RESULTING IN AN INCORRECT TITLE SEARCH?

In Section II, of the Referee's Report, the referee outlines the alleged violations and makes recommendations regarding guilt:

> As to the charge that the respondent violated Article XI, Rule 11.02(3)(a) of The Florida Bar's Integration Rule of Conduct contrary to honesty, justice, or good morals for misrepresentation, the respondent should be found not guilty.
>
> As to the charge that the respondent has violated Disciplinary Rule 1-102(A)(4) for conduct involving misrepresentation and deceit, the respondent should be found not guilty.
>
> As to the charge that the respondent violated Disciplinary Rule 3-104(A) for failing to properly supervise non-lawyer personnel, the respondent should be found not guilty.
>
> As to the charge that respondent violated Disciplinary Rule 3-104(C) for failing to insure compliance by non-lawyer personnel, the respondent should be found not guilty.
>
> As to the charge that the respondent violated Disciplinary Rule 3-104(D) for failing to examine and be responsible for work delegated to nonlawyer personnel, the defendant should be found not guilty.
>
> As to the charge that respondent violated Disciplinary Rule 6-101(A)(3) for neglecting a legal

> matter entrusted to him, the respondent should be found guilty.

The referee further addressed this issue at final hearing, R 80-81:

> Depending on the weight I give to his failure to respond to the Request for Admissions, in particular to Paragraph K, this looks like to me just a neglect on Mr. Greene's part to take care of a legal matter that was left in his hands to dispose of.
>
> I don't see anything dishonest. I see a lot of unbroken promises that he's going to get to it, that he's going to get to it, and he didn't.

The Florida Bar does not seek to change the referee's findings of fact, noting it is well settled that the referee's findings of fact are presumed correct, The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). Rather, The Florida Bar seeks review of the referee's findings of not guilty as to all but one rule despite his findings of fact and further despite a Request for Admissions admitting all allegations of The Florida Bar's complaint.

An important factor in this case is the Request for Admissions served upon respondent on July 10, 1986. Although final hearing was not held until December, 1986, respondent failed to respond in any way to the Request and thereby admitted all allegations of the complaint including all violations as charged. In The Florida Bar v. Baron, 408 So.2d 1050 (Fla. 1982), this

Court held that an unanswered Request for Admissions is deemed admitted. In Baron, the respondent was suspended for one year and thereafter until proof of rehabilitation due to his failure to respond to the Request for Admissions. This serious discipline was imposed despite the fact that the charges were not egregious and the respondent filed a response to the Request for Admissions on the day prior to the final hearing. In the case at hand, the referee allowed the respondent, who failed to appear at the grievance committee hearing despite proper notice, to peruse the grievance committee transcript, which he had not previously seen, during final hearing and offer facts in mitigation. While it is important to allow a fair opportunity to the respondent to defend the charges against him, the respondent in this case had received the Request for Admissions by certified mail some five months prior to the final hearing and, by his own admission, chose not to respond or attend the grievance committee hearing or present any witnesses, exhibits, or significant testimony during final hearing. Respondent's failure to respond to the Request for Admissions was not based on mistake or inability, but rather on the fact that he did not deny the allegations, R-28. Respondent failed to show any reasonable basis for mitigation, stating only that the case was complicated and that Mr. Nutt was justified in relying upon promises to clear the title, R-53-55.

Despite the above, the referee recommended respondent be found not guilty of all but one charged violation of the rules. Specifically, regarding Disciplinary Rule 1-102(A)(4) for conduct involving misrepresentation, fraud, deceit, or dishonesty, the respondent advised Mr. Nutt that the title to the properties had been cleared as alleged in the complaint at paragraphs six and twelve and admitted by the respondent in the unanswered Request for Admissions, paragraphs E, J, and K. The referee acknowledged these representations but apparently did not feel that they constituted a violation of 1-102(A)(4) and 1-102(A)(6), see final hearing transcript R-80, line 22, R-81, lines 1-2, where the referee sees these representations as "un(sic) broken promises". By virtue of the fact that these "promises" led Mr. Nutt to rely on respondent and led to the lapse of the statute of limitations for foreclosures (R-57-60, and The Florida Bar Exhibit A, p.21) and numerous failed attempts to sell the property, it is the position of The Florida Bar that a violation of 1-102(A)(4) for misrepresentation, fraud, deceit, or dishonesty is present in this case. See The Florida Bar v. Brooks, 504 So.2d 1227 (Fla. 1987) where respondent was found to have violated 1-102(A)(4) for deceit and misrepresentation where the respondent "knowingly and willfully represented to his client the false status of her case, causing her to believe that the case was proceeding in due course when it had actually been dismissed by the court in which the case had been pending.", at 1228.

Regarding the next cited violation, 1-102(A)(6) for other misconduct reflecting adversely on his fitness to practice law, this is a very general rule which has been cited by this Court as encompassing a wide variety of unethical conduct including conduct similar to the case at hand. See The Florida Bar v. Hunt, 417 So.2d 967 (Fla. 1982), The Florida Bar v. Collier, 435 So.2d 802 (Fla. 1983), and The Florida Bar v. Provost, 323 So.2d 578 (Fla. 1975).

The next rule alleged to be violated is Disciplinary Rule 3-104(A) for failure to directly supervise nonlawyer personnel performing delegated functions. Again, respondent admitted this allegation at paragraphs G and K of the Request for Admissions. Respondent also testified regarding the law clerk who did the incorrect title search at final hearing, R-55. Respondent asserts that he should not be held responsible for the derelictions in duty by his law clerk stating that his clerk advised him she had checked the title when in fact she had not, R-62-65. The referee apparently concurs. However, the ultimate responsibility for supervising nonlawyer employees rests in the employing attorney pursuant to the Disciplinary Rules of Professional Responsibility of The Florida Bar. See EC 3-6, which addresses the spirit of 3-104(A), (C), and (D), mandating direct supervision of nonlawyer personnel, EC 3-6:

> ...A lawyer often delegates tasks to such persons. [nonlawyer personnel] Such delegation is proper if a lawyer retains a direct relationship with his client, supervising the delegated work, and has complete professional responsibility for the work product.
>
> ...A lawyer may employ nonlawyers ... provided however, the lawyer must become and remain responsible to the client for any work undertaken by nonlawyer officer personnel, supervise the work and maintain a direct relationship with the client. (Emphasis added)

See also The Florida Bar v. Rogowski, 399 So.2d 1390 (Fla. 1981):

> We emphasize that an attorney's nonlawyer personnel are agents of the attorney and that the attorney is responsible for seeing that the agent's actions do not violate the Code of Professional Responsibility, Disciplinary Rule 3-104(C), at 1391.

In summary, there is clear and convincing proof of the alleged violations in addition to the admissions of each and every allegation pursuant to The Florida Bar's Request for Admissions.

ARGUMENT

POINT TWO

WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE OF A PUBLIC REPRIMAND AND PROBATION IS SUFFICIENT DISCIPLINE WHERE THE RESPONDENT HAS A SIGNIFICANT PRIOR DISCIPLINE HISTORY INCLUDING SIMILAR MISCONDUCT AND HAS BEEN HELD IN CONTEMPT OF THIS COURT FOR FAILING TO ABIDE BY THE TERMS OF PROBATION?

It is not contested that respondent has a significant prior discipline history.

In respondent's first discipline with this Court, he was publicly reprimanded and placed on probation for one year for failing to file federal income tax returns, a federal misdemeanor, The Florida Bar v. Greene, 235 So.2d 7 (Fla. 1970). In 1980, respondent received a private reprimand for neglect of a legal matter, The Florida Bar No. 05C78T11. In The Florida Bar v. Greene, 463 So.2d 213 (Fla. 1985), respondent received another public reprimand and one year of probation for neglect of a legal matter where he failed to correct a known error he had made in a property description on a deed, failed to complete a client's request for proration of a tax bill or respond to his client's request concerning same, and overcharged the client for services in a mortgage foreclosure action. Respondent failed to observe the conditions of the 1985 probation and was held in contempt of

the Supreme Court of Florida and suspended for ninety (90) days, The Florida Bar v. Greene, 485 So.2d 1279 (Fla. 1986).

In the case at hand, the referee determined that respondent neglected a legal matter entrusted to him, made representations that he would complete the desired action, and overlooked liens in checking title prior to closing (through his law clerk).

Although the referee was aware of respondent's prior discipline history, he recommended only a public reprimand and probation in this case. Such discipline is inadequate to serve the purposes of attorney discipline. The Florida Bar Integration Rule, Article XI, Rule 11.02, controlling in this case, provides that the purposes of attorney discipline are protection of the public, administration of justice, and the protection of the legal profession through the discipline of members through the Bar. In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), the Court further addressed the goals of discipline noting:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or

tempted to become involved in like violations, at 986.

It is well settled that more serious discipline is warranted to serve these purposes where respondent has a discipline history as in the case at hand, The Florida Bar v. Reese, 421 So.2d 495 (Fla. 1982), and The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981). In The Florida Bar v. Bern, 526 So.2d 526 (Fla. 1983), this Court held that cumulative misconduct of a similar nature should warrant an even more serious discipline than might dissimilar conduct. In Bern, the attorney was found guilty of entering into a partnership with a client in a situation involving conflict. Although the misconduct was not that egregious per se, the Court held that his prior discipline made it necessary to impose a suspension with proof of rehabilitation required. Including respondent's private reprimand, this case is respondent's third discipline for neglect of a legal matter and his fifth incidence of discipline overall. Clearly, a significant discipline is called for to effect the purposes of attorney discipline. Further, probation is unwarranted for this respondent who was held in contempt of court in 1985 for his failure to abide by the conditions of probation. It would be illogical to impose a probation period on this respondent who has recently proven his disregard for orders of this Court.

A six month suspension is more appropriate in this case since proof of rehabilitation as required in suspensions over ninety days should be required due to respondent's history of similar conduct. In The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984), the respondent was suspended for ninety one days and thereafter until proof of rehabilitation where he neglected a client's case and mishandled trust funds where he had two prior disciplinary cases involving similar misconduct. The Court noted, "The mishandling of trust funds and neglect of a client's case are among the most serious violations which an attorney can commit.", at 1341.

This Court has not hesitated to impose serious discipline for breaches of this type in the past. In The Florida Bar v. Hunt, supra, respondent was suspended for six months for neglecting a legal matter entrusted to him where he had one prior discipline. In The Florida Bar v. Collier, 465 So.2d 529 (Fla. 1985) the respondent was suspended for three years and restitution was ordered for neglect of a marriage dissolution case where respondent had a prior discipline history.

The respondent has apparently not yet realized the importance of strict ethical adherence. Therefore, proof of rehabilitation is necessary to serve the purposes of discipline in this case.

CONCLUSION

WHEREFORE, The Florida Bar requests this Honorable Court to affirm the referee's basic finding of facts, however, including all facts admitted by the respondent in the Request for Admissions, and find him guilty of the rules as charged, and impose the visible and effective discipline of at least a six month suspension from the practice of law, and further order the respondent to pay The Florida Bar the costs in this matter now totalling $898.94.

Respectfully submitted,

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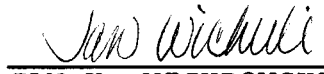
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief have been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing Initial Brief has been furnished by ordinary U.S. mail to John M. Greene, respondent, at 201 North Magnolia Avenue, Post Office Box 1777, Ocala, Florida, 32678; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, this 10th day of June, 1987.

Jan Wichrowski

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