10-20

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

J.B. HOOPER,

Respondent.
_____/

Case No. 67,875
(13B85H92)

COMPLAINANT'S REPLY BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the complainant, The Florida Bar, will be referred to as "The Bar", respondent, J.B. Hooper, will be referred to as "respondent".

Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar will be referred to as the "Disciplinary Rules". The symbol "R" will denote the record of March 14, 1986, and March 21, 1986.

STATEMENT OF THE CASE AND FACTS

The Florida Bar, complainant, would refer the Court to their initial Brief of August 1, 1986, which contains an accurate statement of the case and facts as of August 1, 1986. Subsequent to that date respondent filed a Motion for Extraordinary Writ, a Motion for Stay, a Motion for Order to Show Cause, and a Motion to Expedite Hearing, all of which were denied by this Court on August 25, 1986.

Respondent failed to file a Cross Petition for Review or an Answer Brief within the required time periods. On September 4, 1986, respondent filed a Motion for Extension of Time to File Brief and a Petition for Review. On September 8, 1986, this Court granted respondent an extension of time to file his brief and in support of his Petition for Review, and respondent filed his brief accordingly on September 17, 1986.

Since The Florida Bar's initial Brief addresses the recommended discipline only, this Reply Brief addresses the factual portion of the Report of the Referee raised by respondent in his brief.

Respondent raised several issues in his brief alleging improper actions by the Referee and the Bar in this matter. Since these identical issues were previously raised by respondent in his motions of August 14, 1986, and denied by this Court, The Florida Bar will not address these issues.

SUMMARY OF ARGUMENT

It is well settled that a Referee's findings of fact are presumed to be correct and will not be overturned absent a showing that they are clearly erroneous or without support in the record. In this case the Referee has provided a thoughtful and detailed report in which his findings show numerous references to the record and demonstrate a more than adequate basis for his conclusions.

Paragraphs one through nine of the Report of the Referee state that the respondent is in violation of Disciplinary Rule 1-102(A)(6) for engaging in conduct that reflects adversely on his fitness to practice law, and Disciplinary Rule 7-104(A)(1) for communicating on the subject of the representation during the course of the representation with a party he knows to be represented by a lawyer in the matter without prior consent or other authorization by law as alleged in Count One of the Complaint of The Florida Bar. Count One describes respondent's course of conduct in engaging in a service contract with Suncoast Service Center, Inc., evading payment after completion of the services, and directly telephoning Suncoast to discuss the matter

after receiving a letter from Suncoast's counsel demanding payment. It is the position of The Florida Bar that the above findings of the Referee are supported by clear and convincing evidence on the record, respondent having admitted most of these allegations.

Paragraphs twelve through seventeen of the Report of the Referee reflect Count Two of the Complaint of The Florida Bar outlining respondent's conduct in misrepresenting himself as a dealer and salesman of the air conditioning equipment on a rebate form, mailing a thank you card along with the copy of the rebate check and an order granting respondent's motion for summary judgment to opposing counsel, and finally threatening to sue Suncoast unless they withdrew their complaint against him with The Florida Bar. Count Two further references respondent's failure to appear at a deposition. As the Referee noted, respondent had proper notices of deposition and his failure to appear was not justified.

The above conduct was proven by clear and convincing evidence and is in violation of Disciplinary Rules 1-102(A)(4) and 1-102(A)(6) and Rule 11.02(3)(a) of the Integration Rules of The Florida Bar, Article XI.

ARGUMENT

POINT I

THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED RULES 1-102(A)(6) AND 7-104(A)(1) OF THE DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR AS FOUND BY THE REFEREE REGARDING COUNT ONE OF THE COMPLAINT OF THE FLORIDA BAR.

The Florida Bar Integration Rule, Article XI, Rule 11.06(9)(a) states that a Referee's findings shall have the same presumption of correctness as the judgment of a trier of facts in a civil proceeding. This is further established by case law, including the recent case of The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986) where this Court cited The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980) and The Florida Bar v. Hirsch, 359 So.3d 856 (Fla. 1978).

Respondent was found by the Referee to be in violation of Count One of the Bar's Complaint for engaging in conduct that reflects adversely on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(6) and for communicating on the subject of the representation during the course of the representation with the party he knows to be represented by a lawyer in that matter without prior consent or other authorization by law

in violation of Disciplinary Rule 7-104(A)(1). Count One describes respondent's actions engaging in a contract with Suncoast Service Center, Inc. (hereinafter Suncoast), evading requests for payment upon completion of the contracted work, and telephoning Suncoast directly to express his anger over the facts of the matter after learning that Suncoast had retained legal counsel to represent them in this debt collection.

Regarding specifically Rule 7-104(A)(1) of the Disciplinary Rules, it is undisputed that respondent called Suncoast and discussed the action after receiving a letter from Suncoast's counsel which is in evidence as Bar Exhibit 4. The demand letter from Suncoast's counsel clearly established this representation. Respondent actually admits making this call in his testimony at final hearing on page 311 of the transcript of March 14, 1986. Respondent further admits making the call to Suncoast after receiving the letter in paragraph seven of his Answer to the Bar's Complaint.

Further, Ms. Rodriguez, a principal of Suncoast, testified on March 14, 1986, that she was present when respondent telephoned her agent, Mr. James Alexander, and that respondent expressed his irritation and infuriation at their counsel's

demand letter and threatened that if this matter became litigated he would use legal tactics to delay it for years, (R-65). Mr. Alexander's deposition, in evidence as Exhibit 8, further supports this finding at pp. 60-61:

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Q. Mr. Mirabole: What was your conversation with him at that time?
A. Mr. Alexander: Well, we was discussing why the letter was sent. He felt that he shouldn't have been sent
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the letter. He told me that he was highly insulted and that now we would have to wait for our money and they would get their money after litigation now because he said the letter highly insulted him.
Q. Mr. Mirabole: Is that the reason he gave you for not paying the job?
A. Mr. Alexander: That is what he told me. Those are his exact words.
Q. Mr. Mirabole: Would you state whether or not he used any specific language about Suncoast or Ms. Rodriguez that she can take her best shot, or that I as the attorney can?
A. Mr. Alexander: Yes. Told me to tell her attorney to take his best shot.

From the above, as well as respondent's own admissions, and his Answer to The Florida Bar's Complaint, paragraph seven, in which respondent asserts that his reason for calling Mr. Alexander was to attempt to resolve the dispute, it is clear that there is a more than adequate basis for the Referee's findings regarding communication with an adverse party. Respondent asserts for the first time in these proceedings in his Brief to this Court of September 17, 1986, that his contact with Mr. Alexander was permissible since Mr. Alexander was not a principal or

officer of the corporation. However, Mr. Alexander was the agent of Suncoast with whom the respondent had principally dealt, R-52. Further, respondent's communications to Mr. Alexander leave no doubt that his intent was to threaten and harass the adverse party, Suncoast. Respondent's second contention raised for the first time in his Brief is that an attorney may pursue discovery by interviewing witnesses in such a manner. This premise has two faults; firstly, respondent made no efforts to conduct discovery in the telephone conversation; secondly, prior notice to the party's counsel is still required, State v. Yatman, 320 So.2d 401 (Fla. 1975). Respondent stated his true purpose for making the call at final hearing, p. 311:

> "... But as far as I recall, and I've never denied that I made a phone call the minute I received the letter. It was just a response. I never suggested it was maybe a good judgment, but it was done in response to the collection letter from Mr. -- that I thought Mr. Alexander had initiated."

It is well settled that such contact with an adverse party violates Rule 7-104(A)(1) and subjects an attorney to discipline, The Florida Bar v. LeFave, 409 So.2d 1025 (Fla. 1982), The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982), and The Florida Bar v. Kirtz, 445 So.2d 576 (Fla. 1984).

The Referee further noted in paragraph eight of his report that respondent admitted that he never paid Suncoast any money for the contracted installation despite an initial offer of settlement which was rejected early in the case. Further, he noted respondent conceded that only a few hundred dollars worth of problems were at issue yet very extensive litigation resulted which indisputably subjected respondent to expend efforts on his own behalf in representation.

Although respondent asserts repeatedly that he was representing co-owners of the property as well as himself, such a factor is irrelevant to the standards of conduct required of an attorney.

ARGUMENT

POINT II

THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED RULES 1-102(A)(4) AND 1-102(A)(6) OF THE DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR AND RULE 11.02(3)(a) OF THE INTEGRATION RULE OF THE FLORIDA BAR, ARTICLE XI, AS FOUND BY THE REFEREE REGARDING COUNT TWO OF THE COMPLAINT OF THE FLORIDA BAR.

Count Two of the Bar's Complaint alleges in part that respondent failed to appear at a deposition set as part of the underlying civil dispute. Although respondent does not deny that he failed to appear, he claims that he was not subpoenaed to the deposition and was given only one day's prior notice of the deposition. Respondent further testified that he sought to justify his failure to appear by his filing of a motion for protective order on the date of his failure to appear. Respondent does not deny that his deposition was ultimately compelled by the civil court. The Referee, upon taking notice of the court files, found that respondent did in fact have proper notice of the deposition which had been scheduled by mutual agreement by the attorneys and that his failure to appear was without good cause. As the Referee noted in paragraph twelve of his findings of facts, respondent had plenty of notice of the deposition since the Notice of Taking

Deposition was mailed December 29, 1983, yet erroneously certified to have been mailed January 29th. The Referee noted that the clerk of the court filed and stamped the notice on December 30, 1983, which confirms this fact. Therefore the Referee correctly found a violation by the respondent for attempting to avoid his own deposition in the litigation with Suncoast.

Regarding the Bar's next allegation that respondent misrepresented himself as the dealer in attempting to obtain a rebate for the air conditioning equipment, the Referee noted in paragraphs fourteen and fifteen of his report that the evidence supported this allegation. The application for the rebate shows clearly that the respondent attempted to represent himself as both the dealer and the salesman of the equipment when it was undisputed and obvious that the dealer and salesman of the equipment were Suncoast, who refused to apply for the rebate since they were never paid for the equipment. Respondent admitted responsibility for filling out the form, R-313, and attempted to justify his actions through his acquaintance since 1971 who worked at Tampa Electric. This witness admitted that he did not work directly with the processing of the rebates and, although he claims that his supervisor had told him that respondent could apply for a rebate, there is no evidence that justifies

respondent's attempt to deceive Tampa Electric into believing him to be the dealer so that he could receive the dealer's portion of the rebate as well as the buyer's, R-74-79, R-235-255, R-313. The Referee found this conduct in violation of the Integration Rule, Rule 11.02(3)(a) for conduct contrary to honesty, justice or good morals as well as the following Disciplinary Rules: 1-102(A)(4) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and 1-102(A)(6) for conduct reflecting adversely on his fitness to practice law.

In paragraph sixteen of the Referee's Report, the Referee notes that respondent freely admits to mailing a thank you card along with a copy of the check from the Tampa Electric rebate and the Order from the Circuit Court granting his motion for summary judgment to Suncoast's attorney after the motion was granted. Respondent further stated that he saw nothing wrong with such actions. As the Referee noted,

> "Such actions, apparently in an effort to "gloat" over a perceived victory, reflect poorly on any attorney's judgment as well as the Bar as a whole. Such conduct is clearly a violation of Disciplinary Rule 1-102(A)(6) for conduct reflecting adversely on his fitness to practice law."

Although respondent asserts that such communication should have no reflection on his ethical standards, respondent's actions

took place as part of litigation between a party and the opposing attorney, including copies of pleadings from that lawsuit, and contained a copy of the rebate check noted above to be an ethical violation in itself. Such actions are simply unprofessional and inconsistent with acceptable conduct for a member of The Florida Bar.

The final allegation found to be in violation by the Referee involved the respondent's threat to engage Suncoast in additional lawsuits unless they dismissed their complaint with The Florida Bar. Rule 11.04(4) of the Integration Rule of The Florida Bar, Article XI, clearly states that the complainant is not a party to the disciplinary proceedings and that an investigation would not be waived because of settlement. Respondent is charged with notice of these rules and has sworn to abide by these provisions. Such a threat was clearly designed to intimidate the complainant into attempting to clear the respondent with The Florida Bar. The Referee found such conduct in violation of Rule 11.02(3)(a) of the Integration Rule of The Florida Bar, Article XI, as well as Disciplinary Rule 1-102(A)(6) for conduct reflecting adversely on his fitness to practice law. Although respondent claims that no one told him this was not permitted by the rules, he never

provided proof of this at final hearing. At any rate, this would not be a defense to respondent's actions.

CONCLUSION

WHEREFORE, The Board of Governors of The Florida Bar respectfully prays that this Honorable Court will review the Referee's Report and recommendations; approve the findings of facts and order that the respondent be suspended for ninety days as recommended as an alternative by the Referee, and pay costs in these proceedings currently totalling $1734.77.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Reply Brief has been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing was mailed by ordinary U.S. mail to J.B. Hooper, Post Office Box 1891, Tampa, Florida, 33601; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, this 25th day of September, 1986.

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