IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

RICHARD WAYNE GRANT,

Respondent.
_____/

Case No. 69,242

(TFB No. 14-84N49)

ANSWER BRIEF OF COMPLAINANT

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PRELIMINARY STATEMENT

The Florida Bar, Complainant below, files this Answer Brief in the case against Richard Wayne Grant, who will be hereinafter referred to as Respondent.

References to the transcript of hearing will be (TR - page number) and references to exhibits introduced as evidence at the hearing will be (TFB Exhibit - number). References to the Referee's Report will be referred to as (Referee's Report - page number).

STATEMENT OF THE CASE

The Florida Bar filed a formal complaint against Respondent on August 28, 1986. A final hearing was held before the Honorable John T. Parnham in the Jackson County Courthouse, Marianna, Florida, on the 15th day of December 1986. Written closing arguments were submitted by The Florida Bar and by Respondent. Upon notification from the Referee that a finding of guilt had been made against Respondent, both parties to this proceeding submitted written arguments as to appropriate discipline. The Report of the Referee was filed on March 3, 1987, recommending that Respondent be found guilty of violating Disciplinary Rule 6-101(A)(3) and that Respondent be suspended from the practice of law for a period of four months to be followed by an 18-month period of probation. A petition for review was filed by Respondent on March 27, 1987, pursuant to Rule 3-7.6(c)(1), Rules of Discipline.

STATEMENT OF THE FACTS

This is a case of original jurisdiction, pursuant to Article V, Section 15 of the Florida Constitution.

Because the events forming the factual basis of this case occurred prior to January 1, 1987, all citations to Disciplinary Rules are to the Code of Professional Responsibility of The Florida Bar which was in effect at the time the misconduct occurred.

On August 28, 1986, The Florida Bar filed a complaint against Respondent based on his handling of a legal matter for a client by the name of Mr. Hugh Wheelless. Respondent was retained by Mr. Wheelless on December 30, 1981 to file suit against a creditor (TR - 7, 8). Between the date Respondent was retained and February 21, 1984, when Mr. Wheelless filed a complaint with The Florida Bar, Mr. Wheelless made approximately 25 attempts to establish contact with Respondent, either by telephone or by letter (Referee's Report - 1). After numerous telephone calls and letters to Respondent in an attempt to secure information regarding the status of the lawsuit, and to persuade Respondent to take some action in the matter, Mr. Wheelless contacted The Florida Bar for assistance (TR - 16). Mr. Wheelless, as a businessman, was desirous of having the matter reduced to judgment as quickly as possible in order to enhance the likelihood of his being able to collect on the judgment (TR - 20).

Mr. Wheelless kept detailed records of the letters and telephone calls he made with Respondent, recording the dates, the times and the nature of the discussions (TR - 9). At the time Mr. Wheelless filed his complaint with The Florida Bar, he prepared a summary of his telephone calls and letters to Respondent. This summary was submitted with his complaint and was admitted into evidence at the final hearing.

Mr. Wheelless secured the services of another attorney and judgment was entered on May 21, 1985 against his creditor. Although attempts have been made to collect on the judgment, as of the date of the final hearing, these attempts had been unsuccessful (TR - 17, 18).

SUMMARY OF THE ARGUMENT

The recommended discipline in this matter, a four-month suspension followed by a period of probation of eighteen-months duration, is an appropriate level of discipline based upon the nature of the misconduct and Respondent's prior disciplinary record. The burden upon a party challenging the referee's recommendation of discipline is to demonstrate that the recommendation is "erroneous, unlawful or unjustified." Rule 3-7.6(c)(5), Rules of Discipline. An examination of cases previously decided by this Court, and the standards set forth in The Standards for Imposing Lawyer Sanctions: Black Letter Rules, demonstrate that the recommended level of discipline in the instant case is neither erroneous, unlawful, or unjustified.

Respondent was afforded every opportunity to present evidence as to mitigating factors which should be considered in this matter. Neither the Rules of Discipline nor principles of due process require that there be a hearing on the issue of mitigating and aggravating factors. Respondent was afforded an opportunity to provide written arguments and to request a hearing if he so desired. Respondent failed to do either and now requests that this Court afford him a second opportunity to present evidence in mitigation.

ARGUMENT

THE DISCIPLINE OF FOUR MONTHS ORDERED BY THE REFEREE IS AN APPROPRIATE LEVEL OF DISCIPLINE

This Court has previously set forth the three purposes for discipline which should be considered in determining the appropriate level of discipline in a grievance matter:

> 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 for 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.

The Florida v. Pahules, 233 So.2d 130 (Fla. 1970). Respondent asserts that the four-months suspension recommended by the Referee in the instant case is too harsh a penalty because it is unfair to him. Respondent argues that the effect of a suspension of greater than ninety days, with the attendant requirement of proof of rehabilitation prior to reinstatement, would have a serious effect upon him, more so because he is a sole practitioner in a small, North Florida community. The Florida Bar agrees that a suspension for four-months duration is a serious discipline with grave repercussions

to Respondent's life and livelihood. However, this is simply not sufficient justification for reducing the recommended discipline.

In The Standards of Imposing Lawyer Sanctions: Black Letter Rules, the impact on an attorney of a particular level of discipline, is not recognized as a mitigating factor. These same Standards state:

> The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system and the legal profession properly.

A public reprimand in the instant case would not sufficiently protect the public from an attorney who has demonstrated a pattern of failing to discharge his professional duties to his clients and the legal system. A public reprimand would seriously erode the confidence of the public in the legal system's ability to monitor its own. It would also be inherently unfair to reduce the level of discipline against Respondent simply based upon the fact that he practices in a small, North Florida community. Suspension might be equally devastating to an attorney practicing in a law firm in a large metropolitan area. Economic impact has not been recognized by this Court as a factor which would mitigate the level of discipline against an attorney.

In determining an appropriate level of discipline, this Court has, in the past, considered both the seriousness of the misconduct itself together with the presence or absence of mitigating or aggravating factors. Among those factors which have been recognized by this Court as aggravating factors is the presence of a disciplinary record against an accused attorney. Section 9.22 of The Standards for Imposing Lawyer Sanctions: Black Letter Rules sets forth factors which may be considered in aggravation. Among those factors listed is the presence of prior disciplinary offenses and a pattern of misconduct. These aggravating factors are present in the case against Respondent. Respondent had been publicly reprimanded twice before for the same disciplinary rule violations with which he is charged in the instant case. This indicates both prior disciplinary history and a pattern of misconduct.

On May 19, 1983, Respondent was publicly reprimanded for misconduct arising out of the representation of a client in a suit for damages. After filing suit, Respondent took no further action and, as a result, the matter was dismissed some two years later due to an absence of record activity. Respondent was found guilty in this matter of violating Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility for neglecting a matter entrusted to him. The Florida Bar v. Grant, 432 So.2d 53 (Fla. 1983).

Respondent was again publicly reprimanded on March 7, 1985 based

on his submission of a conditional guilty plea for consent judgment. The Florida Bar v. Grant, 465 So.2d 527 (Fla. 1985). In the consent judgment, Respondent admitted violation of Disciplinary Rule 6-101(A)(3) for neglect of a legal matter in his representation of the City of Marianna in a federal civil rights action. In that case, Respondent had failed to answer several discovery requests and had also failed to respond to court orders and failed to attend court hearings on discovery. These failures resulted in the imposition of sanctions against the City by the federal court.

In past cases, this Court has dealt more harshly with cumulative misconduct and, where the cumulative misconduct was of a similar nature, the level of discipline has been enhanced. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982). As noted in the Referee's Report, the first public reprimand against Respondent was issued May 19, 1983, during the time period when Respondent was representing Mr. Wheelless. Despite this reprimand for almost identical misconduct, Respondent continued his pattern of neglect in his representation of Mr. Wheelless. As stated in the Pahules opinion, one of the purposes of discipline is to encourage reformation and rehabilitation of the disciplined attorney. Apparently, the receipt of two public reprimands have not had that desired effect upon Respondent.

In its written arguments as to appropriate discipline, The Florida Bar argued that a suspension of three months followed by a

period of probation would be consistent with the purpose of discipline. While the Referee elected to recommend a discipline than that requested by The Bar, the recommended level of discipline is not erroneous, unlawful or unjustified.

In Respondent's brief, he cites to a number of cases in which he argues the misconduct is as serious or more serious than his misconduct, but where the attorney received a lesser punishment than that recommended by the Referee in this case. This Court has stated on a number of occasions that each case must be judged on its own facts. This requires that both the misconduct itself and all mitigating or aggravating factors be viewed together in determining the appropriate discipline for that particular case. As long as the discipline is not clearly erroneous as a matter of law, the recommendation of the Referee should be upheld. There are a number of cases previously decided by this Court wherein the facts are similar to those in the instant case. In The Florida Bar v. Hunt, 417 So.2d 967 (Fla. 1982), this Court suspended an attorney for a period of six months with proof of rehabilitation required for neglecting a legal matter in violation of Disciplinary Rule 6-101(A)(3), where the attorney had a previous disciplinary record.

In another case, a referee's recommendation of a public reprimand and six months probation was rejected by this Court where the attorney had failed to diligently pursue a divorce action and

where the attorney had previously been disciplined. The Florida Bar v. Fath, 391 So.2d 213 (Fla. 1980). Fath was suspended for an additional six-month period to run consecutively with a previous suspension.

A suspension of one year was ordered for an attorney for abandoning clients' cases, neglecting and refusing to cooperate with clients, and ignoring court orders. The Florida Bar v. Hendrickson, 222 So.2d 1 (Fla. 1969).

Respondent cites, as support for his position, The Florida Bar v. Brennan, Case No. 67,851 (April 9, 1987). The attorney in Brennan had twice before been publicly reprimanded, once in 1979 for mishandling a matter resulting in harm to his client and, again in 1982, for failure to reconcile his trust account records and issuance of a worthless check on the trust account. The Florida Bar recommended suspension as appropriate discipline but this Court issued a third public reprimand against Brennan, reasoning that the single infraction involved in the most recent case was not as serious as those for which Brennan had previously been disciplined. It is important to note that the two previous cases were dissimilar to the third case, which involved a relatively minor instance of neglect. Also, Justice Grimes, in a dissenting opinion, agreed with The Bar that a public reprimand was not sufficient discipline in light of Brennan's prior disciplinary record.

The Florida Bar v. Budzinski, 322 So.2d 511 (Fla. 1975) is also cited by Respondent in support of his argument that the recommendation of a four-month suspension is excessive. Budzinski had been charged with several counts of incompetence and neglect. The precipitating factor in this case, however, was Budzinski's alcoholism. One of the conditions of Budzinski's three-year probation was an agreement to disbarment in the event that he resumed the consumption of alcoholic beverages. In The Florida Bar v. McKenzie, 432 So.2d 566 (Fla. 1983), this Court upheld a referee's recommendation of a public reprimand for neglect and improper retention of a client's funds. However, The Bar had appealed the referee's recommendation and argued that a three-month suspension was a more appropriate discipline.

In The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985), this Court stated that public reprimands should be reserved for isolated instances of neglect. Respondent has not engaged in an isolated instance of neglect. He has exhibited a pattern of neglecting client cases and failing or refusing to communicate with the clients. The Florida Standards for Imposing Lawyer Sanctions: Black Letter Rules states that suspension is an appropriate discipline when "a lawyer engages in a pattern of neglect and causes injury or potential injury to a client," or when "a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client." Section 4.42. In the instant case, Respondent has exhibited a

pattern of neglect in his handling of the instant case. Over a period of two years, he neglected Mr. Wheelless' case, despite numerous inquiries and repeated pleas for action from Mr. Wheelless. Respondent's failure to take any action was conscious, not negligent. It is important to note that in both provisions of the standards cited above, that actual injury is not required; potential injury is sufficient to justify a suspension. In the instant case, there was clearly a potential for injury to Mr. Wheelless as a result of Respondent's neglect.

The new Rules of Professional Conduct, adopted by this Court and effective January 1, 1987, speak more specifically to the duties of diligence and communication owed by a lawyer to a client. Respondent is not charged under these rules and it is not the intent of The Bar to argue that these standards should be applied in the case before this Court. However, these new standards are an indication of the expectations to be applied in a lawyer's handling of a matter. Rule 4-1.3, Rules of Professional Conduct, addresses the issue of procrastination by a lawyer and indicates that even where a client's interests are not affected, unreasonable delay is a form of prejudice to the client because it causes needless anxiety and undermines the confidence of the client in the lawyer. Under the new rules, a failure to keep a client reasonably informed regarding the status of a matter and to promptly comply with reasonable requests for information is a violation for which an attorney may be subjected to

discipline. Applying either the new rules or the old rules, attorneys owe to their clients a duty to represent them zealously, to act with reasonable diligence and promptness and to communicate with them. Respondent has demonstrated a pattern of failing to carry out these duties. By doing so, he has not only caused needless anxiety to his client, but has damaged the perception of his client and the public in himself personally and in the legal profession. A public reprimand is simply not sufficient discipline. It would not be fair to the public nor would it sufficiently punish Respondent or deter others who might engage in similar misconduct. A suspension of three months, together with probation as recommended by the Referee, is the very minimum which would be appropriate in this case.

Respondent argues that he was denied an opportunity to present evidence in mitigation before the Referee made his recommendation as to appropriate discipline. A careful examination of the record indicates that this simply is not the case. At the conclusion of the hearing held on December 15, 1986, Respondent, together with The Florida Bar, agreed to submit written closing arguments. Further, it was agreed that a second hearing could be scheduled for the purpose of making arguments as to appropriate discipline. Respondent submitted his written closing argument on December 26, 1986 and The Bar submitted its argument on December 30, 1986. The Referee then notified both parties of his finding of guilt against Respondent in a letter dated January 27, 1987. This letter, which was attached as an

exhibit to Respondent's petition for an order remanding, indicates that the Referee required submission of written argument as to the issue of sanctions to be imposed, within seven days of the date of his letter. The Referee also invited either party to contact him should they have any questions concerning the matter. The Florida Bar filed its written arguments on January 30, 1987 and, pursuant to Rule 3-7.5(k)(1), Rules of Discipline, attached certified copies of Respondent's prior disciplinary orders. After receiving an extension of time, Respondent filed his memorandum on appropriate sanctions on February 11, 1987. In this written memorandum, Respondent specifically argued that certain factors should be considered in mitigation of the penalty to be imposed against him. Respondent argued that there had been no substantial loss or damage to Mr. Wheelless (Respondent's Written Argument - 3). Respondent also argued that the three disciplinary cases against him had been chronologically contemporaneous (Respondent's Written Argument - 4). Finally, Respondent argued the severity of the impact of a suspension on him as a small town practitioner (Respondent's Written Argument - 5). Respondent never requested that he be allowed an opportunity to present additional evidence as to mitigation. The Referee filed his report on March 3, 1987 and no motion for rehearing was filed by Respondent.

A number of cases are cited in Respondent's brief which address the issue of due process in disciplinary proceedings. The Florida

Bar v. Fussell, 179 So.2d 852 (Fla. 1965) seems to require that an attorney who is the subject of a disciplinary proceeding based upon conviction of a felony be given notice and an opportunity to be heard. The charges against Respondent were not based on a felony conviction and were therefore the subject of a full blown hearing on the charges themselves. Respondent subsequently had the opportunity to present written arguments as to mitigation and to request a hearing. Respondent cites two other cases from other jurisdictions that speak to this issue. In re: Childs, 303 NW2nd 663 (1981 Wis.) and Giddens v. State Bar, 621 Pac2d 851 (Cal. 1980). Both cases appear to require only an "opportunity" to offer evidence. Respondent was offered such an opportunity but failed to request a hearing.

CONCLUSION

The Referee's finding of neglect, while not the subject of this appeal, is well supported by the record. The nature of Respondent's misconduct in neglecting a legal matter entrusted to him, together with the fact that he had been twice before publicly reprimanded for the same kind of misconduct, justifies the imposition of a suspension. While the Referee's recommendation of a four-month suspension exceeds that requested by The Florida Bar, it is neither erroneous, unlawful or unjustified. Respondent has abrogated his duty, both to his clients and to the legal system, with the attendant result of diminished self confidence in the legal system and the judicial process. While the Referee found no demonstrable harm, the potential for harm was great. Based upon the cases cited, the Referee's recommendation is neither erroneous, unjustified, or unlawful. It is keeping with this Court's past treatment of similar cases and therefore should be upheld by this Court.

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 # P 675 195 526, return receipt requested, to JAMES P. JUDKINS, ESQUIRE, Counsel for Respondent, at his record Bar address of Post Office Box 10368, Tallahassee, Florida 32302, this 18th day of May 1987.

SUSAN V. BLOEMENDAAL
Bar Counsel