IN THE SUPREME COURT OF FLORIDA

Florida Bar
~~STATE OF FLORIDA~~,

Complaintant,

vs.

RICHARD WAYNE GRANT,

Respondent.

_____/

CASE NO. 69,242
(TFB No. 14-84N49)

INITIAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Richard Wayne Grant is an attorney and member of the Florida Bar. He seeks review of the Report and Recommendations of the Referee in a disciplinary action. Mr. Grant will be referred to to by name (he was "Respondent" in proceedings before the Referee and is "Petitioner" seeking review in this court). References to the transcript of hearing will be ("Tr-page number").

STATEMENT OF THE CASE AND FACTS

The Florida Bar filed a complaint against Grant, alleging that he neglected a legal matter entrusted to him by Hugh Wheelless. A hearing was held on December 15, 1986, at which the only witness to testify was Mr. Wheelless.

Wheelless testified that on December 30, 1981, he retained Grant on a contingent fee basis to sue Altha Flying Service on an overdue account. (Tr - 7-8). Grant corresponded with the potential defendant's attorney and provided copies of the correspondence to Wheelless on January 13, 1982. (Tr-10). Following that correspondence, Wheelless contacted or attempted to contact Grant on numerous occasions over the next year with instructions to get the case to trial. In a letter dated March 21, 1983, Grant told Wheelless:

> In response to your recent inquiry, please rest assured that I shall make every possible effort to bring the above claim to a conclusion as soon as possible.
>
> The Court has jury trial scheduled over the next two weeks, as a consequence of which I anticipate that it will be mid April before we will be able to conclude the matter.
>
> I shall be out of town for most of this week, but next week shall advise you of a specific date by which we should be able to conclude the matter. Thank you for your continuing cooperation. (Bar Exhibit 2).

Following receipt of the letter, Wheelless tried on various occasions to contact Grant, most of which were unsuccessful.

In January of 1984, Wheelless contacted his local Alabama attorney, who wrote a letter to Grant requesting action. (Tr - 16). Finally, Wheelless retained another attorney, who brought suit on his behalf. Judgment was rendered in Wheelless' favor on May 21, 1985 (Tr - 17) for the amount sued upon plus interest. The new attorney also had a contingent fee agreement. The judgment remains uncollected (Tr - 17-18) even though the Defendant continues in the same business (Altha Flying Service) as when the debt was incurred (Tr - 22-23).

After Mr. Wheelless finished testifying, the following transpired:

> The Court:
> For the record, the attorneys have agreed to submit written memos in support of their positions. And it's agreed that the memos will be due on December 29 at my office in Pensacola.
> The Court after reviewing the memos will make whatever findings are appropriate and will notify the attorneys.
> * * *
> By Ms. Bloemendaal:
> Your Honor, let me make sure that I understand our written arguments, closing arguments will be due two weeks from today?
> The Court:
> Correct.
> By Ms. Bloemendaal:
> Now, did you want a separate argument as to appropriate discipline after a finding is made if there is necessity of that?
> The Court:
> That's correct. In the event of any other proceeding once I make my findings, if they are necessary, then we can arrange those and I'll come back over here. Okay.

By Ms. Bloemendaal:
Thank you.
By Hon. Grant:
Thank you, your Honor.
(At this point in time the hearing was adjourned).

Thereafter, on January 27, 1987, the Referee wrote a letter to the parties, in which he informed them that he found Grant violated the Disciplinary Rule because he "neglected a legal matter entrusted to him by his client". The court did not direct that further proceedings be held to determine the proper discipline, as he had implied at the conclusion of the hearing, but instead told the parties in his letter:

> "Please forward to me within seven (7) days from the date of this letter your respective positions as to the issue of sanctions to be imposed."

Complying with the directive of the court, the parties submitted the required memoranda. The Bar requested a suspension of three months and a period of probation for eighteen months (memo - p.5). After receiving the memoranda, the Referee (without taking further testimony), entered its Report and Recommendation on March 3, 1987. The Report finds Grant guilty of neglecting a legal matter and recommends a 4 month suspension to be followed by eighteen months probation. Grant timely petitioned this court for review.

SUMMARY OF THE ARGUMENT

Mr. Grant faces a recommendation of a four month suspension. This is a suspension that requires proof of rehabilitation prior to reinstatement, and would have a devastating effect on Mr. Grant, who is a sole practitioner in a rural community.

The purpose of disciplinary proceedings is to insure the public protection and afford fair treatment to the accused attorney. The proposed discipline in this case does neither; this court has consistently imposed lesser penalties for more grievous conduct. In order to protect the public, a period of probation is a sufficient level of discipline; to order a suspension is grossly unfair to Mr. Grant.

This court should review the cases of other recently disciplined attorneys in reachings its decision. Mr. Grant, when compared to others with "prior records", has been treated too harshly.

Finally, Mr. Grant was not afforded the opportunity to offer evidence of mitigating factors. If this court is going to consider any suspension, it should do so only after giving Mr. Grant the opportunity to present his evidence. Perhaps this is the reason the referee exceeded the recommendation of the Bar.

ARGUMENT

THIS COURT SHOULD NOT ADOPT THE PUNISHMENT RECOMMENDED BY THE REFEREE

A. In General.

Rule 3-7.6(a)(2) of the Rules regulating the Florida Bar, provides that the Supreme Court shall review all reports and judgments of refereees recommending suspension. Rule 3-7.6(a)(5) provides that the burden is on the Petitioner to show that the report of the Referee is unlawful or unjustified. Mr. Grant will submit, in this brief, that he should not be suspended from the practice of law even though he did neglect the legal matter entrusted to him by Mr. Wheelless.[1] The purpose of disciplinary proceedings is twofold: (1) to protect the public interest and (2) to assess penalties that give fair treatment to the accused attorney. The Florida Bar v. Thomson, 271 So.2d 758 (Fla. S.Ct. 1972), clarified 310 So.2d 300 (Fla. S.Ct. 1975), 87 A.L.R. 3d 272. Mr. Grant submits that the proposed discipline of him meets neither of these purposes.

B. Effect Of Suspension For 4 Months.

Rule 3-5.1(e) provides that a suspension of more than 90 days requires proof of rehabilitation prior to reinstatement of the lawyer. Rule 3-7.9 describes the procedure for reinstatement

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[1] No reversal is sought of the Referee's finding of neglect. This determination appears to be supportable by the record, even though no harm was suffered by the client.

following a suspension, which includes the filing of a petition, appointment of a Referee, a hearing on the petition, recommendations by the Referee and review by this court. Thus, if a lawyer is suspended for more than 90 days, the likely effect of this suspension is to prevent him from engaging in the practice of law for a year in the reinstatement process. On the other hand, a lawyer suspended for less than 90 days may resume his practice immediately following the expiration of the period of suspension, since he does not have to offer proof of rehabilitation. The difference between a 3 month suspension, which was suggested as appropriate in the instant case by the Bar to the Referee, and a 4 month suspension, which is recommended by the Referee to this court, is much more than 30 days. Indeed, the difference between the two suspensions is drastic.

C. Effect Of Suspension On Grant.

Mr. Grant is a sole practitioner in a small town in the rural Jackson County community of Marianna. The effect of a suspension is much more severe to an attorney who practices alone than to a member of a larger firm, or even a medium sized firm. The sole attorney has no one to maintain his practice for him. He must, in reality, begin anew with his law practice following the suspension. He will be unable to maintain any clients because he has no partners or associates to service his clients during his absence. The lawyer from a law firm does not suffer these consequences.

By the same token, the effect of a suspension on a small town lawyer is much more significant than on a lawyer from a metropolitan area. Not only will all of his present clients know of his suspension, but also almost all of his potential or future clients as well. The lawyer from a city does not suffer consequences as serious, because the large population supplies him with many more potential clients who will never learn of the suspension. Mr. Grant will be punished by a suspension to a much greater degree because of the nature and locale of his practice. This is not to insinuate that a small town, sole practitioner should be immune from punishment; but we do suggest that, consistent with the purpose of disciplinary proceedings (to protect the public and assess penalties that give fair treatment to the accused attorney), the effect of the proposed discipline cannot be ignored. Just as a doctor must prescribe a cure peculiar to the patient's needs and his malady, the court should consider the type of wrong committed and the effect of the proposed punishment in arriving at an appropriate level of discipline.

Severe disciplinary measures are appropriate in some cases, but should be reserved for those cases involving conduct which is dishonest, fraudulent, shows a lack of good moral character, or causes substantial damage to a client or the public. This is not the situation presented by the facts of this case.

In the Florida Bar v. Pahules, 233 So.2d 130 (Fla. S.Ct. 1970), the accused attorney was guilty of embezzlement of client funds and of commingling funds. He made restitution before disciplinary action was instituted. The Bar sought disbarment, but this court concluded that the ultimate penalty was too severe and ordered a suspension for six months. The court described the purposes of disciplinary measures:

> "In cases such as these, three purposes must be kept in mind. 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."
> 233 So.2d at 132.

A suspension of Mr. Grant for neglectful activity resulting in no harm to the client is much more severe a penalty than disbarment was for Pahules' intentional embezzlement and commingling. Pahules was guilty of affirmative acts of misconduct constituting a very serious offense. Yet, he was suspended for only six months because he had made restitution (i.e., no harm to the client) and other positive facts relating to his character. The purposes

expressed in Pahules will be met by placing Mr. Grant on probation and publicly reprimanding him for neglecting Mr. Wheelless' case. If this punishment is directed by the court, the public will be protected and Mr. Grant will be treated fairly and not deprived of his livelihood.

D. Prior History.

The recommendation of the Referee is to a large degree based upon the two prior public reprimands against Mr. Grant. Grant was reprimanded in 1983 when a suit was dismissed because of lack of prosecution. Florida Bar v. Grant, 432 So.2d 53 (Fla. S.Ct. 1983). Grant was again publicly reprimanded in 1985 following a conditional guilty plea. This also involved neglect of a legal matter, to the detriment of a client. Grant made full restitution to the client for its losses. Florida Bar v. Grant, 465 So.2d 527 (Fla. S.Ct. 1985). The instant case involving Mr. Wheelless involves the same type of neglect in the approximate same time period as the conduct which was the subject of the other two disciplinary proceedings. In neither of the two prior cases was Mr. Grant placed on probation and required to file progress reports on his pending cases. It is submitted that Mr. Grant would not now be facing a suspension recommendation if he had been charged with all three counts of neglect in the same complaint. Such a situation occurred in the case of The Florida Bar v. Merrill, 462 So.2d 827 (Fla. S.Ct. 1985), where the accused

was publicly reprimanded for neglecting three different matters entrusted to him, apparently by three different clients. In Mr. Grant's case, he was fortuitously prosecuted in three successive complaints for the same type conduct in the same time period (his representation of Mr. Wheelless was over the same general time period as his other two reprimands). Under these circumstances, to suspend Mr. Grant and reprimand Mr. Merrill is inconsistent. If all three of Grant's neglect cases had been consolidated, as were Mr. Merrill's, he would not have the "prior history" to haunt him and would be appearing before the court as a "first offender".

The suspension recommendation is also inconsistent with the very recent treatment of another thrice-accused attorney. In Florida Bar v. Brennan, 12 FLW 175 (April 17, 1987) the referee recommended a public reprimand and probation for Mr. Brennan due to his admitted failure to deliver a client's file to the client's new attorney. The Bar urged a more severe penalty in view of Brennan's two prior reprimands for misconduct. It is interesting to note that Brennan's prior misconduct was more serious than Mr. Grant's. In his first disciplinary proceeding, Florida Bar v. Brennan, 377 So.2d 1181 (Fla. S.Ct. 1979), the court found that Brennan had revealed a secret of a client and handled litigation without adequate preparation, causing the client to be subjected to an additional two year sentence. Brennan received a public reprimand. In his second trip to the court,

The Florida Bar v. Brennan, 411 So.2d 176 (Fla. S.Ct. 1982), Brennan was found guilty of issuing a bad check to his client and of failure to file quarterly trust account reconciliations following his prior reprimand. The referee on the second case recommended, and the court adopted, a public reprimand and one year of supervised probation. In his most recent (third) disciplinary action, this court rejected the Bar's request for more serious action based on prior history:

> "The Bar urges that the referee's recommendation of a public reprimand and probation for one year is inadequate in view of respondent's previous two public reprimands for disciplinary misconduct [citations omitted]. We disagree. The single infraction here is of less import than his two previous offenses and no harm resulted to the client." (E.S.)
> 12 FLW at 175.

Brennan's history is analagous to, but more severe than that of Mr. Grant. Mr. Grant has never been accused of writing bad checks to clients, disclosing his client's secrets, or of any trust account mismanagement. Surely, Mr. Grant should be treated no more harshly than Mr. Brennan. There are other cases which, compared to Mr. Grant's, support the argument that the penalty recommendation is excessive. See, for example: Florida Bar v. Budzinski, 322 So.2d 511 (Fla. S.Ct. 1975) [several instances of incompetence, neglect and the systematic failure to account for funds, public reprimand, suspension]. Florida Bar v. McKenzie, 432 So.2d 566 (Fla. S.Ct. 1983) [neglect, improperly retaining funds of client, public reprimand].

It was also recently reported in the Florida Bar News, April 15, 1987, that the court had ruled in The Florida Bar v. Collier, (no cite available), where the attorney was found guilty of mishandling his father-in-law's trust. His conduct involved fraud, deceit, dishonesty or misrepresentation. The court suspended Collier for 6 months and required that he prove rehabilitation. Such severe discipline is required to protect the public in cases such as Collier.

In contrast to Collier, Grant was simply guilty of neglect of three separate but concurrent-in-time cases. Although all 3 counts of neglect were not before the court in a single disciplinary proceeding, the discipline must still be consistent with the nature of the charged misconduct. Since the conduct is neglect with no injury or damage to a client, a penalty that would require proof of rehabilitation of the attorney is not necessary. The distinction between moral misconduct and neglect demonstrates the necessity for different levels of discipline. Moral misconduct justifies a suspension that compels proof of rehabilitation. Neglect, on the other hand, requires as a safeguard merely an adequate period of supervision and restitution, if applicable. This approach to discipline results in (1) protection of the public and (2) fair treatment of the attorney. Thomson, supra.

Grant's supervision for the period recommended by the Referee is appropriate. This is fair to him as an attorney

and protects the public interest. Discipline beyond this would be harsh, unfair, and unnecessary to accomplish the ends of proper disciplinary action.

Finally, Grant's situation should be compared to another attorney recently suspended for three months when disciplined for the third time. Brinly Carter was originally publicly reprimanded in 1982 for making comments derogatory to a judge and for failure to surrender trust funds to a client for over a year after demand. Florida Bar v. Carter, 410 So.2d 920 (Fla. S.Ct. 1982). Then, in 1983, Carter was again publicly reprimanded for mishandling the funds of a client and failure to promptly deliver funds to a client, The Florida Bar v. Carter, 429 So.2d 3 (Fla. S.Ct. 1983). The violations were described as "technical" or "surrounded by mitigating factors". The court disapproved the recommendation of a suspension and ordered a public reprimand and one year of probation. In his most recent disciplinary action, The Florida Bar v. Carter, _____ FLW _____ (no cite available but reported in the Florida Bar News April 15, 1987), Carter was suspended for three months. According to the report, Carter failed to supervise non-lawyer personnel, failed to insure nonlawyer personnel's compliance with the code of ethics, and failed to examine and be responsible for all work delegated to nonlawyer personnel.

Apparently, Carter failed to keep adequate records related to any estates being handled by Carter as personal representative or attorney. The Bar asked the court to suspend Carter and to require proof of rehabilitation prior to reinstatement. The court, however, approved as "sufficient" the three month suspension, which does not require proof of rehabilitation.

Obviously, the prior record of Carter, involving a consistent pattern of mishandling funds of his clients, is a case deserving of much more stern treatment than Mr. Grant. Yet Grant faces a recommendation of a longer suspension than Carter and Grant's suspension, if approved by this court, would require proof of rehabilitation.

It is submitted that Mr. Grant's history is more similar to that of Merrill, supra, than any other reported case. His actions are less reprehensible than those of Brennan, Carter or Collier. Surely, consistency should prevail in disciplinary matters as well as in other areas of the law. It is respectfully submitted that a period of supervised probation and a public reprimand consitute an appropriate level of discipline in the instant case.

E. No Hearing On Mitigating Factors.

A license to practice law is a conditional privilege as distinguished from a right. This privilege is costly and difficult to earn. It is employed by the lawyer as his source of livelihood. This is a unique privilege that by virtue of

its character has acquired the same traditional concepts of due process that may be accorded to a property right. It is fundamental that due process requires not only notice to a party in a disciplinary proceeding, but also that the party be given a fair opportunity in person and through witnesses to explain all circumstances surrounding the claims of his misconduct. Such testimony may be offered by the accused attorney to excuse the offense by proper explanations of his conduct or for the purpose of mitigation of any penalty that may be imposed. The case of The Florida Bar v. Fussell, 179 So.2d 852 (Fla. 1965), is a reconginition by this court that the concept of due process applies to disciplinary proceedings:

> "Our Integration Rule recongizes that a license to practice law endows the holder with a conditional privilege and not a vested right. It is nonetheless a valuable privilege which should not be regarded lightly by the lawyer who enjoys it or by those of us who are charged with the supervision of its enjoyment. It is earned and acquired only after an arduous and expensive period of education. It can be retained and employed as a productive source of livelihood only by diligence and an ethical devotion to its responsibilities. In this vein it has characteristics of property which should not be withdrawn by a governing authority save by proper application of traditional concepts of due process. Under our system, no written rule is necessary to prescribe that this contemplates both notice and an opportunity to be heard, before an individual - - regardless of his offense - - is subjected to the disciplinary exercise of governmental power." 179 So.2d at 854.

In the case of In Re: Childs, 303 NW 2d 663 (1981 Wis.) a bar applicant had his application for admission to practice law denied by reason of a failure to satisfy moral character requirements, the court held that not only must the notice requirement be met but thereafter he was entitled to an opportunity to respond. Due process requirements apply even to a candidate for admission to the Bar. See Goldsmith v. Board Of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 474 (1926); Willner v. Committee On Character, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed. 2d 224 (1963).

The fundamental due process requirements have been recognized by many courts as applicable to the need of an opportunity to be heard in disciplinary or disbarment proceedings. See In Re: Colson, 412 A.2d 1160 (D.C. App. 1979); Giddens v. State Bar, 621 P.2d 851 (Cal. 1980). In Giddens, supra, the California court was called upon to review a recommendation for discipline of an attorney who could not respond at a hearing due to his incarceration. The court held that Giddens was not afforded a fair hearing because there was no opportunity for him to offer evidence in mitigation of the charges.

While in the matter now before the court the Respondent did have the opportunity to cross examine the witness against him, this alone is not sufficient to meet due process requirements of a fair hearing. The bifurcated nature of the hearing process

conducted by the Referee could reasonably lead the Respondent to believe that he would have his opportunity to present mitigating factors at a later date, prior to determination of the discipline to be recommended. This inference is based on the statement of the Referee at the conclusion of the hearing that other proceedings, if necessary, could be arranged if a finding of guilt were made; however, once the finding was made there were no further proceedings to allow Grant to introduce mitigating factors. Florida Bar v. Fussell, supra, mandates safeguards of granting the accused attorney an opportunity to explain surrounding circumstances by testimony of witnesses in his behalf on the critical issue of mitigation of the penalty. The failure to provide such an opportunity can result in an excessive penalty, such as in the instant case, where the referee's recommendation even exceeds the disciplinary action requested by the Florida Bar.

CONCLUSION

Mr. Grant was found guilty of neglecting Mr. Wheelless' case, and this finding is one that is supported by the record, even though a contrary finding would likewise be supported because Mr. Wheelless suffered no harm. The Bar recommended a three month suspension; the Refereee recommends a four month suspension. The two prior reprimands obviously were a significant factor in these recommendations. It is respectfully submitted that no suspension is necessary to protect the public or deter others. The proper disciplinary action in this case is a period of probation which requires progress reports. The effect of a suspension on Mr. Grant would be horrible, yet this penalty was recommended without a hearing on mitigating factors. The most analagous prior case is that of Mr. Merrill, whose case is reported at 462 So.2d 867 (Fla. S.Ct. 1985). Mr. Merrill escaped with a public reprimand because his three counts of neglect were brought in one complaint by the Bar. Mr. Grant should not be treated more harshly.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Susan V. Bloemandaal, Bar Counsel, The Florida Bar, Tallahassee, Florida 32301-8226, this 27th day of April, 1987.

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