IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

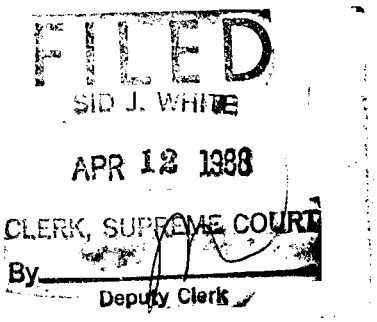
v.

MICHAEL H. WEISSER,

Respondent.
_____/

CONFIDENTIAL

Supreme Court
Case No. 69,937



BRIEF OF THE FLORIDA BAR

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INTRODUCTION

In this brief, The Florida Bar will be referred to as either "THE FLORIDA BAR", or "THE BAR". MICHAEL H. WEISSER will be referred to as the "Respondent" or "WEISSER". [redacted] and [redacted] will be referred to as "[redacted]" or "clients". Other witnesses will be referred to by their respective surnames for clarity.

Abbreviations utilized in this brief are as follows:

"TR"	refers to the transcript of proceedings of the final hearing before the Referee held September 18, 1987 incorporated in three volumes, pages consecutively numbered.
"TR-II"	refers to the transcript of proceedings of the final hearing before the referee held October 9, 1987, incorporated in one volume.
"EX"	refers to Bar Exhibit introduced into evidence at the final hearing before the Referee.
"RR"	refers to the Report of Referee
"APP"	refers to Appendix to Brief of Complainant, attached hereto

STATEMENT OF THE CASE

This disciplinary proceeding commenced on January 27, 1987 with the filing of a confidential complaint by The Florida Bar against Respondent.

On February 3, 1987, the Supreme Court assigned a referee to hear this matter.

Final hearings were held on September 18, 1987 and October 9, 1987. In arguing discipline at the final hearing The Florida Bar recommended a public reprimand as a minimum level of discipline but suggested to the referee that the case law would also support a suspension (TR 400, 401, 402; TR-II 9, 10). Respondent urged the referee to consider a private reprimand as a disciplinary sanction (TR 22, 410; TR-II 16).

The referee issued his report of referee on November 6, 1987 wherein he recommended a public reprimand and payment of costs.

The referee's report was considered and approved by the Board of Governors of The Florida Bar at its meeting held January 13, through 16, 1988.

By order dated March 22, 1988, the Supreme Court directed the parties to file simultaneous briefs as to the referee's recommended discipline.

STATEMENT OF THE FACTS

The Florida Bar filed a two-count complaint against Respondent.

Count I of the complaint involves Respondent's representation of the [redacted] and their corporation, as defendants, in a civil action filed in Broward County Circuit Court. By order dated January 18, 1983, this action was placed on the court's trial calendar for the week commencing February 7, 1983 with calendar call scheduled for February 4, 1983 (EX. 3).

Respondent failed to appear at both the calendar call held February 4, 1983 (complaint amended at final hearing, TR 390) and at the trial held February 10, 1983 (EX. 12). Respondent filed a motion to continue the trial which was recorded by the Clerk's office as having been received on February 10, 1983, the day of trial (EX. 4, APP. A). Respondent failed to schedule a hearing on his motion or contact the court to ascertain the status of the motion and the scheduling of the trial (WEISSER, TR 40, 41-42, 328-329).

As a result of Respondent's failure to appear at trial, a final judgment in the amount of $30,410.56, with interest, plus costs and attorneys fees, was entered against Respondent's clients (EX. 5, APP. B).

Count I alleges that Respondent's actions of failing to ensure either that the trial had been continued or that his clients were properly represented at the calendar call and

trial constitutes neglect of a legal matter in violation of Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility.

At final hearing Respondent admitted the allegations set forth in Count I of the Bar's complaint (WEISSER, TR 38, 39, 40, 378; opening argument by Respondent's counsel, TR 19). Respondent argued in mitigation that on January 23, 1983 he was injured in a skiing accident (WEISSER, TR 44-45) and that he was subsequently incapacitated because of medication (TR 378; opening argument of Respondent's counsel TR 19). Respondent's counsel also argued that the neglect was an isolated instance in respondent's representation of clients (TR 20).

The Florida Bar rebutted Respondent's argument as to mitigation by testimony and evidence which established that Respondent was not incapacitated on the date of the calendar call (WEISSER, TR 44), that he had attended lunch and dinner commitments at local restaurants on that date (WEISSER, TR 48, 49) and that on February 8, 1983 he purchased theater tickets for a performance in New York on February 10th, (WEISSER, TR 50) and on February 10th, the date of trial, he flew to New York, rented a car and was staying in the Grand Hyatt Hotel in New York (WEISSER, TR 51-52).

In addition the testimony of HINENBERG, Respondent's physician, established that when Respondent consulted him at the end of January 1983 he appeared to be oriented (HINENBERG, TR 284, 288) and was able to perform the activities of daily living, (HINENBERG, TR 289-290).

The testimony of REIDY, Respondent's secretary, established that Respondent was not functioning differently during the period after his injury and prior to the trial than he had functioned prior to his injury (REIDY, TR 300-302).

Moreover, the testimony of LEVENSTEIN, Respondent's opposing counsel in the civil action, established that Respondent had failed to appear at a previous calendar call in January (LEVENSTEIN, TR 247; see also EX. 12) and that Respondent had failed to attend depositions in the civil action which were held September 21, 1982, December 7, 1982 and January 31, 1983 (LEVENSTEIN, TR 252).

Respondent's argument as to his incapacity as a mitigating factor was rejected by the Referee (RR at 4).

Count II of the Complaint involves Respondent's actions on behalf of the [redacted] after he had received the final judgment and specifically, his use of the adverse judgment, which was the result of his neglect, as leverage to obtain his fees. Respondent filed a motion to vacate the final judgment which was denied. Respondent subsequently filed a renewed motion to vacate which was also denied. After Respondent's motions were denied, he filed a Notice of Appeal. However, Respondent advised the [redacted] that unless payment of legal fees were made, he would not proceed with the appeal (EX. 7, 9; WEISSER, TR 64, 65). Respondent failed to file a brief because the [redacted] did not fully comply with Respondent's demand for fees and the appeal was dismissed for lack of prosecution.

The Florida Bar alleged that Respondent's demand for payment of legal fees as a prerequisite to pursuing an appeal of an adverse ruling which was caused by his neglect constitutes conduct which adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility.

In support of its position, The Florida Bar presented the testimony of [redacted] to establish that Respondent demanded fees to "fight the judgment" or he would "drop everything" ([redacted], TR 142, 144, 149; EX 8, 9). [redacted]'s testimony further established that Respondent sought to conceal the basis of the final judgment from the [redacted] by refusing to release their file to them or to [redacted]'s brother, who is an attorney and had contacted Respondent on their behalf [redacted] TR 155, 156; [redacted] TR 211-212, 219). [redacted] was forced to obtain a copy of the file directly from the Court (EX. 13). Until they received a copy of the final judgment from [redacted], the [redacted] believed that their case had merely been lost [redacted], TR 142). They were shocked when they subsequently learned that the judgment was entered because of Respondent's failure to appear at trial [redacted], TR 157, 158; [redacted] TR 214, 216).

At final hearing, Respondent asserted that the clients had instructed him not to proceed with the appeal (WEISSER, TR 86). Respondent initially argued that the [redacted] determined to abandon the appeal because they didn't have

any assets and were therefore judgment proof (WEISSER, TR 78, 359). Respondent, however, later claimed that the basis for his clients' instruction not to proceed further was because they didn't want to incur legal fees (WEISSER, TR 360).

In support of its position that Respondent had used the adverse final judgment as leverage to collect his fees, The Florida Bar introduced copies of written communications sent to his clients which confirm his demand for fees (EXS. 7, 8, 9). Respondent initially disclaimed the statement dated October 1, 1983 which included a demand for payment of 2,000 legal fee (EX. 9, APP C; WEISSER, TR 71, 72). In rebuttal The Florida Bar presented the testimony of expert witness HART, a document examiner, to establish that the statement which was sent to the [redacted] was a photocopy of the original which had not been altered (HART, TR 102, 104).

In addition, HART further testified that the letter purportedly sent by Respondent dated January 30, 1984 (EX. 11, APP. D) which confirms Respondent's position that his clients instructed him to abandon the appeal (WEISSER, TR 86) was typed on letterhead using a typestyle which was not in existence on the date indicated (HART, TR 120, 121, 122). [redacted] further denied receipt of this letter ([redacted], TR 160).

In addition to testifying in his own behalf, Respondent called [redacted] as his witness in an attempt to discredit the testimony of [redacted] and attorney

STERN, as a character witness.

After considering the testimony and evidence the Referee found Respondent guilty of the factual allegations and disciplinary rule violations set forth in the Bar's complaint.

SUMMARY OF ARGUMENT

A public reprimand is appropriate as a minimum disciplinary sanction for the misconduct involved in this case; to wit, Respondent's failure to obtain a continuance or appear at trial which resulted in the entry of a final judgment against his clients and thereafter conditioning the appeal of the final judgment, which was initiated in an attempt to rectify the consequences of the misconduct upon, payment of legal fees.

Considering the facts of this case (including the aggravating factor of a selfish motive), case law and the Standards for Imposing Lawyer Sanctions, a suspension would also be appropriate discipline.

The Florida Bar recommends that the Supreme Court either approve a public reprimand, as recommended by the referee, or in lieu thereof impose a suspension as a disciplinary sanction.

ARGUMENT

Although the Referee's recommendation for a public reprimand is warranted as a minimum level of discipline, the referee's findings and case law also support a suspension as an appropriate disciplinary sanction.

A referee's finding of fact enjoys the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. Rule 3-7.5(k)(1), Rules of Discipline. The Supreme Court is not bound by a referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). All referee's reports recommending public reprimand, suspension, disbarment or resignation are reviewed by the Supreme Court, even in the absence of the filing of a petition for review by a party. Rule 3-7.6(a)(2), Rules of Discipline.

In the instant case, the referee recommended a public reprimand as a disciplinary sanction for misconduct involving both neglect of a legal matter by failing to appear at trial as well as conduct which adversely reflects on fitness to practice law by using an adverse ruling caused by the respondent's neglect as leverage to obtain legal fees.

At final hearing, The Florida Bar argued that the minimum level of discipline which is appropriate is a public reprimand. The Florida Bar further argued that considering both the facts of this case and recent case law, a suspension would also be an appropriate disciplinary sanction.

In The Florida Bar v. Mims, 501 So.2d 596 (Fla. 1987)

the Supreme Court ordered a one-year suspension and required the respondent to prove rehabilitation and pass the ethics portion of The Florida Bar examination. The misconduct in Mims involved a failure to comply with Court orders, failure to appear at a scheduled pre-trial conference, and neglect of a pending legal action. See also, The Florida Bar v. Palmer, 584 So.2d 752 (Fla. 1987) where the Supreme Court ordered an eight-month suspension for misconduct involving neglect in failing to file a lawsuit. The client's claim was subsequently barred by the statute of limitations and the respondent made misrepresentation to the client concerning the status of the legal action. In mitigation, the referee in Mims considered respondent's remorse and monetary payment to the client, but rejected the illness and death of Respondent's mother as mitigating factors.

In The Florida Bar v. Hoffer, 412 So.2d 858 (Fla. 1982) the Supreme Court ordered a one-year suspension with proof of rehabilitation where respondent had failed to appear at a hearing and failed to notify both the presiding judge and his client that he would not appear. As a result, the client's legal matter (petition for modification of an order of a dissolution of marriage) was dismissed. The respondent in Hoffer, however, had been previously suspended for two-years and his one-year suspension was ordered to run concurrently with his prior suspension.

In The Florida Bar v. Hollingsworth, 376 So.2d 394 (Fla. 1979) the Supreme Court ordered a six-month suspension and required proof of rehabilitation and passage of the ethics portion of The Florida Bar examination for respondent's failure, on three occasions, to appear in court on his client's behalf for hearings or sentencing. See also The Florida Bar v. Negretti, 346 So.2d 68 (Fla. 1977) where the Supreme Court approved a consent judgment for a thirty-day suspension as a sanction for Respondent's failure to advise his client of the trial date and failure to appear at the trial. As a result, a final judgment was entered against his client. The respondent in Negretti subsequently failed to notify the client of a hearing on a motion to tax costs filed by the opposing party and failed to appear at the hearing on the motion.

The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987) involves a respondent's abandonment of a client at a settlement conference as the result of a dispute with the client concerning fees. Respondent thereafter inappropriately filed a mechanics' lien to force the client to pay legal fees. This aspect of Hooper is similar to Count II of the case sub judice wherein the respondent conditioned the filing of a brief upon payment of legal fees and refused to pursue the appeal when payment was not made. In Hooper, the Supreme Court suspended respondent for one-year, to run concurrently with a previous suspension which was then in effect.

The case law which supports a public reprimand, as recommended by referee, includes The Florida Bar v. Castle, 512 So.2d 162 (Fla. 1987). In Castle the respondent filed a civil suit on behalf of a client and a default judgment was subsequently entered in the client's favor. A motion to vacate the default was filed, but the respondent failed to attend the hearing. The default judgment was set aside and a date for the trial and pretrial conference was scheduled. Respondent failed to appear at the pre-trial conference and, as a result, the case was dismissed without prejudice. Respondent failed to refile the action.

In The Florida Bar v. Grant, 432 So.2d 53 (Fla. 1983) the respondent was publicly reprimanded for his failure to take further action on his client's behalf after filing a lawsuit. The client's lawsuit was subsequently dismissed for lack of prosecution. See also The Florida Bar v. Cervantes, 476 So.2d 668 (Fla. 1985).

A disciplinary sanction ranging from a public reprimand to a suspension is further supported by the Standards for Imposing Lawyer Sanctions ("standards"). These standards were created as a comprehensive system for determining discipline and, among other purposes, were designed to promote consistency in disciplinary sanctions.

Standard 3.0, Florida's Standards for Imposing Lawyer Sanctions, sets forth the factors which should be considered in imposing a sanction after a finding of lawyer misconduct:

a) the duty violated;

b) the lawyer's mental state;

c) the potential or actual injury caused by the lawyer's misconduct; and

d) the existence of aggravating or mitigating factors.

In the instant case, Respondent violated his duty owed to his client to act with reasonable diligence in representing the client.

Standard 4.43 provides that:

> Public Reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. . . .

Whereas, Standard 4.42 provides that:

Suspension is appropriate when:

a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.

In the instant case Respondent failed to appear at both calendar call and trial (EX. 5). He filed a motion for continuance on the day of trial (EX. 4) and never contacted the court to advise of his purported "incapacity" or to inquire as to the status of his motion and the scheduled trial date.

Certainly an attorney who fails to take appropriate action to either obtain a continuance prior to trial or to appear at trial acts, at a minimum, negligently and arguably with full knowledge of the consequences which may result from his actions.

Further, an attorney who fails to file a brief acts with full knowledge that the appeal will be dismissed.

In the instant case Respondent's failure to file the brief was intentional and did not result from neglect or oversight. Under this circumstance, Respondent acted unethically in that he used his client's legal position in an attempt to benefit himself (obtain legal fees). Such action is particularly reprehensible where the respondent's neglect caused the adverse ruling which necessitated the appeal.

The standards suggest that in imposing discipline consideration be given to any mitigating or aggravating factors. It is significant that in the case sub judice, Respondent's claim of physical or mental impairment was rejected by the referee as a mitigating factor. The only factor which may properly be considered in mitigation in this case is the absence of a prior disciplinary record.

In aggravation, however, is Respondent's selfish motive in using his client's legal position as leverage to collect a legal fee (Count II). Respondent's conditioning the filing of a brief upon payment of fees and his subsequent abandonment of the appeal because of his client's failure to comply with his demands illustrates Respondent's selfish motive. This action takes this case out of the realm of neglect and evidences into a conscious disregard for his client's position and the intentional use of the client's position for personal benefit.

This Court has stated three purposes of discipline.

> 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 eithics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter other who might be prone or tempted to become involved in like violations.

The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970).

In the instant case a public reprimand certainly meets the criteria set forth above. Any lesser sanction (e.g., a private reprimand) would not be sufficient to punish a breach of ethics or to deter others who might be prone to similar misconduct. Likewise a suspension would also be warranted under these circumstances.

CONCLUSION

While the facts of this case certainly support the referee's recommendation for a public reprimand it is the Bar's position that the referee's findings, together with case law, support a suspension as well. Accordingly, The Florida Bar recommends that the Supreme Court either approve a public reprimand, as recommended by the referee, or in lieu therof, impose a suspension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the Brief of Complainant was mailed Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301, and that a true and correct copy was mailed to Michael Weisser, Respondent, 18301 Biscayne Boulevard, 2nd Floor, N. Miami Beach, FL 33160 this 11th day of April, 1988.

Patricia S. Etkin

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