1-12

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

JAY SANTIAGO,

Respondent.
_____/

Supreme Court
Case No. 70,357

On Petition for Review of
the Referee's Recommended Order in a
Disciplinary Proceeding.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

In this brief, The Florida Bar will be referred to as either "The Florida Bar", "the Bar" or "Petitioner", and Jay Santiago will be referred to as the "Respondent" or "Mr. Santiago".

Abbreviations utilized in this brief are as follows:

"Tr" refers to the Transcript of Proceedings dated October 19, 1987.

"App" refers to Appendix to Brief of Complainant, attached hereto.

"R.O." refers to the Referee's Recommended Order.

STATEMENT OF THE CASE

These disciplinary proceedings commenced on April 10, 1987 with the filing, by The Florida Bar, of a Petition for Temporary Suspension against Respondent.

On April 15, 1987 the Supreme Court granted The Florida Bar's Petition for Temporary Suspension and ordered Respondent suspended until further order of the Court pursuant to Rule 3-5.1(g) of the Rules Regulating The Florida Bar (hereinafter referred to as "suspension order").

On July 15, 1987, The Florida Bar filed with the Supreme Court a Petition for Order to Show Cause alleging as a basis Respondent's contempt of the suspension order.

On July 21, 1987, The Supreme Court entered an order commanding Respondent to show cause on or before August 5, 1987 why he should not be held in contempt of Court for failure to comply with the suspension order.

Respondent failed to respond to the Order to Show Cause. As a result, by order of the Supreme Court dated October 6, 1987, the allegations of The Florida Bar set forth in its Petition for Order to Show Cause were deemed admitted and this matter was referred to a referee for a hearing and a recommendation as to the penalties which should be imposed.

On October 16, 1987, The Florida Bar hand delivered to the referee a letter confirming Respondent's agreement to both appear at a hearing scheduled for October 19, 1987 and to execute a stipulation acknowledging his agreement to accept

disbarment. In support of its position, The Florida Bar filed with the referee a Memorandum of Law in Support of Disbarment.

Both The Florida Bar and Respondent appeared before the referee for a hearing on October 19, 1987. At the hearing Respondent's Unconditional Guilty Plea and Consent Judgment for Discipline was filed with the referee (hereinafter referred to as "consent judgment"). Pursuant to his consent judgment Respondent agreed to accept disbarment as a sanction for contempt and to comply with the terms of the suspension order forthwith.

On October 22, 1987, the Referee entered an order recommending that Respondent receive a two-year suspension as a sanction for contempt and pay costs. As reflected in the order, the Referee considered as a mitigating factor Respondent's explanation that he was unaware of his suspension because he did not open his mail from The Florida Bar and the Supreme Court.

On October 29, 1987, The Florida Bar filed a cost affidavit reflecting the costs of the proceedings to date.

The referee's order was considered by the Board of Governors at its meeting held November 11 through 13, 1987. At that time the Board of Governors directed the filing of the instant petition for review to contest both the sanction recommended by the referee as well as the referee's consideration, as a mitigating factor in determining discipline, of Respondent's explanation that he lacked actual knowledge of his suspension because he did not open the mail he received from the Supreme Court and The Florida Bar.

The Florida Bar recommends rejection of the referee's recommendation of a two (2) year suspension as a sanction for contempt of a suspension order and in lieu thereof recommends that Respondent be disbarred, pursuant to both the recommendation of The Florida Bar and the consent judgment offered by Respondent.

STATEMENT OF FACTS

Respondent was suspended from the practice of law by order of the Supreme Court dated April 15, 1987 (App A). Pursuant to the suspension order, Respondent was directed to furnish The Florida Bar with the following items within 30 days: all of the records relating to funds or property entrusted to Respondent by his clients; affidavit listing all clients to whom a copy of the suspension order was furnished; affidavit stating the names, addresses, amounts and location of all funds being held in trust for clients; and a copy of the written notification of the provisions of his suspension Respondent sent to every bank in which Respondent maintains an account.

The suspension order further directed Respondent to furnish The Florida Bar with the following items within sixty (60) days of the order: a complete inventory of his requests to his clients as to the manner in which their files should be returned or transferred to other counsel and the results of such requests.

On May 11, 1987, the Assistant Director of Lawyer Regulation sent Respondent a letter reminding him of the requirements of Rule 3-5.1(h), Rules of Discipline and the

actions he should have undertaken to close his practice; to wit: furnishing a copy of the disciplinary order to all clients with matters pending at the time of the suspension; furnishing staff counsel with an affidavit listing the names and addressess of all clients so notified; and eliminating the appearance of being a lawyer in good standing (App B). This letter was sent to Respondent at his official record Bar address by both regular and certified mail and the receipt for the copy sent certified mail was returned to The Florida Bar.

Respondent did not furnish The Florida Bar with the items required pursuant to the suspension order. In addition, Respondent did not respond to Bar inquiries concerning other recent matters reported to The Florida Bar by Respondent's clients which involved both a request for an accounting of trust funds purportedly held by Respondent and the release of a client's file. The information The Florida Bar sought concerning these additional matters should have been included in the material the Court directed Respondent to furnish pursuant to the suspension order.

Because The Florida Bar received no response from Respondent, the Bar initiated an investigation concerning Respondent's whereabouts. During the course of this investigation, The Florida Bar learned that Respondent had not closed his office and, in fact, was continuing to maintain a law office and law office telephone number. Moreover, Respondent was continuing to practice law as evidenced by his scheduling of an appointment for legal consultation with a Bar Staff

Investigator as a prospective client and thereafter accepting the representation. In addition, Respondent appeared in Court to enter his appearance as an attorney for a criminal defendant.

On July 15, 1987, The Florida Bar filed the instant Petition for Order to Show Cause as a direct result of the information The Florida Bar obtained during the course of its investigation concerning Respondent's activities subsequent to his suspension. The facts described herein are set forth fully in the Bar's Petition for Order to Show Cause. (App C).

Respondent failed to respond to the Supreme Court order dated July 21, 1987 directing him to show cause on or before August 5, 1987 why the Bar's petition should not be granted. (App D). As a result of his failure to respond, by order of the Supreme Court dated October 6, 1987, the allegations of contempt set forth in the Bar's Petition were deemed admitted and referred to a referee for a hearing on sanctions to be imposed (App E).

A hearing before the referee was held October 19, 1987. At the hearing Respondent repeatedly acknowledged receipt of the items mailed to him by the Bar and the Supreme Court (Tr 10, 13, 25). Respondent's explanation for his failure to comply with the suspension order was that he was unaware that he had been suspended; he didn't open his mail from the Bar because he didn't want to read "bad news" (Tr 25).

Notwithstanding this fact, Respondent tendered a consent judgment which provided for disbarment and an assurance of his

immediate compliance with the suspension order provisions relating to the closing of his law practice (App F).

Respondent's consent judgment for disbarment was rejected by the referee. In so doing, the referee considered as a mitigating factor Respondent's explanation that he was unaware of his suspension because he did not open his mail from the Supreme Court and The Florida Bar [R.O.(App G); Tr 36, 38, 47]. The referee would not approve Respondent's consent judgment for disbarment in the absence of evidence that Respondent willfully and knowingly violated the suspension order.

SUMMARY OF ARGUMENT

In recommending discipline for contempt of a suspension order the Referee improperly considered as a mitigating factor Respondent's explanation that he lacked knowledge of his suspension because he did not open the mail he received from The Florida Bar and The Supreme Court.

Evidence of the Bar's compliance with the provisions for notice by mail, together with acknowledgment of receipt of mailings by the Respondent, is a sufficient basis to conclude that Respondent had implied actual knowledge of his suspension. Under these circumstances the sanctions of disbarment, which was recommended by the Bar and offered by Respondent in his Unconditional Guilty Plea and Consent Judgment for Discipline, is fully warranted.

ARGUMENT

I. IN RECOMMENDING DISCIPLINE THE REFEREE SHOULD NOT HAVE CONSIDERED AS A MITIGATING FACTOR RESPONDENT'S EXPLANATION

THAT HE WAS UNAWARE THAT HE HAD BEEN SUSPENDED BECAUSE HE DID NOT OPEN THE MAIL HE RECEIVED FROM THE SUPREME COURT AND THE FLORIDA BAR.

Rule 3-7.10(b) of the Rules of Discipline states:

> mailing of registered or certified papers or notices prescribed in these rules to the last mailing address of an attorney as shown by the official records in the office of the executive director of The Florida Bar shall be sufficient notice and service unless this Court shall direct otherwise.

Rule 3-7.10(c) of the Rules of Discipline states:

> [S]ervice of process is not required to obtain jurisdiction over respondents in disciplinary proceedings; but due process requires the giving of reasonable notice and such shall be effective by the service of the complaint upon the respondent by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the respondent according to the records of The Florida Bar or such later address as may be known to the person effecting the service.

In compliance with the aforementioned Rules, The Florida Bar mailed to Respondent, by certified mail at his official record Bar address, a copy of the Petition for Temporary Suspension. In addition after the suspension was ordered The Florida Bar mailed to Respondent, by certified mail at his official record Bar address, a letter reminding him of the requirements of the Rules of Discipline and the actions he should have undertaken to close his law office. Return receipts for these items were received by The Florida Bar.

Thereafter, in an effort to ensure Respondent's receipt, on an expedited basis, of a copy of the Petition for Order to Show Cause, The Florida Bar furnished Respondent, by hand delivery at his official record Bar address, a copy of the petition.

Based upon the foregoing, The Florida Bar fully complied with the requirements of the Rules of Discipline pertaining to furnishing Respondent with notice of these proceedings.

Moreover, in testifying before the referee, Respondent acknowledged that he had received the correspondence that was sent to him by the Bar and the Supreme Court (Tr. 10, 15, 47).

It is, therefore, undisputed not only that The Florida Bar complied with the requirements pertaining to furnishing Respondent with notice of these proceedings but also that Respondent had actually received the items which were sent.

Notwithstanding The Florida Bar's full compliance with the notice provisions of the Rules of Discipline and Respondent's acknowledgment of his receipt of the mailings, the referee would not approve the consent judgment offered by Respondent which provided for disbarment. The referee based his decision to reject the consent judgment on the explanation offered by Respondent that he lacked actual knowledge of his suspension because he didn't open his mail. The referee apparently concluded that Respondent's failure to comply with the suspension order was, therefore, not willful.

> **THE REFEREE:** Did he know that he was suspended?
>
> **[BAR COUNSEL]:** By our rules, we are just required to send correspondence to an attorney's official record Bar address. That is deemed to be adequate notice of service of any complaints or other notices or pleadings. He would have gotten a copy of the petition for temporary suspension. That was sent to his office certified, and we have a return receipt.
>
> **THE REFEREE:** Did you get that?
>
> **[RESPONDENT]:** I got all that, except for one thing. I never opened it.

[BAR COUNSEL]: I can't respond to whether or not he opened it, but I do know that it was sent to him certified. We do have a return receipt.

THE REFEREE: That could make a difference, couldn't it, if somebody willfully does something as opposed to negligently doing something? (Tr. 13)

* * *

[RESPONDENT]: I am not disagreeing with Ms. Etkin at all. The only thing I want to impress upon you -- you mentioned the word willful. It was just totally negligent, grossly negligent . . . . (Tr. 16)

As Respondent explained, if he got a letter from The Florida Bar, he "stashed it" because he "didn't want to read any bad news" (Tr.25).

[THE REFEREE]: But you agree at this point, now that you have seen the documentation, that the Bar did petition for your suspension and the Court did enter an order on your suspension, and that after the Court entered that order, you continued to practice law. You say that you weren't opening your mail and you didn't know that the Bar had filed the application for temporary suspension or the Court had ordered you, at least temporarily suspended?

[RESPONDENT]: Yes, sir.

THE REFEREE: Now that you have looked at the documents and all, you are satisfied that all that occurred?

[RESPONDENT]: All that was done, yes. I am not going to sit here and lie and say that I didn't receive this or that.

THE REFEREE: At this point, your position is that although all those things occurred, you weren't aware that they occurred, because of your state of mind and all of your problems? You weren't opening your mail and you didn't want to hear any bad news.

[RESPONDENT]: Everything was bad news.

THE REFEREE: Therefore, you kind of shut your eyes to things for a period of time and you went on practicing without actual awareness of the fact that you had been suspended, is that right?

[RESPONDENT]: That's totally correct . . . . (Tr 46, 47)

As reflected in the transcript of the hearing and the Recommended Order, the referee's rejection of disbarment as the sanction for contempt which was recommended by the Bar and accepted by Respondent is based upon consideration of Respondent's explanation that Respondent lacked actual knowledge of his suspension because he did not open mail from The Florida Bar and the Supreme Court. This Court, however, considered and rejected a similar argument from a respondent in contempt proceedings who attached as an exhibit to his response to the Court the unopened certified mail letters from staff counsel to demonstrate his lack of actual knowledge. See The Florida Bar v. Brigman, 322 So.2d 556 (Fla. 1975).

Moreover, the referee's position presumes that had Respondent actually known of his suspension, he would have initiated appropriate action to ensure compliance with the order. Respondent's actions, however, belie such presumption. According to Respondent he "actually found out" that he was suspended "three or four months ago" (Tr. 14) (i.e., prior to the October 19, 1987 hearing before the referee). Respondent, therefore, had knowledge of his suspension at or about the time that either the order to show cause was entered by the Court or his response to the order was due. Notwithstanding the fact that there were several months between the date Respondent admits he first learned of his suspension and the date he appeared before the referee in the instant proceedings, Respondent made no effort to respond to the order to show cause, on either a timely or belated basis, and he failed to furnish The Florida with the items required pursuant to the suspension order. (See argument of the Bar, Tr.43; consent judgment

wherein Respondent agrees to comply with the terms of the suspension order forthwith).

Respondent's comment that he stashed letters from The Florida Bar because he didn't want to read "bad news" suggests that Respondent knew or had a reasonable suspicion that the contents of such letters would be disturbing and that he, therefore, intentionally avoided confronting the situation by ignoring the correspondence.

It is the Bar's position that the principle of implied actual notice of the contents of mailing should apply in instances wherein the Bar's compliance with the notice by mail provisions of the Rules of Discipline is clearly established.

> The principle applied in cases of alleged implied actual notice is that a person has no right to shut his eyes or ears to avoid information, and then say that he has no notice; that it will not suffice the law to remain wilfully ignorant of a thing readily ascertainable . . . . when the means of knowledge is at hand. Sapp v. Warner, 105 Fla.245, 141 So. 124, 127 (1932).

II. DISBARMENT IS AN APPROPRIATE SANCTION FOR RESPONDENT'S CONTEMPT OF AN ORDER OF TEMPORARY SUSPENSION.

Contempt of a suspension order may involve actions which are technical in nature, such as the failure to timely file the required affidavits upon the closing of a law practice, or may involve other more serious conduct, such as practicing law in violation of the suspension order.

In the case sub judice, the actions of Respondent which the Bar alleges in its Petition as constituting contempt of the suspension order are undisputed, having been both deemed admitted by the Court as a result of Respondent's failure to respond to an Order to Show Cause, as well as admitted by

Respondent in his consent judgment. These actions specifically include continuing to hold himself out publicly as a lawyer and to actively engage in the practice of law as well as failing to properly close his law practice, including notifying clients and banks of the suspension order, failing to furnish The Florida Bar with information and records pertaining to the location of client funds and property as well as failing to furnish The Florida Bar with an inventory of his requests to clients concerning the disposition of their files and their responses.

The record in this case clearly establishes that Respondent failed to comply with the suspension order in every possible respect. In addition he ignored the directive of the Supreme Court to respond to an order to show cause. Such actions are significant in that they reflect Respondent's utter disregard for orders of this Court and protection of his clients' interests.

In the most recent case involving proceedings for contempt, this Court disbarred an attorney who had been actively engaged in the practice of law during his suspension. The Florida Bar v. Hartnett, 398 So.2d 1352 (Fla. 1981). In addition, in The Florida Bar v. Hirsch, 398 So.2d 1352 (Fla. 1978) an attorney was disbarred for conduct which included receiving fees from a client, drafting pleadings and conducting two or more client interviews while under a three-month suspension.[1]

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[1]In cases which were decided prior to Hartnett and which
(Footnote Continued)

In recommending discipline, this Court has considered the purposes of discipline set forth in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970):

> 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

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(Footnote Continued)
did not in general involve the practice of law, the Court has imposed a wide range of sanctions for a violation of a suspension order, including incarceration and an additional period of suspension. See The Florida Bar v. Brigman, 322 So.2d 556 (Fla. 1975) where a one-year suspension was imposed in addition to the original six-month suspension for conduct involving a failure to remove a sign and to discontinue the use of stationery which indentified the respondent as an attorney and a failure to notify his clients of his suspension; The Florida Bar v. Abagis, 327 So.2d 292 (Fla. 1976) where a one-year suspension was imposed in addition to the original four-month suspension for conduct involving the failure of the respondent to notify his clients of his suspension. The order provided that if respondent complied within one month, the suspension for contempt would be reduced to four months); In re: Ossinsky, 279 So.2d 292 (Fla. 1973) where a sixty-day suspension was imposed in addition to the original six-month suspension, ordered in The Florida Bar v. Ossinsky, 255 So.2d 526 (Fla. 1971), where an attorney failed to take any action to request a delay in the effective date of his suspension and appeared in court on behalf of a client two weeks after the suspension became effective; The Florida Bar v. Breed, 368 So.2d 356 (Fla 1979) where an attorney permitted his law office sign to remain on his door and used letterhead stationery which identified him as an attorney during his temporary suspension. The Supreme Court ordered adjudication withheld upon respondent's removal of the sign within fifteen (15) days and his refraining from use of the stationery. The Florida Bar v. Carlson, 164 So.2d 813 (Fla 1964) where a fine was imposed and if respondent defaulted in payment, a thirty (30) day term of incarceration was ordered for conduct involving practicing law during a three-month suspension; The Florida Bar v. Carlson, 172 So.2d 578 (Fla 1965) where thirty (30) day term of incarceration and restitution of fees paid by a client was ordered where an attorney accepted a retainer from a client during his suspension.

to deter others who might be prone or tempted to become involved in like violation.

As a basis for the entry of an order of temporary suspension, The Florida Bar must demonstrate to the Supreme Court that an attorney appears to be causing great public harm. Accordingly, a respondent who has been suspended pursuant to this provision has been identified as a serious danger to the public. There is nothing more serious to the public than an attorney who has been ordered to cease practicing law who ignores the Court's order and continues to hold himself out publicly as an attorney and to practice law.

To suspend an attorney who is already under an indefinite suspension based upon allegations of serious misconduct, and is most likely facing ultimate disbarment for his actions, is meaningless. A suspension under these circumstances does not have any deterrent effect and may actually encourage attorneys to ignore Court orders of suspension for as long as possible and to continue to practice law.

In order to be effective as both a sanction to punish an attorney for violating an order of suspension and as an effective deterrent, it should be a clearly established policy that attorneys who violate a suspension order face disbarment. Unless the Court deals swiftly and severely in enforcing its orders, confidence in its ability to regulate the profession will be eroded.

CONCLUSION

Where compliance by The Florida Bar of the notice by mail provisions of the Rules of Discipline is clearly established, a

respondent should be deemed to have implied actual knowledge of the contents of the mailings. In circumstances in which receipt of mail is undisputed, the referee should not consider as a mitigating factor in recommending discipline an assertion by the Respondent that he lacked knowledge of the contents of such mail.

Respondent's actions of continuing to hold himself out as an attorney and to practice law, as well as his failure to furnish The Florida Bar with the records and affidavits required pursuant to a suspension order constitute contempt. Under such circumstances disbarment is fully warranted as a sanction for contempt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the Brief of Complainant in Support of Petition for Review was mailed Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, FL 32301 and a true and correct copy was mailed to Jay Santiago, Respondent, at his last known address of 2315 SW 131 Place, Miami, Florida 33175, this 18th day of December, 1987.

Patricia S. Etkin

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