

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE

THE FLORIDA BAR,

Complainant,

v.

FREDERICK E. GRAVES,

Respondent.

CASE NO. 70,859

JAN 30 1989

The Florida Bar Case

Nos. 86-20,414, ~~86-20,466~~
and 86-20,526

CLERK, SUPREME COURT

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BRIEF OF THE FLORIDA BAR

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PREFACE

For purposes of this brief, The Florida Bar will be referred to as "The Florida Bar" and Frederick E. Graves will be referred to as "Respondent."

STATEMENT OF THE CASE AND FACTS

This is an attorney disciplinary proceeding.

A three count formal complaint was filed against the Respondent on July 15, 1987. On July 16, 1987, the Honorable Richard B. Burk was appointed Referee in this cause. On July 21, 1987, The Florida Bar submitted its request for admissions. On January 5, 1988, The Florida Bar filed a notice that the cause was ready for final hearing. On January 11, 1988, a final hearing was scheduled for March 14, 1988.

On January 25, 1988, Respondent submitted his answer, response to The Florida Bar's request for admissions and affirmative defenses. On March 14, 1988, the final hearing in this cause was held. On March 25, 1988, the Referee issued his Initial Report of Referee with findings of guilt. A hearing regarding the discipline to be imposed was held on May 10, 1988, pursuant to notice.

The Florida Bar submitted its statement of costs and memorandum of law on May 16, 1988. The Respondent also submitted a memorandum of law on May 16, 1988.

On May 17, 1988, the Referee issued his recommendation of disposition wherein he recommended that the Respondent be suspended for a period of six (6) months, be placed on probation for a period of three (3) years following reinstatement, and that Respondent take and pass the ethics portion of The Florida Bar examination prior to reinstatement.

At its July 1988 meeting, the Board of Governors of The Florida Bar voted to approve the Report of Referee.

On August 26, 1988, the Respondent filed a motion for extension of time to file his brief, which was granted and an extension was given to October 24, 1988. On October 17, 1988, this Court granted Respondent's

stipulation for substitution of counsel.

The Florida Bar filed on November 4, 1988, a motion to strike Respondent's petition for review and motion to expedite. On November 10, 1988, this Court entered an Order stating that Respondent shall file his brief on or before November 17, 1988, and that no extension would be entertained by the Court.

On November 17, 1988, Respondent filed a motion for a two day extension of time to serve his brief. On December 13, 1988, this Court denied The Florida Bar's motion to strike Respondent's petition for review and granted The Florida Bar's motion to expedite.

To date, Respondent has not filed a brief in this case. On January 13, 1989, this Court issued an Order directing The Florida Bar to file a brief in this cause. Accordingly, this brief is being submitted.

The Referee in his Initial Report of Referee, dated March 25, 1988, found as follows:

1. Respondent is, and at all times hereinafter mentioned, was a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

AS TO COUNT I

2. In or about October, 1984, one Joseph Stroncione hired the Respondent to represent him regarding a criminal aggravated assault charge.

3. By October 31, 1984, Mr. Stroncione paid the Respondent fifteen hundred dollars (\$1,500).

4. Respondent failed to appear in court on or about November 1, 1984 for Mr. Stroncione's scheduled arraignment.

5. Mr. Stroncione's court case was rescheduled for hearing. A few days before Mr. Stroncione's case was set for a court appearance, Respondent advised Mr. Stroncione's wife and/or father-in-law that he would not be representing Mr. Stroncione any further.

6. Respondent subsequently advised Mr. Stroncione and/or Mrs. Stroncione that Respondent only said he was withdrawing from the case to teach Mr. Stroncione a lesson for being late for an appointment.

7. I find by clear and convincing evidence that Respondent's announced withdrawal failed to give sufficient notice to Mr. Stroncione and violated

Disciplinary Rule 2-110(A)(2) of the Code of Professional Responsibility concerning withdrawal of representation even though Respondent subsequently attempted to reinstate the representation.

8. I do not believe that it has been proved clearly and convincingly that there was a fee pay back owed to Mr. Stroncone with regard to these matters.

AS TO COUNT II

9. Respondent was hired to represent Dennis Caruso in the cause styled Frank W. Fisher, Inc., a Florida Corporation, Plaintiff, vs. Dennis Caruso, Defendant, in the County Court In and For Broward County, Florida, Case No. 84-13399 CC "F".

10. Respondent failed to file an answer on Mr. Caruso's behalf and a default was entered against Mr. Caruso regarding liability.

11. Respondent advised Mr. Caruso not to appear at a scheduled January 22, 1985 hearing and advised that he would handle same. However, Respondent failed to appear at said hearing.

12. Respondent failed to properly represent Mr. Caruso regarding the matters Respondent was hired to handle for Mr. Caruso.

13. Respondent scheduled a deposition of the plaintiff in his office and failed to appear for this deposition.

14. A hearing was held as to damages on May 31, 1985 and Respondent arrived late for the hearing.

15. Respondent only gave Mr. Caruso two (2) hours notice of the May 31, 1985 hearing.

16. Respondent failed to have a court reporter present at the May 31, 1985 hearing, although Mr. Caruso had requested the Respondent to have a court reporter present.

17. Respondent filed a notice of appeal on Mr. Caruso's behalf and then failed to properly pursue Mr. Caruso's appeal as the appeal was dismissed based upon Respondent's failure to submit a timely brief. Once Respondent undertook the appeal, he was responsible to handle said appeal in a manner other than to neglect the appeal.

18. I find that it has been shown by clear and convincing evidence that Respondent handled Mr. Caruso's legal matter without preparation adequate in the circumstances.

19. I find that it has been shown by clear and convincing evidence that Respondent neglected Mr. Caruso's legal matters.

20. Respondent failed to file and obtain leave of court to withdraw from representing Mr. Caruso in his appeal.

AS TO COUNT III

21. Respondent represented Rosemary Reynolds regarding a judicial sale on her property that was based upon the foreclosure of a note and mortgage.

22. Respondent filed frivolous pleadings and improperly delayed the judicial sale of the property.

23. I find that it has been proved by clear and convincing evidence that Respondent engaged in conduct prejudicial to the administration of justice by filing frivolous and inappropriate representations concerning the objections Respondent raised to the sale certificate being issued.

24. I find that it has been proved by clear and convincing evidence that the Respondent failed to obtain leave of court before withdrawing from his representation of Mrs. Reynolds.

25. I find that it has been found by clear and convincing evidence that the Respondent violated Disciplinary Rule 2-110(A)(2) of the Code of Professional Responsibility in that he withdrew from representing Ms. Reynolds without taking reasonable steps to avoid foreseeable prejudice to her, including failing to give due notice to Mrs. Reynolds.

26. I find that it has not been shown by clear and convincing evidence that Respondent failed to deliver the file to Mrs. Reynolds as Mrs. Reynolds had copies of the pleadings in the file.

(See Report of Referee, Pages 1-4).

In his Report, the Referee found the Respondent guilty of Disciplinary Rules 1-102(A)(6), 2-110(A)(2) and 6-101(A)(3), of the Code of Professional Responsibility as to Count I, Disciplinary Rules 6-101(A)(2) and 6-101(A)(3) of the Code of Professional Responsibility as to Count II, and Disciplinary Rules 1-102(A)(5), 2-110(A)(1) and 2-110(A)(2) of the Code of Professional Responsibility as to Count III.

SUMMARY OF ARGUMENT

I. THE DISCIPLINE TO BE IMPOSED IN THIS CAUSE SHOULD BE SUSPENSION FOR AT LEAST A PERIOD OF SIX (6) MONTHS, PROBATION FOR THREE (3) YEARS FOLLOWING REINSTATEMENT, AND THE TAKING AND PASSING OF THE ETHICS PORTION OF THE FLORIDA BAR EXAMINATION PRIOR TO REINSTATEMENT.

The Respondent was engaged in cumulative misconduct involving neglect, improper withdrawal of representation of clients and conduct prejudicial to the administration of justice. Prior misconduct is dealt with more severely than isolated misconduct. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

Similar misconduct has resulted in suspensions for six (6) months. See The Florida bar v. Hunt, 417 So.2d 967 (Fla. 1982) and The Florida Bar v. Schilling, 486 So.2d 551 (Fla. 1986).

ARGUMENT

I. THE DISCIPLINE TO BE IMPOSED IN THIS CAUSE SHOULD BE SUSPENSION FOR AT LEAST A PERIOD OF SIX (6) MONTHS, PROBATION FOR THREE (3) YEARS FOLLOWING REINSTATEMENT, AND THE TAKING AND PASSING OF THE ETHICS PORTION OF THE FLORIDA BAR EXAMINATION PRIOR TO REINSTATEMENT.

The Referee has found the Respondent guilty of improper withdrawal, neglect and any other conduct that adversely reflects on his fitness to practice law in Count I of The Florida Bar's Complaint concerning his representation of Joseph Stronccone.

As to Count II, regarding Respondent's representation of Dennis Caruso, the Referee found the Respondent guilty of handling a legal matter without preparation adequate in the circumstances and neglect of a legal matter.

In Count III, concerning Respondent's representation of Rosemary Reynolds, this Referee found the Respondent guilty of engaging in conduct that is prejudicial to the administration of justice, withdrawing from employment without permission of the tribunal and improper withdrawal.

Case law supports the discipline that the Referee has recommended in this cause. In The Florida Bar v. Schilling, 486 So.2d 551 (Fla. 1986), the Respondent received a public reprimand and a six (6) months suspension for neglect of two (2) matters. Respondent Schilling had past misconduct as is present in the instant case.

In The Florida Bar v. Hunt, 417 So.2d 967 (Fla. 1982), the Respondent received suspension for a period of six (6) months for neglect of a legal matter.

Additionally, in The Florida Bar v. Lee, 403 So.2d 1336 (Fla.

1981), the Respondent received suspension for three (3) months and one (1) day and restitution for improper withdrawal of representation and neglect of a legal matter. The facts of this case are similar to Respondent's misconduct in The Florida Bar's Complaint. However, the instant case has three (3) cumulative findings and are much more severe than the facts in the Lee case.

The Supreme Court of Florida stated in The Florida Bar v. Welty, 382 So.2d 1220, 1223 (Fla. 1980), that "public reprimand should be reserved for such instances as isolated instances of neglect or technical violations of trust account rules without willful intent, or lapses of judgment" (citations omitted). The instant case certainly does not involve an isolated instance of neglect.

In The Florida Bar v. Ossinsky, 255 So.2d 526 (Fla. 1971), the Respondent was suspended for a period of six (6) months for neglect of a legal matter.

In The Florida Bar v. Reed, 299 So.2d 583 (Fla. 1974), the Respondent was suspended for a period of one (1) year and thereafter until he proved his rehabilitation for neglect of legal matters.

In The Florida Bar v. Valentiejus, 355 So.2d 425 (Fla. 1978), the Respondent was suspended for twelve (12) months and thereafter until proof of rehabilitation for violations of Disciplinary Rules 1-102(A) (5) [engaging in conduct prejudicial to the administration of justice], 1-102(A) (6) [engaging in any other conduct that adversely reflected on his fitness to practice law] and 6-101(A) (3) [neglect of a legal matter entrusted to him].

In The Florida Bar v. Hollingsworth, 376 So.2d 394 (Fla. 1979), the Respondent was suspended for a period of six (6) months for neglect of a legal matter wherein the Respondent failed to appear in court on behalf

of his criminal client for hearings on sentencing.

Further, this Court has disbarred attorneys from the practice of law for cumulative acts of neglect. See The Florida Bar v. Mitchell, 385 So.2d 96 (Fla. 1980) and The Florida Bar v. Gunther, 400 So.2d 968 (Fla. 1981).

The Supreme Court has held that cases involving prior misconduct and cumulative misconduct are dealt with more severely than isolated misconduct. See The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) and The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981).

The three counts in this complaint are cumulative to each other as well as each count containing more than one act of misconduct. Additionally, Respondent has engaged in cumulative misconduct as he has received prior discipline. Copies of said discipline were introduced as Composite Exhibit 1 at the May 10, 1988 hearing held in this cause regarding the discipline to be imposed (see pages 4-7 of the transcript of the May 10, 1988 hearing held in this cause). Respondent's prior discipline is attached hereto as Composite Appendix I.

Respondent received a private reprimand in The Florida Bar Case No. 11K83M22 regarding technical trust account violations in 1984. Additionally, Respondent received a private reprimand in The Florida Bar Case No. 11K85M70 regarding failure to preserve the identity of funds and property of a client in 1986.

Further, Respondent received a suspension for a period of ten (10) days in The Florida Bar v. Graves, 508 So.2d 344 (Fla. 1987) regarding four (4) different complaints that totalled five (5) counts. Therefore, Respondent has been disciplined previously regarding six (6) separate complaints and charges. The instant three count complaint brings the

total counts of misconduct against the Respondent as consisting of nine counts.

The Board of Governors of The Florida Bar approved in November 1986 Florida's Standards for Imposing Lawyer Sanctions. The applicable standards in this cause are as follows:

Standards 4.42(a) and (b) provide: (a) suspension is appropriate when: a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

The Florida Bar submits that both standards 4.42(a) and (b) are applicable in this cause. This Referee's findings state facts that could only have been knowingly committed (some examples are arriving late for hearings and failing to timely file a brief after receiving an extension to do so).

Standard 7.2 provides:

Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Standard 7.2 is applicable concerning Respondent's improper withdrawals of representation and conduct contrary to the administration of justice.

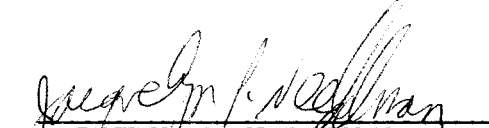
Standard 9.22 contains factors which may be considered in aggravation. The Florida Bar submits that the following aggravating factors are present in this case: (a) Prior disciplinary offenses, (c) a pattern of misconduct, (d) multiple offenses, (g) refusal to acknowledge wrongful nature of conduct and (i) substantial experience in the practice of law. In his testimony before the Referee, the Respondent was making excuses for his misconduct. (See pages 73-87 of transcript of May 10, 1988 hearing).

For all of the above stated reasons, The Florida Bar submits that the discipline in this cause should be suspension for at least a period of six (6) months, requiring proof of rehabilitation pursuant to Rules 3-5.1(e) and 3-7.9 of the Rules of Discipline and probation for a period of three (3) years pursuant to Rule 3-5.1(c) of the Rules of Discipline. Said probation should begin after the Respondent has been reinstated to the practice of law, with quarterly status reports to be submitted by the Respondent.

CONCLUSION

The Florida Bar respectfully requests this Honorable Court to uphold the Referee findings of fact, approve his recommendations of violations and suspend the Respondent from the practice of law for a period of at least six (6) months, impose probation for a period of three (3) years following reinstatement and require the taking and passing of the ethics portion of The Florida Bar examination prior to reinstatement, and tax the costs of these proceedings in the amount of \$2,898.01 against the Respondent.

Respectfully submitted,

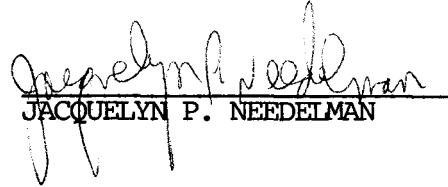

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been forwarded to Frederick E. Graves, Respondent, at his home address 3091 N. E. 42nd Street, Fort Lauderdale, FL 33308, and a copy to Frederick E. Graves, Respondent, at 110 Tower, 110 S. E. 6th Street, Fort Lauderdale, FL 33301, via regular United States mail, this 27th day of January, 1989.


JACQUELYN P. NEEDELMAN