IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STANLEY L. RISKIN,

Respondent.
_____/

Case No. 71,846

INITIAL BRIEF OF THE FLORIDA BAR

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PREFACE

In this brief, the Complainant, The Florida Bar, will be referred to as The Florida Bar. Stanley L. Riskin, Respondent, will be referred to as "the Respondent". The following abbreviations will be utilized:

T - Transcript of final hearing held on June 6, 1988, to be followed by appropriate page number.

STATEMENT OF CASE AND FACTS

The Florida Bar filed its two-count Complaint on January 29, 1988 against the Respondent. The Florida Bar filed a Request for Admissions on February 10, 1988. The Honorable Richard Yale Feder was appointed Referee on February 11, 1988. On February 26, 1988 Respondent, Stanley Riskin filed his Response to the Florida Bar's Request for Admissions. Judge Feder granted The Florida Bar's Motion for Special Setting. The final hearing in this cause was held on June 6, 1988. The Report of Referee was filed on July 15, 1988. The Florida Bar filed a Motion for Rehearing/Clarification on July 18, 1988. Respondent filed a Motion to Amend Report of Referee, paragraph VI as to scrivener's error on July 25, 1988. On July 29, 1988, the Referee entered an order regarding costs and the recommended discipline concerning the post-hearing motions filed.

The Referee found the Respondent guilty of certain violations as to count I and not guilty as to count 11. The Referee's findings of fact concerning count I are as follows:

> 2. In or about late 1981 or February, 1982, Respondent was retained by one Evelyn Fox to represent her regarding a legal matter between Ms. Fox and Eastern Airlines concerning medical treatment received by Ms. Fox as an employee of Eastern Airlines by a person Ms. Fox believed to be a physician when such person was not a physician.
>
> 3. Respondent failed to file a cause of action on Ms. FOX'S behalf until May 16, 1985, after any applicable period of statute of limitations had expired.
>
> 4. Respondent failed to recognize that worker's compensation was an issue concerning Ms. Fox and his file failed to reflect any work on his part concerning a worker's ccsnpensation issue.
>
> 5. Respondent failed to keep his client, Ms. Fox, properly advised of the status of the case and of problems that developed concerning her cause of action.

6. Respondent's file failed to reflect any indication hat there was even an inquiry into the crucial issue of the date that this client learned of the non-licensing of the person who treated her. This date would be essential to a determination by counsel concerning the time period for the running of the statute of limitations.

7. Respondent's file contained insufficient information to apprise the Respondent of the appropriate date for the running of the statute of limitations regarding Ms. Fox's action.

8. A Motion for Summary Judgment was filed by the opposing party, Eastern Airlines, regarding Ms. Fox's lawsuit.

9. Respondent failed to file any documents of record to oppose the opposing party's Motion for Summary Judgment such as the client's sworn answer to interrogatory. If Respondent believed the sworn answer, he should have filed it. If he did not believe it, it is inappropriate to now claim that the court should have denied the summary based on an answer which counsel knew was false (see paragraph 13).

10. The court granted Eastern Airlines' Motion for Summary Judgment against Ms. Fox on the grounds that the statute of limitations had expired prior to the filing of the lawsuit and that this action was barred by the workman's compensation law of Florida.

11. This Referee finds that the Respondent neglected Ms. Fox's legal matter from August 31, 1981 until the time he filed the lawsuit in 1985.

12. This Referee finds that the Respondent handled Ms. Fox's legal matter without preparation adequate in the circumstances.

13. This Referee finds that the Respondent was inconsistent in his testimony before this Referee wherein he testified that he did not wish to submit an affidavit that contained a misleading date or misstated fact, but that he advised the court of a sworn answer to an interrogatory that he believed to be false at the time he would have presented same.

(Report of Referee, pages 1-3.)

The Referee found the Respondent guilty of count I and specifically that he be found guilty of the following violations: Disciplinary Rules 6-101(A)(2) [A lawyer shall not handle a mtter without preparation adequate in the circumstances], 6-101(A)(3) [A lawyer shall not neglect a legal matter entrusted to him] of the Code of Professional Responsibility.

The Referee recommended that Respondent receive a private reprimand in this cause.

The Referee's taxation of costs did not include the costs incurred by The Florida Bar in obtaining a copy of the deposition of Leland Stansell, Esquire, The Florida Bar's expert witness in this cause. Said costs were requested in The Florida Bar's Amended Statement of Costs dated July 12, 1988.

SUMMARY OF ARGUMENT

THE REFEREE'S RECOMMENDATION OF A PRIVATE REPRIMAND WAS ERRONEOUS.

The imposition of a private reprimand rather than a public reprimand was clearly erroneous. Attorney discipline is procedural. The Rules of Statutory Construction provide that procedural or remedial changes in the law must be immediately applied to pending cases. The formal complaint in this cause was filed pursuant to the Rules Regulating The Florida Bar that went into effect January 1, 1987.

Under these rules only minor misconduct cases may receive a private reprimand. This case was not found to involve minor misconduct by the grievance committee (see Appendix A). Additionally, Respondent has previously received a private reprimand. The misconduct involved does not involve an isolated instance of neglect and concerns cumulative instances of neglect by Respondent in his representation of Evelyn Fox and this misconduct necessitates a public reprimand.

ARGUMENT

I. THE REFEREE'S IMPOSITION OF A PRIVATE REPRIMAND WAS ERRONEOUS.

The Referee was in error when he used the Integration Rule of The Florida Bar to impose discipline. In paragraph 2 of the Referee's Order dated July 29, 1988 on The Florida Bar's Motion for Rehearing/Clarification, the Referee stated:

> "The Florida Bar's Request that the Report of Referee be amended as to the recommended discipline is denied. This Referee regards that rules contained in the Integration Rule of The Florida Bar pertained to and must be applied to violations occurring prior to January 1, 1987. This referee regards the imposition of discipline as a substantive right and not a matter of procedure and therefore, he recommended a private reprimand under The Florida Bar Integration Rule which was in effect as of the date of the occurrences of the misconduct found in this matter.

On the issue of discipline as punishment as opposed to procedure, The Florida Bar v. Massfeller, 170 So.2d 834 (Fla. 1964) is controlling. This court recognized the inherent power of a court to discipline an attorney, and rejected the idea that an inquiry into attorney's fitness to practice law is penal. Id.

Massfeller was cited and followed in DeBock v. State, 512 So.2d 164 (Fla. 1987). The court stated in DeBock:

> We affirm here our holding in Massfeller that bar disciplinary proceedings are remedial and are designed for the protection of the public and the integrity of the courts. Id.

Clearly, the Supreme Court has held that attorney discipline is not penal.

The explanatory note which accompanies Rule 3-5.1(f) of the Rules Regulating The Florida Bar provides:

> All disciplinary cases pending as of 12:01 a.m. January 1, 1987, shall thereafter be processed in accordance with the procedures set forth in the Rules Regulating The Florida Bar. Id.

The court held in Heilman v. State, 310 So.2d 376 (2nd DCA 1975):

> While statutory change in law are normally presumed to apply prospectively, procedural or remedial changes may be immediately applied to pending cases. Id.

Since the Respondent's case was not filed until January 29, 1988, the Rules Regulating The Florida Bar are the appropriate procedural rules in this cause.

The rule which should have been used in this matter is Disciplinary Rule 3-7.5 (k) (1)(3), which provides:

> Recommendations as to the disciplinary measures to be applied provide that a private reprimand may be recommended only in cases based on a complaint of minor misconduct. Id.

The grievance committee considered minor misconduct and found as follows:

> "The committee has considered and rejected minor misconduct in this case." (See appendix A, page 151, transcript of grievance committee, attached hereto.)

In The Florida Bar v. Greenberg, 13 F.L.W. 625 (Oct. 20, 1988), this court held that Rule 3-5.1(f) of the Rules of Discipline was applicable to the case since the Greenberg case was pending subsequent to January 1, 1987. Similarly, the instant case was also pending subsequent to January 1, 1987 and the Rules of Discipline are also applicable, particularly Rule 3-7.5 (k)(1)(3). In the Greenberg case, the new rule changed the minimum period of disbarment to be five years instead of three years. Said rule change enlarged the minimum period of disbarment.

Certainly, the procedural change of only having a grievance committee consider a Respondent receiving a private reprimand for minor misconduct in Rule 3-7.5(k) **(1)(3)** of the Rules of Discipline is in accord with this Court's ruling in Greenberg supra. Accordingly, under Rule 3-7.5(k) (1)(3), a private reprimand could not be considered in this cause.

Furthermore, this is not the first charge of neglect against the Respondent. On October **30,** 1974 Respondent received a private reprimand for neglect of a legal matter, The Florida Bar Case No. 11374-12. (Referee's Report, page 4.)

The Court stated in The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982):

> In reviewing discipline, this Court considers the Respondent's previous disciplinary history and increases the discipline where appropriate.... The Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct. (citations omitted). Id.

Among the cases relied on in deciding Bern is The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981), which states in part:

> In considering the appropriate discipline for an ethical violation, this court considers past derelictions of responsibility and when appropriate, increases the penalty. Id.

The present charge of neglect of a legal matter, when considered with the prior reprimand for the same problem, constitutes cumulative misconduct.

Rule 3-5.1(b) of the Rules of Discipline explicitly provides that "Minor Misconduct is the only type of misconduct for which a private reprimand is an appropriate disciplinary sanction." Id. Additionally,

Rule 3-5.1(b)(1)(b) provides in pertinent part, "In the absence of unusual circumstances misconduct shall not be regarded as minor if (b) the misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights or valuable property rights) to a client or other person. In this case, Ms. Fox lost her cause of action due to Respondent's neglect.

Rule 3-7.5(k)(1)(3) further provides that a Referee may only recommend such discipline in cases based on a canplaint of minor misconduct.

In the case at bar, there was no finding of minor misconduct by the grievance committee. The grievance committee, instead, entered a finding of "probable cause". Bar counsel then filed a formal complaint for other than minor misconduct. Rule 3-7.1(a)(2) provides that at the time of filing the canplaint, the matter will no longer be confidential.

The portion of the recommended discipline which recommends a private reprimand was not within the authority of the Referee to recommend pursuant to the language in Rule 3-7.5(k)(1)(3) which states in part "... provided that a private reprimand may be recommended only to cases based on a canplaint of minor misconduct". A private reprimand is not an appropriate disciplinary sanction in this case under the rules.

Additionally, case law supports a public reprimand under the facts of this case.

In The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979) the Respondent received a public reprimand and probation for one (1) year for neglecting legal matters entrusted to him.

In The Florida Bar v. Leopold, 320 So.2d 819 (Fla. 1975), the

Supreme Court held that failure to diligently prosecute a client's workmen's compensation claim within the prescribed statutory period, and attempt to limit liability to the same client warrants a public reprimand. Said facts are similar to the instant case.

In the case, The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), the Court stated, "[p]ublic 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) Id. at 1223.

The instant case specifically applies to the case at bar. The instant case is more than neglect, it also involves the failure of the Respondent to handle a legal matter with adequate preparation.

Respondent in his representation of Evelyn Fox, committed cumulative misconduct:

1. Respondent failed to file a cause of action within any applicable period of statute of limitations.

2. Respondent failed to recognize that worker's compensation was an issue.

3. Respondent failed to keep his client advised of the status of the case.

4. Respondent failed to properly oppose the opposing party's motion for summary judgment.

5. Respondent neglected Ms. Fox's case for a period of approximately four (4) years.

6. Respondent was inconsistent in his testimony before the referee.

(See paragraphs 3, 4, 5, 8, 9, 10, 11, 13 of findings of fact of Report

of Referee.)

Said cumulative misconduct is clearly not an isolated instance of misconduct.

Furthermore, the Board of Governors of The Florida Bar approved, in November of 1986, Florida's *Standards* for Imposing Lawyer Sanctions. The Florida Bar submits that the applicable standards in this case are as follows:

> Standard 4.43 provides:
>
> 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.

This standard is certainly applicable regarding the respondent's representation of Ms. Fox.

Standards 4.53(a) and (b) are applicable and provide as follows:

> Standard 4.53 public reprimand is appropriate when a lawyer:
>
> (a) Demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
>
> (b) is negligent in determining whether he or she is canpetent to handle a legal matter and causes injury or potential injury to a client.

The Florida Bar submits that both Standards 4.53(a) and (b) are applicable in this case. 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 offense, and (i) substantial experience in the practice of law.

For all of the above stated reasons, The Florida Bar respectfully suhnits that the discipline in this cause should be a public reprimand by publication in the Southern Reporter and by Respondent's personal appearance before the Board of Governors of The Florida Bar.

11. THE COST OF THE COPY OF LELAND STANSELL'S DEPOSITION SHOULD HAVE BEEN TAXED AGAINST THE RESPONDENT.

The transcript of the deposition of Leland Stansell, Jr. was 78 pages long and The Florida Bar received a bill for $166.20. (See Appendix B.) The Florida Bar requested in its Amended Statement of Costs that costs of $113.70 be taxed against the Respondent regarding this deposition. The cost reflects only the cost of the pages concerning count I of the complaint.

In support of this issue, The Florida Bar submits the following:

> In The Florida Bar v. White, 284 So.2d 690 (Fla. 1973). this court held:
>
> It is also our judgment that costs incurred by counsel for The Florida Bar in these proceedings in the amount of $181.35, shall be paid by Collis H. White. Id.

The court refers to the "proceedings". It makes no distinction between the actual trial opposed to the preparation for the trial.

In The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986), the Court held that Respondent be taxed for the cost of the grievance committee hearing transcript. This item is not ordinarily admitted into evidence at trial. The Court stated:

> .... we adhere to the general rule that an attorney found guilty of charges brought by the bar will have the cost assessed against him. (Citation omitted) Id.

The Florida Bar therefore, respectfully requests that the cost in the amount of $113.70, for the copy of the pages of the transcript concerning count I, of the Leland Stansell, Jr. deposition be taxed against the respondent.

CONCLUSION

WHEREFORE, for the above stated reasons, The Florida Bar respectfully requests that this Honorable Court uphold the Referee's findings of fact, impose a public reprimand and tax costs against the Respondent for partial costs of The Florida Bar's costs in obtaining a copy of its expert witness' deposition in addition to the costs already taxed in the amount of **$2,006.46.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of The Florida Bar was furnished to David Kahn, Attorney for Respondent, **633** South Andrews Avenue, Suite **203**, Ft. Lauderdale, FL **33301** by Certified Mail #P **971 657 390**, return receipt requested, and a copy to John T. Berry, Staff Counsel, The Florida Bar, **650** Apalachee Parkway, Tallahassee, FL **32399-2300** on this 14th day of November, **1988.**

JACQUELYN P. NEEDELMAN