IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GEORGE W. WILDER,

Respondent.
_____/

CONFIDENTIAL

Supreme Court Case No. 71,847

The Florida Bar File Nos.
87-26,502 (15E) and
87-26,503 (15E).

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ANSWER BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND FACTS

The bar presents this statement in that appellant has failed to recite the nature of the proceedings below.

In its first count, the bar charged that appellant failed to act with reasonable diligence and promptness in representing clients who sought to recover wages allegedly owing to them.

Leonardo Bustamante and his wife, Eugenia Ponce, were domestic servants who rendered services to a Boca Raton, FL couple who refused to pay for such services (15, 16). They selected respondent, by chance, from the telephone directory, and retained him to collect the approximate $2,500.00 of wages owing to them, paying respondent a $375.00 retainer (17, 18, 20, 21).

After several months, hearing nothing from appellant, the clients made numerous calls to appellant who assured them that he had filed an appropriate action, that the sheriff was dragging his feet in effecting service of process, that appellant was considering hiring a private process server and that appellant would attempt to ascertain why the papers were not being served (22, 23).

Frustrated by what they perceived as a lack of action and concerned that appellant was not being forthright in his representations, the clients went to the courthouse to confirm the filing of their action but found no such filing (24, 25). They telephoned appellant from the courthouse and then went to his home/office,* where, in the client's

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* At the time of the representation appellant operated from his kitchen where he conducted all office consultations (20, 21).

presence, appellant picked up the telephone, purportedly called a clerk at the courthouse and then wrote a notation of a file number allegedly assigned to the clients' case (26, 27; bar's exhibit 1 in evidence). The clients then revisited the courthouse where there was no evidence of any filing under the number supplied by appellant (28-30). They telephoned appellant requesting a refund of the $375.00 previously paid to him. Appellant refused to refund the fee suggesting that the clients would, instead, be billed for additional work allegedly performed (31). The clients were never furnished with any documents, correspondence, pleadings or writings by appellant (31, 32).

Appellant offered no evidence to demonstrate that he had performed any service of any type, nature or description on behalf of his clients.

In its second count, the bar charged that appellant had engaged in dishonesty, fraud, deceit or misrepresentation in representing to his clients that an action had been duly filed with arrangements for process service made, when, in fact, no such filing or arrangements had taken place.

In addition to the clients' testimony regarding the charade that had taken place at appellant's office vis a vis the telephone conversation and file number produced thereby, appellant testified that he had taken papers to the court clerk's office, secured two (2) envelopes from a clerk, marked one such envelope "Clerk" and deposited cash and the summons and complaint in such envelope and deposited cash and papers in the second envelope and then, without seeking a receipt, left both envelopes at the clerk's office (42, 43). Appellant further

testified that after the alleged filing, despite having received no receipt from the clerk or word from the sheriff's office, he made no inquiry for at least six (6) weeks to two (2) months until after his clients had called requesting a status report (43, 44).

Appellant insisted that upon finally calling the clerk's office in the presence of his clients, he was given the file number appearing on the bar's exhibit 1 in evidence, in a thirty (30) second conversation (46). When his clients confirmed that the file number was phoney, appellant made no attempt to report his claims of missing envelopes and cash to any personnel at the clerk's office and made no attempt to contact the sheriff's office (51, 53).

Based upon such evidence, the referee concluded that appellant's tale regarding the alleged filing and process service arrangement was contrived (Referee's Report, page 3). Appellant, himself, regarded his story as unworthy of belief. He volunteered as follows:

> As far as Mr. Bustamante, I wouldn't believe the story, but it happened and that's all I can say.
>
> THE COURT: He said what -- you wouldn't what?
>
> MR. WILDER: I said I wouldn't believe the story I told earlier (107).

In its final count, the bar complained that in his representation of one Randall Christopher, in an action to recover damages for property damage and personal injuries allegedly incurred by the client in an auto accident, appellant neglected his client's case with the neglect resulting in the dismissal of the case, with prejudice.

The evidence disclosed that the client was involved in an auto accident in April, 1982 and sustained property damage to his auto and

personal injuries (58). The owner of the other vehicle (Hertz) attempted to settle the claim by sending a check in the sum of $940.00 to Mr. Christopher for property damage (59). Mr. Christopher sought advice with regard to the offer and retained appellant (59). He turned over the $940.00 check to appellant, who returned the check to Hertz with a letter in which demand was made for $8,000.00 (84, 85; bar's exhibit 4 in evidence).

Over the next several years, Mr. Christopher would periodically call and stop at appellant's office for status reports (60, 61) and be assured that letters would be sent to Hertz (61, 62). In January, 1983, Mr. Christopher paid appellant $85.00 (62; bar's exhibit 2 in evidence). Mr. Christopher received nothing as a result of his claim (64).

In April or May, 1986, an application was made to dismiss the action for failure to prosecute (86) resulting in an order of dismissal, with prejudice (89). Mr. Christopher denies that he received either notice of the application nor word that the action was dismissed (64). Appellant claims that despite not communicating with his client, in writing, he nonetheless informed Mr. Christopher of the application and dismissal by telephone (86-89).

Appellant conceded, however, that after the dismissal, appellant's wife/secretary received a telephone call from Mr. Christopher inquiring about the status of his case and was told that "we are waiting for the medical (90)"; that notwithstanding that the case had already been dismissed and the dismissal conveyed to Mr. Christopher, appellant made no effort to communicate with Mr. Christopher to resolve this seeming anomaly. Appellant testified:

Q. Did you ask whoever was working in your office in November or December, 1986, whether or not Randall Christopher called and was told that your office was still waiting for medical records?

A. I think he talked to my wife in -- during that time period.

Q. Do you know?

A. I would assume so.

Q. Did you talk to your wife about this?

A. I think so. I think she told me, she said, hey, Randy Christopher called and I told him we are waiting for the medical.

Q. At that point in time, the case had been dismissed with prejudice?

A. That's correct.

Q. Did you call Mr. Christopher and say, Randy, I have already told you the case was dismissed with prejudice and when you called my office my wife told you we were still waiting for medicals, that's ridiculous, your case is over?

A. No, I didn't call him. (90)

Appellant filed no papers in opposition to the application to dismiss and made no attempt to recover the $940.00 previously offered for his client's property damage (87, 88). As a result, not only was the action dismissed, with prejudice, but the $940.00 previously volunteered by Hertz, was forever lost.

The referee has recommended that appellant be found guilty of violating all rule violations charged by the bar consisting of neglect in both cases and dishonesty, fraud, deceit or misrepresentation in the Bustamante claim. In recommending a 180 day suspension plus restitution of the fees paid by Bustamante and the property damage settlement lost by Christopher, the referee specifically found that appellant's

violations were aggravated by his false statements regarding the alleged filing and process service arrangements in the Bustamante case and appellant's refusal to recant from such a transparent and incredible position.

Appellant filed a petition for review seeking a reduction in the referee's recommended sanctions. The bar has not sought review.

SUMMARY OF ARGUMENT

The referee's findings of fact are supported by overwhelming evidence of neglect and disregard of clients' cases. In proposing a sanction of a 180 day suspension plus specified restitution the referee is most charitable.

Appellant's neglect resulting in the dismissal of a client's case, with prejudice, and the loss of settlement proceeds to the same client plus the retention of an unearned fee with respect to another client, mandate the imposition of a suspension. By fabricating a false story in a clumsy attempt to avoid his responsibility and then refusing to acknowledge the wrongful nature of his misconduct, appellant has demonstrated a need to be suspended for a sufficient period as to afford to the bar and to the public the assurance that an appropriate review will be conducted of appellant's qualifications and rehabilitation prior to any reinstatement of privileges.

POINT I

APPELLANT'S NEGLECT AND FRAUD HAVE BEEN ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE.

In his brief, appellant attempts to skirt the neglect violations by suggesting that the "real question remains whether the respondent did, indeed, actually file the complaint" (appellant's brief, unnumbered page 7). In order to address that question, it first must be ascertained whether there ever was a complaint drafted and whether appellant ever performed any services, at all. There is no dispute that the clerk's files contained no filings. Mr. Bustamante testified that he never received any correspondence from appellant, never received copies of any pleadings and never saw a trace of a file present at the kitchen table consultations (31, 32).

Appellant made no attempt to demonstrate any work product and did not offer a scintilla of evidence that any such work product existed during the course of his representation. Notwithstanding the foregoing and the fact that a referee's findings will be upheld unless clearly erroneous (The Florida Bar v. Hooper, 507 So.2d 1078 (Fla. 1987)), even if appellant's "real question" is addressed, it is difficult to comprehend how or why appellant could possibly find fault with the referee's conclusion that appellant contrived a tale when appellant, himself, volunteered that, even he, "wouldn't believe the story I told earlier" (107). Somehow, appellant wishes this court to substitute its independent findings of fact regarding the incredible story of lost

papers and cash in place of that of the referee who had the opportunity to observe the witnesses and assess their credibility, notwithstanding that appellant, himself, "wouldn't believe the story".

Even more astounding is appellant's assertion that, despite his own assessment that he wouldn't believe the story he told, the referee's conclusion regarding a contrived story was unreasonable "in view of the fact that no testimony was ever elicited from any of the Palm Beach County Clerk's Office that such an occurrence had never happened" (Sic., at unnumbered page 8 of appellant's brief). Apparently appellant would take some comfort in having a procession of clerks testify that they agreed with him that no pleadings were filed nor cash received.

The evidence of appellant's neglect was equally compelling in the Christopher case. Poor Mr. Christopher. He had $940.00 in hand at the outset of his odyssey only to have it disappear together with any and all other claims he ever had upon appellant's failure to oppose the application to dismiss his client's action or make any attempt to at least recoup the $940.00 which was volunteered in the first place.

Appellant contends that his action in permitting the order of dismissal, with prejudice, was taken with his client's knowledge and consent. Yet, the evidence clearly established that no information was imparted to the client and no consent was ever secured. It was respondent, himself, who conceded that after the order of dismissal was entered, Mr. Christopher called for a status report and was informed that appellant was "waiting for the medical" (90). Appellant even attempted to persuade a rather incredulous referee that appellant, for some unspecified reason, despite having filed no opposition to the

dismissal application and despite knowing it to be a waste of time, nonetheless personally attended at the return of the application (91, 92). Appellant was unable to produce any correspondence to corroborate his insistence that he informed his client of the application for and dismissal with prejudice. His client's subsequent telephone call for a status report (90) belies such contention. Had appellant previously informed his client of both the application for and dismissal of the action, why would the client thereafter inquire about the case? Obviously, appellant failed to inform his wife/secretary who assured the client that "we are waiting for the medical" (90). Had appellant, in fact, previously disclosed the dismissal, would not any reasonable individual have contacted the client after the inquiry to the secretary to set matters straight? Appellant did nothing (90). It is respectfully submitted that the referee was more than justified in disregarding appellant's testimony and/or determining issues of credibility against appellant.

II. THE RECOMMENDED SANCTION IS WARRANTED BY THE AGGRAVATING FACTORS RECITED BY THE REFEREE

In formulating his recommendation regarding sanctions, the referee took great pains to specify factors he found to be aggravating and warranting his proposed discipline. The referee recited:

> I have predicated my recommendation of a one hundred eighty (180) day suspension upon findings of aggravating circumstances as enumerated in Florida's Standards for Imposing Lawyer Sanctions including the submission by respondent of false statements during the disciplinary process (Rule 9.22(f)) and respondent's refusal to acknowledge the wrongful nature of his conduct (Rule 9.22(g)). These aggravating circumstances arose in connection with respondent's insistence, testified to by him under oath, that he filed certain pleadings in connection with the Bustamante/Ponce representation despite the fact that he had no filing receipt, the recording office had no evidence of any such filing and the file number allegedly secured by respondent in a thirty (30) second telephone call with a recording office clerk did not, in fact, exist. I regard respondent's story as a contrived tale running afoul of Rule 9.22(f) and his refusal to recant therefrom when offered an opportunity to do so, as constituting the circumstances described in Rule 9.22(g).

Appellant would urge, that even if he contrived the tale as found by the referee, there is sufficient mitigation to nullify the effect of his fraud. He urges, as mitigation, that he offered to refile the Bustamante summons and complaint at his own cost and expense. In an attempt to establish such contention, appellant, once again, indulges in a contrivance. Firstly, he suggests that Mr. Bustamante admitted that appellant offered to refile the complaint at appellant's own cost. In fact, Mr. Bustamante never so testified and appellant's suggestion that

he did, is of his own creation. Appellant makes reference to Mr. Bustamante's September 30, 1988 deposition which he used in an attempt to impeach Mr. Bustamante. The reference in his brief is out of context. Mr. Bustamante testified:

> I'm a very frugal, stingy person, you might say. If he had said so much as I will refile at no expense to you, I don't remember, but I would have jumped at it and said, yes, please go ahead, just knowing my nature (35).

The referee interjected that such testimony does not contradict Mr. Bustamante's statements that appellant never offered to refile at his cost (35). Appellant's suggestion that Mr. Bustamante somehow recanted his testimony is inaccurate, untrue and not supported by any evidence adduced before the referee. Save for appellant's self serving statement that he offered to refile the case at his own expense, there is no evidence to support such uncorroborated suggestion.

It is respectfully submitted that the recommended sanctions are supported by precedent and Florida's Standards for Imposing Lawyer Sanctions. In this case there is client neglect with resulting prejudice and an attempt by appellant to fabricate a fraudulent defense. The combination mandates suspension. Rule 4.42 of the Rules provides for suspension when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Here, appellant failed to perform any services for Mr. and Mrs. Bustamante and in neglecting Mr. Christopher's case created a dismissal, with prejudice, and the loss of settlement monies voluntarily given by the adversary at the outset of the litigation. Rule 7.2 provides that 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. Certainly neglect and fraud constitute conduct which is a violation of a duty owed as a professional. Certainly appellant's indulgences created injury not only to the Bustamantes and Mr. Christopher but to the public who rely upon ethical attorneys and repose faith in the legal system which, through appellant's violations, did not work for appellant's clients.

When measuring appellant's misconduct in light of the aggravating factors made reference to in Rule 9.2, numerous aggravating factors are found. The retention by appellant of the fees received from the Bustamantes without rendering any services in return constitutes a dishonest or selfish motive. The multiple neglect establishes a pattern of misconduct with multiple offenses. When Mr. Bustamante requested that the fee he paid be returned to him, appellant not only demonstrated an indifference to making restitution but suggested that further billings would be forthcoming (31). Having been admitted to the bar in 1979 it would appear that appellant had substantial experience in the practice of law. All three (3) clients were domestic servants which the bar would regard as establishing the aggravating factor regarding vulnerability of victims. Most importantly, and deserving of special consideration, are the aggravating factors made reference to by the referee concerning submission of false evidence during the disciplinary process and refusal to acknowledge the wrongful nature of the misconduct. While the bar would submit that any impartial reading of the transcript of the final hearing would leave the reader convinced,

beyond doubt, that appellant's story regarding the alleged filing and telephone call had no basis and were contrived, certainly the referee who had the opportunity to observe appellant and assess his credibility, was more than justified in rejecting appellant's defense and finding it to consist of a fairytale. This court has previously indicated its concern in similar cases where attorneys have contrived stories. In The Florida Bar v. Palmer, 504 So.2d 752 (Fla. 1987) the court approved a recommendation of an eight (8) month suspension plus other specific recommendations where the respondent neglected his client's cause and then falsely reported to the client that the case had been delayed and made other similar misrepresentations. In The Florida Bar v. O'Malley, No. 70,495 (Fla. December 8, 1988) the court noted that there is no more serious violation than for an attorney to give untruthful testimony.

CONCLUSION

The bar most respectfully urges that the evidence below supports the referee's recommendations and that appellant should be suspended for a period of 180 days and directed to make restitution as recommended by the referee.

All of which is respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing answer brief of The Florida Bar was furnished to George W. Wilder, respondent, at his official record bar address of 111 Estado Way, St. Petersburg, FL 33704 by regular mail on this 27th day of March, 1989.

David M. Barnovitz
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