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SID J. WHITE

OCT 12 1988

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD G. NEWHOUSE,

Respondent.

SUPREME COURT CASE
NO. 71,888

CLERK, SUPREME COURT

By

Deputy Clerk

The Florida Bar Case Nos.
88-50,174 (17B),
87-26,688 (17B),
87-26,714 (17B),
87-26,727 (17B)
87-26,726 (17B) and
87-26,676 (17B)

ANSWER 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 Richard G. Newhouse will be referred to as Respondent. The following abbreviations will be utilized:

- T - Transcript of final hearing held on May 6, 1988
- EX - Exhibit of The Florida Bar admitted into evidence at final hearing on May 6, 1988, to be followed by appropriate exhibit numbers

- RR - Report of Referee
- SRR - Supplemental Report of Referee

STATEMENT OF CASE AND FACTS

The Florida Bar is compelled to submit a statement of the case and facts since Respondent has failed to do so, despite the clear requirements of Fla. R. App. P. 9.210(B)(3).

This is an attorney disciplinary proceeding conducted under The Florida Bar Integration Rule. The Supreme Court of Florida has jurisdiction in this original proceeding by virtue of the Court's jurisdiction over attorney discipline, Art. v, §15, Fla. Const.

Respondent was the subject of an investigation which resulted in findings of probable cause by a duly constituted grievance committee of The Florida Bar. The findings of probable cause culminated in the filing by The Florida Bar of a complaint against Respondent on February 8, 1988. On March 4, 1988, the Respondent filed a motion to dismiss and response to the complaint after a duly noticed hearing on same. Said motion was denied by the Referee.

The Honorable Robert V. Parker was appointed as Referee, to conduct disciplinary proceedings on March 3, 1988. The Respondent filed an answer, affirmative defenses and motion to dismiss on April 13, 1988. Notice of final hearing was served by certified mail and the signed receipt card returned April 7, 1988. The final hearing was held on

May 6, 1988. No one appeared for the Respondent at the final hearing.

The Referee having heard the testimony presented and reviewed the evidence, transmitted his report of referee to this Honorable Court on June 10, 1988. In his report the Referee recommended that Respondent be found guilty of various violations of the Disciplinary Rules and the Integration Rules of The Florida Bar as more specifically enumerated therein, and that Respondent be disbarred without opportunity to reapply for readmission for a period of twenty (20) years.

The Florida Bar filed a motion for clarification of the report of referee on June 16, 1988. The relief sought was granted and a supplemental report of referee was executed by the Referee on July 5, 1988. Said report clarified that the recommendation of disbarment without leave to apply for readmission for twenty (20) years was cumulative to the previous disbarments ordered in The Florida Bar v. Newhouse, 520 So.2d 25 (Fla. 1988).

Respondent mailed his petition for review on August 19, 1988. Respondent filed his brief in support of his petition for review on or about September 20, 1988. Respondent's brief failed to meet the standards required by the Florida Rules of Appellate Procedure.

The Referee found in pertinent part the following:

1. The audit covered the period September 1, 1983

through February 28, 1987.

2. Respondent misappropriated \$8,403.23 in settlement proceeds that were withheld to pay for medical services rendered.

3. Respondent misappropriated the sum of \$1,375.00 regarding insurance funds forwarded for payment to one Dr. Pinella on behalf of Luis Chavez.

4. Eight (8) clients were overcharged a total of \$15,505.43 in costs which cannot be validated and therefore the Referee concluded that Respondent misappropriated said funds.

5. Clients were underpaid by Respondent as follows:

- A. Rothbard - \$366.28
- B. Chavez - \$1,209.52
- C. Lagee - \$2,126.94
- D. Schneider - \$3,461.54

6. Respondent excessively charged fees to Mr. Rothbard regarding a PIP claim in the amount of \$3,545.40.

7. Respondent earned \$2,751.64 in interest on clients funds, none of which was paid to the the clients.

8. Respondent misappropriated the sum of \$2,505.94 from a settlement concerning one Greg Anderson, a client.

9. Respondent failed to maintain and have proper trust procedures providing monthly reconciliations on bank accounts, client ledger cards and run or balance of his

liability to clients as compared to the bank balance.

10. Respondent failed to keep journals, client ledger cards, checks, bank statements, and other required trust account record keeping.

11. Respondent did not itemize \$236.00 in costs regarding a client, Rosie King, nor did he pay any part of the interest earned to said client.

12. Respondent failed to pay entrusted funds promptly upon request.

13. Respondent commingled his funds and that of clients in his interest bearing account.

14. Respondent failed to maintain minimum trust accounting record keeping requirements. (See RR, pages 1-5).

The Referee found that the Respondent violated the following:

1) Disciplinary Rules 1-102(A)(3), 1-102(A)(4), 2-106(A), 9-102(A), 9-102(B)(4) of the Code of Professional Responsibility.

2) Florida Bar Integration Rule, article XI, Rules 11.02(3)(a) and (b), 11.02(4), 11.02(4)(a), 11.02(4)(b), 11.02(4)(c), and 11.02(4)(d).

3) Section 11.02(4)(c) of the Bylaws under the Integration Rule.

4) Rules 4-1.15, 4-1.15(a) and 4-1.15(b) of the Rules of Professional Conduct.

5) Rules 5-1.1, 5-1.1(a), 5-1.1(d)(3)(a), (b) and (c), 5-1.2(b) and (c) of the Rules Regulating Trust Accounts.

(See RR, pages 5-6).

The Referee recommended that the Respondent not be allowed to apply for readmission for a period of twenty (20) years cumulative to the previous disbarment, that Respondent make restitution as indicated in his supplemental report and pay costs to The Florida Bar in the amount of \$12,448.32.

(See RR, pages 8-9 and SRR, pages 1-2).

SUMMARY OF ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND SHOULD BE UPHELD BY THIS COURT.

Respondent in his brief is improperly attempting to present testimony that was not presented to the Referee. It is a long established principle that an appellate court only considers matters which were presented to the lower tribunal. Allen v. Town of Largo, 39 So.2d 549 (Fla. 1949), Coca Cola Bottling Co. v. Clark, 299 So.2d 78 (Fla. 1st DCA 1974).

Additionally, a Referee findings of fact are accorded substantial weight and are not overturned unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968).

Furthermore, Respondent has been previously disciplined three (3) times by this Court and cumulative misconduct is dealt with more severely. The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981).

Accordingly, the Referee's findings of fact, recommendations as to discipline, recommendation of restitution and taxation of costs should be upheld.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND SHOULD BE UPHELD BY THIS COURT.

Respondent has submitted a brief in support of his petition for review. Respondent has obviously ignored the brief requirements set forth in Fla. R. App. P. 9.210(B)(3). In his brief, which contains only an argument, Respondent argues with the findings of fact of the Referee. Respondent had ample notification of the final hearing and chose not to be present at the final hearing. (Ex. 1)

Respondent is now attempting to present his evidentiary arguments before this Court, which is contrary to case law, the Florida Rules of Appellate Procedure and The Florida Bar Rules.

It is a long established principle that an appellate court only considers matters which were presented to the lower tribunal. Allen v. Town of Largo, 39 So.2d 549 (Fla. 1949); Coca Cola Bottling Co. v. Clark, 299 So.2d 78 (Fla. 1st DCA 1974); Hillsborough County Board of County Commissioners v. Public Employees Relations Commission, 424 So.2d 132, 134, (Fla. 1st DCA 1981); Citing Tyson v. Aikman, 159 Fla. 373, 31 So.2d 272 (Fla. 1947); and Seashole v. F & H of Jacksonville, Inc., 258 So.2d 316 (Fla. 1st DCA 1972).

The Respondent is required to meet a heavy burden when seeking to overturn a Referee's findings of fact. Rule

3-7.5(k)(1) of the Rules of Discipline provides in pertinent part, "the Referee's findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." Further, Rule 3-7.6(c)(5) of the Rules of Discipline provides that "upon review, the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful or unjustified." Respondent has failed to meet this burden. Respondent's brief appears to just be a rambling of what could have been his testimony at the final hearing.

The Referee has the advantage as trier of fact of having the witnesses before him when evaluating the evidence which is ultimately presented to this Court. Furthermore, the Referee is in a more suitable position to judge the witness' character, truthfulness and candor. "Evidentiary findings and conclusions of the trier of fact when supported by legally sufficient evidence should not lightly be set aside by those possessing the power of review." The Florida Bar v. Abramson, 199 So.2d 457 (Fla. 1967).

Applicable decisions of this Court are in accord with the aforementioned rules. The Referee's findings of fact should be accorded substantial weight and should not be overturned unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Hawkins, 444 So.2d

961, 962 (Fla. 1984); The Florida Bar v. Lopez, 406 So.2d 1100, 1102 (Fla. 1982); The Florida Bar v. Carter, 410 So.2d 920, 922 (Fla. 1982); The Florida Bar v. Baron, 392 So.2d 7318 (Fla. 1981); The Florida Bar v. McCain, 700, 706 (Fla. 1978); The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978); The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968). The Referee's findings are correct and have the full support of the evidentiary record. (See T. pages 1-40) and Exs. 1-8).

After due consideration of the pleadings, testimony and the documentary evidence presented by The Florida Bar, the Referee found that same revealed numerous violations of disciplinary rules. The Referee stated, "Because of the blatant and continuing nature of the misconduct, it obviously merits disbarment. (RR page. 9). The Referee found the Respondent guilty of numerous and cumulative acts of misappropriation of funds entrusted on behalf of clients. (See RR, pages 1-5).

The Referee's recommendation, that the Respondent be disbarred for twenty (20) years is clearly supported by case law and the facts of this cause. In the cases, The Florida Bar v. Cooper, 429 So.2d 1 (Fla. 1983), and The Florida Bar v. Simons, 521 So.2d 1089 (Fla. 1988), disbarment for periods of twenty (20) years were recommended. Each case appeared to have been the first disciplinary matter for the attorney and the twenty (20) year disbarments were upheld.

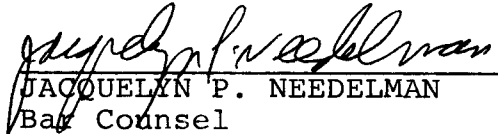
The instant Respondent has already been disbarred for a period of ten (10) years in connection with other serious matters. (See The Florida Bar v. Newhouse, 520 So.2d 25 (Fla. 1988). Additionally, Respondent received a public reprimand in The Florida Bar v. Newhouse, 498 So.2d 935, (Fla. 1986). Considering the cumulateness and seriousness of this case, the recommendation for a twenty (20) year disbarment to run consecutively is appropriate. This case is more severe than the Cooper and Simons cases as it is the Respondent's fourth disciplinary matter before this Court.

This Court has held that cumulative misconduct is dealt with more severely. See The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981) and The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

CONCLUSION

THE FLORIDA BAR respectfully requests this Honorable Court to (1) uphold the Referee's findings of fact and approve the discipline of disbarment for a period of twenty (20) years to run consecutive to the disbarment ordered in The Florida Bar v. Newhouse, 520 So.2d 25 (Fla. 1988), (2) order restitution pursuant to the Referee's recommendations and (3) have execution issue against the Respondent in the amount of \$12,448.32, for the costs incurred in this proceeding.

Respectfully submitted,



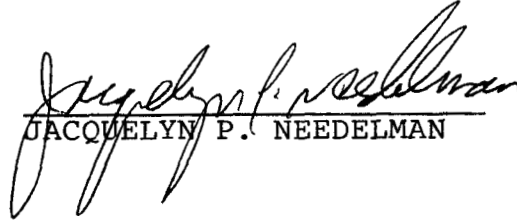
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been forwarded to Richard G. Newhouse, Respondent, Post Office Box 10070, Marina Del Ray, California 90295, on this 12th day of October, 1988, via certified mail, return receipt requested, #P 608 633 065, and regular United States mail; and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway Tallahassee, FL 32399-2300.


JACQUELYN P. NEEDELMAN