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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case No. 72,027

v.

PAUL A. CAILLAUD,

Respondent.

THE FLORIDA BAR'S INITIAL BRIEF

PAUL A. GROSS
Bar Counsel
The Florida Bar
211 Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, Florida
32399-2300
(904) 222-5286

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, Florida
32399-2300
(904) 222-5286

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, will be referred to as "TFB". Paul Caillaud, will be referred to as "Respondent." "T.1" will refer to the transcript of the final hearing held before the Referee on July 1, 1988. "T.2" will refer to the transcript of the final hearing held before the Referee on September 16, 1988. "T.3" will refer to the transcript of the final hearing held before the Referee on October 21, 1988. "RR" will refer to the Report of Referee filed on April 4, 1989. "P" will refer to the Plea Agreement dated March 6, 1986.

STATEMENT OF THE CASE

On or about March 6, 1986, the Respondent pled guilty to four counts of a seventeen count indictment in Case No. 98-85, Sullivan County, New York (Complainant's Ex. 2, 3 and 7). This involved violations of Section 6512 of the New York Education Law in that Respondent "did knowingly, unlawfully and intentionally practice medicine and/or held himself out as being able to practice medicine...", a "Class E" felony (RR-1) See Appendix Exhibit "A". On or about April 24, 1986, the Respondent was sentenced to a five year period of probation on each of the four counts, said sentences of probation to run concurrently (Complainant's Ex. 8).

On or about June 12, 1986, The Florida Bar filed a Notice of Felony Conviction resulting in Respondent being automatically suspended as of July 23, 1986 (Complainant's Ex. 1). On February 8, 1988, a Complaint and Request for Admissions were filed pursuant to Rule 3-7.2(i) of the Rules Regulating The Florida Bar. On March 10, 1988 a Certificate of Service for the Complaint and Request for Admissions was filed by The Florida Bar. On or about March 23, 1988, the Chief Justice of the Supreme Court of Florida appointed Judge Stephen R. Booher as referee in said case. On April 15, 1988, Respondent filed an answer and affirmative defenses to The Florida Bar's Complaint. On April 22, 1988, The Florida Bar filed a Response to Respondent's Affirmative Defenses.

On May 3, 1988, Respondent filed his Response to Request for Admissions. On May 11, 1988, The Florida Bar submitted its Reply to Respondent's Response to Requests for Admissions. On May 14, 1988, Respondent filed a Request for Production of Documents. On May 25, 1988 The Florida Bar filed its Response to Respondent's Request for Production of Documents. On May 27, 1988, Respondent filed his Response to Request for Admissions. On June 21, 1988, a Stipulation for Waiver of Venue was filed. (T.1 - pages 3 and 4)

Final hearings were held concerning the above-mentioned case at Broward County on July 1, 1988, September 16, 1988 and October 21, 1988 (RR-1) See Appendix Exhibit "A". The Report of Referee was mailed to this Court on or about April 4, 1989 (RR-8). The Referee found Respondent guilty of article XI, Rule 11.02(3)(b) of the Integration Rule of The Florida Bar (misconduct constituting a felony or misdemeanor) and Rule 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Code of Professional Responsibility in that Respondent misrepresented himself as a physician or allowed himself to be represented as a physician by others. However, the Referee specifically made a finding that there was no sexual impropriety and no moral turpitude involved in the acts which precipitated the New York charges against the Respondent. (RR-4).

The Florida Bar requested that Respondent be disbarred. (RR-4). The Referee recommended that Respondent be suspended from the practice of law for three years, nunc pro tunc to March 6,

1986. Further, the Referee did not recommend that Respondent be required to show proof of rehabilitation prior to being reinstated stating that he did not "recommend that this be made a condition of the Respondent's discipline because I am satisfied of his present fitness to resume the practice of law.'' (RR 5-6). On June 8, 1989 The Florida Bar filed a Petition for Review contesting the Referee's recommendation that proof of rehabilitation not be made a condition of Respondent's discipline.

STATEMENT OF THE FACTS

During the Summer of 1985, Respondent did knowingly, unlawfully and intentionally practice medicine and/or hold himself out as being able to practice medicine while employed as camp director at the Forestburgh Scout Reservation in Sullivan County, New York. Respondent administered a physical exam on one person and treated a sore throat of another by taking a throat culture which he represented he would take to a hospital and obtain the results, diagnosing an infection of the larynx and administering a hypodermic syringe containing what was represented to be an antibiotic. Respondent treated another person for a purported ulcer by administering an oral anesthetic or pain killer and then catheterizing the person for the alleged purpose of taking a culture. Respondent treated another person for chest pains and administered an EKG and several injections of adrenalin for the purpose of regulating the heartbeat while also prescribing and giving oral medication (P 8-11, Complainant's Ex. 4).

On August 28, 1985, the Grand Jury of the County of Sullivan, New York, indicted Respondent on 17 counts of the Unauthorized Practice of Medicine in Indictment No. 98-85. On March 6, 1986, as part of a plea agreement, Respondent entered a plea of guilty to four counts (6, 7, 9 and 11) of the Indictment with the State

dismissing the remaining counts (P-2, Ex. 4). On April 24, 1986, Respondent was sentenced to a five year period of probation on each of the four counts, said sentences of probation to run concurrently [(T. 10, 11) Complainant's Ex. 3 and 7]. The Respondent was discharged from probation on March 8, 1989. See Appendix Exhibit "C".

SUMI OF ARGUMENT

The Referee's recommendation that the Respondent not be required to show proof of rehabilitation is contrary to Rule 3-5.1(e) of the Rules of Discipline.

ARGUMENT

I. THE REFEREE ERRED IN FAILING TO REQUIRE PROOF OF REHABILITATION THROUGH REINSTATEMENT PROCEEDINGS AS REQUIRED BY RULE 3-5.1(e), RULES OF DISCIPLINE

While the Referee's findings of fact are presumed to be correct,.it is a weli established point of law in Florida that the Florida Supreme Court is not bound by the referee's recommendation of the discipline to be imposed. The Florida Bar v. Weaver, 356 So. 2d 797 (Fla. 1978), The Florida Bar v. Mueller, 351 So.2d 960 (Fla. 1977).

In his Report, the Referee recommended that Respondent be suspended from the practice of law for three years, nunc pro tunc to March 6, 1986. However, the Referee failed to recommend that Respondent be required to show proof of rehabilitation prior to being reinstated, stating: "I do not recommend that this be made a condition of the Respondent's discipline because I am satisfied of his present fitness to resume the practice of law." (RR 5-6). See Appendix Exhibit "A".

Rule 3-5.1(e) of the Rules of Discipline mandates that "a suspension of more than ninety days shall require proof of rehabilitation." In The Florida Bar v. Pavlick, 504 So.2d 1231,

1235, (Fla. 1987) the Florida Supreme Court held that the referee erred in recommending automatic reinstatement following a two year suspension. In The Florida Bar v. Musleh, 453 So.2d 794, 797 (Fla. 1984), the Florida Supreme Court held that the Referee overlooked the Florida Bar's Disciplinary Rules in recommending automatic reinstatement at the end of a six-month suspension since such Rules require proof of rehabilitation for reinstatement after any suspension of more than ninety days. Accordingly, in the case at bar, the Referee's recommendation that proof of rehabilitation not be made a condition of Respondent's discipline is in error.

While The Florida Bar v. Pavlick, supra and The Florida Bar v. Musleh, supra, cite article XI, Rule 11.10(4) of The Florida Bar Integration Rule, for authority which requires proof of rehabilitation when a Respondent is suspended for more than three months, the new rule, Rule 3-5.1(e), Rules of Discipline is substantially the same. Rule 3-5.1(e), states: "a suspension of more than ninety (90) days shall require proof of rehabilitation...".

A trial by referee for violations of the Code of Professional Responsibility or Rules of Professional Conduct, is different than a trial before a Referee concerning a petition for reinstatement. Therefore, the referee at the grievance hearing should not be permitted to consider whether the Respondent has been rehabilitated for purposes of reinstatement as a member of The Florida Bar in good standing.

Reinstatement proceedings are different in that the Bar Counsel in such proceedings is required to conduct an extensive investigation to determine whether the Respondent has been rehabilitated. In reinstatement proceedings, the Respondent must supply The Florida Bar with detailed information as described in Rule 3-7.9(n)(2) of the Rules of Discipline. In addition, The Florida Bar Reinstatement Manual requires the Bar Counsel to take certain actions, prior to the final hearing before a referee. See Appendix Exhibit "B" for appropriate portions of The Florida Bar Reinstatement Manual.

Accordingly, the Bar Counsel at the trial level of this case did not have the opportunity of obtaining the information concerning rehabilitation, as required by Rule 3-7.9, Rules of Discipline and The Florida Bar Reinstatement Manual. Therefore, the referee did not receive evidence from The Florida Bar concerning these matters.

Based upon the foregoing, the Referee erred when he recommended that the Respondent be readmitted as a member in good standing without requiring proof of rehabilitation, as described in Rule 3-7.9(n)(2) of the Rules of Discipline.

CONCLUSION

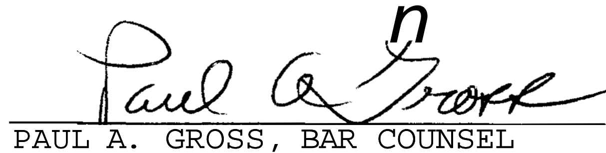
Based upon the foregoing citations to authority and case law, the Referee's recommendation that proof of rehabilitation not be made a condition of Respondent's discipline must be rejected and Respondent shall be required to offer clear and convincing proof of rehabilitation pursuant to Rule 3-5.1(e) and Rule 3-7.9(n)(2), Rules of Discipline.

Respectfully submitted,

PAUL A. GROSS, BAR COUNSEL
Attorney No. 360929
THE FLORIDA BAR
444 Brickell Avenue, Ste. 211
Miami, Florida 33131
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief was sent via Federal Express to Sid J. White, Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida, and a copy was mailed to Paul A. Caillaud, 11108 S.W. 194th Terrace, Miami, Florida 33177, and a copy was mailed to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32399-2300 this 3 day of July, 1989.



PAUL A. GROSS, BAR COUNSEL