IN THE
SUPREME COURT OF FLORIDA

NO. 72,506

IN THE MATTER OF:

THE FLORIDA BAR,

v.

MILTON E. GRUSMARK,

A CONFIDENTIAL DISCIPLINARY MATTER CONDUCTED UNDER THE AUTHORITY OF THE INTEGRATION RULE OF THE FLORIDA BAR

ON PETITION FOR REVIEW
OF A REPORT OF THE REFEREE

INITIAL BRIEF OF PETITIONER, MILTON E. GRUSMARK

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INTRODUCTION

MILTON E. GRUSMARK, petitioner in this court, was the respondent in the lower tribunal. THE FLORIDA BAR was the complainant in the lower tribunal, and is the respondent in these proceedings. In the interest of avoiding confusion about the identity of the parties, in this brief they will be referred to as Grusmark and the Bar, respectively, rather than as petitioner, respondent or complainant.

Since we do not have an index consecutively numbering the pages of the various materials included in the record on appeal, in this brief, each document or transcript will be identified by its title, the date if necessary, and the page numbers as provided within each document or transcript.

STATEMENT OF THE CASE AND FACTS

1. Nature of the Case, Course of Proceedings and Disposition in the Lower Tribunal

In April of 1988, a complaint was filed charging Milton E. Grusmark with a violation of Disciplinary Rule 2-106. See complaint, page 2. [1]

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[1] This proceeding bears a 1987 case number, which means that it must have been filed after January 1, 1987. It is well to note that effective January 1, 1987, this Court promulgated Rules Regulating the Florida Bar, which superseded the provisions of the Code of Professional Responsibility. The specific provision of the Rules Regulating the Florida Bar, which supersedes former Rule 2-106, is different from 2-106 in a number of significant respects. See Point III of this brief, infra.

Grusmark did not appear at the hearing before the grievance committee since he was, at that time, engaged in a major criminal case in Philadelphia, Pennsylvania, and so advised the Bar (T 2/23 - 4); (T 8/19 - 8). [2]

Subsequently, a hearing was held before the Honorable Charles T. Carlton and the referee's report was filed on October 10, 1988. See report of referee. The report recommended the disciplinary sanction of a 10-day suspension from the practice of law.

A petition for review was timely filed in this Court by Grusmark on December 5, 1988, and these proceedings ensue.

STATEMENT OF THE FACTS

Milton Grusmark was retained by Donald Silverstein to represent him in a federal criminal proceeding prior to March 3, 1986 (T 8/19 - 4, 17). Silverstein had been charged with interstate transportation of stolen securities in violation of Title 18 United States Code, Sections 2314 and 2315. Copies of documents from the United States District Court file in United States of America v. Donald Silverstein, Case No. 86-1092 are included in the appendix at the end of this brief. It is respectfully suggested that this Court may take judicial notice of these documents pursuant to Section 90.202 (6), Florida Statutes, which provides that a court may take judicial notice of

> Records of any court of this state or of any court of record of the United States...

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[2] The transcript of the grievance committee hearing will be denoted as T 2/23 followed by a page number, and the transcript of proceeding before the referee as T 8/19 followed by a page number.

The nature of the offenses contemplated in Title 18, United States Code, Sections 2314 and 2315, are set out in Appendix, pages 1 to 5.

In any event, the record reflects that Grusmark met with Silverstein's wife and daughter in Pompano, Florida on Sunday, March 2nd and on other occasions. On March 2, Grusmark went directly from Pompano to interview Silverstein on that same day at the Metropolitan Correctional Center in South Dade (T 8/19 - 9, 10, 11).

The next day, with Silverstein's approval, Grusmark filed his notice of permanent appearance as counsel of record in the pending criminal case. That appearance was unconditional (T 8/19 - 14, 15). See Appendix, page 6, and please specially note the language in capital letters just above the date and attorney's signature:

> FEE DISPUTES BETWEEN COUNSEL AND CLIENT SHALL NOT BE A BASIS FOR WITHDRAWAL FROM THIS REPRESENTATION.

Discussion between Grusmark and the Assistant United States Attorney resulted in a joint stipulation requesting the United States Magistrate to set a personal recognizance bond (T 8/19 - 10, 11). See Appendix, pages 7 and 8.

Following Silverstein's release on bond, Silverstein met with Grusmark at his office for several hours discussing the entire case (T 8/19 - 12). Grusmark also discussed the pending indictment with Special Agent Gaffney of the Federal Bureau of Investigation.

On March 19, 1986, a notice of appearance in the case was filed by Robert Trachman, Attorney. No notification of that

appearance was forwarded to Grusmark (T 8/19 - 24). See Appendix, page 9, and please note the absence of any notification to Grusmark on Trachman's notice of appearance.

Prior to the filing of Grusmark's notice of appearance in the United States District Court, an agreement had been reached with Silverstein that a fee of $15,000 would be charged for the case (T 8/19 - 13). That agreement resulted in the notice of permanent appearance.

Grusmark received $5,000 of that fee before the notice of appearance was filed by Trachman. Silverstein's complaint that the fee was excessive resulted in these proceedings.

The report of the referee following the hearings referred to above recommended a suspension for 10 days.

SUMMARY OF THE ARGUMENT

POINT ONE

The grievance committee in its finding of probable cause and the referee in his report considered only one factor in its deliberations, time spent in Court.

Rule 2-106, on the other hand, lists many factors that should have been considered before reaching a decision as to the reasonableness of the fee. None of those factors was considered.

POINT TWO

The referee in his report considered findings of a Dade County Arbitration Committee as part of the foundation for his

conclusion. He thus improperly delegated his duties to a non-judicial committee.

POINT THREE

The charge in this case involved the fee charged as being unreasonably and therefore unethically excessive. The report, however, only concerned itself with a return of a portion of the fee.

POINT FOUR

The basis for the recommended suspension is far too harsh.

The predicate for that recommendation are reprimands in situations which occurred more than ten years ago.

ARGUMENT

POINT I

RULE 2-106 REQUIRES THE CONSIDERATION OF THE REFEREE OF MANY SPECIFIC CRITERIA IN DETERMINING THE REASONABLENESS OF A FEE CHARGED BY AN ATTORNEY OF HIS CLIENT

The Bar, in its presentation of the complaint to the grievance committee and thereafter to the referee, utterly failed to present any evidence concerning any of the specific stated factors to be considered as guides in determining the reasonableness of the fee which Grusmark charged Silverstein in this case.

The only attempt at proof presented by the Bar through its counsel, concerned its contention regarding the time spent by

Grusmark in the representation of Silverstein in Court. (T 8/19-5, 73)

Obviously, the time involved is one of the factors to be considered, but not the only factor. If Rule 2-106 stated that THE factor to be considered in determining the reasonableness of a fee is the time involved and no more, than the Bar's position in this case could not be assailed.

But, however, even in the very sentence which mentions the consideration of the time involved, i.e., DR 2-106 (B) (1), that consideration is not just limited to the number of hours involved, it also requires a consideration of:

> The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. (emphasis added).

The Bar, the committee and the referee each focused solely on the consideration of the time spent in court on the morning of March 3, 1986. Ignoring for the moment, the consideration of statutory factors 2, 3, 4, 5, 6, 7, and 8, obviously the focus in this case on time alone, ignores all of the other conditions of Section 1.

The charges levied against Silverstein were that he transported in interstate commerce, securities of the value of $5,000 or more knowing them to have been stolen, converted or taken by fraud; and also that he received, possessed and concealed securities of the value of $5,000 or more, which had been taken

across state boundaries when he knew that those securities had been stolen or unlawfully converted.[3]

Each charge carried a potential penalty of ten years imprisonment and/or a $10,000 fine, for a total potential penalty of twenty years in prison and/or a $20,000 fine.

It is respectfully contended that the experience of Milton Grusmark (well reflected in the records of this Court) makes it obvious that his background and skill had to be considered in determining whether the fee charged was excessive. But those factors were never considered.

The Bar never attempted to meet the burden of proof necessary under DR 2-106, and the referee did not consider or even refer to any of those factors in his report.

II

THE FLORIDA BAR CANNOT DELEGATE TO AN ARBITRATION COMMITTEE THE QUESTION OF ETHICAL COMPLIANCE WITH THE CRITERIA FOR REASONABLENESS CONTAINED IN DR 2-106

The Dade County Bar Association has set up an arbitration committee for the purpose of determining fee disputes. No quarrel with the administrative procedure exists in this case. But that committee is not invested with judicial powers, and it does not attempt to perform judicial functions.

The power to deprive a citizen of the benefits of a professional license is a power which is penal in nature. That

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[3] These are not verbatim recitations of Sections 2314 and 2315, but a simplification thereof.

power is necessarily judicial, and as a general rule, judicial powers can never be delegated to a non-judicial board.

Relating that principle to the instant case, the findings of the referee reflect his consideration of the arbitration award and the adoption of that body's findings as factual foundations in part for this report and recommendation.

In so doing, the referee unconstitutionally delegated his authority to a non-judicial board. See for example, Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987), in which this Court held that a trial judge cannot delegate to a state attorney the responsibility for preparation of a sentencing order without first independently determining the specific aggravating and mitigating circumstances applicable.

Further, in Fletcher v. State, 405 So.2d 748, 749 (Fla.2d DCA 1981), it was held that it was improper to delegate to a non-judicial officer, namely the probation supervisor, the power to set a restitution determination. And in Woolf v. Reed, 389 So.2d 1026 (Fla.3rd DCA 1980), the Third District pointed out the limitations upon the right to delegate to a non-judicial officer.

Thus, in the case at bar, the referee's reliance upon findings of fact made by the Dade County Bar Association Arbitration Committee, is a classic example of the improper delegation of judicial function.

III

DR 2-106 ENCOMPASSES NO MORE THAN THE REASONABLENESS OF THE ORIGINAL FEE AGREED TO BETWEEN AN ATTORNEY AND HIS CLIENT

Proof of a charge different than that alleged in the complaint violates basic principles of due process.

It is the position of Grusmark that the proper question before the Bar under the specific complaint lodged in this case, is whether or not the fee originally agreed upon by Silverstein and Grusmark was clearly excessive.

As noted above, the entry of a permanent appearance in the United States District Court carries with it the obligation to continue representation of a defendant, regardless of any dispute about fees, or indeed failure to collect fees. The language of the rule itself only concerns the bases for the setting of a reasonable fee or one clearly excessive.

Reference to Rule 4-1.5 of the Rules Regulating the Florida Bar the apparent successor to Rule 2-106, supports the position taken by Grusmark in this case. The question of return of a portion of a fee is not material or relevant to the question of whether or not the fee originally agreed upon was excessive.

Rule 4-1.5 is not identical with rule 2-106. It clearly refers to the fixing of a fee and the contemplation of the parties at that point. For example, where Rule 2-106 (B) (7) states

> ... the experience, reputation and

> ability of the lawyer or lawyers performing the services...

that section is expanded by addition of the following language in Rule 4-1.5

> ... and the skill, expertise, or efficiency of effort reflected in the actual providing of said services...

In that same rule, promulgated by this Court effective January 1, 1987, it is stated in 4-1.5(C):

> In determining a reasonable fee, the time devoted to the representation and the customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

The charge contained in the original complaint required a determination of before-the-fact reasonableness of the fee agreed upon. That determination was never made by either the committee or by the referee in this case. To the contrary, the post-discharge and the time spent in court on the morning of March 3, 1986 by Grusmark on Silverstein's behalf was the single factor considered in the determination that the fee charged was clearly and unethically excessive.

POINT IV

Waived per order of 2-9-89

THE RECOMMENDATION OF THE REFEREE IN THIS PARTICULAR CASE WAS UNREASONABLY HARSH

Should this court fail to grant relief to Milton Grusmark on Points I, II and/or III raised on this appeal, then it is

respectfully suggested that the Court consider that the penalty of a 10-day suspension is unreasonably harsh.

First, we find that we are at a distinct disadvantage in our ability to research the cases on this issue since Florida Bar grievance matters are confidential until published or otherwise made public. This situation is analogous to doing research for criminal appeals in the United States Court of Appeals for the Eleventh Circuit because that Court often issues non-published opinions which are mailed only to counsel of record. Of course, this includes the United States Attorney in every case, but only to defense lawyers of record in a given case. Unless a lawyer subscribes to the Eleventh Circuit slip opinion service, he/she has no access to a whole body of law which, by the way, is sometimes cited in briefs filed by the United States Attorney, much to defense counsel's disadvantage.

Here, there are numerous published cases of this court on the issue of disciplinary sanctions imposed on Florida lawyers. See, for example, West's Key No. 58 under the heading "Attorney and Client". In all of those cases, counsel did not find one in which this Court ruled that the attorney's actions did not "warrant" the sanction imposed.

We believe that there must be cases in which this Court has ruled that a sanction was unreasonably harsh and that the facts did not warrant the sanction, but the difficulty arises because in a case in which a sanction/penalty was reduced from a public one to a

private one or to no penalty at all, that opinion would not be published due to the confidentiality rule.

Recognizing that if there are opinions (and there must be some) reversing the referee's findings, or finding the sanctions imposed to be overly harsh, those authorities are clearly not available for our use in these proceedings.

We recognize that this court will deal more severely with cumulative misconduct than with isolated misconduct, and that past disciplinary problems will be considered in determining appropriate sanctions against counsel for violations of his duty. This principle was set out in cases cited in the report of the referee.

Having reviewed Grusmark's previous disciplinary record with the Florida Bar, we find that the three previous matters occurred more than ten years ago. See documents attached to report of referee. He received two private reprimands in 1975 and a public reprimand in 1978. It is respectfully suggested that, as a general rule, even the United States Parole Guidelines and the Florida Sentencing Guidelines do not provide for increased punishment based upon a conviction which is more than ten years old.

Understanding, of course, that lawyers should never violate the rules of ethics, based upon the length of time that this attorney has been discipline-free, we implore this Court to consider the harsh nature of a suspension from the practice of law, and to rule that a reprimand, private or even public will be more than sufficient punishment in this case.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the report of the referee should be reversed and the charge dismissed, or in the alternative, remanded for de novo consideration with due regard to the factors delineated in the code of Professional Responsibility and in the Rules Regulating the Florida Bar; alternatively, that the sanction be appropriately reduced.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was mailed on February 2, 1989 to RANDI K. LAZARUS, Assistant Staff counsel, The Florida Bar, Second Floor Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131.

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