IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN N. SAMAHA,

Respondent.

CASE NO. 72,835
(TFB No. 88-10,886 (6D))

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THE FLORIDA BAR'S OPENING BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar". The appellee, John N. Samaha, will be referred to as "the respondent". "RR" will refer to the Report of Referee. "TR" will refer to the transcript of the Final Hearing held on February 21, 1989.

STATEMENT OF FACTS AND OF THE CASE

In July 1986, T. R. retained respondent to represent her in a personal injury claim originating from a May 4, 1986, automobile accident. (RR, p.1, 11, TR, p.6,L9). At the time of employment, Ms. R[redacted] was a young single parent with a ninth grade education. (RR, p.1, II).

In October 1986, Ms. R[redacted] met with respondent in his law office to discuss her case. Respondent asked Ms. R[redacted] questions about her sexual activities and wanted to know if she experienced pain in certain sexual positions. (TR,p.11, L2 and p.103, L8). At this meeting, respondent instructed Ms. R[redacted] to unbutton her blouse in order to view her injuries. (TR,p.7,L15,p.11,LL 5,6, p.12,LL6,7). Respondent touched his client's lower back under the guise that it was necessary to prepare the personal injury action. (TR,p.11, L16).

On December 11, 1986, the respondent called Ms. R[redacted] on the telephone and told her that he needed to come to her residence to have her sign some papers. (TR, p.13,LL1,18). At the time of respondent's telephone call, Ms. R[redacted] had friends visiting at her apartment. Ms. R[redacted] asked her friends to stay with her when respondent arrived as she felt uncomfortable from the previous touching at respondent's office. When the

respondent arrived at Ms. R████s apartment he asked her friends to leave. (TR. p.14, L2, p.34, L7, p.53, L22). In fact, after all but one of her friends left, respondent again asked the remaining guest to leave. (TR, p.54, L10). After all of the guests left the apartment, respondent instructed Ms. R████ to put on her medically prescribed TENS Unit and to go with him into her bedroom so he could take photographs of her wearing the TENS Unit. (TR,p.15, L9). While in the bedroom, respondent instructed Ms. R████ to stand against a blank white wall so he could photograph her back while wearing the TENS Unit. (TR,p.16, LL2,3,5). Subsequently, the respondent proceeded to lift Ms. R████s blouse. (TR,p.16, LL7,8). Immediately thereafter, respondent instructed Ms. R████ to lie down on her bed and to lift and lower her legs. (TR,p.16, LL24,25), Ms. R████ then left the bedroom. (TR, p.17, LL10,11). Respondent remained in the bedroom for a couple of minutes, and requested Ms. R████ to return to the bedroom. However, Ms. R████ refused, and remained in the living room. (TR, p.17, LL10,13). Shortly thereafter, respondent left the bedroom and sat at Ms. R████s kitchen table. (TR,p.18, LL7, 9-10). While at the kitchen table, respondent instructed Ms. R████ to lift her shirt and to lower her shorts. (TR, p.18, L14-16). Respondent lowered Ms. R████s shorts himself. (TR,p.23, L5). Respondent proceeded to touch Ms.

R[redacted] on her back and thighs. (TR,p.18, LL15,25). Afterwards, respondent reached inside of **Ms.** R[redacted]s shorts and touched the outside of her vagina. (TR,p.19, LL20-21). Subsequently, Ms. R[redacted] became visibly afraid and asked respondent to leave her home. (TR,p.20, LL5-6). As soon as respondent left Ms. R[redacted]s home, she reported the incident to the police. (TR, p.20, LL13-16).

On August 11, 1987, respondent was charged with Battery on Ms. R[redacted] On March 24, 1988, respondent pled no contest to the Battery Charge, and was adjudicated guilty. (TR,p.56, LL16-18).

On February **21,** 1989, a Final Hearing was held in the disciplinary proceedings. Respondent was found guilty.

Thereafter, The Referee recommended that respondent be disciplined by a public reprimand, placed on probation for one **(1)** year and required to have psychological counseling. (RR,p.2, **IV).** The Florida Bar Board **of** Governors voted to seek review of the Report of Referee and seek a two (2) year suspension and probation including psychological counseling and payment **of** costs.

SUMMARY OF ARGUMENT

The Referee has recommended a public reprimand for the respondent's illegal and unethical touching of his client. Respondent touched his client's back, thighs, and the outside of her vagina under the pretense that it was necessary to prepare her personal injury action. A public reprimand is clearly inappropriate in the present case.

Moreover, even though respondent was not qualified to conduct physical examinations of his client's injuries, respondent persisted in conducting such examinations on more than one occasion. Therefore, respondent's misconduct cannot be dismissed as a single incident of indiscretion. Respondent's client was dependant on respondent for guidance and assistance regarding her personal injury case. Respondent exploited the attorney-client relationship.

A suspension is the appropriate discipline for respondent under Standard 5.12 of the Florida Standards for Imposing Lawyer Sanctions. Respondent knowingly engaged in criminal conduct that seriously adversely reflects on his fitness to practice law.

Furthermore, Standard 9.2 of the Florida Standards for Imposing Lawyer Sanctions sets forth the following aggravating circumstances to justify an increase in the degree of discipline to be imposed: Respondent's prior disciplinary offense, substantial experience in the practice

of law and the vulnerability of the victim. These aggravating factors should increase the degree of discipline to a two (2) year suspension with probation including psychological counseling.

ISSUE

WHETHER A PUBLIC REPRIMAND IS A SUFFICIENT DISCIPLINE WHERE *AN* ATTORNEY, WHILE REPRESENTING HIS CLIENT, TOUCHES HIS CLIENT'S BODY, INCLUDING HER GENITAL AREA, UNDER THE PRETENSE THAT IT WAS NECESSARY TO PREPARE THE CLIENT'S PERSONAL INJURY ACTION?

The law **is** clear that " **...** the initial fact-finding responsibility in disciplinary matters is imposed upon the Referee and that his findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support." The Florida Bar v. Seldin, **526,** So.2d 41,43 **(Fla. 1988),** and The Florida Bar **v.** Stalnaker, **485** So.2d **815,816** (Fla. **1986).** However, this Court is not bound by the Referee's recommendation for discipline. The Florida Bar v. Weaver, **356** So.2d **797,799** (Fla. **1978).** The Referee's recommended discipline should not be upheld because of the seriousness of respondent's misconduct.

These disciplinary proceedings arose because respondent, without Ms. R[redacted]'s approval, conducted physical examinations of her body. The Florida Bar is unable to find any relevant Florida case law applicable to the present case.

Respondent, abused his fiduciary professional relationship with **Ms.** R[redacted] Respondent, in addition to aising Ms. | bl touched **Ms.** R[redacted] on her back, thighs, and the outside of her vagina. (TR,p.11,

LL 7-8, p.16, L7, p.18, LL 15,20,21,25). Clearly, respondent's touching of Ms. R[redacted]s body in the present case is serious in nature.

In addition, respondent knew that he was not qualified to conduct physical examinations of **Ms.** R[redacted] and that such examinations were not consistent with the legal profession. Respondent testified at the Final Hearing that he had no medical training. (TR, **p.100,L9).** In fact, respondent had a telephone conversation with Ms. R——— where he told her that he was not supposed to be doing an examination of her because he was not a doctor. (TR,p.112, LL9,10; and Bar Exhibit #1). Yet, even though respondent referred **Ms.** R[redacted] to several physicians for physical examinations, respondent persisted in conducting his own physical examination **of** Ms. R[redacted] (TR, p.10, LL15-17).

Moreover, respondent took advantage of the attorney-client relationship by conducting these physical examinations under the pretense that it was necessary to prepare the personal injury action. In the October 1986 meeting, respondent told **Ms.** R[redacted] not to be nervous about the physical examination because he needed to know what injuries she had before he went to Court. (TR, p.12, LL6-7). Respondent also led Ms. R[redacted] to believe that his physical examination, consisting of having Ms. R[redacted] raise and lower her legs while lying on her bed,

was necessary to prepare the personal injury action. (TR, p.16, LL18-21). In fact, respondent testified at the Final Hearing that he touched Ms. R[redacted] to determine whether she had any permanent injuries. (TR, p.100, LL16-17). Thus, respondent purposefully deceived Ms. R[redacted] into believing that his physical examinations of her were necessary to prepare the personal injury action. Respondent assumed the role of a "doctor" in his representation of Ms. R[redacted]

Furthermore, respondent's misconduct in the present case was deliberate in nature in that respondent sought to continually exploit his client under the pretense that it was necessary to prepare the personal injury action. Respondent's actions did not consist of a single spontaneous action. On the contrary, respondent touched Ms. R[redacted] on two occasions. (TR, p.11, LL5-6, p.16, L7). In fact, in the December 11, 1986 meeting, respondent requested Ms. R[redacted] to return to the bedroom on two occasions. (TR, p.17, LL10-13, p.18, LL2-4).

As a result of respondent's misconduct toward Ms. R[redacted] in the present case, respondent was charged and adjudicated guilty of Battery, a misdemeanor. (TR, p.56, LL 16-18) The Referee at the Final Hearing found respondent guilty of violating Integration Rule 11.02(3) (a)(commission of any act contrary to honesty, justice, or good morals); Integration Rule 11.02 (3)(b) (commission of a misdemeanor); Disciplinary Rule 1-102(A) (3) (a lawyer shall not engage in

illegal conduct involving moral turpitude); and Disciplinary Rule 1-102(A)(6) (a lawyer shall not engage in any conduct that adversely reflects on his fitness to practice law). (RR, p.2, III).

Standard 5.1 of the Standards for Imposing Lawyer Sanctions addresses the violation of failure to maintain personal integrity. Under Standard 5.12, suspension is the appropriate discipline under the circumstances of the present case:

> Suspension is appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on the lawyer's fitness to practice.

Suspending respondent with probation would protect the public as it would give respondent an opportunity to correct his misconduct, while not causing any immediate future injuries to his clients. Suspending respondent would also deter other attorneys from engaging in similar conduct. It is clear, that more than a public reprimand is warranted in this case.

Moreover, the Referee's recommended discipline of a public reprimand should be increased based on the existence of aggravating factors. Standard 9.2 of the Standards states that aggravating circumstances are any factors that may justify an increase in the degree of discipline to be imposed. Aggravating factors which may be considered include prior disciplinary offenses, substantial experience

in the practice of law, and the vulnerability of the victim. In addition, case law clearly states that prior disciplinary history should be considered when determining the appropriate discipline for misconduct. The Florida Bar v. Shirpack, 523 So.2d 1139, **1140** (Fla. 1988) and The Florida Bar v. Swindler, 173 So.2d 705,706 (Fla. 1965). The respondent has a prior disciplinary history consisting of a public reprimand in The Florida Bar v. Samaha, **407** So.2d 906, (Fla.1981), for withholding an unapproved fee from a worker's compensation claimant, also a misdemeanor offense. Respondent's prior disciplinary offense should be considered as an aggravating factor when imposing discipline. Furthermore, Standard 9.22 considers the vulnerability of the victim and substantial experience in the practice of law as aggravating factors. In the present case, **Ms. R** was a young woman with a ninth grade education. (RR,p.1, II). Certainly, Ms. R was dependant on respondent for his guidance in her legal affairs. Also, respondent as of December, 1986 had been admitted to The Florida Bar for approximately thirty-two (32) years. (TR,p.68, L6). It **is** clear that respondent had substantial experience in the practice of law at the time he was retained by Ms. R. Therefore, taking into consideration all of the aggravating factors, the Referee's recommended discipline should be increased to a two (2) year suspension with probation including psychological counseling and payment of costs.

CONCLUSION

WHEREFORE, THE FLORIDA BAR respectfully requests this Court to accept the Referee's basic findings of fact but reject the recommended discipline of a public reprimand and impose a two (2) year suspension with probation including psychological counseling and the payment of costs of this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of The Florida Bar's Opening Brief has been furnished to John A. Weiss, Counsel for Respondent, Post Office Box 1167, 101 North Gadsden Street, Tallahassee, Florida 32302, by Regular U.S. Mail; and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by Regular U.S. Mail; on this 27th day of June, 1989.

David R. Ristoff

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