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IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR,
COMPLAINANT,
V.
JAMES G. ROTH,
RESPONDENT.

SUPREME COURT
CASE NO., 73,518

TFB CASE NO. 89-70,051(11E)

THE FLORIDA BAR'S INITIAL 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, James Roth, will be referred to as "Respondent"; "RR" will denote the Report of Referee and "T" will denote the transcript of the August 10, 1989 final hearing.

STATEMENT OF THE CASE

Probable Cause was found by Grievance Committee 11"E" on November 14, 1988. Respondent failed to attend said hearing.

THE FLORIDA BAR filed its Complaint and Request for Admissions in this cause on January 9, 1989. On January 13, 1989, the Honorable Patti Englander Henning was appointed Referee. On March 15, 1989, The Florida Bar filed a Motion for Order Deeming Matters Admitted. On April 4, 1989, the Referee granted The Florida Bar's Motion and entered an Order on Motion for Order Deeming Matters Admitted, since Respondent had failed to respond to The Florida Bar's Request for Admissions. The final hearing was set for June 16, 1989. The Court cancelled the June 16, 1989 hearing date and reset it for August 9, 1989. The final hearing was held on August 9, 1989. At the conclusion of the final hearing, The Florida Bar made a Motion to Amend the Pleadings to Conform with the evidence by adding violations of the Rules of Discipline involving 4-1.1 (competency) and 4-1.3 (diligence) (T-66). The Referee granted The Florida Bar's Motion to amend the charges as to Rule 4-1.3 (diligence) and denied The Florida Bar's motion to amend the charges as to Rule 4-1.1 (competency) (T-73).

The referee's report was signed on September 12, 1989 and recommended that Respondent be found guilty of violating Rule 4-1.3 (diligence) and Rule 4-1.4 (communication) of the Rules Regulating The Florida Bar and that Respondent be found not guilty of violating Rules 4-1.15(b) (safekeeping property) and

8 Rule 5-1.1 (trust accounts) of the Rules Regulating The Florida Bar (RR-2). The referee recommended the following disciplinary measures be imposed:

1. A private reprimand to be administered by Grievance Committee 11"E".

2. Probation for a minimum of one year.

3. That the Respondent shall resolve the problem of who is entitled to the \$2,000 check. This may be done by mutual agreement of the interested parties or by filing an interpleader action in the appropriate court.

4. That the Respondent shall pay 12% interest per year on the \$2,000 from June 9, 1988 to the date the check is given to the person who is entitled to receive it.

8 5. Within 60 days of the date this Report of Referee is approved by the Supreme Court of Florida, the Respondent shall have a certified public accountant audit his trust account, at his own expense, and a report of the audit shall be delivered to The Florida Bar.

6. Within 60 days of the date of this report shall be approved by the Supreme Court, the Respondent shall establish a procedure and form for sending documents to clients and for informing them of the status of their cases, and said procedure and form shall be sent to The Florida Bar, forthwith.

7. That the Respondent shall be responsible for paying all costs and expenses incurred by The Florida Bar.

(RR-2-3)

8 This cause was considered by the Board of Governors of The

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Florida Bar at their September 22, 1989 meeting. The Board voted to appeal the referee's recommended discipline of a private reprimand. The Florida Bar's Petition for Review was filed on October 9, 1989 appealing the Referee's recommended discipline of a private reprimand.

STATEMENT OF THE FACTS

Respondent was retained by a Mrs. Sharek to represent her in the sale of a piece of property. On or about June 9, 1986 Respondent received a \$2,000.00 cashier check from a prospective buyer which was to be deposited in Respondent's trust account pending the closing of the sale. Respondent held onto the check and never deposited the \$2,000.00 in his trust account. The closing fell through and a dispute arose between Respondent's client and the purchaser as to whom the \$2,000.00 deposit belonged to under the contract. On November 3, 1986, Respondent filed an interpleader action to determine the conflicting demands on the \$2,000.00 (RR-1-2). Respondent filed a Motion for Deposit of Funds in the Registry of the Court. Respondent was directed to submit an order granting Respondent's Motion to Deposit the Funds into the Registry of the Court (T31-32). Respondent never did so. (T38-39). On July 7, 1988, the interpleader action was dismissed for lack of prosecution (T-39). As of August 10, 1989, Respondent did not know that the interpleader action had been dismissed over a year earlier (T-11).

From November 1986 through August 10, 1989, Mrs. Sharek and others on her behalf continuously left telephone messages inquiring about the status of the \$2,000.00 (T-42-43; 46; 52-53). Respondent failed to account for this \$2,000.00 to either his client or The Florida Bar until the time of the referee hearing when he produced the original \$2,000.00 check (T-6,27,33).

SUMMARY OF ARGUMENT

The Referee's recommendation that the Respondent receive a private reprimand as discipline for misconduct involving Respondent's failure to respond to inquiries concerning the status of the action Respondent was supposedly pursuing on his client's behalf and Respondent's failure to pursue that matter resulting in the action being dismissed for lack of prosecution is inappropriate based on case law, the Rules Regulating The Florida Bar and Florida Standards For Imposing Lawyer Sanctions.

The nature of Respondent's misconduct mandates that Respondent receive public discipline.

ARGUMENT

WHETHER PUBLIC DISCIPLINE RATHER THAN A PRIVATE REPRIMAND IS THE APPROPRIATE DISCIPLINE IN THIS CASE GIVEN THE NATURE OF RESPONDENT'S MISCONDUCT.

While the Referee's findings of fact are presumed to be correct, it is a well 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 fact, the Florida Supreme Court exercises a broad scope of review in evaluating a referee's recommendation of discipline. The Florida Bar v. Patarni, 14 FLW 458 (Sept. 22, 1989).

It is The Florida Bar's position that Respondent's misconduct warrants discipline more severe than a private reprimand. For more than two and one-half years, Respondent failed to respond to inquiries from his client concerning the interpleader action he was supposedly pursuing on her behalf. In fact, Respondent failed to pursue this matter which resulted in the action being dismissed, for lack of prosecution. After three years, Respondent's client is no closer to a resolution of the issue of who is owed the \$2,000.00 than she was in October of 1986.

As stated by this Court in The Florida Bar v. Schilling, 486 So.2d 551 (Fla. 1986), "Confidence in, and proper utilization of,

the legal system is adversely affected when a lawyer fails to diligently pursue a legal matter entrusted to that lawyer's care. A failure to do so is a direct violation of the oath a lawyer takes upon his admission to the bar." Respondent was entrusted by Mrs. Sharek with the responsibility of resolving the issue of who was owed the \$2,000.00. Respondent failed to pursue this matter thus violating his oath and responsibilities as an attorney. Such conduct cannot be condoned and mandates public discipline.

As in The Florida Bar v. Knowlton, 111, 527 So.2d 1378 (Fla. 1988), where the Respondent was retained to represent a client, failed to communicate with his client about the status of the case and failed to pursue the case on behalf of his client, the Respondent received a public reprimand as should the Respondent in the case at bar.

This Court has held a public reprimand to be the appropriate sanction in case after case where Respondent has failed to pursue a legal matter entrusted to him and has failed to communicate with his client about the status of the case. The Florida Bar v. Harris, 526 So.2d 54 (Fla. 1988); The Florida Bar v. Jordan, 523 So.2d 570 (Fla. 1988); The Florida Bar v. Lowery 522 So.2d 27 (Fla. 1988); The Florida Bar v. Hall, 521 So. 2d 1117 (Fla. 1988).

Rule 3-5(b), Rules of Discipline, limits private reprimands to cases where there is minor misconduct. Misconduct shall not be regarded minor if the misconduct resulted in or is likely to

result in actual prejudice (loss of money, legal rights or valuable property rights) to a client or other person or if the misconduct includes dishonesty, misrepresentation, deceit or fraud on the part of the respondent. Rule 3-5(b)(1)(b) and (e), Rules of Discipline. Respondent's misconduct has resulted in the loss of money for three years to either his client or the third party. Respondent failed to pursue the interpleader action while allowing his client to believe that he was pursuing this action on her behalf. Accordingly, Respondent's misconduct excludes him from the type of case in which a private reprimand is deemed appropriate discipline under the Rules of Discipline.

Similarly, Florida Standards for Imposing Lawyer Sanctions, Section 4.43 recommends the imposition of a public reprimand when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. Under Section 4.44, a private reprimand would only be appropriate when there is little or no actual or potential injury to a client. Accordingly, a private reprimand would not be appropriate discipline, in this case. Respondent's failure, for three years, to pursue the determination of who is owed the \$2,000.00 has injured both his client and the third party. Respondent still has in his possession the original \$2,000.00 check he received back in 1986. This \$2,000.00 has not been placed in a trust account and is not making interest. Respondent has deprived the rightful owner of this \$2,000.00 by his misconduct.

This Court has even suspended attorneys for misconduct similar to that of Respondent's misconduct. In The Florida Bar v. Neale, 432 So.2d 50 (Fla. 1983), Respondent was suspended for 60 days and given three years probation for neglecting a client's interest and failing to keep the client advised at all times. Likewise, Florida Standards for Imposing Lawyer Sanctions, Section 4.42(a) recommends suspension when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. There is no doubt that Respondent knew he had a \$2,000.00 check whose ownership was in dispute. There is no doubt that Respondent knew he was to pursue an interpleader action. In fact, Respondent did file the interpleader action (T-30). There is no doubt that Respondent knew his client thought he was pursuing such action. Many unanswered inquires were made to Respondent concerning the status of the \$2,000.00 (T-30,33). Respondent's knowing failure to pursue such action resulted in the dismissal of the action and the loss of this money to its rightful owner for at least three years.

Furthermore, in aggravation of Respondent's misconduct is Respondent's lack of cooperation with The Florida Bar. Respondent failed to respond to The Florida Bar's correspondence (T-24), failed to attend the grievance committee hearing (T-24,69,77) failed to respond to the Complaint or Requests for Admissions (T-24,69) and failed to respond to messages left by the Referee (T-70). As stated in The Florida Bar v. Jones, 543

So.2d 751 (Fla. 1989), "this was the same callous disregard for the proceedings of The Florida Bar as he had shown toward his client's legal matter in this case" and should be considered in determining the appropriate discipline. Likewise, Respondent's failure to cooperate with or respond to The Florida Bar's proceedings is indicative of how Respondent disregarded his client's legal matter and inquiries. A lawyer's willful refusal to participate at all in the disciplinary process when he is accused of misconduct calls into serious question the lawyer's fitness for the practice of law. The Florida Bar v. Bartlett, 509 So.2d 287 (Fla. 1987).

While the imposition of a sanction of suspension would be appropriate given the Respondent's misconduct, resulting injury, and failure to cooperate with The Florida Bar's proceedings, The Florida Bar does recognize that Respondent was experiencing personal and emotional problems at this time. Respondent's mother was hospitalized during periods of 1986 and 1987 and died on October 28, 1988 (T-8,12). While The Florida Bar realizes Respondent was going through a particularly trying time, this does not excuse Respondent's misconduct to the level of a private reprimand. **As** previously stated, a private reprimand is only appropriate in cases of minor misconduct. Respondent's violation of the Rules Regulating The Florida Bar cannot be classified as minor even when considering the possible mitigating effect of the personal problems Respondent was experiencing at the time.

Even assuming that Respondent's personal problems were the

underlying cause of his failure to communicate with his client and failure to prosecute the interpleader action which resulted in it being dismissed on July 8, 1988, the issue that immediately becomes apparent is what actions did Respondent take to remedy his misconduct in the period following his mother's death in October, 1988. Respondent did nothing and continued to disregard inquiries from and on behalf of his client (T-35,42,46,53). Respondent continued to disregard the disciplinary proceedings progressing against him and without his participation (T-24). At the time of the final hearing on August 10, 1989, almost a year after his mother's death, Respondent still had no idea of what the status of the interpleader action was. In fact, Respondent testified at the final hearing as follows:

Q. Then what happened to the lawsuit?

A. At this moment, I don't know.
I think it's put on hold because
of Bar proceedings.
(T-11, lines 14-17).

The interpleader action was not "put on hold because of Bar proceedings" but had been dismissed for lack of prosecution on July 8, 1988.


The three purposes to be served in imposing lawyer sanctions are that the judgment must be fair to society, fair to respondent and must be severe enough to deter others who might be Drone or tempted to become involved in like violations. The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). By imposing a private reprimand, the Court would be telling other attorneys that the

failure to diligently pursue a client's matter and failure to communicate with a client on the status of that matter for a period of almost three years is only a minor matter that need not be publicly sanctioned, that there is no need to deter others who might be prone to similar misconduct. It is The Florida Bar's position that the nature of Respondent's misconduct mandates public discipline.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Court to affirm the referee's findings of fact and recommendations of guilt but reject the Referee's recommended discipline of a private reprimand and order instead a public reprimand and one year probation, while affirming the referee's other recommended disciplinary measures to be imposed as contained in numbers three through seven of the Report of Referee.

Respectfully submitted,



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