

FILED

SID J. WHITE

SEP 4 1990

CLERK, SUPREME COURT

By Clerk

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,
vs.
ALFRED S. WELLS,
Respondent.

CASE NO: 74,320
TFB Nos. 88-10,125(13E)
88-10,149(13E)
88-10,506(13E)
88-10,685(13E)
88-10,869(13E)
88-10,911(13E)
88-10,497(13E)
88-11,538(13E)
89-10,992(13E)

REPORT OF REFEREE

Summary of Proceedings: Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.5, Rules of Discipline, final hearings were held on April 6, 1990 and May 18, 1990. The pleadings, notices, motions, orders, transcripts, and exhibits, all of which are forwarded to the Supreme Court of Florida with this Report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Thomas E. DeBerg, Esquire

For the Respondent: Scott K. Tozian, Esquire

Findings of Fact as to each item of misconduct with which the Respondent is charged: After considering all of the pleadings and evidence before me, pertinent portions of which are commented on below, I find that due to Respondent's failure to respond to the Request for Admissions that all matters deemed therein are deemed admitted.

Accordingly, all allegations in the Florida Bar's nine count complaint were deemed admitted. Notwithstanding the matters deemed admitted, I make the following findings.

COUNT I

Respondent did represent the defendant in the case of the State of Florida vs. Darrold Leonard Hunter before the Honorable Richard A. Lazzara in Hillsborough County, Florida. That Respondent failed to appear on May 31, 1988 for trial. Moreover, Respondent did not contact the Judge or the State Attorney's Office to inform either party that Respondent would not be present. With respect to Respondent's failure to appear, Respondent testified at hearing on April 6, 1990 that he was experiencing family problems and moreover was arrested on April 7, 1988 for DUI and thereafter arrested on May 20, 1988 for possession of cocaine. On the day of trial referenced above, the Respondent had entered a residential drug treatment program and remained therein for approximately thirty days. Due to the severe personal problems experienced by the Respondent, he testified that he had forgotten about Mr. Hunter's trial.

Findings of Guilt for Violations of Rules Regulating The Florida Bar: Based on matters deemed admitted and the testimony of the Respondent, I find that Respondent has violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and

promptness in representing a client); Rule 4-1.16 (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest); and Rule 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

COUNT II

Findings of Fact: In 1986, Respondent was appointed by a Federal Magistrate to represent Jerry L. Cook to file a Petition for a Writ of Habeas Corpus. Respondent met with Mr. Cook in July of 1986 in the prison facility where he was being held. In December of 1986 the Respondent was directed by the United States District Court for the Middle District of Florida to file a brief regarding the Petition for Writ of Habeas Corpus by January 17, 1987. Respondent failed to file the referenced brief within the time frame given. A second order of October 9, 1987 ordered the filing of the brief no later than October 23, 1987. The Respondent did comply with this later order. Moreover, the Respondent failed to adequately communicate with Mr. Cook and his wife with respect to this representation. Finally, Respondent failed to provide Mr. Cook's subsequent counsel, Nick Mattasini, with the contents of Mr. Cook's file. Respondent testified at the April 6, 1990 hearing that personal feelings concerning Mr. Cook influenced his behavior towards Mr. and Mrs. Cook.

Findings of Guilt: Based on the foregoing, I find that the Respondent has violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information); Rule 4-1.15(b) (a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); Rule 4-1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest); and Rule 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

COUNT III

Findings of Fact: Respondent wrote a trust account check on May 15, 1987 to Betty M. Lauria, a court reporter, in the amount of \$1,121.70 drawn on the Columbia Bank which was returned by said bank for insufficient funds. Thereafter, Pedro J. Pizzaro, Branch Auditor for The Florida Bar conducted an audit upon notification of the bounced trust account check. Mr. Pizzaro's audit revealed that Respondent's trust account was not in substantial compliance with the minimum requirements

established by The Florida Bar for maintaining trust accounts. Respondent testified at hearing that the money received and marked for payment to Betty Lauria was advanced as costs for a client, Debra Sarette, in order to take depositions. Debra Sarette also testified at the hearing before the Referee on April 6, 1990 and it is clear that Mr. Wells did represent Ms. Sarette with respect to two second degree felony charges of child abuse. Moreover, Mr. Wells' efforts with respect to Ms. Sarette resulted in not guilty findings on both charges. Nevertheless, I find a misuse of trust funds as well as Respondent's failure to maintain his trust account in compliance with the minimum requirements of The Florida Bar. I further find as evidenced by a satisfaction of judgment entered into evidence by Respondent, that the debt to Betty Lauria has subsequently been paid by Respondent.

Findings of Guilt: Based on the foregoing, Respondent has violated the following Rules of Professional Conduct: Rule 5-1.1(b) (Rule 11.02(4)(b) before January 1, 1987), Rules Regulating Trust Accounts (the records of all accounts pertaining to the funds or property of a client shall be maintained for a period of not less than six years subsequent to the final conclusion of the representation of a client relative to such funds or property); Rule 5-1.2(b)(2) (Bylaws Section 11.02(4)(c) 2.b. before January 1, 1987) (original or duplicate deposit slips clearly identifying the date and source of all trust funds received, and the client or matter for which

the funds were received, shall be maintained by the attorney); Rule 5-1.2(b)(3) (Bylaws Section 11.02(4)(c) 2.c. before January 1, 1987) (original cancelled checks shall be maintained by the attorney); Rule 5-1.2(b)(5) (Bylaws Section 11.02(4)(c) 2.e. before January 1, 1987) (a separate cash receipts and disbursements journal shall be maintained by the attorney); Rule 5-1.2(b)(6) (Bylaws Section 11.02(4)(c) 2.f. before January 1, 1987) (a separate file or ledger with an individual card or page for each client or matter shall be maintained by the attorney); Rule 5-1.2(b)(7) Bylaws Section 11.02(4)(c) 2.g. before January 1, 1987) (all bank or savings and loan association statements for all trust accounts shall be maintained by the attorney); Rule 5-1.2(c)(1) (Bylaws Section 11.02(4)(c) 3.a. before January 1, 1987) (monthly reconciliations of all trust accounts disclosing the balance per bank, deposits in transit, outstanding checks, and any other items necessary to reconcile the balance per bank with the balance per checkbook and the cash receipt and disbursements journal, and a comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards, together with specific descriptions of any differences between the two totals and the reasons therefore, shall be made by the attorney); Rule 5-1.2(c)(2) (Bylaws Section 11.02(4)(c) 3.b. before January 1, 1987) (at

least annually, a detailed listing identifying the balance of the unexpended trust money held for each client or matter shall be made by the attorney); Rule 5-1.2(c)(3) (Bylaws Section 11.02(c) 3.c. before January 1, 1987); (the reconciliations, comparisons, and listing shall be retained for at least six (6) years by the attorney); Rule 5-1.2(c)(4) (Bylaws Section 11.02(4)(c) 3.d. before January 1, 1987) (a lawyer shall authorize and request any bank or savings and loan association where he is a signatory on a trust account to notify Staff Counsel, The Florida Bar, in the event any trust check is returned due to insufficient funds or uncollected funds, absent bank error); Rule 4-1.15(d), Rules of Professional Conduct (a lawyer shall comply with The Florida Bar Rules Regulating Trust Accounts).

I do not find Respondent guilty of Rule 4-8.4(b), Rules of Professional Conduct (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), as there was no proof adduced at trial that showed Respondent committed a criminal act with respect to his trust account.

COUNT IV

Findings of Fact: Respondent was retained by Bernie Mae Reid to represent Ms. Reid in an adoption proceeding concerning her grandchildren. Ms. Reid paid a \$50.00 retainer fee on November 12, 1986 and later paid an additional \$250.00 in February of 1987. Respondent failed to file the adoption papers as promised and failed to return the fee to Ms. Reid.

Respondent testified at a hearing on April 6, 1990 that his personal problems, including drug use, precipitated his neglect of Ms. Reid's matter.

Findings of Guilt: Based on the foregoing, I find that the Respondent has violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligent and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 4-1.15(b) (a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); Rule 4-1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as refunding any advance payment of fee that has not been earned); and Rule 5-1.1, Rules Regulating Trust Accounts (money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, shall be held in trust and must be applied only to that purpose).

COUNT V

Findings of Fact: Respondent was retained by Leandro Francis for representation in an uncontested divorce on November 12, 1987. Respondent failed to adequately communicate with Mr. Francis over the year with respect to the status of Mr. Francis' case and failed to provide Mr. Francis with various pleadings related thereto.

Findings of Guilt: Based on the foregoing, I find that the Respondent violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); and Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information).

COUNT VI

Findings of Fact: Respondent was retained by Mary Thompson to represent her in a probate matter in January, 1987. Respondent was paid a \$50.00 retainer fee and charged a total fee of \$250.00 for his legal services in this matter. Thereafter, Respondent failed to keep appointments, return telephone calls, and otherwise communicate with his client concerning the litigation. Moreover, Respondent missed a hearing in January of 1988 concerning Ms. Thompson's case. Finally, Respondent failed to return Ms. Thompson's file after her request.

Findings of Guilt: Pursuant to the foregoing, Respondent has violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 4-1.15(b) (a lawyer shall promptly deliver to a client or third person any funds or other property that

the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property); and Rule 4-1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest).

COUNT VII

Findings of Fact: Respondent was hired by Lloyd Davis to represent him in a worker's compensation claim in July, 1987. Thereafter, Respondent successfully negotiated the settlement of Mr. Davis' claim for \$27,500.00; \$2,500.00 of which was earmarked as attorney's fees. Thereafter, Respondent forwarded to Mr. Davis only \$23,500.00. Respondent testified at trial that Mr. Davis had agreed to loan the remaining \$1,500.00 to Respondent and that he had been unable to repay Mr. Davis to date.

Findings of Guilt: Pursuant to the foregoing, Respondent has violated the following Rules of Professional Conduct: Rule 4-1.15(b) (a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); and Rule 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct). I find that a violation of Rule 5-1.1, Rules Regulating Trust Accounts (conversion) has not been clearly and convincingly proven.

COUNT VIII

Findings of Fact: Respondent was retained by Ronald Zito in August of 1987 to represent Mr. Zito on a foreclosure and bankruptcy matter. Mr. Zito paid a fee in the amount of \$350.00 for said representation. Six days after Respondent was retained, Mr. Zito's house was foreclosed upon in Case Number 87-12017 in the Thirteenth Judicial Circuit in Hillsborough County. Thereafter, Respondent filed a bankruptcy petition on behalf of Mr. Zito on October 2, 1987 in Federal Court in Tampa. However, Respondent failed to attend the hearing on behalf of Mr. Zito in December of 1987 concerning the bankruptcy and failed to adequately keep Mr. Zito apprised of the status of his representation.

Findings of Guilt: Based on the foregoing, Respondent has violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter); and Rule 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

COUNT IX

Findings of Fact: On April 7, 1988 Respondent was arrested on the charge of driving under the influence of alcohol. A search of Respondent's vehicle conducted incident to that arrest led to the discovery of a pipe which later tested positive for cocaine residue. On May 20, 1988

Respondent was arrested on the cocaine charge at which time an additional pipe was found in Respondent's vehicle. This pipe also tested positive for cocaine residue. Thereafter, Respondent was charged with two counts of possession of cocaine and paraphernalia which were ultimately disposed of by plea in December of 1988. Respondent was placed on probation for a period of five years and adjudication was withheld by the trial court.

Findings of Guilt: Based on the foregoing, Respondent has violated the following Rules of Professional Conduct: Rule 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects).

Recommendations as to Disciplinary Measures to be Applied:

In arriving at the appropriate discipline in this cause in addition to the findings of fact the court considered that the following testimony offered at the hearings on April 7, 1990 and May 18, 1990. Circuit Judge Manuel Menendez testified that Respondent did a creditable job as an assistant state attorney and defense lawyer prior to experiencing the serious drug problems which are referenced throughout the record below. Judge Menendez further noted that Mr. Wells' judgment was impaired by reason of these drug problems during this time. Moreover, George Robinson previously a DACCO drug counselor, testified as to Respondent's efforts to overcome his drug abuse problems. Mr. Robinson indicated that the prognosis for Mr.

Wells successfully overcoming this problem was good based on his dealings with Mr. Wells and the attitude shown by Mr. Wells in their dealings.

Attorney Joe Murphy, who is a monitor for Florida Lawyers Assistance, Inc., testified on Mr. Wells' behalf concerning Mr. Wells' participation in the FLA program. Mr. Murphy indicated by live testimony and by written report dated February 28, 1990, that Mr. Wells was in compliance with the FLA program and that on a scale from zero to five, (five being excellent), that Mr. Wells' rating was a four.

Attorney Ricky Williams testified on behalf of Respondent as to Respondent's legal ability, and his passion for the practice of law. Moreover, Mr. Williams testified as to the change in Mr. Wells personality due to the insidious drug abuse. Moreover, Mr. Wells' wife, Tracey Wells, testified as to his efforts to rehabilitate himself and the gains made in that regard. It is clear from the testimony of the witnesses and the results of the random drug screenings given to the Respondent that he has been drug free for a period of twenty-one months. Furthermore, testimony was given by Reverend Abe Brown, the organizer of the Prison Crusade in Florida, who spoke of Mr. Wells character and participation in the Prison Crusade.

Additionally, the evidence revealed that Respondent has performed 300 hours of community service since being placed on probation. Furthermore, for a period worked two jobs, including bagging groceries, to support his family.

It is clear that Mr. Wells' conduct in the complaint filed by The Florida Bar amounted to an abandonment of his practice as a result of his drug abuse problem. Moreover, Mr. Wells' inexperience in the practice of law and family problems fostered the drug problems and the collapse of his law practice. In considering the appropriate discipline in the instant cause, I have also considered the mitigating factors set forth in the Florida Standards for Imposing Lawyer Sanctions. I find the following mitigating factors to be present in the instant case. Personal and emotional problems, absence of dishonest or selfish motives, inexperience in the practice of law, character and reputation, interim rehabilitation, imposition of other penalties, and remorse shown by Respondent.

Further, I have considered the recently promulgated Standards for Imposing Lawyer Sanctions in Drug Cases as well as the mitigating factors set forth therein. In this regard, I note that Respondent has continued to attend FLA meetings and maintained his program with Florida Lawyers Assistance, Inc. Moreover, I am aware of the fact that the Respondent has been continuously suspended from the practice of law since February 14, 1989 by reason of the determination of guilt in his felony case.

Accordingly, based upon these Florida Standards for Imposing Lawyer Sanctions, and the prior decisions of the Supreme Court of Florida, I recommend that Respondent be

suspended from the practice of law for a period of eighteen months retroactive to the date of his felony suspension on February 14, 1989. Additionally, I recommend that Respondent be placed on probation for a period of two years in the event that he successfully proves to the Supreme Court that he is rehabilitated and worthy of reinstatement to the practice of law in the future. Furthermore, I recommend that the Respondent be ordered to pay to each of the clients listed in the Florida Bar's complaint the respective amounts owed for retainer fees not earned, and with respect to Mr. Davis the \$1,500.00 borrowed. I further recommend that the Respondent be required to submit to random drug screenings during the period of his probation in the event of his reinstatement.

Personal History and Past Disciplinary Record: After the finding of guilt and prior to recommending discipline pursuant to Rule 3-7.5(k)(4), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

- a) Age: 35
- b) Date Admitted to the Bar: September 22, 1982
- c) Prior Disciplinary Convictions and Disciplinary Measures Imposed Therein: Felony Suspension dated February 14, 1989; Recommendation by this Referee in Case No. 71,927 (TFB Nos. 88-17,622(10B) of a ninety-one (91) day suspension for use of cocaine
- d) Area of Practice: Currently suspended

Statement of Costs: It is the recommendation of this Referee that Respondent be required to pay the administrative costs of this proceeding in the minimum amount of \$500.00. Further, this Referee will entertain a Statement of Costs as described in Rule 3-7.5(k) to be filed by The Florida Bar within ten (10) days of this finding and recommendation. All costs taxed in this action are to be payable to The Florida Bar by the Respondent.

Dated at St. Petersburg, Florida this 27th day of Aug., 1990.


JUDGE FRANK H. WHITE
Referee

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Supreme Court of Florida