IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 74,380
[TFB No. 89-30,584' (19)]

v.

ANDREW T. COUTANT,

Respondent.
_____/

**ANSWER BRIEF**

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## SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, will be referred to as the Bar.

The Report of Referee shall be referred to as RR.

The transcript of the final hearing held on February 6, 1990, will be referred to as T.

The transcript of the hearing held on November 14, 1989, will be referred to as T1.

The Bar's exhibits will be referred to as B-Ex.

## STATEMENT OF THE CASE

The Nineteenth Judicial Circuit Grievance Committee voted to find probable cause on April 21, 1989. The Bar filed its Complaint on June 30, 1989. The final hearing was originally set for October 24, 1989, but was continued to November 14, 1989, at the Bar's request due to a conflict in Bar Counsel's schedule. The hearing was again postponed until February 6, 1990, because the complaining witness could not attend due to a death in her family. On March 2, 1990, the Referee filed his report wherein he recommended the respondent be found guilty of violating Rules of Professional Conduct 4-1.3 for failing to act with reasonable diligence and promptness in representing a client; 4-1.4(a) for failing to keep his client reasonably informed as to the status of a matter and promptly comply with reasonable requests for information; and 4-3.2 for failing to make reasonable efforts to expedite litigation consistent with the interests of his client. The Board of Governors of The Florida Bar reviewed the Report of Referee at its meeting which ended March 16, 1990, and voted not to seek review of the Referee's recommendations.

The respondent filed a motion for rehearing, an undated copy of which was received by the Bar on March 9, 1990. The Referee denied the respondent's motion on March 9, 1990. The respondent mailed his Petition For Review on March 30, 1990, but did not mail his initial brief until May 23, 1990. The document, styled as a Petition For Review, was approximately nineteen days late when it was mailed.

## STATEMENT OF THE FACTS

Except as otherwise noted, the following facts are taken from the Report of Referee.

In 1987 Deborah J. Potter filed a small claims action against the sellers of a home she had purchased for failing to properly repair the roof. The case was styled Potter v. McAdams, et al, Case No. 87-1589, in County Court, Martin County, Florida. She retained the respondent on or around January 12, 1988, after a counterclaim was filed by the seller of the house. Ms. Potter also wanted to join the real estate broker as a co-defendant in the case. She paid the respondent a $250.00 retainer and he was to seek any additional fees from the sellers in accordance with the contract for sale. She understood that it would not cost her more than the retainer but there was some confusion regarding her understanding of the terms and her liability if she lost.

Initially, communication between Ms. Potter and the respondent was satisfactory until mid-summer, 1988. Beginning in July, 1988, Ms. Potter began experiencing difficulty in contacting the respondent by telephone despite leaving messages. She finally wrote the respondent by letter dated September 27, 1988, wherein she clearly set forth what she perceived to be a communication problem between them. (B-Ex 3 - See Appendix).

The respondent testified at the final hearing that he replied to her by a letter written on or around October 4, **1988**, in which he indicated that he had attempted to return her "calls". (B-Ex 4 - See Appendix). He maintained that the letter was inadvertently addressed incorrectly. Ms. Potter never received any such letter from the respondent during this time period and evidence was found to be lacking as to whether or not the respondent actually wrote the letter at that time.

The respondent made no further attempts to contact Ms. Potter and did only enough work on the case to keep it from being dismissed by the court for failure to prosecute. He did not attempt to further ready the case for trial other than to schedule a deposition of the seller for February **17**, **1989**, which was continued.

Ms. Potter complained to The Florida Bar on or around November **21**, **1988**. She did not attempt to contact the respondent further and she heard nothing from him until after the grievance committee hearing on April 12, **1989**.

## SUMMARY OF THE ARGUMENT

The respondent had the opportunity to cross-examine Ms. Potter at the final hearing and did so. The apparent conflict in her testimony must be read in context. The fact that the witness could not remember the exact number of telephone calls she made to the respondent's office did not undermine her credibility before the Referee and certainly does not constitute perjury. The main issue concerns the respondent's lack of adequate communication with his client and not how many times his client tried to call him. Regardless of how often Ms. Potter called, it is the attorney's duty to maintain adequate contact pursuant to Rule 4-1.4(a) of the Rules of Professional Conduct. Had Ms. Potter been able to communicate with the respondent, it is doubtful that she would have made the complaint to The Florida Bar. The thirty day suspension recommended by the Referee is warranted due to the respondent's two previous private reprimands and one public reprimand. A review of these cases indicates problems with adequate communication in all three.

## ARGUMENT

**THE REFEREE'S RECOMMENDATION OF A THIRTY DAY SUSPENSION IS THE APPROPRIATE DISPOSITION GIVEN HIS FINDINGS OF FACT AND THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY.**

The main thrust of Ms. Potter's complaint to the Bar concerned the respondent's failure to communicate with her during the summer and fall of 1988. The actual number of calls she placed to the respondent's office during this time is immaterial and the Referee obviously found her testimony to be credible and supported by the evidence.

Ms. Potter's letter to the respondent dated September 27, 1988, stated the following:

> I don't know whether there is a personality problem whereas our relationship is concerned, but if there is it is not from my end.
>
> I have repeatedly called your office to be told you would return my call, and I have yet to talk to you. This case has been going on for months, which I can understand, but the legal papers I receive copies of are hardly in common laymen's terms.
>
> I realize you have a busy schedule, as do alot of professionals, myself included, but a 2 minute phone call to a clients hardly seems like an infraction on your time.
>
> I do have an answering machine on any time I am away from the phone. I would appreciate an update on the status of this case. (B Ex 3 - See Appendix).

The respondent's reply dated October 4, 1988, which was misaddressed and Mr. Potter never received, stated, in part, the following:

> I am in receipt of your letter dated September 27th, 1988. I am not trying to avoid you as I have tried on many occasions to return your calls. (Emphasis added) (B-Ex 4 - See Appendix).

Clearly, the respondent's letter is inconsistent with the self-serving affidavits from members of his office staff he is attempting to submit and which state that Ms. Potter called his office only once in August, 1988. In his letter he makes reference to her "calls". Furthermore, his statement that he was not trying to avoid her serves to further underscore he was aware Ms. Potter had called his office on more than one occasion. It should be noted that the Bar has filed a motion to strike the affidavits from consideration.

The respondent attempts to argue that Ms. Potter committed perjury because there were discrepancies in her testimony concerning the number of times she called his office. Perjury is defined by Black's Law Dictionary as being a crime which is committed when a lawful oath is administered in a judicial proceeding to a person who swears willfully, absolutely and falsely in a matter material to the issue or point in question. The Bar submits that Ms. Potter's testimony, when read in context, is not so conflicting as to constitute perjury.

Regardless of how many times Ms. Potter did or did not call, the burden was on the respondent to maintain adequate communication with her. He clearly failed to do this before her September 27, 1988, letter which was sent for one reason - lack of communication. He allegedly sent her the letter dated October 4, 1988, and never received a response. Rather than following up on the letter he merely set the case aside and did nothing other then to schedule a deposition to keep the matter from being dismissed for failure to prosecute. (T p. 14). Had Ms. Potter received the October 4, 1988, letter it is unlikely that she would have complained to The Florida Bar two months later. If Ms. Potter were as disinterested in her case as the respondent portrays, it raises the question as to why she would file a complaint with the Bar concerning the respondent's lack of communication. Moreover, she continued to employ the respondent even after complaining to the Bar. It is obvious from Ms. Potter's letter of September 27, 1988, that she called more than once. The Referee found the evidence clearly supported that she made more than one call. (RR p. 2). The exact number of calls is not material to the issue at hand.

The respondent was unable to cross-examine Ms. Potter at the grievance committee hearing because he was late due to automobile trouble. (T1 p. 4). Therefore, he was provided with a copy of her testimony which presumably he reviewed prior to the February final hearing. (T1 pp. 4-5). Yet the respondent chose not to

address the apparent conflict in Ms. Potter's testimony at the final hearing on cross examination. Only now does he attempt to make an argument which should have been made at the trial level. Furthermore, the grievance committee transcript was not submitted into evidence before the Referee although the respondent included portions of it in his brief to buttress his argument. This makes it impossible for the Court to review all of the testimony and the supposed conflicts in context. The respondent had more than enough time to fully prepare his case before the final hearing. He told the Referee at the hearing on November 14, 1989, that he intended to review his records to verify how many telephone calls Ms. Potter made to his office during the time in question. (T1 p. 7). The respondent could have proffered the two affidavits attached to his motion for rehearing at the final hearing or, even better, the affiants could have appeared and given live testimony subject to cross-examination.

With respect to the respondent's statement in his brief that his client failed to appear at the trial in the civil matter despite receiving notice, a review of Ms. Potter's testimony at the final hearing on February 6, 1990, indicated that she probably was not aware of the exact date for the trial. She testified then that the respondent was going to get back in touch with her at a later date and provide information concerning the trial. According to her testimony, he told her this when she spoke with him on February 5, 1990. (T p. 10). No further

inquiry on the subject was made at the final hearing. Given the past communication problems it would have been reasonable for the respondent's office to contact Ms. Potter at some point prior to the trial and confirm that she was aware of the date, time and place and would attend.

It is the Referee who resolves any conflicts in the testimony and his findings will be upheld unless they are without support in the evidence. The Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990). The Referee has the opportunity to observe the witnesses and judge their credibility. Therefore, this Court is bound by the Referee's findings in that respect. Bajoczky, supra. The Referee had the opportunity to observe Ms. Potter's demeanor and judge her credibility. Therefore, his findings should be upheld.

The respondent has a prior history of engaging in similar misconduct. In The Florida Bar v. Coutant, Case No. 1986C87, the respondent received a private reprimand with an appearance before the grievance committee for failing to adequately communicate with his client. He had been retained to handle a small claims matter and was successful in obtaining a judgment on behalf of his client. The client then paid him additional funds to collect on the judgment. The respondent, however, turned that matter over to another attorney in the firm without his client's prior knowledge or consent. The respondent failed to return any of his

client's numerous telephone calls, to keep him apprised of the progress of the case, or to forward copies to him of any correspondence involved. See Appendix for a copy of the Report of Minor Misconduct.

In The Florida Bar v. Coutant, Case No. 1987C27, the respondent again received a private reprimand, this time with an appearance before the Board of Governors and a two year period of probation during which he was to file quarterly case load reports with the Bar and furnish a verified statement of his new office policies. The respondent had been retained to handle a dissolution of marriage action. The parties entered into a stipulation for temporary relief but the respondent failed to furnish a copy of it to his client or fully explain its provisions to her. Furthermore, he did not have her explicit authority to enter into the stipulation. The respondent also failed to advise his client of an order freezing the marital assets. She withdrew money in violation of the terms of the order and the respondent indicated to the committee that if it became an issue he would advise the court there was an apparent lack of communication between him and his client. See Appendix for a copy of the Report of Minor Misconduct.

In The Florida Bar v. Coutant, 541 So.2d 1173 (Fla. 1989), the respondent received a public reprimand and a two year period of probation for practicing law while suspended and for failing

to adequately maintain his trust account, for failing to adequately maintain a guardianship account and for failing to adequately communicate, as guardian, with his ward's nursing home administrator. The respondent had failed to forward payments for the ward's expenses in a timely manner on numerous occasions. The administrator of the nursing home had experienced a great deal of difficulty in contacting the respondent and finally complained to the Bar.

Although the Court's opinion in the respondent's public reprimand case above was issued after the misconduct occurred in the instant matter, this Court has most recently stated in The Florida Bar v. Golden, No. 73,553 (Fla. May 31, 1990), that "cumulative misconduct can be found when the misconduct occurs near in time to the other offenses, regardless of when discipline is imposed." Citing The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981). The communication problems with Ms. Potter occurred during 1988 around the same time as the communication problems with the administrator of the nursing home. Therefore, the respondent's public reprimand case should be considered as cumulative misconduct exemplifying yet another example of inadequate communication which has permeated all of the respondent's prior cases.

Standing alone the misconduct charged in the instant case most likely would warrant a finding of minor misconduct (now

admonishment) or a public reprimand. The Bar submits that a thirty day suspension is warranted in this case because of the respondent's prior disciplinary history involving similar and cumulative misconduct. As this Court stated in The Florida Bar v. Bern, 425 So.2d 526, 528 (Fla. 1982), "[t]he Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar misconduct."

Other cases have resulted in similar discipline for failing to communicate and neglecting a legal matter.

In The Florida Bar v. Golden, 530 So.2d 931 (Fla. 1988), an attorney was suspended for ninety days for neglecting a legal matter entrusted to him. The attorney had been retained to handle a medical malpractice suit. He failed to timely file an amended complaint as requested by the court and was admonished to file a second amended complaint in a timely fashion. He again failed to do so and the District Court of Appeals upheld the dismissal of claims against two of the defendants and specifically criticized the accused attorney for disregarding an order of the court. He filed an appeal of the trial court's ruling dismissing a third defendant but failed to timely file his brief. The District Court of Appeals upheld the trial court's order dismissing the claim and noted that the plaintiff was

running out of defendants to take to trial. In addition, the accused attorney failed to timely file his brief in the Bar discipline case. This Court stated that attorneys have an obligation to diligently pursue matters they undertake and comply with court orders. Failing to do so demonstrates a lack of zealousness or dedication to professional responsibilities. The accused attorney had a prior disciplinary history with other cases of neglect.

In The Florida Bar v. Schilling, 486 So.2d 551 (Fla. 1986), an attorney was publicly reprimanded and placed on a six month period of suspension for neglecting two legal matters that had been entrusted to him. The attorney had a prior disciplinary history which warranted the more sever discipline.

In The Florida Bar v. Rosenberg, 474 So.2d 1175 (Fla. 1985), an attorney was suspended for ninety days for neglecting a legal matter and being convicted of five misdemeanor charges. The attorney had agreed to represent an out-of-state client in a civil matter but failed to respond to repeated inquiries concerning the status of the case for approximately ten months. The client also made numerous requests that the attorney send copies of the defendant's interrogatories, requests for admission and other pleadings which the attorney had not attended to in a timely manner. The suit was dismissed for lack of prosecution on two occasions due to the attorney's neglect. The attorney was

also convicted of five misdemeanors for failing to comply with minimum housing standards and was sentenced to the county jail. The attorney had a prior disciplinary history which warranted the more severe discipline.

In The Florida Bar v. Ryan, 396 So.2d 181 (Fla. 1981), an attorney received a thirty day suspension for neglect. The attorney had allowed a statute of limitations to run against a client's case, failed to deliver to the client securities or other property the client was entitled to and failed to timely account for escrow funds after both a request and an order by the circuit court. The suspension was justified because the attorney had a prior disciplinary history.

In The Florida Bar v. Fuller, 389 So.2d 998 (Fla. 1980), an attorney was suspended for one month for neglect and inadequate communication. The attorney had been retained by two Canadian businessmen to pursue a claim against a Florida corporation. He was paid a retainer but failed to adequately communicate with his clients and did not proceed with the action as originally agreed. His reinstatement was conditioned upon restitution of the retainer and payment of costs in the Bar proceedings. The attorney had no prior disciplinary history and the referee belived he was genuinely remorseful for his misconduct.

The Florida Standards For Imposing Lawyer Discipline, which were adopted by the Board of Governors in late **1986,** also indicate that a suspension is the most appropriate discipline in this case. Under Standard **4.4,** Lack of Diligence, 4.42(a) calls for a suspension when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. Knowledge is defined by the Standards as being the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. When the respondent received no reply to his letter of October 4, **1988,** allegedly sent to Ms. Potter at an incorrect address, rather attempting to contact her and determine what she wanted to do with her case he simply put the matter on hold. (T p. **14).** He knowingly allowed Ms. Potter's case to languish and did nothing more other than set a deposition in order to keep it from being dismissed for lack of prosecution. (T p. **14).** He did nothing to advance the case apparently because he had other clients with more substantial claims pending in court. (T p. 14**).**

Under Standard **8.0,** Prior Discipline Orders, **8.2** calls for a suspension when a lawyer has been publicly reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession. A review of the respondent's disciplinary history clearly indicates that

communication with his clients has been an ongoing problem for quite some time.

Standard 9.0, Aggravation and Mitigation, should also be considered in determining the appropriate level of discipline in a case. Standard 9.22 lists factors which may be considered in aggravation. In the instant case, the respondent has a prior disciplinary history, has exhibited a pattern of misconduct and has substantial experience in the practice of law.

Standard 9.32 lists factors which may be considered in mitigation. In the instant case the only applicable factor appears to be that there is no dishonest or selfish motive involved.

In determining the appropriate level of discipline, three considerations must be made as laid out in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). First, the judgment must be fair to society and the respondent, protecting the former from unethical conduct without unduly denying them the services of a qualified lawyer. The Bar submits that the suspension in the instant case is fair to the respondent considering his prior three discipline cases all of which involved inadequate communication. Furthermore, the size of the Bar is such that the respondent's suspension will not unduly deprive society of the services of an otherwise qualified attorney.

Second, the discipline must be fair to the respondent, being sufficient to punish the breach and at the same time encourage reform and rehabilitation. The cumulative principle of discipline demands more than a public reprimand. A thirty day suspension, as expressed by the Referee at the final hearing, will afford the respondent time to contemplate his communication problems and take steps to improve them.

Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misconduct. The suspension recommended in the instant case should help to deter like-minded individuals by advising members of the Bar, through the issuance of this Court's opinion, that repeated instances of neglect and inadequate communication will warrant stern discipline.

Neglect and inadequate communication produce a large number of complaints to the Bar that eventuate into many of the disciplinary orders from the Court. Inadequate communication is a continuing problem which this Court recoginized when it adopted Rule of Professional Conduct **4-1.4** which became effective January **1, 1987.** Prior to that time inadequate communication had been bound up in Disciplinary Rule 6-101(A)(3) concerning neglect. In the instant case the Referee recommended the respondent be found guilty of violating Rules of Professional Conduct **4-1.3** for failing to act with reasonable diligence in representing a

client; 4-1.4(a) for failing to keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and 4-3.2 for failing to make reasonable efforts to expedite litigation consistent with the interests of the client. Failure to adequately communicate is the main issue in this case.

The Bar submits that a thirty day suspension would best serve the three purposes enumerated in Lord, supra. The respondent has failed to learn from his prior disciplines that it is his main responsibility to maintain reasonable contact with his clients to keep them apprised of the status of their case as opposed to the reverse.

## CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will review and approve the Referee's findings of fact, recommendation of guilt and recommendation of a thirty day suspension and further order the respondent to pay costs in these proceedings currently totalling $1,086.18.

Respectfully submitted,

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BY: David G. McGunegle
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original and seven (7) copies of the The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by certified mail, return receipt requested no. P 034 463 953; to the respondent, Andrew T. Coutant, 43 East Ocean Avenue, Post Office Box 2710, Stuart, Florida, 34994; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 11Th day of June, 1990.

Respectfully submitted,

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