IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT K. HAYDEN,

Respondent.

_____/

Case No. 75,351
(TFB #89-10,262(06C)
(TFB #89-10,308(06C)

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The following references will be used in this brief:

Tr. = Transcript of final hearing (May 11, 1990).

RR = Report of Referee (August 9, 1990).

STATEMENT OF THE CASE AND OF THE FACTS

On February 4, 1988, June Ferreri spoke to Robert K. Hayden about retaining him to represent her in a dissolution of marriage action. An Authority to Represent was signed by Mrs. Ferreri and Mr. Hayden on February 10, 1988. (Bar Ex. 1).

On May 3, 1988, Mrs. Ferreri returned to Mr. Hayden's office and paid him a retainer of $500.00. (Bar Composite Ex. 4). Mr. Hayden then prepared and filed a Petition for Dissolution of Marriage on behalf of Mrs. Ferreri. In the petition, Mr. Hayden sought child support and lump sum alimony as directed by Mrs. Ferreri.

On July 11, 1988, a final hearing was held in In Re The Marriage of June Ferreri, Petitioner, and Frank C. Ferreri, Respondent, in the Circuit Court for Pinellas County, Florida, Circuit Civil Number 88-6815-16. Mr. Ferreri did not respond to the petition or appear for the final hearing. Mrs. Ferreri was awarded child support plus lump sum alimony in the amount of $2,500.00. (Tr. page 11, line 11). The $2,500.00 was the amount Mrs. Ferreri asked Mr. Hayden to seek on her behalf. (Tr. page 27, line 15).

Immediately after the final hearing of July 11, 1988, Mr. Hayden attempted to contact Mr. Ferreri to work-out an installment payment plan for the $2,500.00. Mrs. Ferreri authorized Mr. Hayden to pursue payment of the lump sum alimony award in this manner. (Tr. page 27, line 24).

On July 25, 1988, Mrs. Ferreri secretly accepted a check in the amount of $300.00 from her ex-husband, Frank Ferreri. (Bar Ex. 3). Mrs. Ferreri accepted the $300.00 payment as payment in full of the $2,500.00 lump sum alimony award procured by Mr. Hayden. (Bar Ex. 12). Mrs. Ferreri did not give Mr. Hayden a copy of the settlement agreement she entered into with her ex-husband. (Tr. page 29, line 11). In numerous conversations with Mr. Hayden subsequent to July 25, 1988, Mrs. Ferreri failed to mention she had settled with her ex-husband. (See references to record below).

Since Mr. Hayden was unaware of the settlement reached between Mr. and Mrs. Ferreri, he prepared a Final Judgment of Dissolution of Marriage awarding Mrs. Ferreri $2,500.00 as lump sum alimony. (Bar Ex. 2). Mrs. Ferreri received a copy of the final judgment, (Tr. page 28, line 16), and failed to tell Mr. Hayden the court order should be amended to reflect the fact she had settled with Mr. Ferreri. (Tr. page 29, line 7).

Subsequent to entry of the Final Judgment of Dissolution of Marriage on August 16, 1988, Mr. Hayden continued to take steps to attempt to collect the $2,500.00 for his client, Mrs. Ferreri. On September 7, 1988, Mr. Hayden asked Mrs. Ferreri if she wished to bring a contempt action against Mr. Ferreri for his failure to pay the lump sum alimony. (Tr. page 97, line 16). Mrs. Ferreri agreed to do so as long as she would not incur any additional fees. Mr. Hayden did not charge Mrs. Ferreri for preparing the motion for contempt. (Tr. page 32, line 19, and page 86, line 18). Again, Mrs. Ferreri failed to tell Mr. Hayden she had received $300.00 as payment in full from Mr. Ferreri.

On September 14, 1988, Henry Winecker, an attorney from Mr. Hayden's office, spoke to Mrs. Ferreri. He first asked her if Mr. Ferreri was current in paying child support and whether Mr. Ferreri had paid the $2,500.00 lump sum alimony. (Tr. page 30, lines 2 and 9). Mrs. Ferreri told Mr. Winecker she had received $300.00 of the $2,500.00, (Tr. page 30, line 21), but she did not tell him the $300.00 had been accepted as payment in full. (Tr. page 31, line 1). Mr. Winecker then told Mrs. Ferreri Mr. Hayden was going to proceed with a motion for contempt against Mr. Ferreri. (Tr. page 67, lines 8-13). A Notice of Date of Action was sent to Mrs. Ferreri confirming her conversation with Mr. Winecker. (Bar Ex. 7). Mrs. Ferreri received the notice, but did not contact Mr. Hayden to tell him she had settled for $300.00. (Tr. page 31, line 18).

On September 16, 1988, Mrs. Ferreri filed a complaint with The Florida Bar against Mr. Hayden. (Resp. Ex. 1). The complaint failed to mention that the $300.00 received by Mrs. Ferreri was payment in full. The complaint also failed to mention Mrs. Ferreri's conversation with Mr. Winecker.

Mr. Hayden again spoke with Mrs. Ferreri on September 19, 1988, about the upcoming hearing on the motion for contempt. (Tr. page 33, line 20 - page 34, line 4 and page 88, lines 11-23). Mrs. Ferreri did not tell Mr. Hayden she had accepted $300.00 as payment in full from Mr. Ferreri. In addition, Mrs. Ferreri did not tell Mr. Hayden on September 19, 1988, that she did not wish to proceed with the motion for contempt. (Tr. page 88, line 20).

Finally, on September 26, 1988, the day before the scheduled hearing on the motion for contempt, Mr. Hayden learned for the first time that Mrs. Ferreri had secretly settled with Mr. Ferreri for $300.00. (Tr. page 89, line 2). Mr. Hayden then immediately cancelled the hearing on the motion for contempt. (Tr. page 51, lines 16-19, and page 89, line 9).

On April 11, 1989, the Sixth Judicial Circuit Grievance Committee "C" found probable cause for further disciplinary proceedings in this case. The complaint of The Florida Bar was filed on January 18, 1990. The Honorable Morrison Buck was then assigned as referee on February 14, 1990.

A final hearing was held on May 11, 1990. Final arguments were heard on July 30, 1990. The report of referee sought to be reviewed was served on August 9, 1990. The petition for review in this case was filed on October 19, 1990.

SUMMARY OF ARGUMENT

I. The referee made several findings of fact which are erroneous, unlawful, or unjustified. The referee found that, subsequent to July 25, 1988, respondent was contacting Mr. Ferreri in an effort "at least secondarily to recover his legal fees from the proceeds." (RR, p.2). No witness provided any testimony to support this finding. In fact, several portions of the record show the erroneous nature of the aforementioned finding of fact.

The referee's findings of fact (5) and (6) are also erroneous, unlawful, or unjustified. In regard to finding of fact (5), the testimony of Mrs. Ferreri and the respondent was basically consistent about the events up and to September 1988. The main divergence in their testimony relates to whether Mrs. Ferreri authorized the respondent to proceed with a motion for contempt against Mr. Ferreri.

When the totality of the circumstances is considered, Mrs. Ferreri's testimony is inconsistent and illogical. Thus, the referee's finding of fact (5) is not supported by clear and convincing evidence.

The referee's finding of fact (6) is also not supported by clear and convincing evidence. The referee appears to have ignored the testimony of Henry Winecker and Bar Exhibit 7 in reaching this finding.

Finally, the referee found that the respondent cancelled the hearing on the motion for contempt after meeting with the

Ferreris. (RR, Sec. II-7, p.2). This finding is totally unsupported by the record and is diametrically opposed to the testimony of the Bar's own witness, Frank Ferreri. The referee's clearly erroneous finding on this point colored his entire view of the respondent's conduct in this case.

II. A. The referee recommended that the respondent be found guilty of violating Rule 4-1.2(a), Rules Regulating The Florida Bar. Since the referee's recommendation was influenced by his mistaken impression that the respondent was motivated by a desire to "enhance recovery" of respondent's fees, this recommendation is not supported by clear and convincing evidence. In addition, since the respondent did not actually proceed with a hearing on the motion for contempt, Rule 4-1.2(a) does not apply in this case.

The respondent is guilty of, at most, failure to communicate clearly with his client. Mrs. Ferreri, however, failed to provide the respondent with critical information which would have influenced the respondent's entire course of conduct. This lack of disclosure by Mrs. Ferreri caused the respondent to take steps, at no charge to Mrs. Ferreri, he otherwise would not have taken.

B. Rule 4-3.1, Rules Regulating The Florida Bar, was not violated by the respondent in this case. The intent of the rule is to sanction lawyers who bring frivolous proceedings, not those who fail to follow the directions of their client.

The motion for contempt filed by the respondent was not frivolous under the facts of the underlying dissolution of marriage action. Since the lump sum alimony award was in the nature of support, the respondent had a good faith argument for bringing a contempt action to enforce the trial court's order.

III. A six-month suspension from the practice of law is clearly not warranted in this case. The respondent's conduct, even taking his prior disciplinary record into consideration, is not so egregious as to merit such a severe sanction.

The Florida Standards for Imposing Lawyer Sanctions show a public reprimand is the appropriate discipline in this case. A public reprimand is also supported by prior cases of this Court.

I. THE REFEREE'S FINDINGS OF FACT ARE ERRONEOUS, UNLAWFUL, OR UNJUSTIFIED

Respondent is well aware of the presumed correctness of the referee's findings of fact, the burden respondent must overcome, and the clearly erroneous or lacking in evidentiary support standard. The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990) (rules and cases cited therein). Nevertheless, respondent believes several of the referee's findings of fact are erroneous, unlawful, or unjustified.

The referee found that, subsequent to July 25, 1988, respondent was contacting Mr. Ferreri in an effort "at least secondarily to recover his legal fees from the proceeds." (RR, p.2). There is absolutely no support in the record for this finding by the referee. No witness testified that respondent was seeking recovery of the court-ordered lump sum alimony in order to recover his legal fees.

The following points show the erroneous nature of the aforementioned finding of fact. First, the authority to represent entered into between respondent and Mrs. Ferreri does not provide that Mr. Ferreri would in any way be liable for respondent's fees. (Bar Ex. 1). Likewise, the Final Judgment of Dissolution of Marriage did not provide that Mr. Ferreri would be liable for respondent's fees. (Bar Ex. 2). Second, even if respondent had successfully collected the full lump sum alimony award for Mrs. Ferreri, he still may have had to resort to a lawsuit to recover his fees if Mrs. Ferreri would not voluntarily pay him. Finally, respondent clearly was motivated by a desire to recover the money for Mrs. Ferreri as evidenced by the fact he

did not charge her for anything other than a few telephone conferences after July 25, 1988. (Bar Ex. Composite 4, Tr. page 32, line 19, and page 86, line 18).

One of the central issues in this case is whether Mrs. Ferreri authorized respondent to proceed with a motion for contempt against Mr. Ferreri for his failure to pay the lump-sum alimony. Although the testimony on this issue was in conflict, respondent submits the referee's findings of fact (5) and (6) (RR, p.2), are not supported by clear and convincing evidence.

The testimony of Mrs. Ferreri and the respondent is basically consistent about the events up and to September 1988. The main conflict in their testimony begins with a telephone conversation on either September 7, 1988, (Tr. page 87, line 11 and Bar Composite Ex. 4), or September 9, 1988. (Tr. page 19, line 5). The respondent testified Mrs. Ferreri authorized him to proceed with a motion for contempt against Mr. Ferreri for failure to pay the $2500.00 lump sum alimony award. (Tr. page 87, line 19). Mrs. Ferreri testified she did not want respondent to proceed with a motion for contempt because she did not want to incur "any more attorney's fees." (Tr. page 20, line 9). It is clear, however, that up to this point the respondent had been seeking recovery of the lump sum alimony with Mrs. Ferreri's authorization. (Tr. page 35, line 6).

The totality of the circumstances supports the respondent's version of the events which occurred in September 1988. If the respondent had truly been motivated by a desire to "enhance recovery", (RR, sec. III, p.3), of his fees, he would

have charged Mrs. Ferreri for preparation of the motion for contempt. In addition, as will be discussed below, the respondent certainly would not have dismissed the motion for contempt prior to meeting with the Ferreris to discuss his fees.

The referee found that "Mrs. Ferreri instructed respondent not to proceed with the contempt proceeding, with her primary motivation being to avoid incurring any additional lawyer's fees." (RR, p.2). Respondent testified that as early as August 15, 1988, Mrs. Ferreri authorized him to seek to hold Mr. Ferreri in contempt for failure to pay the alimony. (Tr. page 87, line 2). On September 7, 1988, Mrs. Ferreri again told respondent to "go ahead" with the contempt motion. (Tr. page 87, line 19). Both respondent and Mrs. Ferreri testified she was not charged any additional fees for respondent's efforts in filing for contempt. (Tr. page 32, line 19 and page 86, line 18).

The referee's finding of fact (6) totally ignores the testimony of Henry Winecker and Bar Exhibit 7. Mr. Winecker testified he spoke to Mrs. Ferreri on September 14, 1988, and told her respondent was going forward with the motion for contempt. (Tr. page 67, lines 8-13). Mrs. Ferreri did not tell Mr. Winecker she did not want the motion for contempt filed. (Tr. page 67, line 14). Bar Exhibit 7 is consistent with the above-referenced testimony of Mr. Winecker.

Mrs. Ferreri received Bar Exhibit 7 shortly after her conversation with Mr. Winecker. (Tr. page 31, line 6). Even though the Notice of Date of Action clearly indicated a Motion for Contempt had been filed and that her testimony was required,

(Bar Ex. 7), Mrs. Ferreri took no steps to tell respondent he was proceeding against her wishes. (Tr. page 31, lines 7-25 and page 32, lines 1-6).

Perhaps the most erroneous finding of the referee, one on which the entire finding regarding respondent's motivation in pursuing the contempt action relies, (RR, Sec. III, p.3), is that "[t]he hearing on the contempt motion was later cancelled by respondent." (RR, Sec. II-7, p.2) (emphasis supplied).

Mr. Ferreri's testimony on this point was clear and unequivocal:

> Q - Now, that September 27, 1988, the day that you went to Mr. Hayden's office, wasn't that the same day that had been scheduled for the hearing on the motion for contempt?
> A - Yes.
> Q - Did that hearing go forward?
> A - No. He had called it off like the day before because I called the courthouse to find out if it was cancelled. I called the courthouse up the day before and found out it was cancelled.

(Tr. page 51, lines 10-19).

Respondent's testimony was consistent with Mr. Ferreri's, and diametrically opposed to the referee's finding:

> A - But on the 26th was the first time that I found out about any kind of quote, settlement.
> Q - Okay.
> A - In September --
> Q - When you found out that they had settled it and that contempt was not a viable action did you cancel the hearing?
> A - Yes --
> Q - Just listen to me. Did you cancel the hearing before the Ferreris came in to offer any kind of payment?
> A - That's true.

(Tr. page 89, lines 2-12).

As will be more thoroughly discussed in Section II below, the erroneous finding by the referee in II-7 was the main reason respondent was found guilty of violating Rule 4-1.2(a) and, more particularly, Rule 4-3.1, Rules Regulating The Florida Bar. When this erroneous finding is overturned, complainant's case against respondent is mortally wounded.

II. THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING RULE 4-1.2(a) AND RULE 4-3.1, RULES REGULATING THE FLORIDA BAR, IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

A. The Referee's Recommendation That Respondent Be Found Guilty of Violating Rule 4-1.2(a), Rules Regulating The Florida Bar, Is Not Supported by Clear and Convincing Evidence.

The referee recommended respondent be found guilty of violating Rule 4-1.2(a) "for failure to abide by the client's decision not to proceed with the contempt proceedings." (RR, Sec. III, p.2). This recommendation is not supported by clear and convincing evidence.

As noted in Section I above, the referee's finding that respondent cancelled the contempt hearing after meeting with Mr. and Mrs. Ferreri in his office on September 27, 1988, was erroneous. The referee's mistaken impression on this critical point colored the referee's entire view of respondent's conduct. Since respondent cancelled the contempt hearing as soon as he learned Mrs. Ferreri had secretly accepted $300.00 as payment in full of the lump sum alimony, (Tr. page 89, line 9), and before he met with the Ferreris to discuss his outstanding fees, (Tr. page 89, line 12), respondent clearly was not motivated by a desire to "enhance recovery" of his fees.

The evidence below shows that the Ferreris, not the respondent, were motivated by monetary concerns. On August 26, 1988, Mrs. Ferreri prepared her initial complaint to The Florida Bar. (Resp. Ex. 1). In this complaint, Mrs. Ferreri only complained about the fees being charged by the respondent.

On September 14, 1988, Mrs. Ferreri evidently added references to the motion for contempt to her grievance. (Resp. Ex. 1, page 2). It is significant that Mrs. Ferreri fails to mention in this complaint that she spoke with Mr. Winecker. The grievance also makes it appear Mrs. Ferreri has just decided to accept $300.00 as payment in full from Mr. Ferreri, as opposed to accepting it on July 25, 1988.

When the entire record in this case is examined closely, several questions arise which are not satisfactorily answered by the report of referee. First, if Mrs. Ferreri did, in fact, tell respondent on September 9, 1988, not to proceed with the contempt motion, why didn't she tell this to Mr. Winecker on September 14, 1988, or to the respondent on September 19, 1988? Also, why did Mrs. Ferreri wait until the day before the hearing on the motion for contempt was scheduled to take place to tell the respondent she had secretly entered into an agreement with her ex-husband?

The evidence below establishes that respondent is guilty of, at most, failure to communicate clearly with his client. Mrs. Ferreri testified she told respondent not to proceed with a motion for contempt against her ex-husband. (Tr. page 19, line 2). Yet she failed on numerous occasions to tell respondent she had settled for $300.00 as payment in full of the lump sum alimony obligation. Mrs. Ferreri's failure to advise respondent of this critical fact caused him to follow the directions he received from Mrs. Ferreri after the July 11, 1988, hearing, (Tr. page 27, line 24), and seek the full $2,500.00 on her behalf. If respondent had been told a settlement had been reached between

the Ferreris, he would not have exerted his energies, at no charge to Mrs. Ferreri, (Tr. page 32, line 19 and page 86, line 18), in seeking the motion for contempt. (Tr. page 68, line 7).

Respondent, on the other hand, testified Mrs. Ferreri authorized the filing of the motion for contempt on several different occasions. (Tr. page 87, lines 2-3, 19-20 and page 88, line 20). Mrs. Ferreri also had a detailed conversation with Henry Winecker from respondent's office and never voiced disapproval of the contempt action. (Tr. page 67, lines 4-15).

Even assuming Mrs. Ferreri did not authorize the filing of the motion for contempt, respondent should not be found guilty of violating Rule 4-1.2(a) because he did not proceed with the motion. As soon as respondent learned the Ferreris had reached their secret agreement, he immediately cancelled the contempt hearing. (Tr. page 51, line 16 and page 89, line 9). If respondent had truly filed the motion for contempt in order to "enhance recovery of the fees claimed by and perhaps due respondent", (RR, Sec. III, p.3), as opposed to filing it because of a lack of clear communication with his client, he certainly would not have dismissed the motion prior to meeting with the Ferreris.

B. The Referee's Recommendation That Respondent Be Found Guilty of Violating Rule 4-3.1, Rules Regulating The Florida Bar, Is Contrary To the Provisions of The Rule.

The referee recommended respondent be found guilty of violating Rule 4-3.1, Rules Regulating The Florida Bar, "for initiating the contempt proceeding without authority from the client." (RR, Sec. III, p.2). This recommendation is contrary to both the express provisions of the rule and the law in Florida.

Rule 4-3.1 provides, in its relevant part, that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." The clear intent of the rule, as revealed by the heading of the rule ("meritorious claims and contentions"), is to sanction lawyers who abuse legal procedure by bringing frivolous proceedings. Whether the attorney has received "authority from the client" is simply not an issue under this rule.

The referee's finding that the contempt proceeding was initiated "without authority from the client" may be an important factor under Rule 4-1.2(a), Rules Regulating The Florida Bar, but it has no application to consideration of Rule 4-3.1. The issue to be considered under Rule 4-3.1 is whether a motion for contempt in the underlying dissolution of marriage action was frivolous.

A distinction is made in Florida between alimony provisions which constitute support and those which constitute

enforcement of debts pursuant to a "pure property settlement". Riley v. Riley, 509 So.2d 1366, 1368 (Fla. 5th DCA 1987). The former are enforceable by contempt, but the latter are not. Id., at 1369.

The Final Judgment of Dissolution of Marriage, (Bar Ex. 7), clearly indicates the lump sum alimony awarded Mrs. Ferreri was in the nature of support. The Final Judgment first notes that Mrs. Ferreri "is awarded lump sum alimony in lieu" of a special equity in the marital home. (Bar Ex. 2, para. B). (emphasis supplied). The Final Judgment then awards Mrs. Ferreri "the said sum of $2,500 as and for lump sum alimony". (Bar Ex. 2, para. 4). Since the $2,500.00 was characterized as "alimony", even though it was arguably in the nature of a property settlement, it was not frivolous to seek an order for contempt for non-payment.

While the use of the term "alimony" is not necessarily conclusive of the intent of the parties, it does have weight in determining the intent. English v. Galbreath, 462 So.2d 876, 877 (Fla. 2d DCA 1985). Since there is nothing in the record to indicate the award of $2,500.00 to Mrs. Ferreri was an exchange of property rights or obligations, Id. See also Cox v. Cox, 462 So.2d 122, 123 (Fla. 2d DCA 1985), the respondent had a good faith argument that the lump sum alimony was in the nature of support. This is especially true in light of the explicit reference to awarding alimony "in lieu of" a special equity. (Bar Ex. 2). Therefore, a motion for contempt was not frivolous. (For a good example of truly frivolous filings by an attorney, see The Florida Bar v. Clark, 528 So.2d 369 (Fla. 1988).

III. A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW, REQUIRING PROOF OF REHABILITATION, IS NOT WARRANTED IN THIS CASE.

A review of recent attorney discipline cases of this Court and the Florida Standards for Imposing Lawyer Sanctions shows that a six-month suspension from the practice of law, requiring proof of rehabilitation, is not warranted in this case. The recommended sanction is too severe when the facts of this case are carefully scrutinized. The respondent's prior disciplinary record does not justify the enhanced sanction recommended in this case.

The following cases are examples of cases in which this Court imposed a six-month suspension or lesser sanction for conduct more egregious than that of the respondent. For example, in The Florida Bar v. McKenzie, 557 So.2d 31 (Fla. 1990), the respondent received a ninety-one day suspension for improperly communicating with a judge, threatening opposing counsel in another case, and filing suit to harass the defendants and the presiding judge in the second case. Id. The respondent in McKenzie received a ninety-one day suspension even though he had received two prior public reprimands and his overall conduct displayed a "disrespect of the legal profession and makes suspect his ability to practice law competently and ethically." Id., at 32.

As discussed previously in Sections I and II, the respondent in this case is guilty of at most one rule violation. The violation, if it occurred, was due to poor communication with his client. The conduct of respondent certainly does not warrant a greater sanction than that of the respondent in McKenzie, even

taking "the moderate treatment administered" to respondent in the past into consideration. (RR, p.3).

The Florida Bar v. Greer, 541 So.2d 1149 (Fla. 1989), is another example of a case in which the respondent received a lesser sanction than the one recommended in this case for greater misconduct. In Greer, the respondent was found guilty of violating numerous provisions of the former Code of Professional Responsibility in four separate counts arising from complaints of four separate clients. The respondent in Greer received a sixty-day suspension followed by two years' probation, even though he had previously received a public reprimand and probation for violating many of the same ethical rules. Id., at 1152.

The following cases, when compared to the present case, show the recommended discipline was not "measurably but fairly increased." (RR, p.3). The Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990), deliberate conversion of funds belonging to a nonclient (public reprimand); The Florida Bar v. Fertig, 551 So.2d 1213 (Fla. 1989), helping law partner and client launder money for a drug-smuggling scheme (ninety-day suspension); The Florida Bar v. Stein, 545 So.2d 1364 (Fla. 1989), failure to maintain complete records of property of client held as collateral and resorting to self-help to acquire property of client and sell it (three-month suspension); The Florida Bar v. Barley, 541 So.2d 606 (Fla. 1989), numerous rule violations arising from unsecured loan from client to attorney (sixty-day suspension); The Florida Bar v. MacPherson, 534 So.2d 1156 (Fla.

1988), abandonment of law practice causing harm to numerous clients (six-month suspension); The Florida Bar v. Hankal, 533 So.2d 293 (Fla. 1988), attorney accepted loan from lender with knowledge loan was for purpose of evading or avoiding payment of income taxes (public reprimand after two prior private reprimands); and The Florida Bar v. Sax, 530 So.2d 284 (Fla. 1988), submitting a notarized pleading to a court when the lawyer knew or should have known the pleading contained an untrue factual averment, and when the document was signed outside the presence of the notary (public reprimand).

The above listing of cases could continue almost ad infinitum. The point is clear. A six-month suspension is not warranted in this case.

The Florida Standards for Imposing Lawyer Sanctions (Standards) also show a six-month suspension is not warranted here. Rule 3.0, Standards, provides that the following general factors should be considered in imposing sanctions:

(a) the duty violated;

(b) the lawyer's mental state;

(c) the potential or actual injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors.

The duty violated in the present case, assuming one is found to exist, involves failure to bring a meritorious claim. Rule 6.22, Standards, provides that a suspension is appropriate when a lawyer knows that he is violating a court order or rule, and causes injury or potential injury to a client or a party, or

causes interference or potential interference with a legal proceeding. As previously noted, the respondent is guilty of at most a failure to clearly communicate with his client regarding the filing of the motion for contempt. Therefore, Rule 6.22 does not apply.

Respondent's misconduct falls more appropriately under Rule 6.23, Standards. The rule provides that a public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding. Since there was no actual injury to respondent's client or Mr. Ferreri by the filing, and immediate withdrawal, of the motion for contempt, a public reprimand is the appropriate discipline in this case.

The referee made no findings as to aggravating and mitigating factors. Respondent submits the following are supported by the record:

Rule 9.22, Standards, aggravating factors:

(a) prior disciplinary offenses; and

(i) substantial experience in the practice of law.

Rule 9.32, Standards, mitigating factors:

(b) absence of a dishonest or selfish motive;

(d) timely good faith effort to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and

(m) remoteness of prior offenses.

Complainant may argue the respondent had a dishonest or selfish motive for filing the motion for contempt. As discussed in Sections I and II above, this argument is refuted by the fact respondent withdrew the motion for contempt prior to his meeting with the Ferreris to discuss his fee. The immediate cancellation of the contempt hearing by respondent when he learned of the secret $300.00 settlement also supports Rule 9.32(d) above.

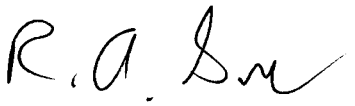
Finally, complainant may argue respondent's prior offenses are not remote. Respondent submits his prior offenses are remote in the sense of not being closely connected or related in subject matter to the present case.

CONCLUSION

Several of the referee's findings of fact are erroneous, unlawful, or unjustified. These findings of fact caused the referee to make recommendations which are not supported by clear and convincing evidence.

The respondent is guilty of, at most, one rule violation. If any misconduct is found to exist, a public reprimand is the appropriate sanction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Initial Brief has been furnished by U.S. Mail to Susan V. Bloemendaal, Esquire, The Florida Bar, Tampa Airport Marriott, #C-49, Tampa, Florida, 33607, this 16th day of November, 1990.

R. A. G.

RICHARD A. GREENBERG