IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

S. RICHARD KAPLAN,

Respondent-Appellee.
_____/

The Florida Bar File No.
89-71,631 (15B)

Supreme Court Case No. 75,777

INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent, after undertaking representation of a client for purposes of prosecuting a claim to recover damages for personal injuries sustained by the client as a result of an automobile accident, totally neglected the matter, failed and refused to communicate with his client and her representatives, failed to give his client any notification of respondent's termination in representation and failed and refused to turn over any of the client's file to successor counsel despite due request and demand therefor.

Indicted by a grievance committee which found that respondent had violated Rules 4-1.3, 4-1.4(a) and 4-1.16(d), Rules of Professional Conduct relating to neglect, lack of communication and improper withdrawal, the bar prepared, filed and served its complaint elaborating upon the facts as hereinabove recited and charging respondent with commission of the violations as charged by the committee.

Together with the filing and service of its complaint, the bar filed and served a request for admissions which request exactly paralleled the allegations of the complaint. Respondent failed to appear or respond to the request for admissions precipitating an application for judgment on the pleadings.

Concerned at respondent's total default, the referee in entering an order granting the bar's application for judgment on the pleadings, specially set a hearing for sanctions consideration and recited in his order granting judgment on the pleadings, the following:

> While I do not order that the respondent appear in person or by counsel at the July 2, 1990 hearing, I strongly urge and recommend that respondent attend and/or be represented thereat and will, in considering what disciplinary sanction to recommend to the Supreme Court of Florida, take into consideration respondent's attendance and/or representation at the July 2, 1990 hearing.

Upon the sanctions hearing the bar, pointing to respondent's disciplinary history consisting of three (3) cases in which respondent had previously been afforded minor misconduct treatment with resultant private reprimands[1], two (2) of which cases involved neglect of personal injury cases and lack of communication with his clients and the third involving the issuance of a worthless check, urged the referee to recommend a public reprimand (2-7).[2] Respondent, alleging to have had personal problems which led to his neglect and lack of communications, concluded his argument in mitigation expressing:

> So I would say that there are mitigating circumstances which warrant a public reprimand at best (15).

In arriving at his sanction recommendation the referee stated:

> Respondent recently received a private reprimand in two neglect cases. In each (The Florida Bar case number 89-70,345 and 89-70,786) respondent was retained to represent clients seeking to recover damages for personal injuries received in accidents. He failed to prosecute the claims and did not communicate with his

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[1] Florida Bar case numbers 89-70,345 and 89-70,786 involved neglect of personal injury actions and lack of communications with clients and resulted in one (1) private reprimand. Case number 85-12,227 involved respondent's issuance of a worthless check and resulted in respondent's first private reprimand.

[2] All page references are to transcript of July 2, 1990 sanctions hearing.

> clients for approximately a year during the 1987-1988 period. His neglect, failure to communicate and improper withdrawal in the case at bar reflect a pattern. Respondent offered in mitigation that his neglect and other violations occurred during a particularly stressful period when respondent underwent a bitter matrimonial proceeding and lost his father. While I take this into consideration, there seems no excuse why respondent neglected this discipline proceeding, defaulted at every stage and had to be persuaded by virtue of my June 11, 1990 order to attend the sanction hearing. This causes me great concern and requires, in my opinion a sanction that will serve to impress respondent with the seriousness of his conduct while at the same time protect the public and hopefully cause other members of the bar soberly to act diligently in attending to their clients' cases. Accordingly, I recommend that respondent be placed on probation for a period of one year, with all work supervised by a member of The Florida Bar.

The Board of Governors of The Florida Bar directed bar counsel to petition for review seeking a public reprimand rather than the sanction recommended by the referee.

SUMMARY OF ARGUMENT

While the sui generis approach to bar discipline proceedings has been productive of a broad scope of sanctions for seemingly identical misconduct, there appears, nonetheless, such a consistent application of sanction in neglect cases as to render axiomatic the imposition of a public reprimand for isolated acts of neglect. In the bar's view, there appears no reason for imposition of the lesser sanction recommended by the referee in the instant case, especially when viewing the additional violations involved and the existence of a prior bar record.

ARGUMENT

I. NEGLECT OF A CLIENT'S CASE WARRANTS A PUBLIC REPRIMAND.

As seen from the bar's complaint (deemed admitted due to respondent's default in responding to the bar's request for admissions), respondent undertook representation of one Florence Taylor in connection with pursuing her claim to recover damages for personal injuries she sustained in an automobile accident. He ascertained that the other party involved in the accident had no insurance and informed Mrs. Taylor that she would have to proceed under the uninsured motorist provisions of her own policy. Thereafter, respondent thoroughly neglected the matter, failed and refused to communicate with Mrs. Taylor and her son despite repeated attempts by each of them to communicate with respondent, neglected to communicate any withdrawal from representation to his client and failed and refused to furnish Mrs. Taylor's file to successor counsel (see the bar's complaint). As a result, respondent was found to have violated three of the Rules of Professional Conduct. He violated Rule 4-1.3 which provides that a lawyer shall act with reasonable diligence and promptness in representing a client, Rule 4-1.4 (a) which provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information and Rule 4-1.16(d) which provides that upon termination of representation a lawyer shall take steps to the extent reasonably practicable to protect a client's interest including the surrender of papers to which the client is entitled.

In the bar's view, the violation by respondent of Rule 4-1.3 (formerly Disciplinary Rule 6-103(A)(3) of the Code of Professional Responsibility), alone, warrants imposition of a public reprimand. It is respectfully submitted that if a compendium of isolated instance neglect cases were compiled covering the last decade, it would establish, conclusively, that at very least, this court has determined that a public reprimand is the appropriate sanction in such cases. Thus, in **The Florida Bar v. Welty**, 382 So.2nd 1220 (Fla. 1980) the court singled out neglect cases stating "Public reprimands should be reserved for such instances as isolated instances of neglect" (at page 1223). In **Welty**, supra, the court referred to **The Florida Bar v. Larkin**, 370 So.2nd 371 (Fla. 1979) where, in directing a public reprimand in a neglect case, it specifically addressed the traditional criteria underlying all bar sanctions, viz., that the sanction be fair both to the public and to the accused; that it be sufficient to punish the violation and encourage reformation; and that it be severe enough to deter others who might tend to engage in similar violations. Public reprimands were directed in **The Florida Bar v. Harrison**, 398 So.2nd 1367 (Fla. 1981), **The Florida Bar v. Baker**, 431 So.2nd 601 (Fla. 1983), **The Florida Bar v. Grant**, 465 So.2nd 527 (Fla. 1985), **The Florida Bar v. Brennan**, 508 So.2nd 315 (Fla. 1987), **The Florida Bar v. Weil**, 511 So.2nd 988 (Fla. 1987), **The Florida Bar v. Lowery**, 522 So.2nd 27 (Fla. 1988), **The Florida Bar v. Jordan**, 523 So.2nd 570 (Fla. 1988), **The Florida Bar v. Harris**, 526 So.2nd 54 (Fla. 1988) and **The Florida Bar v. Knowlton**, 527 So.2nd 1378 (Fla. 1988). Each of such cases involved neglect violations.

When the additional violations committed by respondent are taken into account as well as his prior discipline record, it would appear that a public reprimand is the least of the sanctions appropriate in the

circumstances. In **The Florida Bar v. Harrison**, supra, the bar had recommended a private reprimand. The referee rejected the bar's recommendation and determined that imposition of a public reprimand was more appropriate in light of respondent's prior disciplinary record consisting of a private reprimand. The court adopted the referee's recommendation and imposed a public reprimand.

The personal difficulties respondent alleged to have experienced during the time he neglected the various cases forming the bases for the several bar proceedings, even if considered to be mitigating, should not result in a sanction less than a public reprimand. In **The Florida Bar v. Lowery**, supra, the referee expressly found that there were mitigating circumstances based on the respondent's personal and financial difficulties; that respondent had cooperated with the bar's investigation and had taken positive steps to correct the underlying problems that contributed to his neglect of a client's cases. Such mitigation, notwithstanding, the referee regarded a public reprimand as the appropriate sanction and this court agreed. In **The Florida Bar v. Larkin**, supra, the court cited **The Florida Bar v. Moran**, 273 So.2nd 379 (Fla. 1973) where it was held that a public reprimand was the appropriate sanction where the accused attorney had failed to prosecute his clients' cases "even though there were mitigating circumstances."

The referee noted in his report that respondent offered in mitigation that his neglect and other violations occurred during a particularly trying time when respondent underwent a bitter matrimonial proceeding and lost his father. On the other hand, the referee specifically observed that "there seems no excuse why respondent neglected this discipline proceeding, defaulted at every stage and had

to be persuaded by virtue of my June 11, 1990 order to attend the sanction hearing." This court has consistently and uniformly imposed public reprimands in cases involving isolated instances of neglect. That being so, it is respectfully submitted that the referee's stated concern regarding respondent's total default in the disciplinary proceeding should form the basis for imposition of at least a public reprimand; certainly not the lesser sanction of probation. In **The Florida Bar v. Harris**, supra, the court made specific reference to that respondent's default in the bar proceedings noting that it indicated "respondent's lack of responsibility." It imposed a public reprimand.

The bar can discern no reason for affording to respondent treatment different from that involved in virtually every other case to come before the court. He presents himself to the court with a bar record in connection with his neglect of two (2) personal injury cases and his lack of communication with the clients involved in such cases. His bar record also contains a private reprimand issued in connection with respondent's issuance of a worthless check. In the case at bar, he not only neglected his client's case and refused to communicate with her but refused to heed successor counsel's requests for the client's file. To carve out an entirely new sanction for application to this respondent is not only unfair to the many attorneys who have been treated uniformly and consistently in the past but disruptive to an established precedent for no apparent reason.

CONCLUSION

Respondent should receive a public reprimand administered by the Board of Governors of the Florida Bar. Such reprimand will, it is respectfully submitted, serve the goals of lawyer discipline, promote consistency in sanction and be in total accord with precedent.

All of which is respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief was furnished to S. Richard Kaplan, respondent, at his official record bar address of Northbridge Centre, Suite 802, 515 North Flagler Drive, West Palm Beach, Florida 33401-4321 by regular mail, on this 6th day of November, 1990.

David M. Barnovitz
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