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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

complainant,

v.

KENNETH W. MASTRILLI,

Respondent.

Case No. 78,942
TFB No. 91-10,108(13D)

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, the Appellant, Kenneth Mastrilli, will be referred to as the "Respondent". The Appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "T" will refer to the transcript of the Final Hearing held on April 14, 1992. "RR" will refer to the Report of Referee. "RB" will refer to Respondent's Initial Brief. "R" will refer to the record in this case. Exhibits of The Florida Bar will be referred to as "TFB Exh." Exhibits of Respondent shall be referred to as "Resp. Exh."

STATEMENT OF THE FACTS AND OF THE CASE

The facts in this case are essentially undisputed. (R. Complaint, Response). On or about March 3, 1989, Sadie Lapinski and Eleanore Konopka were involved in an automobile accident, wherein Ms. Lapinski made a u-turn in front of a motor vehicle driven by a Linda Dawkins and caused an accident. (TFB Exh. #3). Ms. Lapinski was driving and Ms. Konopka was her passenger. On or about August 30 or August 31, 1989, Respondent's investigator Walton D. "Val" Locket informed Ms. Lapinski that the Respondent could help her recover out of pocket expenses. On this same date, Respondent began dual representation of Ms. Lapinski and Ms. Konopka. (R. Complaint, Response, TFB Exhs. #1 and #2).

Respondent received an accident report after he began representing Ms. Lapinski and Ms. Konopka, which showed that Ms. Lapinski had been charged with violating the other vehicle's right of way. (TFB Exh. #3). By letter dated November 3, 1989, Respondent received correspondence from Allstate Insurance Company indicating that Allstate's position was that Ms. Lapinski was 100% at fault. (TFB Composite Exh. #4).

In two letters of correspondence to Allstate dated November 27, 1989, Respondent admitted liability of Ms. Lapinski, his client, in his attempt to obtain recovery for his other client, Ms. Konopka. (TFB Composite Exh. #4). On or about April 23, 1990, Respondent filed a lawsuit on behalf of his client, Ms. Konopka, naming Ms. Lapinski, his other client, as one of the defendants. The lawsuit alleged, among other things, that Ms. Lapinski

"negligently operated" her motor vehicle causing it to collide with a motor vehicle driven by Ms. Dawkins. The Complaint requested in excess of $5,000.00 in damages. (TFB #5). Respondent maintained the dual representation of both Ms. Konopka and Ms. Lapinski and did not disclose to either client the conflict of interest.

In a document entitled "Insurance Consumer Service Request" and dated May 10, 1990, Ms. Lapinski complained to the Insurance Commissioner's Office about Respondent's dual representation. (TFB Exh. #9). Ms. Lapinski stated at the final hearing that Respondent told her he would take care of her case after he settled Ms. Konopka's case. (T, p. 1.).

By letter dated June 27, 1990, Ms. Lapinski terminated Respondent's representation "since you are bringing a suit against me." (TFB Exh. #8).

The Complaint in this matter was filed with The Supreme Court of Florida on or about November 15, 1991. An Amended Complaint was filed with the Referee on or about April 6, 1992.

The Final Hearing was held on April 14, 1992. The Referee found the Respondent guilty of violating Rule 4-1.7(a) and (b), Rules of Professional Conduct, recommended that Respondent be suspended from the practice of law for six (6) months, and assessed the costs of these disciplinary proceedings.

Respondent served his Petition for Review on or about August 14, 1992. The Respondent served his Initial Brief, by service dated September 15, 1992. This Answer brief is filed in response to the Respondent's Initial Brief.

SUMMARY OF THE ARGUMENT

The facts are essentially undisputed in this case. Respondent requests that this Court reduce the Referee's recommended discipline because he believes it is unfair and excessive. However, the Referee found that the Respondent's misconduct warranted a six (6) month suspension, which is justified upon consideration of the misconduct of Respondent and aggravating factors.

Respondent represented a client, Ms. Konopka, in a civil suit against another client, Ms. Lapinski. Ms. Konopka was the passenger and Ms. Lapinski was the driver and was at fault in the accident. Ms. Lapinski did not and could not consent to be named as a defendant in an action on behalf of Ms. Konopka while represented by Respondent because her interests were directly adverse to the interests of Ms. Konopka. The Referee found that Respondent's actions were a clear conflict of interest and the potential injury to Respondent's clients was substantial. Respondent knew or should have known that a conflict of interest existed when he initiated the lawsuit on behalf of Ms. Konopka against Ms. Lapinski.

Respondent received a remedial discipline and not punishment. Bar disciplinary proceedings are designed to protect the public, not punish attorneys.

The Referee made specific findings in aggravation. The clients involved were elderly persons with little understanding of the legal process. The Referee found factually that these clients

relied totally on **Respondent's** "independent" **professional judgment.** The **Referee** also found that Respondent exhibited no **remorse,** and refused **to** acknowledge the wrongful nature of his conduct. These factors, which **are** included under Standard 9.21, were properly used by the Referee in his consideration of discipline. **The Referee** did not base his decision on these aggravating factors alone. Under the totality of the circumstances, the Referee's recommendation of a six (6) month suspension should be upheld.

ISSUE

A SIX (6) MONTH SUSPENSION IS THE APPROPRIATE DISCIPLINE IN LIGHT OF RESPONDENT'S CONDUCT HEREIN

ARGUMENT

In order to determine an appropriate sanction, the Court must consider whether the judgment is fair to society, fair to Respondent and severe enough to deter others who might be prone to become involved in like violations. The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). The Referee's recommendation of a six (6) month suspension is appropriate to adequately protect the public, deter other members of the profession from engaging in similar misconduct, appropriately discipline Respondent for his misconduct, and still allow for and encourage reformation and rehabilitation.

The facts are essentially undisputed in this case. On or about March 3, 1989, Sadie Marie Lapinski, the driver, made a u-turn in front of another car driven by Linda Parker Dawkins. Eleanore Konopka was riding in the car with Ms. Lapinski. (T, p. 22, l. 11). On or about August 30 or August 31, 1989, Respondent's investigator arranged for Ms. Lapinski and Ms. Konopka to be seen by a local physician. At the doctor's office, Ms. Lapinski and Ms. Konopka each signed contracts for representation by Respondent. The investigator provided the contracts. (T, p. 16, l. 21). Neither Ms. Lapinski nor Ms. Konopka personally met Respondent. (T, p. 15, l. 8, p. 19, l. 3-19). Ms. Lapinski never met Respondent at any time. (T, p. 60, l. 7-8).

In the course of Respondent's representation of Ms. Konopka,

he made written demands for settlement upon Allstate, the insurance carrier for both Ms. Lapinski and Ms. Dawkins. In this correspondence, Respondent admitted liability of his client, Ms. Lapinski, and demanded insurance benefits on behalf of his other client, Ms. Konopka. (TFB Composite Exh. #4).

When Settlement was unsuccessful, on or about April 2, 1990, Respondent initiated a personal injury protection lawsuit on behalf of his client, Ms. Lapinski, against the insurer, Allstate. (T, p. 33, 1. 20). Respondent did not inform Ms. Lapinski that he was filing the lawsuit on her behalf. (T, p. 37, 1. 23, p. 38, 1. 2).

On or about April 23, 1990, Respondent initiated a lawsuit on behalf of his client, Ms. Konopka, against his other client, Ms. Lapinski, as well as against Ms. Dawkins. (RR, p. 2)(TFB Exh. #6).

Prior to or upon filing this suit, Respondent never disclosed the conflict or obtained consent for this dual representation from either Ms. Konopka or Ms. Lapinski. (T, p. 36, 1. 4-6, 25). On or about June 27, 1990, Ms. Lapinski terminated the Respondent's representation because of the conflict of interest. (T, p. 41, 1. 14).

Respondent argues that additional facts exist that are relevant to a determination of discipline. (RB, pp. 9-10), These facts include that Ms. Lapinski and Ms. Konopka were aware of Respondent's representation of both and they retained Respondent contemporaneously; both clients agreed that Respondent should make whatever claims were necessary to maximize their individual recoveries; Respondent's intention in filing suit on behalf of Ms.

Konopka was to maximize the settlements; and the real party in interest was Ms. Lapinski's insurance carrier and not Ms. Lapinski personally.

However, these facts were raised at the final hearing and already considered and rejected by the Referee. (RR, p. 3). The Referee found that Respondent's actions were a clear conflict of interest warranting the suspension:

> The interests of each client were materially limited and adversely affected. Simply stated, Respondent represented opposing parties in litigation. He could not represent the interests of one without adversely affecting the interests of the other. If Respondent protected Driver's interests by settling Passenger's potential $100,000.00 claim within the $50,000.00 insurance policy limits, he adversely affected the interests of Passenger. Conversely, if Respondent protected Passenger's interests by vigorously pursuing an award for damages in excess of Driver's $50,000.00 insurance policy limits, then he adversely affected the interests of his other client, Driver. In a word, his "independent" professional judgment in the representation of one client was materially limited by Respondent's responsibility to his other client. (RR, p. 4).

Respondent further argues that the "only expert witness testified that with 100% certainty, there was no financial exposure to Lapinski as a result of the suit by Respondent." (RB, p. 10). Respondent's brief is inaccurate in stating that he presented the only expert witness at this hearing. (T, p. 87, l. 1-25, p. 88, l. 1-4). The Bar offered the testimony of Alton Winston Isum, Jr. as both a fact and opinion witness. Additionally, the qualifications of Respondent's purported expert, Richard Bokor, were seriously challenged at the final hearing. (T, p. 96, l. 12). It was, and is, the Bar's position that Bokor was not qualified to testify

regarding the crucial issue of whether Respondent's actions violated the charged disciplinary rules . (T, p. 100, 1. 23, p. 101, 1. 5-23). The Referee specifically rejected the testimony of Bokor in the Report of Referee and found factually that Respondent's actions exposed Ms. Lapinski to a potentially large judgment. (RR, p. 4). Factual findings by the Referee are presumed correct and must be upheld unless they are "clearly erroneous or lacking evidentiasy support." The Florida Bar v. Wagner, 212 So. 2d 770, 772 (Fla. 1968), The Florida Bar v. Bajoczky, 558 So. 2d 1022 (Fla. 1990).

Isum testified that a conflict of interest arose when Respondent filed the lawsuit on behalf of Ms. Lapinski and then filed a lawsuit on behalf of Ms. Konopka against Ms. Lapinski. Isum further testified that Respondent's actions were a violation of the Rules of Professional Conduct. Mr. Isum did testify that after he was retained he believed that there was no potential far an excess verdict, however, that belief could only have been confirmed after a trial and verdict had actually occurred.

Loyalty to a client is an essential element in the lawyer's relationship with the client. The comment to Rule 4-1.7 specifically addresses and prohibits the representation of opposing parties in litigation. By representing directly adverse interests, Respondent undermined this loyalty. The Rule and comment provide no exception to this prohibition.

In his report, the Referee found that Respondent's argument that there could be no potential judgment in excess of the policy

limits against Ms. Lapinski was convoluted and rejected it. The Referee also rejected Respondent's argument that all would have worked out well in spite of the conflict. (T, p. 130, 1. 17; RR, p. 4). The Referee found that a clear conflict of interest was evident and this violation warranted suspension.

Under Standard 4.32 of the Florida Standards for Imposing Lawyer Sanctions, suspension is appropriate when a lawyer knows of a conflict of interest, does not fully disclose to a client the possible effect of that conflict and causes injury or potential injury to a client. The record shows that Respondent knew by at least November 3, 1989 that Allstate, the insurer, was claiming Ms. Lapinski was 100 percent liable. (T., p. 27, 1. 13-16, p. 28, 1. 1-8).

Respondent knew or should have known when he initiated a lawsuit on behalf of Ms. Konopka naming as a defendant his other client, Ms. Lapinski, that a conflict of interest existed. The record shows that Respondent told Ms. Lapinski that he would not act on her potential personal injury case until Ms. Konopka's case was settled. (T, p. 41, 1. 10). Another lawyer in the exercise of his independent professional judgment may not have put Ms. Lapinski's case on hold to her potential detriment for the benefit of another client.

Regardless of whether Respondent intended to pursue the lawsuit for damages on behalf of Ms. Konopka against Ms. Lapinski, he still filed the lawsuit and at that point knew or should have known that an obvious conflict existed, Respondent failed to

disclose this conflict and the potential injury to Ms. Lapinski. The Referee found that the potential injury to the clients was substantial.

Respondent's argument that a suspension of six (6) months is equivalent to a suspension of one year and thus constitutes impermissible punishment is unpersuasive. It would be inappropriate for this Court to consider "the effective result of the recommended discipline" in determining the ultimate discipline. All rehabilitative disciplines of ninety-one (91) days or more "effectively result" in a longer suspension due to the reinstatement requirements. This requirement is to insure that Respondent is fit to resume the practice of law.

The fact that Respondent is a sole practitioner is not an appropriate consideration for this Court in determining the ultimate discipline to be imposed. If the discipline is to be lessened because of this status, lawyers who are members of law firms would effectively be disciplined more harshly merely because they have chosen to work for a law firm and not as a sole practitioner. Respondent has shown by his actions that he is not a qualified attorney and should not be allowed to continue practicing before the public without interruption, as argued in the initial brief,

Respondent cites Debock v. State, 512 So. 2d 164 (Fla. 1987) and The Florida Bar v. Massfeller, 170 So. 2d 834 (Fla. 1964) in support of his position that no suspension should be imposed. Respondent misinterprets this Court's analysis in these cases.

Respondent argues that the language in these cases prohibiting discipline as punishment is a protection for the attorney when it is actually a safeguard for the public and for the image of the profession.

Bar disciplinary proceedings are remedial and are designed to protect the public and the integrity of the profession and the legal system. Since the public places their trust, property, liberty and possibly their lives in the hands of their attorney, that attorney must possess a fidelity and loyalty to the client that is beyond reproach. Debock, 512 So. 2d at 167. In Debock, this Court stated, "[t]o protect the public the bar is mandated to inquire into an attorney's conduct when even the appearance of impropriety exists. For these reasons, the vast weight of judicial authority recognizes that bar discipline exists to protect the public, and not to 'punish' the lawyer." Id. at 167. The suspension recommended in this case will protect the public and not punish the lawyer.

Respondent also refers to another case, The Florida Bar v. Welch, 272 So. 2d 139 (Fla. 1972), in his argument. He argues that this Court has held that a suspension should only be imposed where there is an isolated incident involving embezzlement, bribery or other similar conduct. (RB, p. 12). The Welch case does not make any such holding. It states that "disciplinary proceedings are instituted primarily in the public interest and to preserve the purity of the bar." The case does not discuss the situations in which suspension should be imposed.

Respondent asserts that he should receive a public reprimand because bar counsel discussed public reprimand as a potential discipline in his argument. However, bar counsel made the recommendation without the benefit of the Referee's findings of fact. The recommendation of discipline is strictly the obligation of the Referee, and the Referee, after making his findings of fact and considering aggravating and mitigating factors, found that a six (6) month suspension was appropriate.

Respondent argues that a suspension is not warranted when the attorney has violated the ethical rules because of a "mistake in judgment." (RB, p. 12). In this case, Respondent's violations were more than a mistake in judgment. His actions show a blatant disregard for or knowledge of fundamental rules relating to client loyalty and avoidance of conflicts of interest. The public perception of lawyers as loyal defenders of their clients is damaged by Respondent's misconduct. In addition, Respondent compounded his unethical behavior by refusing to acknowledge his wrongful conduct and attacking The Florida Bar for prosecuting the violations both by his own testimony and the testimony of his witness, Richard Bokor.

Respondent states that it was not shown that his clients were any more vulnerable or dependent on his legal advice than any other lay client. He further states that "age, standing alone, is just as consistent with wisdom and experience as it is with reliance or vulnerability." (RB, p. 15). However, in his testimony at the final hearing, Respondent himself stated that Ms. Lapinski was an

elderly woman and that she did not understand the concept of comparative negligence. (T, p. 40, 1. 16). He also stated that she tended to be forgetful. (T, p. 40, 1. 24). Florida case law and the Florida Statutes have made several allowances and protections for the elderly. Thus, the Referee's consideration of Ms. Lapinski and Ms. Konopka's ages as an aggravating factor was appropriate in determining the proper discipline for Respondent. The Referee stated in his report that the clients involved were elderly women with little understanding of the legal process who totally relied on Respondent's "independent" professional judgment. (RR, p. 4). The Standards include the aggravating factor af vulnerability of victim, which, although perhaps not entirely applicable here, arguably indicates that the vulnerability of Respondent's clients should be a proper consideration in determining the appropriate discipline.

Respondent further argues that the failure of Respondent to admit to an error, during the final hearing, is an improper consideration in determining the severity of any discipline. Respondent cites The Florida Bar v. Lipman, 497 so. 2d 1165 (Fla. 1986) to support his position. Lipman states that a Referee cannot base the severity of a recommended discipline on an attorney's refusal to admit alleged misconduct or on a lack of remorse presumed from such refusal.

The Referee in the case at hand did not base his recommended discipline entirely on these factors, but properly considered all the factors under Standard 9.2, Aggravation, in his determination

of discipline. Standard 9.21 defines aggravation or aggravating circumstances as any considerations or factors that may justify an increase in the degree of discipline to be imposed. Respondent's refusal to acknowledge the wrongful nature of his conduct is considered an aggravating factor under Standard 9.22. The Referee properly considered in his report that Respondent exhibited no remorse nor the possibility of wrongdoing. (RR, p. 4).

Respondent was given the opportunity to offer evidence regarding aggravation and mitigation at the final hearing. At his discretion, the Referee may grant Respondent such a hearing to consider aggravating factors. However, such a hearing is not required and the Referee has the authority to consider the appropriate discipline at the final hearing without a separate disciplinary hearing.

In his Report, the Referee mentions that he presided over a previous disciplinary proceeding where he found Respondent not guilty. Respondent argues that his due process right to be noticed of the Referee's consideration of this matter has been violated. The statements made by the Referee do not show that they were a determining factor in his recommendation, but seem to be merely an observation made by him. Neither the rules nor case law prohibit the Referee from making observations of previous cases in subsequent disciplinary actions.

It would be impossible for the Referee to simply forget about the previous disciplinary matter, and the mere fact that the Referee chose to mention the previous matter in his report does not

show that the Referee was unfair or prejudiced against Respondent. The Referee is not bound by technical rules of evidence in Bar disciplinary cases. The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986).

Respondent cites The Florida Bar v. Ethier, 261 So. 2d 817 (Fla. 1972) in his brief and argues that Respondent similarly deserves a public reprimand. This case does impose a public reprimand for dual representation of adverse interests, however, the Referee in the instant case found that Respondent's action were more egregious. Respondent sent a letter to Allstate, the insurer, essentially admitting Ms. Lapinski's liability in order to receive benefits for his other client, Ms. Konopka. At this point, Respondent knew or should have known that he had a conflict of interest, but continued the representation of both clients.

In Ethier, the attorney had a prior discipline of a private reprimand, which is an aggravating factor. In the present case, Respondent was dealing with elderly, unsophisticated clients, refused to acknowledge the wrongful nature of his conduct and exposed one of his clients to substantial potential financial injury. Since Respondent knew or should have known of the conflict of interest together with the above-mentioned aggravating factors, his actions warrant a six (6) month suspension. However, regardless of the term of suspension ultimately imposed, Respondent should be additionally placed on probation and his cases should be monitored to insure compliance with the Rules of Professional Conduct. Additionally, Respondent should be required to take, and

successfully pass, the ethics portion of The Florida Bar Examination and attend an ethics seminar sponsored by The Florida Bar.

CONCLUSION

The Referee properly recommended a six (6) month suspension, which is fair to society, fair to Respondent and severe enough to deter others who might engage in similar conduct. The factual and other findings of the Referee, indicate that, under the totality of the circumstances, the recommended discipline is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief has been furnished to Kenneth W. Mastrilli, Respondent, c/o Donald A. Smith, Jr., Esquire, Attorney for Respondent, 109 No. Brush Street, Suite 150, Tampa, Florida 33602, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by regular U.S. Mail this 8th day of October, 1992.

JOSEPH A. CORSMEIER
Assistant Staff Counsel