IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO: 78,942

vs.

KENNETH W. MASTRILLI,

Respondent.

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief:

Ex.	–	Exhibits at Referee Trial
RR	–	Referee Report
T.	–	Transcript of Referee Trial

TABLE OF CITATIONS

STATEMENT OF THE CASE

This is a disciplinary proceeding by The Florida Bar and is a matter involving the original and exclusive jurisdiction of this Court pursuant to Article V, Section 15, of the Constitution of the State of Florida.

On May 29, 1991 a Circuit Grievance committee considered this matter without hearing testimony and without the appearance of Respondent, pursuant to Rule **3-7.4**, Rules of Discipline. The Grievance Committee issued a Notice of Finding of Probable Cause on May 29, 1991.

The referee stage of this proceeding began with the filing of The Florida Bar's complaint on November 15, **1991**. An Amended Complaint **was** filed on April 6, 1992. The Referee conducted an evidentiary hearing on April 14, 1992 based upon the Amended Complaint. [RR 1].

The Referee's report was dated May ***8***, 1992. On May **27, 1992** a Stipulation **for** Substitution of Counsel was filed. Also on May 27, 1992 Respondent filed a Motion For Rehearing Or Reconsideration of Discipline To Be Imposed. The motion requested the Referee to conduct a hearing to determine the appropriate discipline to be recommended and to reconsider his recommendation of discipline in view of his consideration of matters outside the record. On June **3, 1992 The** Florida Bar filed a response to Respondent's motion and on June **4, 1992** the Referee entered an order denying Respondent's motion.

The Referee made findings of fact and referenced additional matters. Based upon these findings and considerations, the Referee recommended that Respondent be found guilty of violating Rules 4-1.7(a) and 4-1.7(b), Rules Regulating The Florida Bar. [RR 4].

The Referee recommended that Respondent be suspended from the practice of law for six (6) months and for a period thereafter until he proves rehabilitation by attending a bar sponsored course on ethics and by successfully re-completing the professional responsibility bar examination.

Subsequent to receiving notice from The Florida Bar that it would not petition for review of the Referee Report, Respondent timely filed his Petition For Review on August 17, 1992. The Petition requests review of the Referee's recommended discipline. The Florida Bar has filed no counter-petition and the time for filing such a petition has expired.

STATEMENT OF THE FACTS

In March of 1989, Sadie Lapinski was driving her automobile when it was struck from the rear by another automobile driven by Linda Dawkins. [T. 14]. At the time of the accident, Eleanore Konopka was a passenger in Lapinski's automobile. [T. 14]. Lapinski and Konopka were friends and were both injured as a result of this accident. On August 30 and 31, 1989, respectively, Konopka and Lapinski signed contracts authorizing Respondent to represent them concerning their claims for personal injuries resulting from this accident. [Ex. 1 and Ex. 2/T. 12, 18]. After making an unsuccessful demand, Respondent filed suit on behalf of Lapinski against her insurance company for personal injury benefits on April 2, 1990. [Ex. 5/T. 32, 38]. On April 23, 1990 Respondent filed suit on behalf of Konopka. [Ex. 6/T. 33, 34]. In that suit Respondent named as defendants Dawkins, the driver of the other automobile, and Lapinski, his client.

Subsequent to receiving notice that she was a named defendant, Lapinski terminated Respondent's representation. [Ex. 8/T. 41]. Respondent subsequently executed a stipulation allowing for the continued representation of Lapinski by substitute counsel and immediately thereafter delivered her entire file to substitute counsel. [T. 43].

Konopka's personal injury claim was settled for a total value of $25,000.00. The claim against the other driver was settled for $5,000.00. [T. 51]. The claim as to Lapinski was settled for

$20,000.00 which was within Lapinski's policy limits of $50,000.00. (Ex. 4-B/T.44). The PIP suit on behalf of Lapinski was settled without trial and her claim for damages against Dawkins was also ultimately settled. The claim of Konopka was not of sufficient potential value to have ever subjected Lapinski to a personal excess judgment. [T. 91].

There are no disputed facts concerning Respondent's representation of Konopka or concerning his initial representation of Lapinski and Konopka. The Referee concluded that neither client consented after consultation with Respondent to become adverse parties in a law suit which named Kanopka a5 a plaintiff and Lapinski as defendant. [RR Finding 11].

However, there does exist a factual issue as to whether Respondent believed that he had the consent of his clients to file suit on behalf of Konopka against Lapinski. [T. 34, 63]. This issue is relevant, for the purposes of this review, only as it relates to appropriate discipline.

The Referee did not make specific findings of aggravating or mitigating factors. However, the Referee included within his report findings to the effect that Respondent apparently sincerely argued that his demands of settlement and his filing of the law suit were efforts to obtain settlement from the insurance carriers. [RR 3]. The Referee also acknowledged Respondent's argument that Respondent sought, on behalf of Konopka, to settle her claim within the limits of Lapinski's policy and that such a policy limit settlement did occur. [RR 3]. He also concluded that the

potential injury to Respondent's clients were substantial, that Respondent exhibited no remorse, and that the clients were elderly women with little understanding of the legal process, who relied totally upon his independent professional judgment. [RR 4]. He also determined that Respondent had no prior disciplinary record but, that Respondent had a prior complaint which resulted in a finding of not guilty. [RR 5].

Based upon these findings of fact, conclusions and considerations, the Referee found that Respondent's actions were a conflict of interest and that his independent professional judgment in the representation of one client was materially limited by his responsibility to the other client.

STATEMENT OF ISSUE

The Referee's Recommendation of Discipline is unfair, unwarranted and excessive in view of the facts of this case, the applicable Standards For Imposing Lawyer Sanctions, and the purposes of lawyer discipline in the State of Florida.

ARGUMENT SUMMARY

The issue for review concerns the appropriateness and fairness of the discipline recommended by the Referee. The factual determinations of the Referee are not at issue except as such facts are relevant to a determination of appropriate discipline.

The Referee concluded that Respondent represented a client in a civil suit against another client. The plaintiff/client was the passenger and the defendant/client was the **driver** of an automobile. Both parties/clients were injured in an automobile accident involving a third party. **The** facts also showed that the passenger's claim was settled within the policy limits of the driver's insurance coverage and that no personal liability resulted to this driver. **The** evidence proved that the parties knew of the concurrent representation by Respondent. However, the Referee found that the driver did not knowingly consent to be named as a defendant in an action by her passenger while represented by Respondent.

Based on the findings of fact, the Referee determined that a conflict of interest existed and recommended a six (6) month suspension, with proof of rehabilitation by completion of an ethics

course and the ethics portion of the bar examination.

In view of all the factors and applicable considerations, the recommended discipline is unfair and excessive. The evidence proved a negligent violation and a failure to appreciate that these circumstances did not allow for the dual representation. There was no allegation or evidence of an intentional violation and there was clear evidence that the driver/defendant was never realistically subjected to personal liability.

The record also proves that Respondent has no prior disciplinary record, but, in recommending discipline, the Referee considered a prior matter for which Respondent was determined to have not violated any rule. This was beyond the record and was inappropriate.

In view of the circumstances of this case; Respondent's clean record and lack of intent; the Standards for Imposing Lawyer Sanctions; the case law establishingthat discipline should be fair to all parties, including Respondent; and this Court's prior decisions concerning similar conflicts, a public reprimand is the only appropriate discipline and the harsh penalty recommended by the Referee should be rejected.

THE REFEREE'S RECOMMENDED DISCIPLINE IS UNFAIR, UNWARRANTED AND EXCESSIVE IN VIEW OF THE FACTS OF THIS CASE, THE APPLICABLE STANDARDS FOR IMPOSING LAWYER SANCTIONS AND THE PURPOSE OF LAWYER DISCIPLINE IN THE STATE OF FLORIDA.

In this case, the Referee has made findings of fact, recommendations of guilt and a recommendation of discipline to be imposed upon Respondent. The recommended discipline includes a suspension for six (6) months and thereafter until Respondent proves rehabilitation. In determining the appropriate discipline to be imposed upon Respondent, this Court has a broad scope of review as this is a matter of its exclusive jurisdiction and it is this Court's responsibility to order appropriate discipline. Article V, Section 15, Florida Constitution and The Florida Bar In Re Inglis, 471 So.2d 38 (Fla. 1985).

The Referee's Report in this case sets forth merely a recommendation of discipline which should be followed by this Court only when that recommendation is based upon facts proven by clear and convincing evidence; is consistent with the Standards For Imposing Discipline; and is consistent with the established purposes for imposing discipline. In this case, the recommended discipline fails to consider relevant facts; is based upon factors improperly considered by the Referee; is inconsistent with the applicable standards; is totally inconsistent with the recognized purposes of discipline; and can only serve to severely punish Respondent for an error in judgment.

The facts as found by the Referee establish that Respondent

initially represented the driver and passenger of an automobile concerning their accident and personal injury claims. [Ex. 1, Ex. 2]. Respondent later represented one of these clients, Konopka, the passenger, in a legal action against the driver of the other automobile and his other client, Lapinski, the driver. [RR Finding 7]. Prior to settlement of that law suit, Respondent was terminated from representing the defendant/driver. [RR Finding 10]. Ultimately, all law suits and claims of both the driver and passenger were settled to their satisfaction. The passenger's law suit was settled within the policy limits of Lapinski, the driver/client, and she was not exposed to personal liability. [T. 44 and RR Finding 15]. Based on the findings of fact, it is not contested that Respondent represented clients with conflicting interest, in violation of Rule 4-1.7(a) and that his independent professional judgment of one client was materially limited by his responsibility to another client, in violation of Rule 4-1.7(b).

However, the clear and convincing record evidence establishes additional facts relevant to a determination of discipline. These include the fact that the clients, Lapinski (driver) and Konopka, (passenger) were acutely aware of Respondent's representation of each other and in fact, retained Respondent contemporaneously. [T. 8]. The uncontroverted evidence also proves that both clients agreed that Respondent should make whatever claims were necessary to maximize their individual recoveries. [T. 29]. The evidence also clearly proves that Respondent's intention in filing suit on behalf of Konopka was to maximize the settlements. [T. 39].

Respondent had also determined that the real party in interest was Lapinski's insurance carrier and not, in actuality, Lapinski personally. [T. 34].

The record evidence further proves clearly and convincingly that there was no potential for an excess judgment in favor of Kanopka against Lapinski. In fact, Lapinski's substitute counsel testified to the effect that there was no potential for such an excess verdict. [T. 91]. Likewise, the only expert witness testified that with 100% certainty, there was no financial exposure to Lapinski as a result of the suit by Respondent. [T. 100]. Furthermore, the record proves and the Referee observed, that Respondent was apparently sincere in his argument that his demands for settlement and the law suit were initiated in an effort to obtain settlement from the insurance carrier and not to obtain a judgment against Lapinski personally. [RR 3/T. 39].

Accordingly, the facts of this case are consistent only with a determination that Respondent acted in a manner which he, in good faith, determined was in the best interests of his clients. Therefore, it can only be concluded from the record evidence and the Referee's findings that Respondent's violations of the enumerated rules resulted from a mistake in judgment and a failure to appreciate the applicability of Rules 4-1.7(a) and (b) to the facts of this particular representation.

This Court has recognized that the purposes of attorney discipline are to protect the public, maintain the integrity of the Bar and to ensure fairness to the respondent. The Florida Bar v.

Rubin, 362 So.2d 12 (Fla. 1978). To be fair to the public, the discipline must serve to protect it from unethical conduct but, must also at the same time not deny the public the services of a qualified lawyer as a result of undue harshness. The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). To be fair to the Bar, the discipline should deter others who may be prone to similar conduct. Id. In being fair to the Respondent, the discipline must encourage reform and must encourage rehabilitation. Id.

On the other hand, any consideration of punishment must be eliminated from recommendations of discipline. Punishment does not necessarily serve the public interest, but may adversely affect its members who are represented by a respondent or have need of legal services. It does not enhance the image of our profession. It does not foster rehabilitation. Therefore, no disciplinary purpose is served by punishment. State v. DeBoch, 512 So.2d 164 (Fla. 1987) and The Florida Bar v. Massfeller, 170 So.2d 834 (Fla. 1964).

A suspension of six months is necessarily tantamount to a suspension of one year, or longer. Such a suspension, with or without the specific recommendation of rehabilitation, requires a rehabilitation proceeding pursuant to Rule 3-7.10, Rules of Discipline. Proceedings thereunder require investigation by the Bar and a separate reinstatement hearing. A subsequent review by this Court is also available to either party. Assuming an expedited proceeding for reinstatement, one year until an order of reinstatement issues after a suspension of six months is realistic, if not optimistic. Therefore, the effective result of the

recommended discipline upon Respondent must be considered by this Court. Because Respondent is a sole practitioner, with an active trial practice and an obligation to clients, such a suspension will have a devastating and unjustly harsh effect upon him. It will also require all clients to obtain substitute counsel and will therefore deny the public the services of an otherwise qualified attorney. Such discipline is therefore only a form of punishment and is inappropriate.

Furthermore, this Court has held that only where an isolated incident involves embezzlement, bribery, or other similar conduct should a suspension be imposed. The Florida Bar v. Welch, 272 So.2d 139 (Fla. 1972). Conversely, logic dictates that where an attorney is determined to have violated our ethical rules because of a mistake in judgment not involving dishonest conduct, a discipline other than suspension, such as a reprimand, is the appropriate discipline. Such discipline serves to protect the public as it dissuades future similar conduct by the respondent and others by publicizing the attorney's error to the public, as well as to the bar. At the same time, it allows a qualified attorney to continue serving his clients without interruption or prejudice, does not deny the public access to the attorney's services and also encourages the attorney to reform his practices. Such a discipline is therefore well suited to the purposes of discipline for such an isolated violation as exist here.

Additionally, the Florida Standards For Imposing Lawyer Sanctions provide for a public reprimand. These standards were

adopted by The Florida Board of Governors to provide a format for referees and this Court to consider before imposing discipline on a Respondent. [Preamble: Florida Standards for Imposing Lawyer Sanctions]. The standards are designed to promote the **Consideration of all factors relevant to imposing the appropriate level of sanctions in an individual case; consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline and consistency in the imposition of disciplinary sanctions . . . " [Section 1.3, Florida Standards For Imposing Lawyer Sanctions].

Section 4.3 of the standards sets forth appropriate sanctions for conduct involving a failure to avoid conflicts of interest, absent aggravating or mitigating circumstances. Specifically, Section 4.33 establishes that a public reprimand is appropriate when a lawyer negligently fails to determine that representation will adversely affect another client and causes injury or potential injury to a client.

This discipline is consistent with the facts here that Respondent's efforts were intended to obtain settlements for his clients within the policy limits and were never intended to pursue one client in her personal capacity. [RR 3]. This discipline is also consistent with the record evidence to the effect that, as Respondent understood the circumstances, the real party at interest was the insurance carrier, not his client. [T. 34]. These facts prove a negligent failure to recognize a conflict and not a bad-faith or intentional act which may require the more harsh

discipline of suspension as set forth in section 4.32.

Moreover, the applicability of the public reprimand mandated by Section 4.33 is shown by the closing argument of bar counsel to the Referee. At trial, counsel stated that the above cited standard was applicable. [T. 138]. It was further pointed out to the Referee that this case involves no allegation of a conscious failure to adhere to the rules, but is instead, a case where Respondent was "[I]nsensitive to determining that there was a potential conflict of interest or violation of the rules". [T. 139]. Counsel went on to recommend, absent a finding of aggravation, a public reprimand. [T. 139]. If aggravation was found to have been proven, then, as the bar argued, a "short term suspension" may be appropriate. [T. 139].

Here, the Referee failed to make specific findings of aggravation or mitigation. Those conclusions which may be considered aggravation are either unsupported by the record evidence or do not constitute aggravating factors under the sanctions. Therefore, the sanction to be imposed by Standard 4.33 applies.

Arguably, however, in his recommendation of discipline, the Referee considered Respondent's failure to acknowledge wrongdoing; the potential for substantial injury and the reliance by the clients on Respondent's professional judgment. These considerations are insufficient to aggravate the appropriate discipline here from a reprimand to a lengthy suspension.

First, the record evidence does not support a finding that

Respondent's clients were any more vulnerable or dependent on his legal advice than any other lay client, This conclusion is apparently based upon the single factor of the clients' ages. However, age, standing alone, is just as consistent with wisdom and experience as it is with reliance or vulnerability. Therefore, the record is insufficient to uphold this conclusion and it should not be considered as an aggravating factor.

Secondly, the failure of Respondent to admit to an error, during the trial of this case, is an improper consideration in determining the severity of any discipline. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986). Only if Respondent had been allowed an opportunity to have an evidentiary hearing concerning factors of aggravation and mitigation, could his failure to acknowledge his error have been a potential relevant factor. As he was not allowed such an opportunity, despite a motion for such relief, this factor should not be consideration in aggravation.

Also, the reference by the Referee to the potential substantial injury is not supported by the record evidence. All evidence presented to the Referee tended to prove the converse conclusion - there was no potential for an excess judgment against the driver client. [T. 91, 100]. Absent clear and convincing evidence to the contrary, this conclusion is not supported by the record and should not be considered a matter of aggravation.

The report also reflects the Referee's consideration of a prior, unrelated proceeding which resulted in a determination of not guilty. Such consideration clearly violates Respondent's due

process right to be noticed of those matters to be considered by the Referee and this Court. Furthermore, it injects into this proceeding considerations which are irrelevant and unjustly prejudicial. Accordingly, this recommendation of discipline must be viewed with extreme caution to ensure that it is fair to Respondent.

Finally, the prior relevant decision of this Court in The Florida Bar v. Ethier requires the imposition of a public reprimand upon Respondent. The Florida Bar v. Ethier, 261 So.2d 817 (Fla. 1972). There, the respondent initially agreed and was retained to represent a husband against the wife in a divorce case. Subsequently, after a settlement was not reached by the parties, the respondent was retained by the wife and he filed suit against the husband. The respondent had never terminated his representation of the husband. This Court, despite that respondent's prior discipline of a private reprimand, entered an order of a public reprimand as a result of that conflict of interest,

Here, there exist no aggravating factor of a prior discipline. Here, unlike Ethier, Respondent had a sincere belief that the circumstances of his representation did not result in a material and adverse affect upon another client. Therefore, the prior holding of this Court requires that a public reprimand be ordered.

CONCLUSION

The facts and circumstances of this case are consistent with violations of our rules as a result of negligence or a mistake in judgment. The facts do not prove any improper motive or intentional misconduct. Respondent has no prior record of discipline and the Referee considered a factor, in recommending discipline, which is outside the record and irrelevant. Therefore, the recommended discipline of a suspension is unwarranted.

Moreover, the prior holdings of this Court and the discipline recommended by the standards require imposition of a public reprimand. An order of any discipline more severe will serve only to punish Respondent and is therefore unjustly harsh.

C E R T I F I C A T E O F S E R V I C E

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 15 day of September, 1992, to: Joseph A. Corsmeier, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607.

Donald A. Smith, Jr.

DONALD A. SMITH, JR., ESQUIRE