ORIGINAL

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO: 78,942

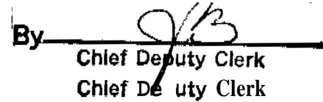
vs.

KENNETH W. MASTRILLI,

Respondent.

FILED
SID J. WHITE

OCT 28 1993



RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief:

RR	–	Referee Report
T.	–	Transcript of Referee Trial

SUMMARY OF ARGUMENT

Complainant, The Florida Bar, argues to this Court that the Referee's recommended discipline should be imposed because a suspension of six months is fair to the public; deters others from similar conduct; and is an appropriate discipline for Respondent and encourages his rehabilitation. However, the Bar provides no compelling argument nor does it cite any prior decision by this Court in support of this recommendation.

In support of its argument, the Bar first relies upon the same findings from which the Referee concluded that Respondent's acts resulted in a conflict of interest. The Referee's conclusion that Respondent represented one client in a legal action which named another client as a defendant and his recommendation that such representation resulted in violations of Rules 4-1.7(a) and 4-1.7(b) continue to be uncontested by Respondent. However, these findings and the resulting recommendations of guilt are not determinative of appropriate discipline, as suggested by the Bar.

The Florida Bar also argues that the findings of fact proved that Respondent knew or should have known that a conflict of interest existed. Therefore, it argues, the more severe discipline of suspension rather than reprimand is appropriate. This argument is inconsistent with the Florida Standards For Imposing Lawyer Sanctions. Standard 4.32 provides for a suspension where the conduct knowingly occurred. If Respondent only should have known of the conflict, but failed to recognize it, a suspension is not appropriate.

Furthermore, the Bar argues that the aggravating factors found by the Referee, plus additional factors and the totality of the circumstances, warrant a suspension. However, the aggravation relied upon by the Referee is unsupported by clear and convincing record evidence and was therefore improperly considered. Additionally, a prior proceeding in which Respondent was determined not guilty was improperly considered by the Referee. Therefore, there exist no aggravation sufficient to warrant a suspension.

Therefore, the Referee's recommended discipline should be rejected by this Court because it is unsupported by the record evidence and case law. The discipline of a public reprimand will adequately serve to protect the public, while not denying it the services of a qualified attorney. It will also serve to deter others from engaging in dual representation by noticing all members that similar conduct will result in public discipline. A public reprimand will also be fair to Respondent while encouraging his reformation and rehabilitation.

THE ARGUMENTS PROPOUNDED BY THE FLORIDA BAR ARE MISPLACED AND INADEQUATE TO JUSTIFY THE RECOMMENDED DISCIPLINE.

In its answer brief, the Bar characterizes the Referee Report as a rejection of certain factors upon which Respondent relies in arguing the excessiveness of the recommended discipline. Specifically, it argues that the Referee rejected the facts that Ms. Lapinski and Ms. Konopka were aware of Respondent's representation of both and they retained Respondent contemporaneously; that both clients agreed that Respondent should make whatever claims were necessary to maximize their individual recoveries; that Respondent's intention in filing suit on behalf of Ms. Konopka was to maximize the settlements; and that the real party in interest was Ms. Lapinkski's insurance carrier and not Ms. Lapinski personally.

The Referee's Report does not reject such findings. To the contrary, the Referee's Report states the following:

1) "At the doctor's office, Driver and Passenger each signed contracts for representation by Respondent." [RR 1].

2) "Respondent makes an artful and apparently sincere argument that his demands for settlement, as well as the law suit, which pitted one of his clients against the other, were simply efforts to obtain settlement from the insurance carrier. Respondent argues that all he sought was for Allstate to settle Passenger's claim within the limits of Driver's insurance policy, which in fact did occur. Respondent maintains that he never intended to pursue the law suit for damages upon behalf of passenger against driver in her 'personal' capacity." [RR 3].

These findings by the Referee were uncontroverted and are clearly supported by the record evidence. These findings are relevant to the appropriate discipline as evidence that

Respondent's acts were motivated by a good faith intention to settle his clients' cases for the maximum available amount and not to subject a client to personal liability. These findings also evidence the fact that both clients knew of the dual representation by Respondent. Additionally, the Referee acknowledges that Allstate did in fact settle Passenger's claim within the policy limits of Driver. All of these factors are inconsistent with the necessity of severe discipline and serve to mitigate against the recommended discipline.

The Bar also argues that Respondent should be suspended because he knew or should have known of a conflict. It is suggested that the Referee summarized Respondent's error in his Report when he states the following: "The Referee concludes from the facts that neither of Respondent's clients, driver nor passenger, consented after consultation with Respondent to become adverse parties in a law suit which named passenger as plaintiff and driver as defendant."

From this statement it is clear that the Referee determined that when Respondent named his clients as adverse parties in a law suit he created a conflict situation in which his independent professional judgment was limited by his duties to each client. However, the Referee did not find that Respondent <u>knew</u> of the conflict. Nor did he find that the clients were unaware of the dual representation. Therefore, these arguments are misplaced and do not support the recommended discipline.

In arguing the issue of appropriate discipline, the Bar suggests that the recommended suspension is appropriate to protect the public, deter others from similar conduct and to encourage rehabilitation. However, neither at trial nor in its brief, has the Bar indicated how a suspension of six months protects the interests of the public without denying it Respondent's services as an attorney. Conversely, a suspension of six months will effectively deny the public Respondent's services for a period of nine to twelve months. Likewise, there has been nothing propounded which supports the conclusion that such a severe discipline is necessary to deter others from similar conflict situations. Furthermore, nothing has been submitted supporting the argument that a suspension will be fair to Respondent's interests while serving to encourage reform and rehabilitation. Such discipline is realistically nothing but punishment and as such serves no function in disciplinary proceedings. State v. DeBoch, 512 So.2d 164 **(Fla. 1987).**

In addressing the factor of potential client injury, which was apparently considered by **the Referee** as aggravation, the Bar does concede that its own witness, Mr. Isom, testified that there was no potential for an excess verdict against his client, Ms. Lapinski. This testimony is consistent with **that** of Respondent's expert witness, Mr. Bokor. [T. 100]. Since there is no record evidence to the contrary, the Referee's finding that Respondent subjected his clients to substantial potential injury is unsupported and should not be considered.

The Bar also concedes that a victim's vulnerability, as a potential aggravating factor, may not be entirely applicable here. Clearly, merely observing the clients' ages, without any evidence of unusual vulnerability, causes this factor to also be questionable in its applicability.

On the other hand, this Referee clearly relied upon his personal memory and interpretation of a prior proceeding in formulating his recommendation of discipline. This fact cannot be considered harmless. It was not only a matter cited by the Referee, but one for which he articulated his own adverse conclusions. If it were not a matter which he considered relevant, why did he state it? Obviously, it was a consideration of significance to the Referee and is a factor which cannot be allowed by this Court to influence a determination of discipline.

The Florida Bar also suggest that the failure of this Referee to conduct an evidentiary hearing for the purpose of determining factors of mitigation and aggravation was within the sole discretion of the Referee. However, no authority for such discretion has been cited. Although a referee may have discretion in ordering the bifurcation of disciplinary proceedings, such discretion should be exercised based upon sound judicial reasoning. Here, the record is devoid of any justification for a denial of Respondent's right to first have the Referee make findings of fact and recommendations of guilt and to subsequently consider appropriate discipline. Clearly, Respondent was denied an opportunity to present argument and evidence in mitigation after

being advised of the Referee's findings and recommendations of guilt. This denial occurred despite his request for such a hearing prior to entry of the Referee Report. (Respondent's Motion For Rehearing or Reconsideration Of Discipline To Be Imposed). The prejudice to Respondent significantly outweighs any other factor, such as judicial economy, which **may** have been relevant in the Referee's denial of that request.

Finally, the Bar now suggests that this Court's decision in the case of The Florida Bar v. Ethier, 261 So.2d 817 (Fla. 1972), is inapplicable because the referee here faund the circumstances to be more egregious. This rejection of Ethier is inconsistent with the Bar's reliance on that decision at the Referee trial. This argument is also unsupported by the Referee's Report because the Referee made no finding of egregious conduct. No substantive fact has changed. Therefore, if Ethier applied at trial, it still applies.

In Ethier, this Court determined that a public reprimand was the appropriate discipline for an attorney representing conflicting client interest. There, the facts were that the Respondent first represented a husband in initiating a divorce action against his wife. After settlement became impossible, the attorney switched sides and then represented the wife against the husband/client. Most significantly, Mr. Ethier had been previously privately reprimanded for similar conduct. Despite this, he again engaged in a conflict of interest, but received a public reprimand.

Here, Respondent has no prior disciplinary record. Also, the conflict situation here was clear than the obvious one in Ethier. Additionally, the Referee has referenced the apparent intent of Respondent to maximize the settlements of his clients. Therefore, based upon this Court's prior decision of appropriate discipline, Respondent should be publicly reprimanded.

Finally, it is argued that the Standards for Imposing Lawyer Discipline require a suspension. Assuming arguendo the applicability of Standard 4.32, a suspension of six months, which will require proof of rehabilitation and an additional length of suspension, is not specifically required by this Standard.

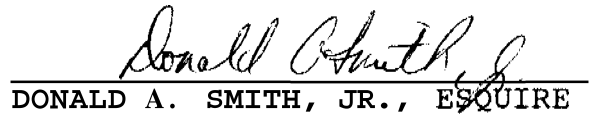
Moreover, the applicable standard is 4.33, which applies to circumstances where the attorney has negligently, versus knowingly, erred. Here, Respondent was never accused of consciously violating the rules. [T. 139]. Furthermore, the uncontroverted evidence proves that Respondent's understanding of the real party in interest (Allstate) is inconsistent with a knowing and intentional disregard for ethical conduct as now argued by the Bar. [T. 34]. Only where the attorney has acted with actual knowledge of the conflict does Standard 4.32 apply. Based upon the facts of this case, only the provisions of Standard 4.33 are applicable.

Accordingly, the arguments of the Bar fail to support the recommendation of a suspension for six months. The recommended discipline is excessive in view of Respondent's negligent failure to recognize the conflict of interest under the total circumstances of this case. Respondent should be disciplined consistent with

onlythe facts supported by clear and convincing evidence, Standard 4.33, and in recognition of his lack *of* a prior disciplinary record. A public reprimand should be ordered!

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery this 22ND day of October, 1992, to: Joseph A. Corsmeier, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607.



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