IN THE SUPREME COURT OF FLORIDA

No. 80,046

THE FLORIDA BAR,

Complainant,

FILED
SID J. WHITE
MAR 26 1993
CLERK, SUPREME COURT
By
Chief Deputy Clerk

vs.

WILLIAM C. NESBITT,

Respondent.

PETITION FOR REVIEW OF REFEREE'S REPORT

REPLY BRIEF FOR RESPONDENT

William C. Nesbitt
Respondent

P.O. Box 900175
Atlanta, Georgia 30329

In Proper Person

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ISSUE I

Whether the imposition of a 91-day suspension is consistent with the purposes of discipline as set forth in *The Florida Bar v. Pahules,* 233 So.2d 130 (Fla. 1970)

ARGUMENT

The imposition of a 91-day suspension is not consistent with the purposes of discipline as set forth in *The Florida Bar v. Pahules,* 233 So.2d 130 (Fla. 1970)

In its brief, the Bar notes that the first prong of the test laid down in *The Florida Bar v. Pahules,* 233 So.2d 130 (Fla. 1970), that "the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty," has *in part* been conceded by the undersigned when he stated that the proposed discipline does protect the public. It is obvious that *many* different penalties could be said to protect the public. Disbarment would protect the public. For that matter, so would imprisonment. The question is not whether a penalty harsher than that proposed by the Respondent will protect the public; *the question is whether the penalty proposed by the Respondent would adequately protect the public.* For the reasons discussed at length in the Respondent's First Amended Initial Brief, it is clear that the proposed penalty does, in fact, adequately protect the public.

The Florida Bar points to *The Florida Bar v. Weiss,* 586 So.2d 1051 (Fla. 1991), as supporting the proposition that "[t]he recommended discipline in this case is more lenient than that imposed in *Weiss* and the Respondent cannot cite to the mitigation evidenced in *Weiss.* (Bar Brief at 6). However, this Court specifically found that *Weiss* involved *gross negligence* in the handling of client trust funds, a situation which, as The Florida Bar itself admits on page 10 of its Brief, was a situation *not found by the Referee.*

The Florida Bar further argues that the penalty proposed by the Referee "does not deny the public a qualified attorney in that it protects the public and guarantees that the Respondent will not be reinstated to practice law in Florida until the court determines he is competent, rehabilitated, and reformed." (Bar Brief at 6). First, the statement itself is a non sequitur. Second, it (unfortunately) not a mere speculation, but a *probability,* that a suspension in Florida will automatically result in a suspension in Georgia. Third, it is the Respondent's former trust accounting practices, *not* his competency, which is at issue. Fourth, the question of reformation assumes that the Respondent was knowingly and willfully using improper trust accounting procedures. As is noted throughout the Respondent's First Amended Brief and as was testified to extensively at the hearing before the Referee, *all of the Respondent's trust account violations were inadvertent.* Thus, the only *real* question is that of the Respondent's rehabilitation. As noted in the Respondent's Brief, that matter can very adequately

be dealt with by imposing the discipline requested by the respondent, which includes as an integral part participating in LOMAS and/or taking courses to gain proficiency in trust accounting procedures.

The Florida Bar next argues that this Court "should not be influenced by potential or speculative discipline in another state when imposing discipline in a case where Respondent has flagrantly disregarded his responsibility with respect to the practice of law in Florida, has grossly mismanaged a trust account, and then left the jurisdiction." (Bar Brief at 6, 7). By this argument the Bar seeks to imply that the Respondent in this case has flagrantly disregarded his responsibilities to the practice of law, a situation *not* found by the Referee or otherwise indicated in the record; has grossly mismanaged a trust account, a situation which, as noted above, The Florida Bar itself admits was *not found by the Referee;* and then left the jurisdiction, as if to imply that the Respondent, facing a barrage of ethical problems in Florida, fled from the state. As noted in both the Respondent's Brief and in the testimony before the Referee, the Respondent left the State of Florida because he accepted a job offer in another state, *and for no other reason.* The Respondent has remained "available" to both The Florida Bar and this Court (as a matter of fact, the Respondent's Atlanta location puts him closer to Tallahassee than anyone located south of a line connecting Titusville and Sarasota, which probably includes 35% of Florida's land mass and 50+% of its population).

The Florida Bar states that the proposed discipline "is fair to the Respondent in that it is sufficient to punish a breach of ethics and at the same time encourages reformation and rehabilitation." As noted above and in the Respondent's First Amended Initial Brief, the proposed discipline certainly punishes (by effectively disbarring the Respondent and forcing him into unemployment); it *does not* "encourage[] reformation and rehabilitation."

The Florida Bar notes that the proposed discipline "is severe enough to deter others who might be prone or tempted to become involved in like violations." Bar Brief at 7. Setting aside the questions of whether people can be deterred from *inadvertent* conduct, again the question is not whether a penalty harsher than that proposed by the Respondent will deter others; *the question is whether the penalty proposed by the Respondent would deter others.* The Bar then cites *The Florida Bar v. Rogers,* 583 So.2d 1379 (Fla. 1991), for the proposition that a public reprimand should be reserved for "isolated instances of neglect, lapses of judgment, or technical violations of trust account rules *without wilful intent.*" (emphasis added). In the instant case, however, The Florida Bar compares shortages in the Respondent's trust account "in nearly every month" (that is, less than a 12-month period of time) to the *Rogers* situation of "misconduct occurring from 1983 to 1986." The Florida Bar then goes on to argue that the Respondent is guilty of a pattern of misconduct. As the Respondent has previously pointed out to this Court (on pages 5 and 6 of his First Amended Initial

Brief), the instant case grew out of the Respondent's earlier disciplinary case; *it is not a separate, distinct, and unrelated case constituting a "pattern" of misconduct.* Indeed, the Bar itself has admitted that the present case is closely connected to the prior case when it states on page 8 of its brief that the prior case "that arose in Florida Supreme Court Case No. 76,707 *occurred during this same year,* i.e., 1989."

ISSUE II

Whether "gross negligence" in the handling of the Respondent's client's trust account warrants a 91-day suspension

ARGUMENT

The question of whether "gross negligence" in the handling of the Respondent's client's trust account would warrant a 91-day suspension is irrelevant as this case *does not involve* gross negligence

The Bar cites Black's Law dictionary for the proposition that gross negligence involves "the *intentional* failure to perform a *manifest* duty in *reckless disregard* of the consequences as affecting the life or property of another. It is *materially* more want of care than constitutes simple inadvertence." (Bar Brief at 9; emphasis added).

First, it must be reiterated that the Referee in this case *did not find gross negligence* in this case. Second, as has been amply

testified to, argued, and briefed, *all of the Respondent's trust account violations were inadvertent.* Thus, *by definition,* they were not "intentional." Third, the duty to properly maintain trust accounting records, while inarguably important, is not "manifest." Fourth, there is *no* evidence tending to show that the Respondent's trust accounting lapses were "in reckless disregard" of the consequences. In fact, if this Court were to review the documentation which the undersigned furnished to The Florida Bar, it would inescapably conclude that the undersigned did attempt to properly maintain his trust account and the trust account records, and that, while deficiencies may be found, they do not begin to approach a level where they might be fairly characterized as a "reckless disregard" for proper trust accounting procedures. Certainly this failure does not rise to "materially" more want of care than simple inadvertence.

The problems which have been found to exist with the Respondent's trust accounting procedures have resulted not from wilfulness, and not from gross negligence, but from honest errors. If there *had* been a pattern as alleged by The Florida Bar, some clients would have been injured ... but no clients ever were injured.

The Florida Bar then *assumes* that gross negligence has been established in the instant case when it cites *The Florida Bar v. Neely,* 488 So.2d 535 (Fla. 1986) (gross negligence found); *The Florida Bar v. Weiss,* 586 So.2d 1051 (Fla. 1991) (gross negligence found); *The Florida Bar v. Burke,* 578 So.2d 1099 (Fla. 1991) (gross

negligence found); *The Florida Bar v. Pino,* 526 So.2d 67 (Fla. 1988) (cited by the Respondent but stated by The Florida Bar to be inapplicable because gross negligence not involved); *The Florida Bar v. Thomson,* 429 So.2d 2 (Fla. 1983) (cited by the Respondent but stated by The Florida Bar to be inapplicable because of unusual time period which had expired even though Thomson had had *forty-three checks returned for lack of sufficient funds;* the undersigned Respondent has had *no* checks returned, for lack of sufficient funds or for any other reason); and *The Florida Bar v. Bornes,* 428 So.2d 648 (Fla. 1983) (cited by the Respondent but stated by The Florida Bar to be inapplicable because gross negligence not involved).

ISSUE III

Whether the Supreme Court of Florida deals more severely with cumulative misconduct than with isolated misconduct, thereby justifying the discipline of a 91-day suspension

ARGUMENT

The question of whether the Supreme Court of Florida deals more severely with cumulative misconduct than with isolated misconduct, thereby justifying the discipline of a 91-day suspension, is a non-issue, inasmuch as this case *does not involve* cumulative misconduct

Obviously this Court deals more severely with cumulative misconduct than with isolated misconduct. That is irrelevant, as (notwithstanding The Florida Bar's assertion that the undersigned

Respondent's misconduct rises to the level of cumulative misconduct of a similar nature), the misconduct involved in this case is *not* cumulative and, additionally, is decidedly *not* similar. Again, The Florida Bar makes the unsupported statement that, not only the present trust accounting violations, but *all,* of the undersigned Respondent's misconduct have involved "grossly negligent" handling (Bar Brief at 13). The Bar then cites three cases in support of its argument that prior disciplinary actions justify enhanced penalties, two of which involved a significantly more serious prior disciplinary history (even if one concedes--which I do not!--that the prior disciplinary action involving this Respondent is a separate and distinct action): *The Florida Bar v. Welch,* 427 So.2d 720 (Fla. 1983) (Respondent had *three* prior disciplinary actions) and *Neely* (Respondent had *two* prior disciplinary actions).

ISSUE IV

Whether the aggravating circumstances in the case at bar outweigh the mitigating circumstances that would support the Respondent's request for more lenient discipline

ARGUMENT

The aggravating circumstances in the case at bar *are far outweighed* by the mitigating circumstances which *amply* support the Respondent's request for more lenient discipline

The Florida Bar, noting that the Referee "did not specifically

enumerate the attending and mitigating factors in his report" (Bar Brief at 5), then attempts to substitute its opinions for the Referee's findings (or lack thereof).

The first aggravating circumstance is the so-called pattern of prior misconduct. That issue has been amply dealt with in preceding briefs and in this brief, and needs no further discussion. Similarly, the Bar's unsupported assertion that *all* of the Respondent's violations involve gross negligence has been previously discussed.

Apparently the Bar would have this Court rule that an attorney's failure to live up to the public's perception of attorneys as financially well-to-do is unethical, as the Respondent's recent financial inabilities are characterized as a "lack of regard ... evidenc[ing] gross negligence" (Bar Brief at 14-15). In addition, the Respondent's failure to report his CLE to The Florida Bar (during a period when he was not practicing in Florida [and in fact *could not* practice in Florida because of his nonpayment of Bar dues] and was operating under a good-faith belief that he was not required to report his CLE hours to The Florida Bar), is unfairly characterized as an aggravating factor.

The Florida Bar then states that the Respondent has not cooperated with the Bar, even though the Respondent fully and completely explained the sequence of events regarding the bank statements and other items requested by the Bar. (Of course, the Bar has failed to return the Respondent's original Certificate of Good Standing with the State Bar of Georgia, as requested in the

Respondent's letter to The Florida Bar of November 2, 1992 [a copy of which letter has been attached by the Bar to other materials provided by it]. In addition, notwithstanding the Respondent's requests that the Bar either not send materials to him via certified mail or, if it must do so, that it also send a copy via regular mail, the Bar persists in sending matters such as its Answer Brief to the Respondent via certified mail, a procedure which, it has been demonstrated in the past, may cause problems. The Bar would no doubt assert that these failures are inadvertent. Apparently every failure on the Bar's part is "inadvertent" while every failure on the Respondent's part is "wilful" or "grossly negligent). The Bar further argues that the Respondent has been licensed to practice law in the State of Florida since 1981. However, the testimony adduced in the hearing before the Referee shows that the Respondent was un- or under-employed for much of that time.

In its brief, the Bar concedes that "if the Respondent had no cumulative misconduct and no other aggravating circumstances existed, probation may have been the appropriate discipline" (Bar brief at 15-16).

Apart from the fact that there *is no* "cumulative misconduct" and that no aggravating circumstances exist, the Bar fails to consider whether any mitigating factors might exist. Isn't the Respondent's prior honorable service in the U.S. armed forces a factor to consider? Shouldn't the Bar consider the Respondent's academic record (received J.D. degree *with honors* while working

part-time to support self and then-family; inducted into Phi Kappa Phi honor society while in law school; served as law review editor while in law school; law review note published while in law school [*see Trucking Deregulation and the Florida Antitrust Act of 1981, 34 U. Fla. L. Rev 934 (1981)*).

The fact that the Respondent was, and is, remorseful (as the most cursory review of the transcript of the hearing before the Referee will indicate) apparently is not considered by the Bar to be a mitigating factor.

ISSUE V

Whether there are any other factors in the case at bar which this Court should consider in arriving at a just and fair discipline

ARGUMENT

There are additional factors in the case at bar which this Court should consider in arriving at a just and fair discipline

From the very beginning, the undersigned Respondent has indicated his willingness to participate in LOMAS and to take remedial courses in trust accounting. This, coupled with the fact that the undersigned Respondent's new job involves handling *no* funds of *any* nature, and that that job involves *no* bookkeeping or other accounting/financial responsibilities, should satisfy this Court that the Respondent poses no "financial danger" to anyone.

The only remaining matter, then, is the appropriate disposi-

tion of the Respondent's trust account. From the very beginning, the Respondent has made it clear to the Bar's representatives that he would welcome either instructions in how to close the trust account in a manner which The Florida Bar would find satisfactory, or the Bar's guidance and supervision while the account was closed. Neither has been forthcoming. The Respondent has, therefore, taken the following steps to close the trust account in what he hopes is a manner which will earn the approval of The Florida Bar:

1. The present shortage in the trust account was on the order of $150.00. The Respondent has, therefore, deposited $300.00 (via U.S. postal money order) in the account, which is an amount sufficient to cover any shortages, all cashier's check fees, stop payment fees, and any incidental costs related to closing the account.

2. The Respondent has caused a 'stop payment' to be issued for check #2158, originally payable to Moore Group Inc. in the amount of $1,072.45, as this check has never been paid by the bank and must be presumed to be lost (incidentally, this check is one of those documents which, due to the Respondent's "lack of cooperation," was not forwarded to the Bar).

3. The Respondent has caused cashier's checks to be issued to four of the five former clients which are reflected on the client ledgers as being owed money. One of these clients is Moore Group Inc. (see #2 above). The client to whom money is owed, Debra Arthur, moved to an unknown location out of state immediately upon the resolution of her case. The balance in

her account is 50¢ (that is, *fifty cents*). Of course, all cashier's check fees have been paid by the Respondent, and have not come from client funds.

4. The Respondent will cause cashier's checks to be issued to those clients who have been issued trust account checks which have never been paid by the bank. As all of these checks are for nominal amounts ($45.00, $25.00, $12.00, and $1.31), are years old, and are considered to be 'stale,' it should not be necessary to cause 'stop payments' to be issued. All cashier's check fees will be paid by the Respondent, and will not come from client funds.

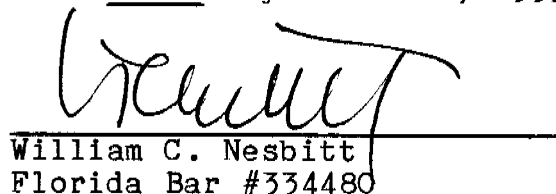
5. After not less than 30 days have elapsed from the last transaction, the undersigned will formally close the account. As all clients will have been paid, the (very nominal) amount of money left over will be retained by the Respondent.

The Florida Bar will, no doubt, assert that the fact that the Respondent is taking this action at this late date is further evidence of what the Bar views as dilatory behavior. *In fact,* the only reason that the undersigned has waited this long to take these steps is that he was waiting for the Bar to respond to his request that the Bar either instruct him as to the procedures it would like to see followed in closing the account, or that it guide and supervise the undersigned in the closure of the account. As no such response has been forthcoming, the undersigned has elected to close the account himself.

CONCLUSION

A comparison of the facts in the instant case to those in cases previously ruled upon by this Court quickly reveals that no aggravating circumstances exist. Two circumstances urged on this Court by the Bar--the Respondent's alleged "gross negligence" and his alleged "pattern" of unethical behavior--are simply not supported by the facts. If this Court would review the Referee's findings and the documents and other materials which this Court should review to determine whether they do in fact support the Referee's findings, it is very possible that this Court would conclude that many of the deficiencies urged upon this Court in fact do not exist, or exist in lesser degree than alleged by the Bar. The undersigned respondent has indicated his willingness to participate in LOMAS, to take classes in trust account management, to pay all dues and outstanding costs and, in sum, to do whatever may be required. What more can reasonably be requested? Rehabilitation and punishment require no more. To suspend the undersigned as urged by the Bar would merely ensure that I again become unemployed. Who does that benefit? No one.

Respectfully submitted, this the 25th day of March, 1993.



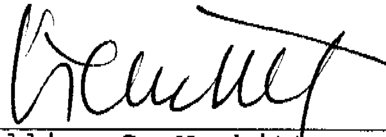
William C. Nesbitt
Florida Bar #334480

P.O. Box 900175
Atlanta, Georgia 30329
(404) 996-3316

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has on this date, March 25th, 1993, served upon The Florida Bar a copy of the Reply Brief for Respondent, by mailing the same by U.S. Mail, postage prepaid, to:

Ms. Alisa M. Smith, Esq.
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 33299-2300.



William C. Nesbitt
Florida Bar #334480

P.O. Box 900175
Atlanta, Georgia 30329
(404) 996-3316