IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 80,117
[TFB Case No. 91-31,398 (18D)

v.

WILLIAM F. LAWLESS,

Respondent.
_____/

REPLY BRIEF AND CROSS-APPEAL ANSWER BRIEF OF COMPLAINANT

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, will be referred to as "the bar."

The transcript of the final hearing of January 7, 1993 will be referred to as T- , followed by the referenced page number.

The transcript of the hearing held February 9, 1993, will be referred to as T- , followed by the referenced page number and hearing date.

The report of referee dated February 22, 1993, will be referred to as RR- , followed by the referenced page number of the Appendix to The Florida Bar's Initial Brief.

POINT I

WHETHER A SUBSTANTIAL SUSPENSION REQUIRING PROOF OF REHABILITATION IS REQUIRED IN VIEW OF RESPONDENT'S PRIOR DISCIPLINE HISTORY AND THE FACTS OF THE CASE AT HAND.

A substantial suspension requiring proof of rehabilitation is required in view of respondent's prior discipline history and the facts of the case at hand.

It is well settled that a prior discipline history calls for enhanced discipline, regardless of whether or not the prior disciplines involved similar conduct. The Florida Bar v. Leopold, 399 So. 2d 978 (Fla. 1981), rehearing denied, and Standards 8.0 and 9.22(a) of the Florida Standards for Imposing Lawyer Sanctions. Respondent has had one private reprimand and two public reprimands within the last five years. A suspension requiring proof of rehabilitation, in excess of 91 days or greater, is justified on that basis alone.

Respondent's citation of The Florida Bar v. Carter, 502 So. 2d 904 (Fla. 1987), is inappropriate in view of The Florida Bar v. Golden, 561 So. 2d 1146, 1147 (Fla. 1990), a more recent case in which this Court disbarred an attorney for engaging in fraudulent conduct, noting that when misconduct occurs near in

time to other offenses, cumulative misconduct can be found regardless of when the discipline was imposed. The Florida Bar v. Adler, 589 So. 2d 899 (Fla. 1991).

The fact remains, as detailed in the Initial Brief, that respondent should have supervised Mr. Aboudraah and the Seguins' case more carefully. He testified at final hearing that he was aware of a 1986 investigation of Mr. Aboudraah for the unauthorized practice of law, T-199. He also should have been aware of Mr. Aboudraah's character from two of his previous three bar disciplines which involved Mr. Aboudraah, both of which took place at the same time the Seguins' case was pending. Respondent should have had adequate contact with his employee and his clients to prevent the misconduct from occurring. He did not.

A suspension requiring proof of rehabilitation is required where the respondent has a prior history. In The Florida Bar v. Glick, 397 So. 2d 1140 (Fla. 1981), this Court suspended an attorney for three months and one day, requiring proof of rehabilitation, where the attorney demonstrated an unwillingness to correct an earlier mistake made in a probate matter. In suspending the attorney, this Court noted that his prior record of a public reprimand and one year of probation one year earlier for similar misconduct demanded more severe discipline for cumulative misconduct.

In reviewing the facts of respondent's prior discipline which are before this Court in the Appendix to The Florida Bar's Initial Brief, it is clear that a pattern of misconduct is present involving respondent's dealings with Mr. Aboudraah and innocent clients. Enhanced discipline pursuant to The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1982), rehearing denied, is required to serve the purposes of discipline outlined in The Florida Bar v. Lord, 433 So. 2d 986 (Fla. 1983).

POINT II

ON ANSWER TO RESPONDENT'S POINT I

WHETHER THE REFEREE'S DESCRIPTION OF RESPONDENT'S PRIOR THREE DISCIPLINES WAS SUBSTANTIALLY CORRECT.

The referee's description of respondent's prior three disciplines did not cause him to recommend cumulative discipline erroneously.

Respondent makes much out of the referee's description of respondent's prior discipline history. The referee's description was somewhat inaccurate but in no way prejudiced the respondent. The referee described respondent's first discipline of a private reprimand in 1981 as being for assisting a nonlawyer in the practice of law. Although respondent never requested the referee to correct this statement, it appears that the reprimand actually was for his improper actions in a real estate closing.

The other two cases, the 1990 public reprimand and the 1991 public reprimand, both involved Mr. Aboudraah. Respondent was well aware of Mr. Aboudraah's character prior to 1990 by virtue of these two matters. Ms. Townsend, who testified as an expert in immigration matters, testified that she had previously testified as an expert for The Florida Bar in 1990 regarding Mr.

Aboudraah's misconduct in relation to immigration cases and his association with Mr. Lawless stemming from prior conduct, T-120-122. It should also be clarified that respondent and Ms. Townsend engaged in a business relationship regarding the handling of other immigration matters prior to her testimony at the final hearing on this matter before the Court, T-136.

POINT III

WHETHER THE REFEREE'S RECOMMENDATIONS AS TO RESTITUTION TO THE RESPONDENT'S CLIENTS ARE PROPER AND SHOULD BE UPHELD.

The referee's recommendations as to restitution to the respondent's clients are proper and should be upheld.

Respondent's clients lost $12,546.00 as a result of their contact with the respondent. It is appropriate that respondent should reimburse them this amount, as recommended by the referee.

> It is my finding that had it not been for the respondent, the Seguins would not have been subjected to Charles Aboudraah's misconduct. Therefore, reimbursement should be required of the respondent in the amount of $12,546.00, RR-6.

It is the position of The Florida Bar that the referee's order complies with Rule 3-5.1(h) and (i), referring to the respondent's "receipt" of improper fees because Mr. Aboudraah was acting as respondent's agent in this matter. Much as an attorney is responsible for a secretary's theft of a client's trust funds, respondent is responsible in this case for the conduct of his nonlawyer employee, Mr. Aboudraah.

This is particularly true where the very slightest inquiry and supervision by respondent would have informed him that Mr.

Aboudraah was neglecting the Seguins' case and fraudulently extracting fees and costs from them.

Further, the referee specifically noted in his findings that respondent was engaging in improper fee splitting:

> Five: refrain from splitting fees with a non-lawyer. I believe that was admitted in the trial transcript on page a hundred and eighty that he got twenty-five hundred dollars from these people, which he gave half to this non-attorney, even though that was not alleged as a violation, T - February 9, 1993, p.7.

Therefore it is further appropriate that these improper fees be reimbursed.

As this Court noted in The Florida Bar v. Richardson, 574 So. 2d 60, 62 (Fla. 1990), rehearing denied, restitution is important where an attorney's fees are excessive because of the harm to the public and the public's perception of the bar resulting from this practice.

In The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989), rehearing denied, this Court specifically receded from its previous holding in The Florida Bar v. Winn, 208 So. 2d 809 (Fla. 1968), cert. den. 393 U.S. 914, 89 S. Ct. 236, 21 L. Ed. 2d 199 (1968), stating,

> Charging and collecting an excessive fee can cause harm just as converting a client's funds can. Restitution of an excessive fee, therefore, can be ordered as a condition of readmission or reinstatement, and we recede from Winn to the extent that it conflicts with this holding, at 311.

It should be noted the referee recommended that respondent pay the restitution to the Seguins over the three year period of his probation. Should respondent be suspended for a period requiring proof of rehabilitation as the bar prefers, it appears clear that restitution would be appropriate as a condition of reinstatement.

In The Florida Bar v. Grusmark, 544 So. 2d 188 (Fla. 1989), rehearing denied, the attorney was suspended for ten days and thereafter until he repaid an excessive fee where the attorney refused to make a refund or account for the fee to the client. Clearly, it is appropriate to order restitution of the excessive fee in this case.

POINT IV

THE REFEREE'S RECOMMENDATIONS AS TO SUPERVISING PARALEGALS AND REMOVING HIS NAME FROM LAWYER REFERRAL LISTS ARE APPROPRIATE IN THIS CASE.

The referee's recommendations as to not hiring paralegals and not letting his name be used on lawyer referral lists is appropriate to the situation at hand.

The referee is the finder of fact and is in the best position to make a judgment on the facts in the case. The referee saw the harm caused the respondent's clients by respondent's failure to supervise his nonlawyer assistant. He also saw the harm caused the clients who were referred to respondent as an immigration lawyer by a lawyer referral service. Clearly, such restrictions are appropriate, at least for the period of probation. Should the bar's recommended discipline of suspension requiring proof of rehabilitation be instituted, then respondent's argument for removing this condition may have more merit, for respondent's proof of rehabilitation would include proof that he be able to give paralegals the necessary supervision and to be worthy of having his name placed on a lawyer referral list.

This Court has not hesitated to uphold unusual types of recommendations by a referee in the past. In The Florida Bar v. Whitaker, 596 So. 2d 672 (Fla. 1992), this Court upheld terms of probation requiring grievance committee supervision and submission of a "tickler" system plan. In The Florida Bar v. Willis, 459 So. 2d 1026 (Fla. 1984), the referee's recommendations that reinstatement be conditioned upon a psychiatric examination, among other things, was upheld.

The referee's recommendations are appropriate. These recommendations indicate the serious questions the referee had about respondent's ability to ethically practice law and lend further credence to The Florida Bar's argument that a suspension requiring proof of rehabilitation is required in this case.

POINT V

THE REFEREE'S FINDINGS OF FACT ARE CORRECT AND SHOULD BE UPHELD.

Respondent argues that the referee's finding of fact at paragraph 21 of his report, "[t}he respondent further claimed he had no direct contact with Mr. Aboudraah in over two years," is erroneous.

This statement describes what transpired in the April, 1990, office visit with respondent. At this meeting, the respondent told the Seguins that he had not had contact with Mr. Aboudraah in over two years. This statement was in fact contradictory to other statements made by the respondent. However, this contradiction is the respondent's, not the referee's. The referee was merely reporting the statement that was told to the Seguins. This is clear from the Seguins' testimony, T-39.

Respondent also claims that the referee erred in not finding that it was respondent who obtained the Seguins' E-2 visa for them in February, 1991. However, this was a significantly disputed issue at final hearing and the referee's finding indicated where he found the clear and convincing evidence to be. He did not omit such a finding in error. The referee chose to

adopt the testimony of Ms. Catherine Henin, the attorney who handled the Seguins' immigration case after they fired the respondent, T-38, 79-80. Ms. Henin testified that the E-2 visas obtained by respondent for the Seguins were not legitimate and therefore she had to reapply for them in a correct and proper manner, T-156-158. There is ample support in the record to support the referee's failure to acknowledge respondent as the attorney who obtained the Seguins' E-2 visas.

CONCLUSION

WHEREFORE, The Board of Governors of The Florida Bar respectfully prays that this Honorable Court will review the referee's report and recommendations, and impose a ninety-one (91) day suspension requiring proof of rehabilitation on respondent, approve the referee's other recommendations, and order respondent to pay costs in these proceedings currently totaling $2,385.59.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief and Cross-Appeal Brief of Complainant have been furnished by ordinary mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by ordinary mail to Mr. John A. Weiss, Counsel for Respondent, at Post Office Box 1167, Tallahassee, Florida 32302-1167; and a copy of the foregoing has been furnished by ordinary mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 26th day of July, 1993.

Jan Wichrowski

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