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IN THE SUPREME COURT OF FLORIDA

FILED

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AUG 27 1993

CLERK, SUPREME COURT

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Case Nos. 80,236 and 80,714

TFB File Nos. 87-21613-04C
and 90-00370-04C

THE FLORIDA BAR,

Complainant,

vs.

DETRA R. H. MICKS,

Respondent.

_____ /

AMENDED REPLY BRIEF

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SUMMARY OF ARGUMENT

The Referee's recommended discipline is too lenient due to the extensive and serious nature of the admitted misconduct. Respondent admits to entering into a business transaction with a client and assisting that client in unknowingly transferring her property to Respondent. (RR-4) In the second case, Respondent admits to representing a client in a frivolous lawsuit and encouraging that client to mortgage her home to pay \$10,000 in attorney's fees to Respondent to appeal its dismissal. (RR-19-21)

The cumulative nature of Respondent's serious ethical violations which occurred during an extended period of time, i.e., four years justifies the more severe sanction of disbarment.

Further the Referee's findings in mitigation are clearly erroneous in that they are not supported by a factual basis. The record is devoid of references to Respondent's full and free disclosure during the investigatory process and there was no unreasonable delay on the part of The Florida Bar to support the more lenient sanction of suspension. In the alternative, should this Court make a finding that the mitigating factors cited by the Referee are supported by the record, The Florida Bar submits that the mitigation is insufficient to outweigh the serious and cumulative nature of Respondent's misconduct and to justify the sanction of an 18 month suspension from the practice of law.

Finally, Respondent's contention that these egregious violations be dismissed due to laches is not supported by the record nor this Court's precedence. In The Florida Bar v. Guard, 453 So. 2d 393, 394 (Fla. 1984), this Court held that "dismissal of...complaints [based on laches] would totally frustrate the primary purpose of discipline, namely, protection of the public from the misconduct of attorneys."

Accordingly, this Court should reject Respondent's contention that her case be dismissed for laches and further reject the discipline recommended by the Referee in this case and impose the sanction of disbarment.

ARGUMENT I

THE REFEREE WAS CORRECT IN DENYING RESPONDENT'S MOTION TO DISMISS

Respondent filed Motions to Dismiss in Supreme Court Case Nos. 80,236 and 80,714, on March 9, 1993, three days prior to the scheduled final hearing on March 12, 1993. (T-1) The Referee was fully advised by counsel for The Florida Bar and Respondent's counsel concerning the facts, evidence and caselaw submitted at the hearing concerning the issues of laches, prior to rendering his decision concerning the dismissal of Respondent's Motions and the granting of The Florida Bar's Motions for Summary Judgment. (T-3-42)

The Referee's rulings are supported by precedence and clear and convincing evidence.

The elements which comprise laches, as set forth in Respondent's Brief at p. 10, were made applicable to attorney discipline matters in The Florida Bar v. McCain, 361 So. 2d 700, 704 (Fla. 1978). McCain also stated that "[t]here is no express statute of limitations governing attorney discipline proceedings," and that The Florida Bar has a "reasonable time after it obtains jurisdiction to proceed." McCain at 705. In The Florida Bar v. McCain, in which The Florida Bar proceeded against an attorney immediately following attorney's resignation as a judge, the Court found that "The Florida Bar has been diligent in its efforts and did not fall within any of the requirements for laches." The Florida Bar v. McCain at 706.

Specifically, the Court found that "[i]t was not until August 31, 1975, when McCain resigned that the Bar could possibly have proceeded against him. Realistically, it was not until the filing of our opinion in The Florida Bar v. McCain, on May 18, 1976 that the Bar knew to what extent and in what manner it could pursue disciplinary action against the former Justice."

In 1986, this Court, relying on McCain, rejected a claim that an attorney complaint be dismissed due to a delay in the disciplinary proceedings. The Florida Bar v. Lipman, 497 So. 2d 1165 (Fla. 1986).

The significance of these two opinions, to the case at bar, is that they set forth the ground work upon which a viable laches argument may rest. Laches in attorney discipline cases concerns delay perpetrated by The Florida Bar after receipt of jurisdiction. It would be unconscionable to hold The Florida Bar responsible for the time period prior to it having knowledge or notice of Respondent's misconduct.

With regard to Supreme Court Case No. 80,714, jurisdiction or notice of a grievance was not given to The Florida Bar until 1989; (T-24) and as to Supreme Court Case No. 80,236, The Florida Bar initiated its proceedings against Respondent after the civil lawsuit against Respondent concerning the incidents under which this complaint manifested was resolved. (T-33-34)

In 1989, The Florida Bar began an investigation into the allegations which give rise to the Supreme Court Case No. 80,714. (T-24) On several occasions between 1989 and 1993 in reference to Supreme Court Case Number 80,714, Respondent

caused delay in her disciplinary proceedings. The instances of delay caused by Respondent are as follows: 1. Respondent failed to respond to the allegations of misconduct following requests to do so by The Florida Bar on September 12, 1990 and October 4, 1990. (T-25) 2. Although, Respondent informed the Grievance Committee in November 1991 that she would submit a written response to the complaint, one was never filed. (T-30-31) 3. In February 1993, this Court granted an extension of time in which to file the Report of Referee. This extension was necessary due to Repondent's counsel's inability to attend a Referee hearing during the requisite time frame. (R)

In reference to Supreme Court Case No. 80,236, Respondent was the cause of delay in her disciplinary proceedings as follows: 1. Following the jury verdict of the civil lawsuit, Respondent's counsel contacted the grievance committee to request a continuance of the March 9, 1990 hearing scheduled in this matter and represented that the matter would be "disposed of one way or another on April 13, [1990]. (T-34-35) 2. The grievance committee granted Repondent's request for a continuance and reset the hearing for April 13, 1990. (T-35) 3. It was not until April 1992 that Respondent submitted a waiver of probable cause in this disciplinary proceeding to the grievance committee. (T-37) 4. The delay at the referee stage was caused by Respondent's counsel's inability to attend a final hearing due to illness duing the requisite time period and this was the impetus for the Motion for an Extension of Time filed in this matter on February 12, 1993. (R)

There is a total absense of cites to delay perpetrated by The Florida Bar within the Respondent's Answer Brief. This is simply due to the lack of evidentiary support upon which to allege this claim.

According to Respondent's Answer Brief, it appears that Respondent requests this Court determine delay in the prosecution of these cases from the time of the underlying misconduct as opposed to from the time The Florida Bar was put on notice of the misconduct. (RB-11) The second prong set forth in McCain, regarding laches, requires the following:

that the "delay in asserting the claimant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute the suit." McCain at 705.

Respondent asserts that this element is established because "the Bar did not file a complaint in the Brown matter until November 3, 1992 [Case No. 80,714]. (T-9) A complaint in the Bush matter was not filed until November 3, 1992 [Case No. 80,236]. (T-9) (RB-11) This statement begs the question, in that it does not establish the reason for the delay nor does it prove delay was the responsibility of The Florida Bar.

In the only two cases cited by Respondent in which a lawyer claimed laches in an attorney disciplinary proceeding, this Court was unwilling to dismiss the allegations. The Florida Bar v. Randolph, 238 So. 2d 635 (Fla. 1970) and The Florida Bar v. Papy, 358 So. 2d 4 (Fla. 1978).

Further, unlike the case at bar, the delay denounced in The Florida Bar v. Randolph, 238 So. 2d 635 (Fla. 1970) and The Florida Bar v. Papy, 358 So. 2d 4 (Fla. 1978) was clearly due to the failure of The Florida Bar to expeditiously prosecute the complaints.

Finally, in The Florida Bar v. Guard, 453 So. 2d 393, 394 this court held that "[d]ismissal of...complaints would totally frustrate the primary purpose of discipline, namely, protection of the public from the misconduct of attorneys." Therefore, equity dictates that Respondent's disciplinary cases be heard on their merits.

Although it is The Florida Bar's position that the delay in this matter was caused solely by Respondent's actions, should this Court find that The Florida Bar bears the burden of unreasonable delay, this delay is insufficient to justify dismissal or to justify a reversal the Referee's finding that this case should be heard on its merits.

ARGUMENT II

THE RECOMMENDED DISCIPLINE IS INAPPROPRIATE; THE APPROPRIATE DISCIPLINE IS DISBARMENT

The Referee erred in finding and considering Respondent's full and free disclosure of information to The Florida Bar and that The Florida Bar caused unreasonable delay in these attorney discipline proceedings as mitigating factors. Further, the cumulative misconduct of Respondent warrants the more severe discipline of disbarment.

The record is devoid of evidence which could be construed to support a finding in mitigation that Respondent cooperated with The Florida Bar's investigation by providing full and free disclosure. Respondent's Answer Brief is also devoid of any record or transcript cites which support the contention that she was cooperative. Although Respondent conceded to the facts at the Referee hearing, this was accomplished after her failure to respond to The Florida Bar's initial inquiries. (T-25; T-26; T-31; T-37) Furthermore, Respondent failed to respond to The Florida Bar's Request for Admissions, which resulted in the Referee granting The Florida Bar's Motions for Summary Judgment. (R) Finally, three days prior to the Referee hearing, Respondent filed two motions to dismiss both Supreme Court Case No. 80,714 and 80,236. (T-3-42; R) This conduct does not amount to cooperation in the eyes of The Florida Bar.

Further as evidence of full and free disclosure, Respondent asserts in her Answer Brief at page 24 that she "acknowledged her wrongdoing." The hearing transcripts

contradict this assertion. Regarding the Brown matter, Supreme Court Case No. 80,714, Respondent stated that she "admit[s] the substance of those statement[s]. The substance of those statements is basically, basically, correct." (T-74 statements referring to The Florida Bar's complaint). Regarding the Bush case, i.e., Supreme Court Case No. 80,236, Respondent stated that she "basically substantially admitted the allegations." (T-79) Neither of these statements made by Respondent affirmatively assert recognition of the wrongful nature of her conduct.

Further, Respondent continues during testimony to deny the specific allegations as set forth in The Florida Bar's complaints. For example, a primary issue in the Bush matter, Supreme Court Case No. 80,236, was whether Respondent advised her client to seek another lawyer's advice during the business transaction with her client. The Referee found that "Ms. Bush was not advised to have outside counsel during this business transaction." (RR-8) Yet, in response to the following question, "And you have agreed that you should have, at a minimum, advised Mrs. Bush to seek outside counsel?" Respondent testified that "I did advise Mrs. Bush to seek outside counsel." (T-79) In another instance at the Referee hearing, Respondent was asked "Was it ever your intent to deprive Mrs. Bush of the property at issue?" (T-79) Her response was "No. Never." (T-79) Yet, the Referee made several factual findings that contradict this claim, i.e., 1)

an Agreement for Deed sets forth the conditions for the Locksley property to be conveyed back to Mrs. Bush (RR-7); 2) the Agreement for Deed conveying the Locksley property to Mrs. Bush was never filed (RR-13); 3) Respondent was therefore the record titleholder of the property (RR-13); 4) Respondent advanced eviction proceedings against Mrs. Bush (RR-13-14); 5) A landlord/tenant arrangement was not the original agreement between Respondent and Mrs. Bush. (RR-13) These findings support that Respondent intended to evict her client from her home and therefore deprive her of her property and cannot be logically construed to support any other intention.

Instead of accepting responsibility, Respondent attributes her misconduct to being a sole practitioner (T-83); holding public office (T-72); and personal crises (RB-23). These are not the assertions of one who is acknowledging the wrongful nature of her conduct. At no point in time has Respondent acknowledged her misconduct and wrongdoing nor its impact on her clients and the legal system. The lack of support in the record with regard to Respondent's lack of cooperation, free and full disclosure and acknowledgement of prohibited conduct compels this Court to determine that the Referee's findings in mitigation to be clearly erroneous.

The issue regarding delay as a mitigating factor is thoroughly discussed in argument 1 of this brief (Pages 1-6). The Florida Bar would adopt those arguments to support its contention that the record does not support a finding that the

Bar caused unreasonable delay in these proceedings and therefore such a finding is clearly erroneous.

On the other hand, The Florida Bar asserts that the cumulation of Respondent's misconduct as set forth in the two cases before this Court justifies the more severe discipline of disbarment. Respondent interprets "cumulative" misconduct to be the equivalent to prior discipline. (RB-19) The Florida Bar submits that this interpretation is in error and that cumulative misconduct can be based upon serious and extensive violations of the ethical rules in cases pending before the Court and does not require an extensive prior history. The Florida Bar v. Baron, 392 So. 2d 1318, 1321 (Fla. 1981) It is The Florida Bar's contention that the cumulative nature of the misconduct evidenced in the pending cases, coupled with the prior private reprimand imposed upon Respondent warrants the sanction of disbarment. Respondent's representation of both Ms. Brown (Supreme Court Case No. 80,714) and Ms. Bush (Supreme Court Case No. 80,236) is replete with misconduct. The Referee found Respondent to be in violation of numerous rules of the Rules Regulating The Florida Bar. (RR-23-24) Further, Respondent's misconduct in these two matters extended for a period of years between February 1985 to May 1986 in the Bush case (Supreme Court Case No. 80,236) and November 1983 until November 1985 in the Brown case (Supreme Court Case No. 80,714). Cumulatively, Respondent violated many of the Rules Regulating The Florida Bar during a period of four years.

The most serious of violations include conduct which amount to fraud and theft, in that she violated Rule 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Code of Professional Responsibility. (RR-22) It is The Florida Bar's position that the record supports the contentions that Respondent converted monies from a client when she received consultation fees but provided no services to her client (RR 12); converted her client's home (RR 12-14); and defrauded a financial institution by misrepresenting collateral and assets on several loan applications (RR 9-10). This misconduct is similar to precedent in which lawyers have been disbarred for converting client funds. The Florida Bar v. Bussey, 529 So. 2d 1113 (Fla. 1988); The Florida Bar v. Fitzgerald, 541 So. 2d 602 (Fla. 1989).

Respondent relies on a series of cases that are easily distinguishable from the case at bar. Respondent's reliance on The Florida Bar v. Barley, 541 So. 2d 606 (Fla. 1989) is misplaced. In Barley, this Court and the Referee made a specific finding that "Barley's misconduct occurred mainly through ignorance, not through bad motives." Id at 608. The Referee in the case at bar, did not make this finding and, in fact, found Respondent in violation of Rule 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 7-101(A)(1) (a lawyer shall not intentionally fail to see the lawful objectives of his client through reasonably available means permitted by law and

the disciplinary rules); Rule 7-101(A)(3) (a lawyer shall not intentionally prejudice or damage his client during the course of the professional relationship) (emphasis added) which specifically reflect intentional misconduct on the part of Respondent. Further, in Barley, there are not findings of other misconduct either prior to this discipline or concurrent with this misconduct as is evidenced in the case at bar.

Respondent also cites to The Florida Bar v. Bazley, 597 So. 2d 798 (Fla. 1992) to support the Referee's recommendation. Although Bazley is similar, it is not identical to the Brown case (Supreme Court Case No. 80,714), in that Bazley's conduct is less egregious and involves only one isolated incident of misconduct. Unlike Bazley, Respondent committed multiple violations of the Rules Regulating The Florida Bar regarding two clients; Respondent does not admit to any wrongdoing; Respondent has not provided restitution in the Brown Case (Supreme Court Case No. 80,714) (T-102-103); Respondent repaid monies to Ms. Bush (Supreme Court Case No. 80,236) but only after a jury verdict found in Ms. Bush's favor; Respondent does not have an alcohol addiction; Respondent's rule violations lasted over a period of four years; and Respondent has caused injury to her clients.

The cases cited within The Florida Bar's initial brief relative to theft of client funds, lying to a financial institution and cumulative misconduct are more aptly applied to the misconduct of Respondent than are the cases cited by Respondent.

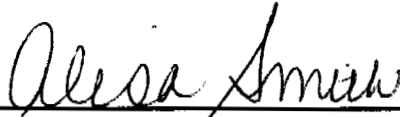
CONCLUSION

It is The Florida Bar's position that the Referee's recommendation in light of the serious and extensive nature of Respondent's misconduct is inappropriate. Respondent's misconduct is analogous to that of theft of client funds. The appropriate discipline for converting a client's home should be disbarment. Further, the cumulative nature of Respondent's misconduct evidenced in the two disciplinary cases before this Honorable Court justifies the more severe discipline as well.

Finally, Respondent's argument regarding dismissal of this egregious and admitted misconduct lacks merit, in that, dismissal of these "complaints would totally frustrate the primary purpose of discipline, namely, protection of the public from the misconduct of attorneys." The Florida Bar v. Guard, 453 So. 2d 393, 394 (Fla. 1984) Accordingly, this Court should reject Respondent's request for dismissal as well as the Referee's recommendation as to the imposition of discipline and impose the sanction of disbarment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Reply Brief regarding Supreme Court Case Nos. 80,236 and 80,714; TFB File Nos. 87-21613-04C and 90-00370-04C has been mailed by certified mail #P 230-518-514, return receipt requested, to **DIETRA R. H. MICKS, c/o WILLIAM J. SHEPPARD**, Counsel for Respondent, at his record Bar address of 215 Washington Street, Jacksonville, Florida 32202-2808, on this 25th day of August, 1993.



ALISA M. SMITH, Assistant Staff Counsel