IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

STEPHEN MICHAEL WITT,

Respondent.
_____/

Case No. 80,471

TFB File Nos. 92-00673-03
and 92-00766-03

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, STEPHEN MICHAEL WITT, will be referred to as Respondent or as Mr. Witt throughout this Brief. The Appellee, THE FLORIDA BAR, will be referred to as such or as the Bar.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to the hearing before the Referee on February 4, 1993, shall be by the symbol RHT followed by the appropriate page number.

References to the exhibits submitted into evidence at the final hearing shall be as follows: Ex followed by appropriate number.

References to Respondent's brief shall be as follows: RB followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Florida Bar would augment Respondent's statement of the case and statement of the facts as follows:

The following are the facts as set forth by the Referee:

As to Count I: In June, 1988, Donald Richerson (hereinafter Richerson) retained Respondent to represent him in connection with a worker's compensation case for money owed and a personal injury case for negligence resulting from an incident that occurred in March, 1988, on the property of Occidental Petroleum. (RHT-13) Respondent did not provide Richerson with an explanation of his rights or responsibilities, or the nature of the legal process involved in the two claims. He instructed Richerson to "bring all the papers and stuff that I had, which I did, and turn them over to him." (RHT-14)

Respondent had Richerson to sign a couple of papers but Richerson was not furnished copies and does not know what he signed. (RHT-16) He does know that he never received a copy of the Client's Bill of Rights. (RHT-16) Actually, fees and costs were not discussed.

Richerson moved back to his home state of Illinois in July, 1988; he contacted Respondent who then notified him that Respondent needed a small amount of money for the cases. Richerson advised Respondent that he was unable to pay at the time, to which Respondent said, "don't worry about it, he'll take care of it, we'll work around it." (RHT-17)

Thereafter, Richerson called Respondent several times but his calls were never returned; he sent Respondent a certified letter in March, 1991, but it went unanswered. After numerous inquiries to Respondent, Richerson was told that the suit was filed and court hearings scheduled. This was not true. (RHT-19, 20)

Richerson never received notice that a lawsuit had been filed, or a copy of a complaint, or any other evidence of activity on his two claims until, after becoming frustrated, he notified Respondent in 1991 that he was going to complain to The Florida Bar. (RHT-15, 20) Respondent asked Richerson to let him contact Occidental before complainant filed with The Florida Bar. Respondent thereafter called Richerson "repeatedly" to discuss an offer of settlement first for $400, then $500, then $600.

Richerson testified that he told Respondent that he was owed at least $1,600 on the worker's comp claim, that Respondent offered to send him $1,600 if he would not file a complaint. (RHT-21) Respondent sent Richerson $1,200 via Western Union (RHT-22), deducting $400 for fees. There was never a release or settlement agreement, or report, or any follow-up paperwork after the $1,200 was received. These were Respondent's personal funds. (RHT-47)

In March, 1992, Respondent filed a suit against Occidental Petroleum. He did not confer with Richerson or send him a copy of the complaint. (RHT-35) The only evidence of correspondence or transmittal of papers relative to the lawsuit was a letter dated May 1, 1992, from Respondent advising Richerson that a

deposition was scheduled for May 21, 1992, at 3:00 o'clock p.m. (RHT-51) Richerson's case against Occidental was scheduled for non-jury trial on March 5, 1993, for three (3) hours. There was no evidence of pre-trial preparation.

Respondent reported that he handled some personal injury cases when he first began to practice law in 1977, that he had 10 or 20 or maybe 50 cases, and recalled taking one personal injury case to trial; it involved a car hitting a cow. Personal injury isn't one of the Respondent's specialties, he admitted. (RHT-53)

As to Count II: Respondent represented appellants in five (5) appeals to the Florida District Court of Appeals, First District, in the cases listed below between 1988 and 1992:

In the interest of D.J.H. and D.H. Jr., case number 88-1059 (an appeal by the mother from an order permanently committing the children to HRS for subsequent adoption). Respondent filed the Notice of Appeal April 27, 1988. The Appeal was ultimately dismissed due to Respondent's failure to file the initial brief or respond to the Court's Order to Show Cause.

The case of Gissendanner v. State, case number 89-2076. The Notice of Appeal in this direct criminal appeal was filed July 31, 1989; Respondent was appointed substitute counsel in December, 1989. A show cause order was issued April 4, 1990, because no initial brief had been filed. In response, Respondent cited an extremely heavy caseload and difficulty in contacting his client, who was incarcerated, and, further, that

he had determined there were no meritorious appealable issues, that he did not oppose the order to show cause and moved that the appeal be dismissed. The Court rejected the suggestion that the appeal be dismissed and ordered Respondent to serve a brief within 20 days. Respondent tendered a brief, but it was stricken for failure to comply with appellate Rule 9.210. An amended initial brief was filed and the Court ultimately affirmed.

The case of Buiey v. State, case number 89-2731. The Notice of Appeal for this direct criminal appeal was filed October 9, 1989. Again, the initial brief was not timely filed and a show cause order was issued. Respondent cited an extremely heavy caseload, difficulty in contacting his incarcerated client, no meritorious appealable issues, and that he did not appeal the order to show cause and moved that the appeal be dismissed. The Court again rejected the suggestion that the appeal be dismissed and ordered Respondent to serve a brief within 20 days. The initial brief was stricken. An amended initial brief was filed. Thereafter, the District Court of Appeals issued an order November 4, 1990, requiring supplemental briefing within 20 days. The brief was not filed. On March 8, 1991, the District Court issued an order directing Respondent to show cause why he should not be held in contempt. Again, Respondent cited an extremely heavy caseload and that he would immediately file a supplemental brief. It was filed April 11, 1991. The DCA reversed on two of the four issues that it directed be argued in the supplemental brief.

The case of Gadson v. State, case number 90-262. The Notice for this direct criminal appeal was filed January 19, 1990. Again, no initial brief was filed; a show cause order on dismissal was issued September 29, 1990. No response was filed and this case was dismissed by the clerk on October 30, 1990.

In the Interest of: W.L.M., a minor child, case number 91-3319 (an appeal from an order terminating a mother's rights). Respondent filed a Notice of Appeal on October 9, 1991. He failed to timely file the certificate concerning the transcript to be provided by the court reporter and failed to timely file the initial brief. He was directed by the District Court of Appeal to show cause within ten (10) days why the appeal should not be dismissed and/or other sanctions imposed. Respondent did not respond to the order but tendered the initial brief 28 days later. Respondent was directed to show cause why he should not be held in contempt. Appearing before the District Court of Appeals on February 26, 1992, Respondent stated that the law library available to him was inadequate and that this was an isolated case, and he did not normally practice law in this manner.

The Respondent admitted each of the allegations in Count II of the Complaint except Paragraph 70 which alleges:

> "70. No response was filed and this case was dismissed by the Clerk on October 30, 1990."

Paragraph 70 of the complaint in this cause was addressed by the Florida District Court of Appeal, First District, by

order dated March 10, 1992, In the Interest of W.L.M., a minor child, wherein it finds that "No response was filed and this [Gadson v. State] case was dismissed by the clerk on October 30, 1990." (Ex-1)

The Referee, based upon the above set of facts and the evidence presented at the hearing, as well as argument of counsel, recommended that the Respondent be suspended for a period of 91 days; that thereafter he shall petition the Court for reinstatement and prove rehabilitation. The Referee also recommended that as a condition of rehabilitation, Respondent shall take the ethics portion of The Florida Bar exam, pass the same, and pay the costs thereof. (RR-8)

SUMMARY OF ARGUMENT

The function of the Referee in a disciplinary matter is to determine the weight and sufficiency of the evidence and, based on it, make a recommendation as to discipline to be imposed, which is exactly what took place in this case. The case law, Florida Standards, and argument made by The Florida Bar were on point and support the Referee's recommendation that the Respondent be suspended from the practice of law for 91 days and thereafter petition the Court for reinstatement and prove rehabilitation. As a condition of rehabilitation, Respondent shall take the ethics portion of The Florida Bar exam, pass the same, and pay the costs thereof. The Referee's recommended discipline should be approved by the Court.

ARGUMENT

The Referee, having considered the case law, the Florida Standards for Imposing Lawyer Sanctions and the recommendations of the parties as to appropriate discipline, and having determined the weight and sufficiency of the evidence, recommended that the Respondent be suspended for 91 days and that, as a condition of rehabilitation, he take and pass the ethics portion of The Florida Bar examination at his expense. The recommendation of the Referee should be upheld in light of the Referee's findings in this case.

There is no dispute as to the facts of this case or the finding that the Respondent violated the Rules of Professional Conduct as found by the Referee. Respondent's only argument is that the Florida Standards for Imposing Lawyer Sanctions do not call for his suspension. The Respondent cites no case law in support of his request to this Court nor does he cite to the record within his brief. The Respondent's brief arguably could be stricken for failure to comply with the Rules of Appellate Procedure; however, it would, in this writer's opinion, serve no useful purpose to do so.

Respondent, in his brief, relies on the argument that the degree of injury to his client(s) is the key factor which should be used in the determination of the sanction to be imposed for a specific violation. Respondent defines injury apparently as to his client(s) alone instead of as defined

within the Florida Standards for Imposing Lawyer Sanctions (hereinafter Standards) as set forth below:

> "Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.
>
> "Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

Florida Standards for Imposing Lawyer Sanctions, Black Letter Rules (Fla. Bar Bd. Governors 1992)

Respondent recognizes no injury or potential injury to his former clients by his actions and this demonstrates one of the main problems with Respondent in the underlying cases. If it were not for the intervention of the District Court of Appeal or the threat of disciplinary sanctions by the Supreme Court of Florida, the clients Respondent agreed to represent would have received no representation.

The Respondent has injured the legal system by continuously forcing the appellate court to deal with his inaction. The Respondent has injured the profession by helping to create a negative image of attorneys within the state of Florida by his actions in the underlying cases. The general

public has been harmed by Respondent's actions because by them he has lessened the general public's faith in the legal profession. The potential injury to Respondent's clients was great. The actual injury to Respondent's clients will probably never be known for without the zealous representation Respondent's clients deserved the record which remains for review is at best speculative on this point. Indications of the amount of effort put forth by Respondent on behalf of his clients is reflected within the statement of facts of this case.

The factors to be considered in the imposition of sanctions per Section 3.0 of the Standards are as follows:

(1) duties violated;

(2) the lawyer's mental state;

(3) the potential or actual injury caused by the lawyer's misconduct; and

(4) the existence of aggravating or mitigating circumstances.

Florida Standards for Imposing Lawyer Sanctions, Section 3.0 (Fla. Bar Bd. Governors 1992).

The duties violated by the Respondent with respect to the Standards in this case as outlined at the final hearing are:

4.42(a)	Lack of Diligence
4.52	Lack of Competence
4.62	Lack of Candor
6.12	False Statements, Fraud, and Misrepresentation
6.22	Abuse of Legal Process
7.2	Duties Owed as a Professional

(RHT-71, 72)

The corresponding sanctions for violating the above duties according to the Standards are:

> Rule 4.42 - Suspension is appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.
>
> Rule 4.52 - Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence, and causes injury or potential injury to a client.
>
> Rule 4.62 - Suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
>
> Rule 6.12 - Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.
>
> Rule 6.22 - Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
>
> Rule 7.2 - Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Florida Standards for Imposing Lawyer Sanctions, Sections 4.42, 4.52, 4.62, 6.12, 6.22, 7.2 (Fla. Bar Bd. Governors 1992).

The above violations correspond to the violations of the Rules of Professional Conduct as found by the Referee in this case.

According to the Standards, Respondent's mental state should also be considered when imposing sanctions. The standards differentiate between acts done intentionally, with knowledge, or negligently as follows:

> "Intent" is the conscious objective or purpose to accomplish a particular result."
>
> "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."
>
> "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard care that a reasonable lawyer would exercise in the situation."

Florida Standards for Imposing Lawyer Sanctions, Black Letter Rules (Fla. Bar Bd. Governors 1992)

At a minimum, Respondent's acts were knowingly done in the cases under review and a number of them were done within the definition of intent.

The Respondent admits that "the appeals all involved in this, I should have responded to them and done the proper thing. I know I should have. . . . I should have looked at them, evaluated them, just like with Mr. Richerson's case, this is what I've got and done something with it." (RHT-57) The Respondent's acts, as put forth in the Statement of Facts, were done with the knowledge required under the Standards to impose the sanction of suspension. The Respondent had been practicing

law approximately ten (10) years when he became involved in the first appellate case under review. (RHT-53, Ex-1) Respondent testified that he had done appellate work when he first started his practice. (RHT-56) The Respondent, therefore, knew what was happening with respect to the appellate cases he was involved in. The Respondent has also been involved in between 10 to 50 personal injury cases giving him the understanding of what would happen based upon his conduct while representing Mr. Richerson. (RR-4) The Respondent certainly possessed the knowledge and intent as defined within the Standards to violate the duties owed his client when he made a false statement(s) to his client, Mr. Richerson, regarding the status of his case. (RR-3)

With respect to Respondent's knowledge and intent, the court should remember that Respondent stood before the District Court of Appeal and explained his most recent failure to abide by that Court's rules and stated "that this was an isolated case and that he did not normally practice law in this manner," an assertion which the remainder of the District Court's opinion clearly refutes. (Ex-1)

Rule 9.1 of the Standards suggests that:

> After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

Florida Standards for Imposing Lawyer Sanctions, Section 9.7 (Fla. Bar Bd. Governors 1992).

In the case under review, the following aggravating factors should be considered, although not all have been enumerated within the Referee's Report:

1) The Respondent has a prior disciplinary record, having received a private reprimand in 1989. (RHT-76);

2) Respondent has exhibited a pattern of misconduct in his appellate practice;

3) Respondent has multiple offenses based upon the number of cases he failed to act on as well as the number of violations found by the Referee to exist;

4) Respondent has substantial experience in the practice of law -- 15 years (R-53);

In mitigation, Respondent could argue:

1) Full and free disclosure to disciplinary board;

2) Imposition of other penalties or sanctions -- District Court of Appeal opinion; and

3) Remorse.

The case law supports the Referee's recommendation in this matter. In the case of The Florida Bar v. Mims, 501 So. 2d 596 (Fla. 1987), the Court held that failure to comply with court orders, failure to appear at scheduled pretrial conference, and admitted neglect of case warrant a one-year suspension. Id. at 597. The Respondent in this case has neglected five (5) appellate cases (Ex-1) as well as Mr. Richerson's civil case. (RHT-74, RR-4)

The Florida Bar v. Weed, 513 So. 2d 126 (Fla. 1987), is a case which is somewhat analogous to the case before this

Court. Mr. Weed "totally ignored the requirements to prosecute three separate appeals. He did not even seek to obtain an extension of time. The First District Court of Appeal had already disciplined him in 1978 and 1982 for similar misconduct. Even if Weed's conduct was not intentional, it was surely habitual." (Id. at 128) The Respondent in this case failed to prosecute five (5) appellate cases until forced to by the Court and he has a prior private reprimand as did Mr. Weed. The Respondent herein has also failed to represent Mr. Richerson as outlined in the Statement of Facts of this case. The Court, noting the case of The Florida Bar v. Vernell, 374 So. 2d 473, 476 (Fla. 1979), within Mr. Weed's case stated, "'this Court deals more severely with cumulative misconduct than with isolated misconduct.' The minimum sanction for Weed's action should be a sixty-day suspension." (Id. at 129) Surely Respondent's actions in the District Court of Appeal cases coupled with his lack of representation of Mr. Richerson, warrants a 91-day suspension with conditions as outlined by the Referee.

In The Florida Bar v. Bazley, 597 So. 2d 796 (Fla. 1992), the Supreme Court of Florida imposed an eight-month suspension upon attorney Bazley for his conduct in falsely misrepresenting to his client the status of the client's lawsuit. The facts of attorney Bazley's misconduct and the alleged misconduct of the Respondent are quite similar. However, in determining the appropriate sanction, the court held that Bazley's conduct deserved more than the 30-day suspension ordered by the

referee, particularly in light of Bazley's record of prior reprimand. Additionally, it was determined that Bazley's misconduct was due, in part, to alcohol abuse. The instant case differs from Bazley in that there are no allegations of alcohol abuse. It should be noted that the Referee found that Mr. Bazley "caused no injury as a result of his conduct since the client received money that he could not have received through a negligence suit." Id. at 797.

In The Florida Bar v. Schilling, 486 So. 2d 551 (Fla. 1986), the Supreme Court of Florida imposed a public reprimand and six-month suspension upon attorney Schilling for his neglect of two legal matters. In its opinion, the court stated that "Confidence in, and proper utilization of, the legal system is adversely affected when a lawyer fails to diligently pursue a legal matter entrusted to that lawyer's care." Id. at 552. Additionally, the court finds the sanction appropriate in light of attorney Schilling's record of past misconduct.

In The Florida Bar v. Wilder, 543 So. 2d 222 (Fla. 1989), the Supreme Court of Florida imposed a six-month suspension upon attorney Wilder for his neglect of legal matters entrusted to him and for false representations to his clients regarding the status of their cases. The court held that this conduct was deserving of a heavy penalty. Additionally, the court affirmed the referee's increase of the suspension from 91 days to six months based upon the aggravating circumstances of making false statements during the disciplinary process and

Respondent's refusal to acknowledge the wrongful nature of his misconduct.

The case of The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), sets forth the purposes of discipline for professional misconduct:

> In cases such as these, three purposes must be kept in mind in reaching our conclusion. First, 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. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Id. at 132.

A ninety-one (91) day suspension with conditions as outlined by the Referee will meet all three enumerated purposes.

The fact that the Respondent regrets his past misconduct was considered by the Referee before making a recommendation to this Court. (RHT-74) In light of the case law on point, the Referee could have recommended a more severe discipline. The request by the Respondent that this Court reweigh that aspect of mitigation and reject the Referee's recommendation as to appropriate discipline although within this Court's power would

seem inappropriate based upon the facts of this case. The Respondent's ongoing violations of the Rules of Professional Conduct in case after case does not portray a man who made an isolated mistake and now regrets it, but rather a man who regrets his mistakes after being confronted with them.

The Referee summed up Respondent's actions quite accurately with the following observations:

> ". . . I think the thing that impresses me the most is the total lack of activity by the attorney that was either appointed or had agreed to represent these clients. You just simply can't do it. It's one of the highest positions of trust that a person can have and there's been violation after violation here of that trust . . . . You had a duty and a responsibility to carry forth as their representative in the area of legal assistance and there was none . . . . But it's quite scary to me to think that somebody can walk into an office where some, that says John Jones or Stephen Witt or anybody else, attorney at law, and that person believes that he's going to have representation when that person, as soon as he walks out, that person does nothing. That's one of the scariest things in the world. And we can't have it in our profession. We simply can't have it in our profession." (RHT-74, 75)

The Florida Bar agrees with the observations and conclusions of the Referee in this case and believes that the Court should accept the Referee's findings of fact and recommendations in this case.

CONCLUSION

The Respondent has in his initial brief given this Court no valid basis for rejecting the Referee's recommendation as to the discipline to be imposed in this case. The Referee's factual findings are not disputed and the disciplinary sanctions recommended are appropriate in light of the Florida Standards for Imposing Lawyer Sanctions, the case law, and the misconduct involved. It is The Florida Bar's position that the Referee's recommendations should be accepted by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. 80,471; TFB File Nos. 92-00673-03 and 92-00766-03, has been forwarded by certified mail # P230-518-244 to STEPHEN MICHAEL WITT, Respondent, at his record Bar address of Post Office Box 2064, Lake City, Florida 32056-2064, on this 10th day of June, 1993.

JOHN V. McCARTHY, Bar Counsel