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IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 81,145

TFB CASE NO.: 92-31,975(07C)

THE FLORIDA BAR,

Complainant,

vs.

PETER L. NILES, JR.,

Respondent.

RESPONDENT'S REPLY BRIEF AND ANSWER BRIEF TO THE FLORIDA BAR'S CROSS-PETITION FOR REVIEW

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PRELIMINARY STATEMENT

In this Reply Brief and Answer Brief to the Florida Bar's Cross-Petition for Review, Peter L. Niles, Jr., will be referred to as "respondent" or Mr. Niles. The Florida Bar will be referred to as "the Bar" or "complainant." References to the Report of Referee, dated January 6, 1994, will be designated "RR.," followed by the appropriate pages numbers set out in brackets. References to the transcript of the Final Hearing held on December 28, 1993, will be designated "Tr.," followed by the appropriate page numbers set out in brackets.

STATEMENT OF THE CASE AND FACTS

The respondent incorporates by reference Statement of the Case and Facts found in the Initial Brief of Respondent. The respondent would only add that following the respondent's Initial Brief, the Florida Bar filed its Answer Brief and Initial Brief in Support of Cross-Petition for Review, dated May 12, 1994. In its Answer and Initial Brief, the complainant argues for disbarment of the respondent. This brief follows.

SUMMARY OF THE ARGUMENT

The respondent incorporates by reference the Summary of the Argument found in the Initial Brief of Respondent. The respondent would only add that the complainant's new argument for disbarment is improper based on current law and practical concerns. The Florida Bar has not demonstrated that the referee's recommendation is clearly erroneous or unsupported by the evidence such that a greater sanction should be imposed. The primary cases relied upon by the Florida Bar are factually distinguishable and wholly unpersuasive.

ARGUMENT

I.

THE REFEREE'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS AND LACKING IN EVIDENTIARY SUPPORT.

The complainant, The Florida Bar, proclaims without support that its case has been proven by clear and convincing evidence. However, unless one only gives the record a cursory glance, it is evident that the referee's findings of fact were clearly erroneous and lacking in evidentiary support. The actions of the respondent, Peter Niles, were not egregious and some of the conduct should not even be attributed to him.

A. Count I

The referee found in Count I that Mr. Niles had violated the following rules: 3-4.3 (Misconduct and Minor Misconduct), 4-1.2(a) (Scope of Representation), 4-1.4 (Communication), 4-1.5 (Fees for Legal Services), 4-1.6(a) (Confidentiality of Information), 4-1.7(b) (Conflict of Interest; General Rule), 4-1.8(b, d, i) (Conflict of Interest; Prohibited Transactions), 4-2.1 (Advisor), 4-4.1(a) (Truthfulness in Statements to Others), 4-4.4 (Respect for Rights of Third Persons), and 4-8.4(d) (Misconduct). [RR. 1-3]. None of these findings are supported by the record and accordingly, should be overturned on review.

Where findings of fact of the referee are not based on competent and substantial evidence, such findings are not considered conclusive. See, The Florida Bar v. Smiley, 622 So.2d 465 (Fla. 1993); The Florida Bar v. Gross, 610 So.2d 442 (Fla.

1992). Thus, where the findings of fact of a state bar referee are clearly erroneous and lacking in evidentiary support, such findings will not be upheld. The Florida Bar v. Winderman, 614 So.2d 484 (Fla. 1993); The Florida Bar v. Rogers, 583 So.2d 1379 (Fla. 1991); The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990).

In support of the referee's findings, the Florida Bar argues that Peter Niles is responsible for gaining unauthorized access for William Watkiss, a reporter for "A Current Affair," and Dennis Dillon, cameraman, by making misrepresentations to the Broward Correctional Institution (BCI) Superintendent Marta Villacorta. However, the Florida Bar ignores the more relevant facts. Mr. Niles did not give any permission to Mr. Watkiss or "A Current Affair" for a media interview. [Tr. 101]. In fact, Mr. Niles had refused Mr. Watkiss' requests. [Tr. 110]. Mr. Niles went to see Deidre Hunt, his client, on September 26, 1990, to convince her to testify against her co-defendant, and also to obtain information for mitigation and to seek sympathy from the judge who had imposed the death penalty on Ms. Hunt. [Tr. 104-105]. Mr. Watkiss and Mr. Dillon were merely permitted to accompany Mr. Niles to BCI. [Tr. 103].

Upon arriving at BCI on September 26, 1990, Mr. Niles requested to speak with Superintendent Villacorta, but learned she was not present that day. [Tr. 105]. Mr. Niles was told that there was no problem with a media interview. [Tr. 106]. Mr. Watkiss displayed his press card to the BCI security guards who allowed access. [Tr. 106]. The guards failed to identify the camera crew as being with "A Current Affair" in the BCI

control room log despite the fact that the equipment was clearly designated as television equipment and one guard even asked when the episode would air on television so that he could watch it. [RR. 5; Tr. 106].

The Florida Bar conveniently failed to cite all of the relevant facts and has tried to shift the blame onto Mr. Niles for the media's unauthorized entrance. Mr. Niles reasonably believed the camera crew was given authorization to enter BCI by the security guards. Indeed, a correctional officer was present during the entire interview process. [Tr. 106]. Mr. Niles made no misrepresentations to Superintendent Villacorta or to the security guards. The fault lies not with Mr. Niles, as the Florida Bar would have, but with BCI whose guards ignored regulations and permitted any security breach which has occurred.

Additionally, the record is void of any evidence that Mr. Niles made any misrepresentations to Superintendent Villacorta in an attempt to gain access for "A Current Affair" crew. The Florida Bar's contention to the contrary is simply conclusory.

Subsequently, on September 26, 1990, Ms. Hunt gave her consent to be interviewed by "A Current Affair" after Mr. Niles informed her of the situation. [Tr. 107]. Mr. Niles believed that convincing Ms. Hunt to testify at her co-defendant's trial, which would go to mitigation at the sentencing phase, would be in her best interests. [Tr. 99].

The referee's finding that Mr. Niles helped "A Current Affair" gain a media interview to sensationalize Ms. Hunt's story is clearly erroneous. Mr. Niles' participation in the

unauthorized entry of "A Current Affair" was that the camera crew was with him when he went to speak with Ms. Hunt at BCI. Despite the Florida Bar's attempt to overemphasize some facts and totally ignore other relevant facts, it is clear that Mr. Niles did not help the camera crew gain access through misrepresentation or otherwise.

Further, Mr. Niles did not make misrepresentations to the public when he informed Carol Hunt, Deidre Hunt's mother, and Kathy Kelly, a Daytona News Journal reporter, that he had not received any money for the media interview. [Tr. 109-110]. Mr. Niles did receive a $5,000 consulting fee for providing public information to "A Current Affair." [Tr. 111]. The information supplied by Mr. Niles was available to the general public, but the news program did not have a correspondent in the area who could quickly retrieve the information. [Tr. 111]. The fee was contingent on the airing of Ms. Hunt's story, not the granting of an interview. [Tr. 111]. Significantly, Ms. Hunt had made numerous requests for her story to be published or broadcast, and, in fact, had previously spoken to Mr. Watkiss from "A Current Affair." [Tr. 98, 107]. Further, five to six months passed between Mr. Niles' agreement to the $5,000 consultation fee and the actual interview. [RR. 6]. Had there truly been a conflict of such "chilling" proportions, as the Florida Bar alleges, Mr. Niles could have acquiesced to Ms. Hunt's expressed desires and arranged an interview months before she agreed to speak with "A Current Affair." Thus, there was no conflict, and any finding to that effect is clearly erroneous.

The referee's findings in these matters are clearly erroneous for lack of evidentiary support. The Florida Bar did not present and the referee did not consider all of the relevant facts. Rather, the referee made his findings dependent on only a few facts. Accordingly, the referee's findings of fact should be overturned as clearly erroneous.

B. Count II

In Count II, the referee found that Mr. Niles had violated Rules Violating the Florida Bar 4-1.15 (Safekeeping Property) and 4-8.4(b) (Misconduct). [RR. 3-4]. These findings arose from Mr. Niles receiving $5,000 from "A Current Affair" and the subsequent tendering of that sum to the County of Volusia. [RR. 7]. David Damore, the Assistant State Attorney, instructed Mr. Niles to write a check for that amount even after Mr. Niles told him that he lacked sufficient funds in his account at that time. [Tr. 116]. Mr. Niles' check was nonetheless deposited three months after being tendered, without notification to Mr. Niles as per an agreement between Mr. Niles and Mr. Damore, and was returned for insufficient funds. [RR. 3; Tr. 116].

The Florida Bar contends that the Count II violations are supported by the fact that neither the check nor any correspondence between the respondent and Mr. Damore memorialized their agreement that Mr. Niles would be informed before his $5,000 check was deposited. However, once again, the Florida Bar passes over the relevant facts directly contradicting its case in this matter. When the $5,000 check was returned and the County

Manager learned of the notification agreement between the respondent and Mr. Damore, the normal return check charge was waived. [Tr. 116-117]. Mr. Niles immediately replaced the returned check with a cashier's check. [RR. 8]. With such material evidence, any finding that the returned check mishap violates any rule regulation of the Florida Bar is clearly erroneous.

The Florida Bar also asserts that the respondent's arguments distinguishing the cases relied upon by the referee are nonetheless insufficient for a not guilty finding, because Mr. Niles failed to place the fee he received in a trust account. The Florida Bar maintains that this is sufficient to find that the respondent violated Rule 4-1.15 (Safekeeping Property) and 4-8.4(b) (Misconduct). The Florida Bar, consistent with its previous strategy, conveniently overlooks important facts. The referee based the Rule 4-8.4(b) violation strictly on the alleged act of passing a worthless check, not for failing to safekeep property. [RR. 4]. Thus, the Florida Bar's unsupported view that the respondent violated both Rule 4-1.15 and 4-8.4(b), for not placing his fee in a trust account demonstrates the complainant's usual practice in this case of skipping over important facts which harm its case.

In addition, the Florida Bar appropriately could make no argument to dispute the respondent's factual analysis which factually distinguished the cases relied upon by the referee to find that the respondent violated Rule 4-8.4(b).

The referee relied on The Florida Bar v. Brennan, 411 So.2d 126 (Fla. 1982); The Florida Bar v. Dingle, 235 So.2d 479 (Fla. 1970); and The Florida Bar v. Harris, 436 So.2d 88 (Fla. 1983). Those cases involve repetitious patterns of bad check writing, bad checks being made to the attorney's client, not a third party; or the attorney's delay in making good on the returned check(s). However, in the instant case, Mr. Niles wrote only one check which was returned for insufficient funds. That check was not written to a client and Mr. Niles immediately made good the check with a cashier's check when he learned of it being returned. [RR. 7-8].

The referee's finding that Mr. Niles violated Rule 4-1.15 is also clearly erroneous. The $5,000 consultation fee received by Mr. Niles was not in connection with the representation of Ms. Hunt, but rather was for the mere obtaining and sending of public information. The representation of Ms. Hunt was separate and apart from the collection of information performed for "A Current Affair." Thus, looking at the whole record, it is clear that the fee did not belong to the State and that Mr. Niles did not violate Rule 4-1.15. Any findings to the contrary are clearly erroneous.

II.

THE REFEREE'S RECOMMENDATION FOR ONE YEAR SUSPENSION WITH PROOF OF REHABILITATION AND THE FLORIDA BAR'S CROSS-PETITION FOR DISBARMENT ARE EXCESSIVELY SEVERE AND UNJUSTIFIED.

The referee recommended that Mr. Niles be suspended for one year with proof of rehabilitation required prior to reinstatement. [RR. 8]. In its Answer Brief and Initial Brief in Support of Cross-Petition for Review, the Florida Bar now argues that disbarment is the more appropriate disciplinary action that should be taken against Mr. Niles. The question arises whether the Florida Bar would have taken the same action had Mr. Niles not appealed the referee's finding and recommendation for disciplinary action.

The Florida Bar cites State ex rel. Florida Bar v. Glover, 60 So.2d 17 (Fla. 1952), for the proposition that it may now argue for disbarment of Mr. Niles despite its previous arguments for a one-year suspension. Despite the Florida Bar's success in finding a single supportive case decided over four decades ago, before the promulgation of the Rules Regulating the Florida Bar, the Florida Supreme Court has recently ruled that a referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. The Florida Bar v. Poplack, 599 So.2d 116, 118 (Fla. 1992). (The Florida Bar petitioned for review of the referee's recommended sanction). The Florida Bar's brief is completely void of any argument that the referee's recommendation is clearly erroneous or unsupported by evidence such that it

warrants a greater punishment. The Florida Bar fails to carry its burden.

Furthermore, without meeting this burden for attacking a referee's recommendation, there would be a substantial threat that permitting the Florida Bar to argue for a stiffer sanction when a respondent petitions for review would result in fewer petitions due to fear of such retaliation. Many respondents would be fearful to bring legitimate petitions for review because of the risk that the Florida Bar would retaliate by arguing for an even greater sanction. Such valid concerns demonstrate that Poplack was appropriately decided when it imposed some standard to overcome in order to attack the referee's disciplinary action recommendation.

The Florida Bar makes no argument that the referee's recommendation is clearly erroneous or unlawful such that a greater sanction is justified. The Florida Bar's contention for greater disciplinary action against Mr. Niles is a blatant attempt to retaliate against Mr. Niles for petitioning for review of the referee's findings and recommendation or to have this Court make a compromise between the respondent's argument for a lesser sanction and the complainant's argument for a greater sanction; the compromise being the referee's original recommendation. Nonetheless, the complainant failed to prove that the referee's recommendation is clearly erroneous or unsupported by evidence. The respondent, however, demonstrated that the referee's recommendation is clearly erroneous or unlawful in that it is too severe.

The cases cited by the Florida Bar, other than those used merely to cite general principles of law, are distinguishable based on the facts and are totally unpersuasive. Indeed, the only case the Florida Bar applies to the facts of the instant case is The Florida Bar v. Crabtree, 595 So.2d 935 (Fla. 1992). In Crabtree, the respondent was retained to repatriate $1.5 million from Europe for a Florida client without disclosing the sources of the funds. Id. at 936. The respondent involved another client in a number of the transactions without disclosing to either client that he was representing the other client who could have had adverse interests. Id.

In the instant case, there is no such egregious conduct. The instant case is factually dissimilar because there was no conflict of interest for representing numerous clients with adverse interests. A close review of the relevant facts, many of which the Florida Bar conveniently discarded from its brief, will illustrate that there was no conflict at all. Further, the Crabtree case involves prior disciplinary action based on similar conduct. The respondent's prior disciplinary action in the instant case - technical trust violations, improper fees and making improper financial advances to clients - are not based on similar misconduct. [RR. 8-9]. The Crabtree decision is inapposite to the facts of the instant case and should not be given any weight.

The three purposes of disciplinary action for unethical conduct are (1) to protect the public from unethical conduct and at the same time not to deny the public the services of a

qualified attorney, (2) to be fair to the attorney in punishing the breach of ethics and at the same time encourage reformation and rehabilitation, and (3) to be severe enough to deter others. Poplack, supra, at 118; The Florida Bar v. Neu, 597 So.2d 266, 269 (Fla. 1992); see, The Florida Bar v. Carswell, 624 So.2d 259, 260 (Fla. 1993). Disbarment is too severe of a sanction. Mr. Niles does a great quantity of pro bono work, which society will be deprived of if he is disbarred. Also, disbarment, as the most severe type of disciplinary action, will not encourage any rehabilitation on the part of Mr. Niles and is thus unjust under the relevant facts. Finally, although disbarment will be a deterrent to others, this Court need not impose such an extreme sanction to serve deterrent purposes.

Thus, any punishment of suspension or disbarment of Mr. Niles would be improper as clearly erroneous and lacking in evidentiary support. Mr. Niles did not violate any of the rules alleged before the referee. As such, the referee's report should be overturned and the Florida Bar's request that this Court impose disbarment or any sanction should be rejected.

The proper disciplinary action, if any such action is proper, should be no greater than a public reprimand. See The Florida Bar v. Rogers, 583 So.2d 1379 (Fla. 1991) (isolated instances of neglect warrant public reprimand); The Florida Bar v. Kaplan, 576 So.2d 1318 (Fla. 1991) (failure to communicate with client warrants public reprimand); The Florida Bar v. Betts, 530 So.2d 928 (Fla. 1988) (coercing a client warrants a public reprimand); The Florida Bar v. McLawhorn, 505 So.2d 1338 (Fla.

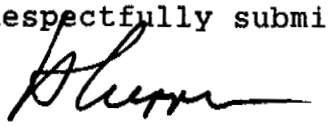
1987) (misrepresentations to third parties warrant public reprimand).

The Florida Bar also points out several aggravating factors from the Florida Standards for Imposing Lawyer Sanctions which it believes are appropriate, including a dishonest or selfish motive of financial greed, pattern of misconduct, and others. Florida Standard 9.22. However, if this Court decides that disciplinary action is warranted, the record only supports one of the aggravating factors - substantial experience in the practice of law. Florida Standard 9.22(i). The other aggravating factors endorsed by the Florida Bar are not supported by the relevant facts of the case and should not be a consideration.

CONCLUSION

For the foregoing reasons, respondent Peter Niles respectfully requests that this Honorable Court reject the referee's findings of rule violations. Alternatively, if this Court affirms that the appellant has violated one or more of the Rules Regulating the Florida Bar, the respondent respectfully requests that the imposed discipline be no greater than a public reprimand. Further, the respondent respectfully requests that this Honorable Court reject the complainant's Answer Brief and Initial Brief in Support of Cross-Petition for Review to Impose Disbarment as it endorses sanctions too severe and unsupported by the law or facts.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Jan K. Wichrowski, Esquire,** Bar Counsel, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, Florida 32801, by mail, this 6th day of June, 1994.

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