IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

R. MICHAEL ROBINSON,

Respondent.

_____/

Case No. 82,886
TFB Nos. 93-10,465(6D)
93-10,925(6D)

Case No. 83,590
TFB No. 93-11,484(6D)

REPLY BRIEF

OF

THE FLORIDA BAR

DAVID R. RISTOFF
Branch Staff Counsel
The Florida Bar
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 358576

JOSEPH A. CORSMEIER
Assistant Staff Counsel
The Florida Bar
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 492582

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar." The Respondent, R. Michael Robinson, will be referred to as "Respondent." The transcript of the final hearing in this case held on May 13, 1994 will be referred to as "T." "RR" will refer to the Report of Referee, dated June 8, 1994. "R" will refer to the record in this cause. "IB" will refer to the Initial Brief of The Florida Bar filed September 2, 1994. "AB" will refer to the Answer Brief of the Respondent mistakenly entitled by Respondent as a Reply Brief filed on September 27, 1994. The transcript of the grievance committee proceeding on July 13, 1993 will be referred to as "GC-T."

STATEMENT OF THE FACTS AND OF THE CASE

The Florida Bar adopts by reference its initial statement of the facts and of the case as contained in its Initial Brief filed on September 2, 1994.

SUMMARY OF THE ARGUMENT

The Respondent cited several cases in support of his position that a public reprimand and two years of probation is an appropriate discipline in attorney neglect and incompetence cases. All of the cases cited by Respondent can be distinguished as involving either single instances of neglect or incompetence or guilty pleas and consent judgments approved by The Florida Bar.

Respondent has engaged in a cumulative pattern of misconduct of neglecting legal matters entrusted to him and failing to provide competent representation to his clients in three separate cases. The Respondent has not entered a guilty plea and The Florida Bar did not recommend, consent to, or approve a public reprimand and two years probation as appropriate discipline for Respondent's misconduct.

Respondent has also indicated that The Florida Bar "conceded" that a public reprimand would be appropriate discipline for Respondent's misconduct were it not for the Holmes case. The Florida Bar only responded to the Referee that a public reprimand would "probably" be appropriate discipline for Respondent's misconduct without the charges stemming from the Holmes case.

Respondent has challenged the appropriateness of the Referee's recommendation that the costs of the transcripts of the grievance committee proceedings and final hearing before the Referee be taxed against Respondent. The Rules Regulating The Florida Bar are quite clear on this subject, however. Rule 3-7.4(k) requires bar counsel to prepare a record of the grievance committee proceedings.

> The record before the committee shall consist of all reports, correspondence, papers, and/or recordings furnished to or received from the respondent and the transcript of grievance committee meetings or hearings, if the proceedings were attended by a court reporter... ." (emphasis added)

Rule 3-7.6(l)(1) required that The Florida Bar file in the cause a copy of the transcripts of all hearings at which testimony is presented during the referee level proceedings. The costs of reporting and copying transcripts are, therefore, legitimate costs incurred by The Florida Bar which shall be taxed against Respondent under Rule 3-7.4(k) and Rule 3-7.6(k)(1)(E).

ARGUMENT

I. ISSUE: THE REFEREE ERRED BY RECOMMENDING A PUBLIC REPRIMAND AND PROBATION RATHER THAN A NINETY (90) DAY SUSPENSION.

The Florida Bar stands on its position as set forth in its Initial Brief. In addition, The Florida Bar replies to Respondent's Answer Brief (entitled Reply Brief) as follows:

Respondent has cited several cases in his Answer Brief in support of his position that the Referee's recommendation that Respondent receive discipline of a public reprimand and two years probation is correct. Respondent first cites The Florida Bar v. Titone, 522 So. 2d 822 (Fla. 1988) wherein Titone received a public reprimand and three years of probation as discipline in a consolidation of two disciplinary proceedings. Titone is distinguishable from the instant case in that Titone entered a conditional guilty plea and, as a result, a consent judgment was agreed to by The Florida Bar requiring Titone to pay restitution to one of his clients in addition to the public reprimand and three years probation.

Since the discipline received by Titone was recommended by the Referee and approved by the Supreme Court pursuant to the guilty plea of Titone and The Florida Bar's agreement to the consent judgment, it is distinguishable from the current case where Respondent entered no such guilty plea. Titone at 824.

The Respondent also relies on The Florida Bar v. Kirkpatrick, 567 So. 2d 1377 (Fla. 1990) in support of his position. In Kirkpatrick, the lawyer was publicly reprimanded for failing to

appear in court on several occasions after his arrest for resisting arrest on traffic charges and for failing to complete his probationary obligations in a timely manner. Kirkpatrick is factually distinguishable from the current case because Kirkpatrick involved no neglect or mishandling of clients' cases but rather concerned misconduct of Kirkpatrick during his own criminal proceeding.

In The Florida Bar v. Maas, 510 So. 2d 291 (Fla. 1987), Maas received a public reprimand, two years of probation, was directed to pay restitution, and was assessed costs of the proceedings for a single instance of incompetence and neglect of a legal matter regarding his handling of an estate. In approving the recommendation of the Referee, the Supreme Court stated:

> This discipline is consistent with prior single incident neglect cases, given the mitigating factors in the cause. Maas at 292.

Maas involved a single incident of neglect and incompetence which occurred while Maas was "going through a very difficult personal period of life." Maas at 292. In the instant case, however, Respondent has been found guilty of neglecting three separate legal matters, as well as failing to provide competent representation in two of those cases. Because of the cumulative nature of Respondent's misconduct, more severe discipline is appropriate than was imposed in the Maas case.

The Florida Bar v. Weil, 511 So. 2d 988 (Fla. 1987) is another case wherein the attorney admitted his misconduct and submitted a consent judgment which was approved by The Florida Bar. The

Referee recommended a public reprimand for Weil's failure to timely pursue his client's claim. The Referee's recommendation was approved by The Florida Supreme Court.

In The Florida Bar v. Hawkins, 444 So. 2d 961 (Fla. 1984), Hawkins was found guilty of a single instance of incompetence in the handling of a felony case. In the Hawkins case, Bar counsel recommended that Hawkins receive a public reprimand and two years probation which recommendation was adopted by the Referee and approved by the Supreme Court. The Hawkins case differs from the instant case because in Hawkins, the Bar recommended a public reprimand and two years probation as appropriate discipline because there was only a single incident of misconduct.

All of the cases cited by the Respondent are distinguishable from the instant case because they involved either only single instances of neglect or incompetence or there was a guilty plea and consent judgment entered by the charged attorney. In Mr. Robinson's case, however, there is a cumulative pattern of misconduct and Respondent did not enter a plea or consent judgment in this matter.

II. ISSUE: RESPONDENT FAILED TO KEEP HIS CLIENT, JAMES MCCLOUD, REASONABLY INFORMED REGARDING THE STATUS OF HIS CASE AND FAILED TO ACT DILIGENTLY IN HIS REPRESENTATION.

The Florida Bar stands on its position as set forth in its Initial Brief. In addition, The Florida Bar replies to Respondent's Answer Brief as follows:

Respondent included in his statement of the facts that the, "Referee found that the client (Mr. McCloud) was indeed "difficult"

due to his affliction..." (AB p. 2, T. p. 196, L. 15 - p. 197, L. 23). This statement was taken out of context giving the impression that the Referee considered Mr. McCloud's "difficult" nature as mitigating Respondent's failure to keep Mr. McCloud reasonably informed and Respondent's lack of diligence in pursuing his client's case.

Taken in context, it is apparent that the Referee was commenting that Mr. McCloud's lack of cooperation was a factor of his representation that Respondent should have acknowledged and taken appropriate action on as part of Respondent's diligent representation of his client. The Referee's statements were as follows:

> The Referee: "You just can't go along on the State's tab for almost two years without doing something more to accomplish the task for which you were appointed or going back to the Court and saying, "Judge, we can't do anything because my client is being unwilling and does not assist me in doing the things that are necessary to accomplish his objectives and those of the Court." And, again, I find that is a lack of diligence." (T. p. 196, L. 2-9).

> The Referee: "The post-traumatic stress syndrome coupled with alcohol makes for a very difficult client at best. And the Court recognized the difficulty that Mr. Robinson had with this client. I take all that to be true. I'm just saying, again, Mr. Robinson, it's like that continuance. You needed to get your client before the Court and say, "We need to get off center here. We're not getting anywhere," and let the Court decided what it needed to do. You didn't do your client an appropriate service nor the Court." (T. p. 196, L. 21 - p. 197, L. 5).

Also, Respondent indicated in his statement of facts and under issue II that The Florida Bar had agreed that a public reprimand was an appropriate discipline for Respondent's misconduct in the

McCloud and Gilliam cases. (AB p. 6 and p. 11). This is not an accurate account of the Bar's position. When asked by the Referee, "if we had just the two cases and not the Holmes' case, a public reprimand would be more than appropriate", Bar counsel answered, "probably." (T. p. 220, L. 7-10). Bar counsel's answer does not amount to an agreement that public reprimand is appropriate or a concession that suspension is not warranted.

III. ISSUE: RESPONDENT FAILED TO ACT DILIGENTLY AND COMPETENTLY IN REPRESENTING HIS CLIENT, DOUGLAS E. GILLIAM, FAILED TO KEEP HIS CLIENT REASONABLY INFORMED ABOUT THE STATUS OF HIS CASE, AND FAILED TO ABIDE BY HIS CLIENT'S DECISION.

The Florida Bar stands on its position as set forth in its Initial Brief. In addition, The Florida Bar replies to Respondent's Answer Brief as follows:

Respondent argues that Mr. Gilliam has suffered no actual harm because his Motion for Post Conviction Relief Requesting an Order to Allow a Belated Appeal was granted subsequent to the final hearing in Respondent's disciplinary matter. (AB p. 3 and p. 12). In order to get such relief, however, Mr. Gilliam was forced to file three separate motions for post conviction relief, two of which were denied, before being granted leave to file a belated appeal almost two and a half (2 1/2) years after he was convicted. (AB, Appendix "A"). All of the time, effort, and money expended by Mr. Gilliam, the Courts, and the prosecution in handling Mr. Gilliam's motions could have been avoided if Respondent had timely filed an appeal on his client's behalf or notified Mr. Gilliam of his intent not to file the appeal.

As previously noted under issue II herein, The Florida Bar has not conceded that this is not a case warranting suspension.

IV. ISSUE: RESPONDENT FAILED TO PROVIDE COMPETENT REPRESENTATION TO HIS CLIENT, BOBBY HOLMES, AND FAILED TO ACT WITH DILIGENCE IN HIS REPRESENTATION OF HIS CLIENT.

The Florida Bar stands on its position as set forth in its Initial Brief.

V. ISSUE: THE REFEREE DID NOT ERR IN ASSESSING RESPONDENT THE COSTS OF THE DISCIPLINARY PROCEEDINGS INCURRED BY THE FLORIDA BAR, INCLUDING THE COSTS OF TRANSCRIPTS.

Rule 3-7.6(k)(1)(E), Rules Regulating The Florida Bar, provides that the Referee's Report shall include "a statement of costs incurred by The Florida Bar and recommendations as to the manner in which such costs should be taxed. The cost of the proceedings shall include ... copy costs ... ."

Rule 3-7.4, states, "The record before the committee shall consist of all reports, correspondence, papers, and/or recordings furnished to or received from the respondent and the transcript of grievance committee meetings or hearings, if the proceedings were attended by a court reporter... ."

Furthermore, Rule 3-7.6(l)(1), Rules Regulating The Florida Bar requires that:

> All hearings at which testimony is presented shall be reported and the transcript of the testimony shall be filed in the cause.

Since testimony was given at the grievance committee proceedings and at the final hearing (Referee level), The Florida Bar is required by Rule 3-7.4(k) and Rule 3-7.6(l)(1) to have those proceedings transcribed to be filed in the cause.

The Florida Supreme Court has held that the appropriate standard for setting costs in disciplinary actions is the discretionary approach, rather than the civil standard that costs generally follow the result of the suit. The Florida Bar v. Bosse, 609 So. 2d 1320, 1322 (Fla. 1992); The Florida Bar v. Chilton, 606 So. 2d 449, 450 (Fla. 1993). The taxation of costs is a matter within the discretion of the referee, and should not be reversed absent an abuse of discretion. The Florida Bar v. Carr, 574 So. 2d 59 (Fla. 1990).

In light of the foregoing, the Referee did not err in assessing Respondent the costs of the transcripts of the grievance committee proceedings and the final hearing as appropriate copy costs under Rule 3-7.4(k) and Rule 3-7.6(k)(1)(E).

CONCLUSION

The cases cited by Respondent in his Answer Brief (entitled Reply Brief) as supporting his position that a public reprimand is an appropriate sanction in this case can be distinguished from the instant case. All of the cases cited by Respondent involved single instances of misconduct or guilty pleas and consent judgments entered by the charged attorneys which were approved or recommended by The Florida Bar. Respondent engaged in a pattern of misconduct based on three separate cases and Respondent did not enter a guilty plea in this matter. The Florida Bar recommends a ninety (90) day suspension as an appropriate sanction for Respondent based on his pattern of misconduct and the injury or potential injury to his clients.

Under Rule 3-7.4(k) and Rule 3-7.6(l)(1), Rules Regulating The Florida Bar, The Florida Bar is required to file in the cause transcripts of all hearings at which testimony was presented. Since testimony was given at both grievance committee proceedings and at the final hearing before the Referee, the costs of reporting and copying these transcripts are legitimate costs incurred by The Florida Bar appropriately taxable to Respondent under Rule 3-7.6(k)(1)(E), Rules Regulating The Florida Bar.

Respectfully submitted,

DAVID R. RISTOFF
Branch Staff Counsel
The Florida Bar
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 358576

JOSEPH A. CORSMEIER
Assistant Staff Counsel
The Florida Bar
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 492582

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of The Florida Bar has been furnished by regular U.S. Mail to Joseph F. McDermott, Counsel for Respondent, 445 Corey Avenue, St. Petersburg Beach, Florida 33706-1901, and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 11th day of Oct., 1994.

DAVID R. RISTOFF
Branch Staff Counsel