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)

INITIAL BRIEF

OF

THE FLORIDA BAR

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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.

STATEMENT OF THE FACTS AND OF THE CASE

The Florida Bar agrees with and accepts the Referee's findings of fact and sets forth the following facts taken, unless otherwise noted, from the Report of Referee.

On December 14, 1993, The Florida Bar filed a two count complaint charging Respondent with misconduct based on the complaints of James W. McCloud and Douglas E. Gilliam. Then on April 25, 1994, a second complaint was filed against Respondent by The Florida Bar based on a complaint of Bobby Holmes. The three cases were consolidated for final hearing which was held before the Honorable Edgar A. Hinson, Referee, on May 13, 1994.

During the final hearing, the Bar presented the testimony of the three complainants. Complainant, James W. McCloud's sworn grievance committee testimony was presented in lieu of live testimony as Mr. McCloud had died prior to the date of the final hearing. The Respondent presented testimony of the appellate attorney in Mr. Holmes' appeal, three character witnesses and submitted as Exhibits, affidavits of three additional character references. Respondent testified on his own behalf. On June 8, 1994, the Referee issued a Report with the following findings of fact and recommendations as to each of the three cases.

Count I
TFB No. 93-10,465(6D)
(Complaint of James W. McCloud)

On or about November 17, 1989, Respondent was appointed to represent Mr. James W. McCloud subsequent to a Motion for Visitation or Change of Custody filed on behalf of Mr. McCloud.

The court ordered that no visitation was to occur until Mr. McCloud submitted to a psychological examination and obtained a recommendation approving visitation with his children. In order to comply with the court order, sometime in 1991 or 1992, Mr. McCloud submitted to a psychological evaluation at a VA hospital and, thereafter, sent documentation to Respondent regarding the visitation. The evaluation was insufficient for purposes of satisfying the court's order. Thereafter, Respondent attempted to obtain more complete records from the VA hospital; however, Mr. McCloud's doctor was unable to locate additional information at that time. Respondent made no effort to obtain a court-appointed psychological evaluation of Mr. McCloud.

The Referee found that it appeared that there had been no direct communication between Respondent and Mr. McCloud for a year and a half, except through Respondent's secretary and one or two pieces of written correspondence. The Referee concluded that Respondent failed to keep his client adequately informed because he relied too heavily on his secretary to advise Mr. McCloud as to what was required by the court to obtain visitation.

The Referee found Respondent guilty of violating Rule 4-1.3, Rule 4-1.4(a) and Rule 4-1.4(b) of the Rules Regulating The Florida Bar.

Count II
TFB No. 93-10,925(6D)
(Complaint of Douglas E. Gilliam)

On or about January 31, 1991, Respondent was appointed to represent Mr. Douglas E. Gilliam on criminal charges of aggravated

battery, felonious possession of a firearm, and carrying a concealed firearm. On or about April 9, 1991, Respondent represented Mr. Gilliam at the trial concerning the aggravated battery charge. Mr. Gilliam was found guilty of aggravated battery and sentencing was scheduled for May 17, 1991. At the conclusion of the trial, Mr. Gilliam requested that Respondent file a Notice of Appeal on Mr. Gilliam's behalf. On or about May 16, 1991, Respondent indicated to Mr. Gilliam that he did not believe that there was any justiciable issue upon which to base an appeal.

Nevertheless, Mr. Gilliam requested that Respondent file the appeal. Respondent did not file the Notice of Appeal, as required by the Rules of Appellate Procedure, and as requested by Mr. Gilliam (RR p. 2)

A Notice of Appeal was not timely filed so in an attempt to preserve his appellate rights, Mr. Gilliam filed a Motion for Post-Conviction Relief Requesting an Order Allowing a Belated Appeal. Mr. Gilliam's motion was denied. (R., Complaint paragraph 23; Respondent's Amended Answer paragraph 23.)

The Referee found Respondent guilty of violating Rule 4-1.1, Rule 4-1.2, Rule 4-1.3, and Rule 4-1.4(a) of the Rules Regulating The Florida Bar.

Count III
TFB No. 93-11,484(6D)
(Complaint of Bobby Holmes)

On or about December 4, 1992, Respondent was appointed to represent Mr. Bobby Holmes in three (3) cases. One case involved the charges of attempted first degree murder, first degree arson,

and possession of marijuana. Another case involved felonious possession of a firearm. The third case involved sexual battery, aggravated battery, and false imprisonment. At the time of Respondent's appointment to the attempted first degree murder case on December 4, 1992, a trial date had previously been set for January 19, 1993. Prior to Respondent's appointment to the attempted first degree murder case, Bobby Holmes had been represented by the public defender's office. The public defender's office had taken two (2) witness depositions, made a videotape of the crime scene, and completed other discovery, all of which was made available to Respondent. On or about January 6, 1993, Respondent made a motion to continue the January 17, 1993 trial date. The motion was granted, and the trial was rescheduled for March 23, 1993.

On or about January 12, 1993, Respondent obtained an order granting permission to retain a private investigator. In January of 1993, Respondent was aware, from his review of the attempted first degree murder case, that ten (10) to twenty (20) hours of work was needed to prepare for trial. Likewise, Respondent was aware, on January 19, 1993 that a trial date was set sixty (60) days in advance. On the morning of March 23, 1993, Respondent orally moved to continue the attempted first degree murder case. The court denied Respondent's motion to continue. Further, on March 23, 1993, Respondent moved to withdraw from the attempted first degree murder case, claiming ineffective assistance of counsel, because of his lack of preparation. Prior to the March

23, 1993 trial date, Respondent had not taken the deposition of any witnesses. Respondent had interviewed two (2) witnesses, but he did not make any notes of the interviews. Respondent did not assign any work to a private investigator. Respondent was aware a week before the March 23, 1993 trial date that he was not prepared for trial, yet Respondent filed no written motion to continue the March 23, 1993 trial. Respondent viewed the crime scene on the afternoon of the first day of trial, March 23, 1993, as to the attempted first degree murder case. Respondent did not view the video tape made by the public defender's office to ascertain whether it would have been beneficial for the defense of his client. Respondent determined that a viewing was not necessary.

The Referee found that the evidence was clear and convincing that Respondent did almost nothing in preparing and pursuing his client's case. The Respondent's representation showed a lack of diligence and preparation.

The Referee found Respondent guilty of violating Rule 4-1.1 and Rule 4-1.3 of the Rules Regulating The Florida Bar.

Although the Bar sought a ninety (90) day suspension and the assessment of the costs of the disciplinary proceedings, it was the Referee's recommendation that Respondent receive a public reprimand and two (2) years probation, plus be assessed the costs of the disciplinary proceedings. The Referee further recommended that Respondent be required to furnish a copy of the order of public reprimand to all of his clients, furnish staff counsel of The Florida Bar with a sworn affidavit listing the names and addresses

of all clients who have been furnished copies of the order and, as a condition of his probation, that Respondent contract with the Law Office Management Service of The Florida Bar.

The Bar filed its Petition for Review on August 10, 1994. Pursuant to the vote of the Board of Governors, the Bar seeks to enhance the Referee's recommended discipline to a ninety (90) day suspension based on the Referee's findings.

SUMMARY OF THE ARGUMENT

It is The Florida Bar's position that a public reprimand and two (2) years probation is an insufficient discipline in light of Respondent's misconduct. The Referee found Respondent guilty of multiple rule violations, including lack of competence, lack of diligence and inadequate communication on three cases consolidated for hearing. Respondent's pattern of misconduct together with the serious potential and actual injury faced by his clients due to his misconduct warrant a more severe sanction than that recommended by the Referee.

A ninety (90) day suspension with probation is warranted.

ARGUMENT

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

It is well established that in reviewing a Referee's recommendations for discipline, the Florida Supreme Court employs a broader scope of review than afforded the Referee's findings of fact because it is ultimately the Supreme Court's responsibility to order an appropriate punishment. The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989). The Referee's recommended discipline of public reprimand and two (2) years probation is far too lenient considering the cumulative nature of Respondent's misconduct and the vulnerability of his clients due to the serious consequences faced by each.

Under the Florida Standards for Imposing Lawyer Sanctions, suspension is an appropriate sanction in this case. Standard 4.42(b) provides that absent aggravating or mitigating circumstances, suspension is appropriate when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. The Referee found that Respondent's pattern of misconduct involved multiple offenses of lack of competence, lack of diligence, and inadequate communication. (Standard 9.22(c) and (d)). Respondent's neglect of the complainants' cases was an unreasonable gamble with the lives of his clients who faced outcomes including imprisonment, possibly for life, and loss of parental visitation rights. (Standard 9.22(h) and RR. p. 1 - 5). The Referee noted as an additional aggravating factor that

Respondent had substantial experience in the practice of law. (Standard 9.22(i)).

In mitigation, the Referee considered the Respondent's absence of a prior disciplinary record (Standard 9.32(a)), absence of a dishonest or selfish motive (Standard 9.32(b)), full and free disclosure to the disciplinary board or a cooperative attitude toward the proceedings (Standard 9.32(e)), and the character and reputation of Respondent (Standard 9.32(g)).

The Referee considered case law presented by the Bar and the Respondent in making his recommendations. One such case presented by the Bar was The Florida Bar v. Sandstrom, 609 So. 2d 583 (Fla. 1992). The Referee accepted Sandstrom as persuasive but factually distinguished it from the instant case based on the greater injury caused to Sandstrom's client. (T. p. 207, L. 16 to p. 208, L. 18). The facts of the Sandstrom case are similar to those in one of the cases here concerned, the complaint of Bobby Holmes.

Sandstrom's client was convicted of the first degree murder of his wife, but the conviction was set aside based on ineffective assistance of counsel because Sandstrom failed to investigate and present evidence that would have established that the wife's death was attributable to medical malpractice rather than his client's actions. The Referee found in Sandstrom that the attorney failed to take any pretrial depositions; failed to conduct a proper investigation; failed to timely challenge admission of evidence; failed to discover that a fence that surrounded the crime scene and was injurious to his client's defense was not erected until over a

year after the crime; failed to present a tape recording to impeach a prosecution witness; and failed to become familiar with or know the physical evidence in the case.

The Referee found Sandstrom guilty of neglect and inadequate preparation and recommended Sandstrom be suspended for one year. Sandstrom had received a previous discipline of a private reprimand. The Florida Supreme Court adopted the findings of the Referee but suspended Sandstrom for sixty days.

In Count III, the complaint of Mr. Holmes, Respondent was appointed to represent Mr. Holmes in three (3) criminal cases. One of the criminal cases involved three counts; attempted first degree murder; first degree arson; and, possession of marijuana. Mr. Holmes was convicted of attempted second degree murder and arson of a dwelling and, on Respondent's advice, pled guilty to the possession charge. Mr. Holmes was sentenced to life imprisonment. (RR. pp. 2 - 3; T. p. 65, L. 22 to p. 68, L. 11).

Respondent failed to take any pretrial depositions; failed to conduct a proper investigation even after the court had approved funds for a private investigator; failed to research scientific testing methods used in arson cases; failed to move for a continuance the week before trial; failed to move for severance of the attempted first degree murder charge and the arson charge; and, failed to view a videotape of the crime scene. (RR. pp. 2 - 3, T. p. 78, L. 4 to p. 81, L. 8).

The Referee distinguished Sandstrom from the instant case based solely on his observation that had Sandstrom provided

effective assistance, his client would probably have been found not guilty of first degree murder where as in Mr. Holmes case, the Referee did not believe the outcome would have been changed. (T. p. 207, L. 16 - 23). Sandstrom and the Respondent herein were found guilty of the same ethical violations.

In a 1993 case, The Florida Bar v. Witt, 626 So. 2d 1358 (Fla. 1993), Witt was charged with two counts of misconduct. Count I concerned Witt's representation of a client in a worker's compensation and personal injury case. Witt was found to have failed to pursue his client's claim, provided financial assistance to his client, and filed the personal injury suit without his client's permission. Witt claimed he did not proceed to trial because his client failed to provide him with the necessary medical proof.

This count is similar to Count I in the present case in that Respondent argued that he did not proceed with Mr. McCloud's visitation motion because Mr. McCloud failed to provide him with necessary medical (psychiatric) reports. Respondent did not provide financial assistance to Mr. McCloud or file actions without Mr. McCloud's permission.

Count II in the Witt case concerned Witt's failure to timely file Appellate Briefs in five appeals. This count is similar to Count II of the present case in which Respondent failed or refused to file a Notice of Appeal on behalf of his client, Mr. Gilliam.

Witt was found guilty of neglect, conduct involving false statements or misrepresentations, conduct prejudicial to the

administration of justice, fee violations, and providing financial assistance to a client. Witt had a prior private reprimand. The Court suspended Witt for ninety-one days in accordance with the recommendation of the Referee. The Court commented in ordering the ninety-one day suspension that Witt's continuing pattern of inaction in client representation caused both injury and potential injury to the legal profession and based upon other cases, the Referee clearly could have recommended a more severe discipline than a ninety-one (91) day suspension. Witt at 1360.

While the Witt case involved more violations of the Rules Regulating The Florida Bar than are present in the instant case, the type of neglect is similar in both cases and each case involved multiple offenses. There was, however, an additional offense in the present case and several aggravating and mitigating factors. The Bar is seeking a ninety (90) day non-rehabilitative suspension of the Respondent in the instant case.

In another case, The Florida Bar v. Graves, 153 So. 2d 297 (Fla. 1963), the Florida Supreme Court ordered a three (3) month suspension of Graves for his failure to press a client's claim, carelessness and inattention to duty, failure to keep his client informed, and neglect of trusteeship or sense of responsibility to client where such acts involved no moral turpitude or corrupt motive. Graves was retained by his client to recover possession of his client's automobile and $100.00 cash payment. Graves took no action on his client's behalf but kept a $50.00 retainer paid by his client. Graves had no prior discipline and the case involved

only one offense. There were no aggravating or mitigating circumstances addressed by the court.

The Respondent should receive discipline of at least the severity as was imposed by the Supreme Court in Graves. The Florida Supreme Court has held in several cases involving attorney neglect that public reprimands should be reserved for isolated instances of neglect, The Florida Bar v. Welty, 382 So. 2d 1220 (Fla. 1980); The Florida Bar v. Larkin, 370 So. 2d 371 (Fla. 1979); or lapses in judgment, The Florida Bar v. Welch, 369 So. 2d 343 (Fla. 1979). The Supreme Court deals more severely with cumulative misconduct than with isolated misconduct, The Florida Bar v. Vernell, 374 So. 2d 473 (Fla. 1979); The Florida Bar v. Rubin, 362 So. 2d 12 (Fla. 1978); The Florida Bar v. Baron, 392 So. 2d 1318 (Fla. 1981).

In The Florida Bar v. Vernell, 374 So. 2d 473 (Fla. 1979), Vernell was found guilty of two counts out of a three count complaint. Vernell's misconduct consisted of misdemeanor convictions of failing to file income tax returns and advising clients to plead guilty and if they receive a harsh sentence to use his conflict of interest to get the pleas set aside. Vernell had two prior reprimands, one private and one public. The Referee recommended a public reprimand and probation for six months.

In reviewing the Referee's recommendation as to discipline, the Florida Supreme court in Vernell held that in view of Vernell's prior discipline and his cumulative misconduct in the present case, a suspension is appropriate. The Court found that the Referee's

recommended discipline was too lenient and ordered Vernell suspended for six months. In so ordering, the Court stated that the Supreme Court deals more severely with cumulative misconduct than with isolated misconduct. Vernell at 476.

In another case involving cumulative misconduct, The Florida Bar v. Baron, 392 So. 2d 1318 (Fla. 1981), the attorney was involved in four separate instances of misconduct, each of which was heard independently by a Referee. In each of the four cases, the Referee's recommended discipline ranging from a private reprimand and probation to a public reprimand and six months probation. The Florida Supreme Court consolidated all four cases for review.

In determining that a sixty day suspension was appropriate, the Court in Baron held that in view of the fact that there were four separate bar discipline cases, a more severe punishment was warranted than was recommended in any of the individual proceedings. Baron at 1321. Baron also had a prior disciplinary record.

CONCLUSION

Under the Florida Standards for Imposing Lawyer Sanctions Standard 4.42(b), suspension would be an appropriate sanction when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client, absent aggravating or mitigating circumstances. The Referee considered the following aggravating factors:

Standard 9.22(c) - a pattern of misconduct;
Standard 9.22(d) - multiple offenses;
Standard 9.22(h) - vulnerability of victim;
Standard 9.22(i) - substantial experience in the practice of law.

The Referee further found the following mitigating factors to be present:

Standard 9.32(a) - absence of a prior disciplinary record;
Standard 9.32(b) - absence of a dishonest or selfish motive;
Standard 9.32(e) - full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
Standard 9.32(g) - character or reputation.

In light of the discipline imposed in similar cases, the discipline called for by the applicable Standards and the cumulative nature of Respondent's misconduct, the Referee's recommendation of public reprimand and two years probation is too lenient. A suspension of ninety (90) days would be the appropriate discipline considering the serious consequences of his negligence to his clients.

The Florida Bar requests this Court accept the Referee's findings of fact and recommendations of guilt, but reject the Referee's recommendations as to appropriate discipline and suspend Respondent from the practice of law for ninety (90) days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial 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 2nd day of Sept., 1994.

DAVID R. RISTOFF
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