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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

ROBERT SCOTT LAING,

Respondent-Appellee.

_______________________________/

Supreme Court Case No. 83,457

The Florida Bar Case Nos.
93-51,082(15E), 93-51,095(15E)
93-51,395(15E), 93-51,564(15E)
94-50,695(15E) & 94-50,701(15E)

REPLY BRIEF OF THE FLORIDA BAR

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ARGUMENT

INTRODUCTION

The bar has raised two major points in its initial brief. First, as to Count I of the complaint, the bar has argued that the referee should have made an additional finding of dishonesty with respect to respondent's admissions that he had his client sign two different fee agreements. Second and regardless of whether this Court makes an additional finding on Count I, the bar has argued that the cumulative nature of respondent's misconduct, particularly in light of the findings of dishonesty and deceit, warrants disbarment. The bar replies to Respondent's Amended Brief as follows.

I. THE REFEREE SHOULD HAVE MADE AN ADDITIONAL FINDING OF VIOLATION UNDER RULE 3-4.3 AND/OR 4-8.4(c) WITH RESPECT TO DISHONESTY ON THE STRENGTH OF RESPONDENT'S ADMISSIONS.

The respondent in his brief does not contest the fact that respondent had his client, Luba Delaney sign two fee agreements. (Bar exhibits 33 and 34). In his brief, the respondent stated that: "The Bar argues that Laing had his client Delaney sign two contracts which the Bar chooses to characterize as a contingency fee contract and a hourly contract." Respondent's Amended Brief, pp. 17-18. However, Mr. Laing admitted such in his testimony as follows:

Q Now, I'll ask you some questions on these. Mr.

Laing, looking at what's been admitted as Bar Exhibit 33 and 34, these are your contracts with Mrs. Delaney, is that correct?

A Yes.

Q One was for a contingency fee and one was for an hourly fee, is that correct?

A Yes. T., pp. 346-347

Respondent in his brief claimed that the bar was seeking the respondent's conviction of dishonesty "because of what he <u>might</u> have done in the future..." Respondent's Amended Brief, p. 17. That claim is a mischaracterization of the bar's argument. The bar is not seeking a finding of dishonesty based on what Mr. Laing might have done; the bar is seeking a finding of dishonesty based on Mr. Laing's having had his client sign two different contracts and then retaining them without having signed either one.

Furthermore, Mr. Laing admitted that the continency fee contract governed the transaction (T., p.. 347 and 351) but wrote his client a letter indicating that she was obligated under the hourly rate contract. (Bar exhibit 36). Mr. Laing's testified with respect to the continency fee contract as follows:

Q The continency fee contract was your arrangement with Mrs. Delaney?

A. Yes. (T., p. 347).

However, Mr. Laing's letter of January 13, 1996 to Mrs. Delaney reads as follows:

This letter is to confirm your decision to terminate my

> services and request a refund. As you may remember, you signed **an hourly fee contract** providing for a $2,500 nonrefundable retainer (copy enclosed) which retainer was to be applied against $250 an hour. Bar exhibit 36, emphasis added.

Although respondent in his brief argued that Mr. Laing should not be convicted because of what he might have done in the future, we know what Mr. Laing already did which includes the above letter to his client when he admitted that the transaction was governed by the other contract.

Respondent's brief points out that both contracts called for a $2,500 non-refundable retainer. However, the fact that the contracts contained a provision in common does not give due consideration to the fact that one contract was for a hourly rate and one for a contingency fee as admitted by Mr. Laing and as shown by the contracts themselves. In this regard, the contracts were fundamentally different.

Respondent has argued that the element of intent is necessary for a finding of dishonesty. The bar does not disagree but submits that the dishonest intent is evidenced by the two different contracts as well as by the fact that Mr. Laing wrote a letter indicating the client's obligation under the hourly rate contract when he testified that the contingency rate contract governed their arrangement.

We also know that Mr. Laing did not mistakenly have his client execute the two contracts. As admitted in his testimony, he purposely had two contracts executed. If he was successful in litigation, he intended to offer the hourly rate one to the court to demonstrate that he was entitled to an hourly rate of $250. (T., p. 348 and 350). In accordance with his office policy, he did not sign either contract. (T., pp. 351-352). Thus, he deliberately set up a transaction where he had the option of holding his client to either contract or of holding out either contract as the one that governed the representation.

Mr. Laing testified that he intended to offer the hourly rate contract to the court as evidence of his entitlement to $250 per hour although his regular hourly rate at the time was only $210. As discussed in the bar's initial brief, it is somewhat incomprehensible as to how the hourly rate contract could be evidence of his entitlement when the agreement was actually for a contingency fee. Regardless of what Mr. Laing intended to do, he had already accomplished the execution by his client of the two separate contracts (without executing either one) and when he became involved in a dispute with his client, he wrote a letter to the client advising her that she was bound by the provisions of the one that he admitted did not govern the transaction.

A respondent's own admission may be grounds to overturn a referee's recommendation of a not guilty finding. *The Florida Bar v. Wooten*, 452 So. 2d 547 (Fla. 1984). Also, when this court's own reading of the record causes this Court to conclude that the referee's factual finds are clearly erroneous, they may be set aside. *The Florida Bar v. Johnson*, 648 So. 2d 680, 682 (Fla. 1994). In *The Florida Bar v. Johnson*, the referee found that the bar failed to establish the guilt of the respondent and this Court reversed finding that the respondent had violated Rules 4-4.1 and 4-8.4(c):

> The referee did not approve of respondent's conduct but noted that it had to be viewed in the totality of the circumstances. The referee decided that the entire complaint arose from a soured family association. We recognize that but for the dissolution of the marriage between respondent's daughter and Bartholomew, the false affidavit would not have come to the attention of the Bar. This does not obviate the fact that respondent did engage in a dishonest act and did knowingly make a false statement of material fact to a third person. *The Florida Bar v. Johnson*,648 So. 2d at 681.

In the instant case, the referee declined to find the respondent guilty of dishonesty on Count I but made no factual findings that were at odds with the admissions made by Mr. Laing. What Mr. Laing intended to do in the future was expressed by Mr. Laing in his testimony. In the bar's view, what Mr. Laing had already done with respect to the two contracts warrants a finding

of dishonesty.

II. THE CUMULATIVE NATURE OF RESPONDENT'S MISCONDUCT WARRANTS DISBARMENT.

Respondent in his brief stated the following with respect to Count I: "Judge Miller found five separate rule violations based upon the single factual conclusion that Laing had delayed in sending client Delaney the last $300 payment." Respondent's Amended Brief, p. 21. The bar disagrees with this characterization of the referee's findings.

First of all, the referee stated the following in his report on Count I:

> "As the case proceeded, numerous conflicts and difficulties arose between Laing and Delaney. Additionally, one of the potential defendants filed a Bar Grievance against Laing concerning his conduct in the case. *Report of Referee*, p. 1.

The bar argued to the referee that Mr. Laing engaged in a conflict of interest with Ms. Delaney because he desired her assistance with the bar grievance filed by the potential defendant, Joni Crane, Ms. Delaney refused and he persisted to the point that she made a police report. T., pp. 672-673. The bar also argued to the referee that when Ms. Delaney refused to sign the affidavit, Mr. Laing stopped working on her case and stopped communicating with her in violation of the diligence and client communication

rules. *See*, bar's closing argument on Count I, T., p. 672-677. The bar was not arguing these rule violations with respect to the failure to return $300. The bar argued that the failure to promptly return money owed to a client was a violation of Rule 4-1.15(b)[A lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive].*See*, bar's closing argument on Count I, T. p. 677.

The referee apparently accepted the bar's argument with respect to conflict of interest, diligence and client communication as evidenced by page 1 of the Report of Referee and as evidenced by the following statement in the record by the referee:

> ...and I find that Respondent, Scott Laing, has within the technical umbrella, violated Rule 4-1.3 and 4-1.4(a) and 4-1.7(b) in that his interests became superior to that of his client's <u>once the grievance had been filed</u>, and 4-1.15(b), failing to promptly deliver the monies to the client. T., p. 719, emphasis added.[1]

The referee, also, on Count I found that Mr. Laing had violated Rule 4-1.5(f)(2) [Each participating lawyer or law firm shall sign the contract with the client... The client shall be

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[1]It should , also, be noted that the refund to Luba Delaney was due as a result of the termination of the representation. Although respondent contended in his Amended Brief that all of the rule violations on Count I concerned the failure to promptly refund $300, there could not be a Rule 4-1.7(b) conflict of interest violation once the representation has been terminated. Rule 4-1.7(b) refers to an existing lawyer-client relationship.

furnished with a copy of the signed contract.] Report of Referee, p. 6.

Although respondent argued that the referee found five separate violations as a result of a single act (Respondent's Amended Brief, p. 21], the bar submits that the record and Report of Referee establish that much more than a single act was involved.

Also, with respect to Count I, the bar would like to address respondent's arguments with respect to Mr. Laing's telephone calls to Ms. Crane and Ms. Delaney. Joni Crane testified that because of the respondent's calls, she ultimately went to the police and to the bar. (T., p. 209-210). After Ms. Crane filed the grievance against the respondent, Mr. Laing testified that he requested Ms. Delaney to assist him with his defense to Joni Crane's grievance since Ms. Delaney had witnessed the telephone conversations. T., p. 545. According to Mr. Laing, Mr. Laing prepared an affidavit for his client, Luba Delaney, to sign with respect to the telephone conversations with Ms. Crane. T., p. 545. Ms. Delaney testified that Mr. Laing then began calling her and "harassed her for days and days and on the phone." T., p. 375. Mr. Laing admitted that he continued to act as Ms. Delaney's attorney while asking Ms. Delaney to help him with the Joni Crane bar grievance. T., p. 567. Ms. Delaney further testified that he got her so scared on the phone

that she also filed a police report. T., p. 375.

Respondent has stated that the referee did not make a finding that the telephone calls themselves were "abusive" (Respondent's Amended Brief, p. 23) and the bar agrees. However, the referee did make a finding of conflict of interest with Delaney as a result of respondent's activities surrounding Crane's bar grievance. Report of Referee, pp. 1 and 6, T., p. 719. The evidence of this conflict, as argued to the referee, consisted of Mr. Laing's repeated telephone requests to Ms. Delaney to assist with the Crane bar grievance. T., pp. 673, 680-681.

Respondent's major argument was that the referee chose to find only technical violations and that the technical rule violations do not warrant disbarment. Even in the absence of an additional finding of dishonesty with respect to Count I of the complaint, the bar submits that the cumulative nature of Mr. Laing's misconduct warrants disbarment.

The bar has already discussed the five rule violations found by the referee on Count I. On Count II of the complaint, the referee found the respondent "technically" in violation of Rule 4-3.4(c) {A lawyer shall not knowingly disobey an obligation under the rules of a tribunal] for failing to appear for his trial in Ohio. RR., p. 6. On Count III, by virtue of his Florida

conviction of resisting an officer without violence, the referee found the respondent "technically" in violation of Rule 3-4.3 [The commission by a lawyer of any act that is unlawful...may constitute a cause for discipline] and 3-4.4 [Whether the alleged misconduct constitutes a felony or misdemeanor, the Florida Bar may initiate disciplinary actions regardless of whether the respondent has been tried, acquitted, or convicted in a Court for the alleged criminal offense]. As noted in the bar's initial brief, the respondent was previously disciplined for his prior criminal conviction for fleeing and eluding a police officer.

With respect to Count IV of the complaint, the referee stated:

> This is the easiest Count on which to find the respondent in violation of Rule 4-1.15(b) [A lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.], 4-4.4 [In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.] of the Rules of Professional Conduct and Rule 5-1.1(a) [Money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose.] of the Rules Regulations [sic] Trust Accounts, based upon the respondent's admission that he did not comply with the rules or regulations and that he was in error in doing so. RR., p. 7.

The respondent in his brief argued that this Count related solely to Mr. Laing's having erroneously deducted $44.85 as an expense item on a disbursement. Respondent's Amended Brief, p. 11.

The referee, in fact, found that: "Mr. Laing did not distribute the $1,750 on the date of the final judgment and did not disperse [sic] the sum within a reasonable time after the final judgment despite the demands of Mrs. Notte." RR., p. 3. The referee further noted that the $1,750 was being held by Mr. Laing pursuant to a Court order, that the final judgment in the case provided for distribution of the $1,750 to Mrs. Notte, and that Mr. Laing did not have a Court order authorizing him to deduct the $44.85. RR., pp. 3-4.

With respect to Count V, the referee in his oral pronouncement stated: "Count five I think is the worst problem that Mr. Laing has because I believe and find that Ms. Hall was Mr. Laing's client when he got into this deal with her." T., p. 727. In his report, the referee stated that: "It is obvious that respondent took advantage of the monies paid by Karen Hall in his taking over the option and eventual occupancy and purchase of the property." RR., p. 4. On Count V , the referee found the respondent guilty of Rule 4-1.8 [business transaction with a client], 4-1.4(a) and 4-1.4(b) [client communication] and 4-1.7(b) [conflict of interest]. Two of these rule violations, Rule 4-1.4(a) and 4-1.7(b), had been previously found on Count I with respect to the Delaney-Crane matter.

On Count VI of the complaint, the referee found that respondent had engaged in deceitful acts in two instances in violation of Rule 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]. RR., p. 9. The first deceitful act concerned respondent's request that his client, Karen Hall, falsely represent that their agreed upon rent was $500 when it was, in fact, $950 per month so that respondent could avoid a penalty under the landlord tenant act. RR., p. 9. The second act concerned Mr. Laing's demand that more documentary stamp taxes be placed on the deed than the purchase price allowed and his tender of a check for the artificially inflated amount. RR., p. 9. As noted in the bar's initial brief, respondent was previously disciplined for having been untruthful to a police captain.

Respondent submitted in his brief that there were no similarities between the past and present violations. Respondent's Amended Brief., p. 16. Regardless of other similarities that may exist between respondent's prior discipline and the current case, it is crystal clear that respondent was previously disciplined for being untruthful and is currently before this Court for having been deceitful in two instances. The bar submits that it would be a misnomer to label dishonesty as a technical violation. The bar

regards many of the rule violations by Mr. Laing as serious including, in particular, the conflicts of interest on Counts I and V, but none more so than the deceitful acts found with respect to Count VI.

The referee in his oral pronouncement stated that he considered that respondent was at "strike two in a three strike ball game." T., p. 736. In his written report, he stated that: "The referee's final recommendation is that should the respondent be found in violation of any further bar disciplinary actions, he should be disbarred." RR., p. 10. The bar submits that given the prior finding of dishonesty and the two current findings of deceit as well as the multiple other rule violations found previously and currently, the respondent should be disbarred now. His record is such that he should not be given a further opportunity for dishonest conduct.

The *Florida Standards for Imposing Lawyer Sanctions* provides that disbarment is appropriate when an attorney has previously been suspended and later intentionally engages in similar misconduct. Fla. Stds.Imposing Law. Sancs. 8.1; *Applied in, The Florida Bar v. Inglis*, 660 So. 2d 697,700 (Fla. 1995). Although separate instances of misconduct, standing alone would not require disbarment, the cumulative effect of multiple violations has been

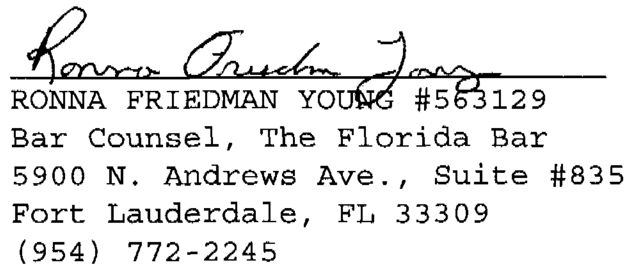
held to warrant disbarment. *Eg., The Florida Bar v. Mavrides*, 442 So. 2d 220 (Fla. 1983). This Court has not hesitated to apply this principle when dishonesty has been found. *See, The Florida Bar v. Williams*, 604 So. 2d 447 (Fla. 1992); *The Florida Bar v. Knowles*, 572 So. 2d 1373 (Fla. 1991).

The two instances of deceit were part of the 17 rule violations found by the referee in this case. In the bar's view, respondent's prior suspension (11 violations) including the finding of having been untruthful to a police captain and prior reprimand (two violations) coupled with the current violations warrant disbarment.

CONCLUSION

On Count I, the bar submits that in addition to the five rule violations found by the referee, the record warrants an additional finding of violation for dishonesty. Regardless of whether this Court makes an additional finding of dishonesty on Count I, the bar contends that the cumulative nature of Mr. Laing's misconduct, particularly in light of the current and prior findings of dishonesty and deceit, warrants disbarment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above referenced motion has been forwarded to Mr. John Beranek, Counsel for Respondent, Ausley & McMullen, P. O. Box 391, Tallahassee, FL 32302, and a copy to John A. Boggs, Director of Lawyer Regulation, The Florida Bar 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 26th day of November, 1996.

RONNA FRIEDMAN YOUNG