IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL M. TOBIN,

Respondent.
_____/

Supreme Court Case
No. 84,203

The Florida Bar Case
No. 93-70,033(11F)

ANSWER BRIEF OF THE FLORIDA BAR

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PREFACE

The Florida Bar, the Complainant below, will be referred to as the "Bar". Michael Tobin, Esq., the Petitioner herein, will be referred to as the "Respondent". The symbol "T" is used to identify the page of the transcript of the hearing regarding discipline which took place on April 24, 1995. The reference to "Para" or "Paras" is to the Admissions deemed admitted, e.g., "Para A".

STATEMENT OF THE CASE AND FACTS

On April 5, 1995 a hearing took place on The Florida Bar's Motion to Strike Respondent's Answers to the Request for Admissions. The hearing was a result of the following chronology of events which is reflected in the pleadings and the transcript of hearing held on April 5, 1995:

1. August 8, 1994.

The Bar's Complaint was served upon the Respondent. No answer was served at any time.

2. November 2, 1994.

The Florida Bar's First Request for Admissions was served upon the Respondent.

3. December 27, 1994.

The Florida Bar filed a Motion for an Order deeming matters admitted on this date, 55 days after service of the Request for Admissions.

4. January 13, 1995.

The Referee had received no response to the Bar's Motion and entered an Order deeming the matters contained in the Request for Admissions as admitted.

5. January 19, 1995.

On this date, 78 days after the Request for Admissions was served, Respondent filed his Response to the Request for Admissions.

6. February 2, 1995.

The Bar moved to Strike the Respondent's Answers to the Request for Admissions.

7. April 5, 1995.

Hearing was held on the Bar's Motion to Strike. Respondent was present and was provided with an opportunity to offer an explanation for his late response. No explanation was offered.

8. April 11, 1995.

The Referee entered an Order Granting the Bar's Motion to Strike. The Order also stated that the case would proceed to final hearing solely in regard to a determination of the appropriate discipline.

Among those matters which were deemed to be admitted are the following:

> B. That you in your legal capacity represented a company by the name of Plane Adds, Inc. (hereinafter referred to as Plane Adds) in an action against Avemco Insurance Company (hereinafter referred to as Avemco) for the collection of insurance proceeds payable under a policy involving the crash of a Piper aircraft whose hull was insured by Avemco.
>
> .....

N. That on April 2, 1990, your associate Sapiro, hand-delivered a motion and proposed order to the Court requesting that the Court release the remaining funds in the amount of $32,423.00, from the Court Registry to Sapiro.

O. That in furtherance of the request made on April 2, 1990, Sapiro participated in an ex-parte meeting with Judge Price, and represented to the Court that the motion for the release of the remaining funds was unopposed.

P. That based upon Sapiro's representation that the motion to withdraw the remaining funds were unopposed, the Court ordered the release to Sapiro of the remaining $32,423.00 held in the Court Registry.

Q. That prior to April 2, 1990, you personally had not contacted Avemco to discuss the release of the remaining $32,423.00 from the Court Registry, nor confirmed whether Sapiro had contacted Avemco prior to the hearing before Judge Price on April 2, 1990.

R. That Avemco did not receive your motion to withdraw the additional funds from the Registry until April 3, 1990, the day after the order was signed.

S. That at the time the $32,423.00 in funds were withdrawn from the Court Registry, you were aware that by law, you were required to serve proper notice of hearing upon the opposing party within a reasonable time before the hearing in accordance with the Florida Rules of Civil Procedure.

T. That you were also aware on April 2, 1990, that a proposed order of judgments must be furnished to opposing counsel prior to its submission to the Court, in accordance with the Local Rules of Court, Rule 8.

U. That on or about April 4, 1990, you delivered or caused to be delivered the sum of $32,423.00, withdrawn from the Court Registry, to James Phillips, the president of Plane Adds.

V. That on or about April 4, 1990, you had knowledge that Avemco had scheduled an emergency hearing on April 5, 1990, for the purpose of having the withdrawn funds returned to the Court Registry.

W. That on June 5, 1990, the Court vacated the order which granted withdrawal of the $32,423.00 by you from the Court Registry, and found that neither Plane Adds nor you were entitled to said sum.

X. That you and Plane Adds were thereafter ordered by the Court to return the funds to the Court Registry within 14 days.

Y. That you and Plane Adds failed to return the funds to the Court Registry within 14 days as ordered by the Court.

Z. That on or about June 14, 1990, the Court heard your motion for rehearing at which time you testified that you did not retain any of the $32,423.00 withdrawn from the Registry, but had given said amount to James Phillips, the president of Plane Adds, Inc.

AA. That on July 16, 1990, your motion for rehearing was denied and the Court entered a second order which required you and Plane Adds to return the $32,432.00 to the Court Registry with 12% interest to be assessed against the funds until they were returned.

BB. That despite the Court's second order to return the funds, you and Plane Adds failed to return the funds to the Registry of the Court.

. . . . . .

DD. That at a hearing held on November 14, 1990, on Avemco's Motion for Rule to Show Cause, Phillips testified that you had not informed him until April of 1990, that you previously had withdrawn $15,792.00 from the Court Registry for legal fees.

EE. That on or about December 20, 1990, the Court granted Avemco's Motion for Sanctions for your failure to comply with the Court's Orders.

FF. That on December 20, 1990, the Court ordered you and Plane Adds to return the improperly withdrawn funds to the Registry for the third time.

GG. That on July 6, 1992, a final order to return the funds to the Court Registry was entered.

HH. That at the hearing on July 6, 1992, the Court found that you had ignored three prior orders of the Court directing the return of the $32,432.00 withdrawn from the Court Registry.

JJ. That, you failed to inform or advise the court of material facts or information known to you at the time the funds were withdrawn, when such information would have enabled the Court to make a more informed decision at the time the Court released the $32,432.00 in funds to you.

All the foregoing facts were deemed admitted and no issue has been presented to this Court in this appeal in regard to that ruling. Nevertheless, Respondent seeks to re-argue facts admitted in his brief. Among those purported facts is an incorrect claim that Respondent replaced the funds in the Registry of the Court in

April of 1992, citing an order at Appendix 59. In fact, the order was not even signed until April of 1993, three years after Respondent was ordered to return to funds. The order deferred a finding of contempt on the condition that Respondent return the funds to the Registry. If Respondent did so, it was clearly not a voluntary act.

No answer or affirmative defense was filed by the Respondent. Reference is made, nevertheless, to a call to the Ethics Hotline. Respondent fails to address the circumstance that the Hotline attorney was not advised of all of the material facts. (T.123).

POINTS ON APPEAL

The Bar respectfully rephrases the Points on Appeal as follows:

Point I

I. WHETHER PROCEEDING EX PARTE TO OBTAIN AN ORDER DIRECTING THE CLERK OF THE COURT TO DISBURSE FUNDS DEPOSITED IN THE COURT REGISTRY WITHOUT FULLY INFORMING THE JUDGE OF ALL THE MATERIAL FACTS CONSTITUTES A BASIS FOR DISCIPLINE.

II. WHETHER IT IS ERROR TO SUSPEND AN ATTORNEY FOR REPEATED FAILURE TO COMPLY WITH COURT ORDERS, AGGRAVATING FACTORS, AND AN ADDITIONAL VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT.

SUMMARY OF ARGUMENT

The Admissions which were deemed admitted conclusively establish that the Respondent sought an ex parte order without informing the Court of all the material facts in violation of Rule 4-3.3(d). Respondent knew that counsel for Avemco opposed removal of the funds from the Registry of the Court. Nevertheless, Respondent failed to notify counsel for Avemco of the petition for withdrawal of funds or the scheduled hearing. Furthermore, the proposed order was not submitted to Avemco's counsel.

Respondent's arguments simply ignore the procedural posture of this case and Respondent seeks to argue factual questions as if there had been a hearing regarding guilt. The hearing conducted by the Referee was exclusively devoted to determining the appropriate discipline insofar as the admissions were conclusive as to Respondent's guilt.

The admissions were also conclusive in regard to Respondent's failure to obey court orders requiring that the withdrawn funds be replaced. A forty-five (45) day suspension was clearly justified in view of that violation coupled with the improper ex parte conduct and aggravating factors. Florida's Standards for Imposing

Lawyer Sanctions and several discipline cases establish that the Referee committed no error in that regard.

Respondent's effort to attack the Referee's reasoning is misplaced. This Court has repeatedly stated that the rulings below will be affirmed or reversed based upon the nature of the rulings and not the reasoning process employed. In addition, Respondent failed to establish that the Referee's reasoning was incorrect in relation to the basic violations set forth in the Report.

ARGUMENT

I. PROCEEDING EX PARTE TO OBTAIN AN ORDER DIRECTING THE CLERK OF THE COURT TO DISBURSE FUNDS DEPOSITED IN THE COURT REGISTRY WITHOUT FULLY INFORMING THE JUDGE OF ALL OF THE MATERIAL FACTS CONSTITUTES A BASIS FOR DISCIPLINE.

The burden of proof before this Court is upon the Respondent who has Petitioned for Review of the Referee's Report. The Florida Bar v. McLure, 575 So.2d 176 (Fla. 1991). The party seeking review must show that the Report is erroneous unlawful or unjustified. Rule 3-7.7(c)(5), Rules of Professional Conduct. Respondent has failed to meet his burden of proof and has failed to overcome the presumption of correctness.

It is clear that Respondent's conduct constituted a violation of Rule 4-3.3(d) of the Rules of Professional Conduct. The facts deemed admitted before the Referee demonstrated that Respondent represented Plane Adds in the action against Avemco Insurance, that his associate delivered a motion to the Court requesting the release of $32,423 held in the Court Registry (Paras. B and N), and that the representation to the Judge ex parte was that the motion was unopposed. (Para. O). The funds were then released by the Court although Respondent had not contacted Avemco regarding the release of the funds nor determined whether his associate had

done so (Para. Q). Avemco did not receive the proposed Order granting the right to withdraw until April 5, 1990, one day after the Order was signed (Para. R). Neither notice of a hearing before Judge Price nor a copy of the proposed order was provided as required by the Rules of Civil Procedure and the local rules (Para. S and T).

In view of the undisputed facts it is clear that Respondent was in violation of Rule of Professional Conduct 4-3.3(d) for failing in an ex parte proceeding to inform the tribunal of all of the material facts that would enable the tribunal to make an informed decision.

Respondent seeks to argue the factual question of whether his client was the only party in the case who was entitled to the funds. That argument, however, involves a factual question which was not an issue in the proceedings before the Referee. The admissions deemed admitted, summarized above, point out that the opposing party, Avemco had no notice of the hearing, did not see the proposed order and, in fact, objected to the disbursal of those proceeds as reflected by their effort to obtain an emergency hearing as soon as the order was entered (Para. V). Whether or not, in hindsight, there was a party other than Respondent's client who had a financial interest in the proceeds, is irrelevant

and immaterial.[1] Respondent's associate delivered an inaccurate and incomplete message to the Judge when the Judge was not informed of the lack of notice and the lack of opportunity to view the order before it was signed. The act was improper even if, in fact, it could be subsequently determined that Plane Adds was entitled to the funds.

Respondent attempts to raise some type of sufficiency of the evidence argument by challenging the accuracy of some of the admissions. Respondent, however, presents no authority for the proposition that he is free to do so, without challenging the Referee's ruling deeming those matters admitted. As stated previously, a hearing was held in regard to striking the Respondent's Answers to Request for Admissions which were submitted to the Referee, 78 days after they were served, and Respondent offered no defense for his inactivity for that long period of time.

Therefore, in view of the factual admissions and the applicable legal principles, Respondent was in violation of Rule 4-3.3(d). F.R.C.P. 1.080 requires that every paper filed in civil actions shall be served on the other party, unless the Court order

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[1]At the discipline hearing there was some testimony that Piper Aircraft was entitled to the funds. (T. 32).

otherwise. Furthermore, unless a matter may be heard ex parte, notice must be given. F.R.C.P. 1.090(d). F.S. 55.141 regarding funds in the court registry contains no provision for ex parte hearings. Therefore, it is clear that the ex parte conduct is improper.

Respondent is not in a position to challenge the admissions which were deemed admitted which establish that the ex parte meeting did take place with Respondent's associate and the Judge.[2] There was no motion for relief from the order deeming the admissions conclusive. Therefore, the refusal to excuse non-compliance must be affirmed. Farish v. Lums, Inc., 267 So.2d 325 (Fla. 1972). When an order is entered deeming matters admitted, the requested matter is conclusively admitted and those matters remain so unless the Court on motion permits withdrawal or amendment. Morgan v. Thompson, 427 So.2d 1134 (Fla. 1983). Absent such relief, subsequent efforts to offer evidence will not prevail over the admissions. Morgan, supra. The Referee may correctly deem matters admitted when the Respondent has not properly addressed them. The Florida Bar v. Solomon, 589 So.2d 286 (Fla. 1991); The Florida Bar v. Dubow, 636 So.2d 1287 (Fla.

[2]Respondent acknowledged the meeting and approved it according to his testimony at the hearing on discipline. (T. 129).

1994). It would have been error if the Referee had disregarded the admissions and considered other facts. West v. West, 436 So.2d 1010 (5th DCA, 1983).

Since there has been no challenge to the ruling deeming the Requests for Admissions as admitted, and since the final hearing was not devoted to introducing evidence of guilt, Respondent's current argument regarding the sufficiency of the evidence is not properly before this Court.

The wording of Point I of the Points on Appeal also suggests that the Bar contends that the ex parte conduct, by itself, justifies suspension. Whether or not such is the case is not a matter at issue. The real issue, discussed in Point II is whether two violations and aggravating factors including a past record of discipline should result in suspension.

II. IT IS NOT ERROR TO SUSPEND AN ATTORNEY FOR REPEATED FAILURE TO COMPLY WITH COURT ORDERS, AGGRAVATING FACTORS, AND AN ADDITIONAL VIOLATION OF THE RULES OF PROFESSIONAL RESPONSIBILITY.

The Admissions quoted above and contained in the Referee's order unequivocally establish that a number of orders to return

the funds to the Registry were issued beginning in June 1990, but were not obeyed (Paras. X, Y, AA, BB, GG, HH).

There was some testimony at the hearing on discipline to the effect that Respondent and his partner and a referring attorney ultimately put the funds in the Registry, namely during 1994. The return of the funds took place after Respondent failed to obey several orders, was held in contempt and lost an appeal (T. 31). The return of the funds in 1994 was, therefore, irrelevant and immaterial. In addition, it was discussed in the context of the discipline phase of the case, and was not, and could not have been presented in the posture of a defense on the merits.

Respondent's past disciplinary history was also considered by the Referee in regard to the appropriate discipline. The Referee's report (P. 9) properly considered a public reprimand administered to the Respondent during 1979 and a private reprimand during 1989. (T. 145, 149, 161). The Report also recognized that Respondent had been practicing law since 1953. Florida's Standards for Imposing Lawyer Sanctions identifies prior disciplinary offenses [9.22(a)] and substantial experience in the practice of law [9.22(i)] as aggravating factors.

There is no appeal before this Court of the foregoing findings. Therefore, they must be considered in relation to the

Respondent's argument that the 45 day suspension was unjustified. Also, the undisputed violation discussed above, the ex parte conduct which led the Judge to enter an order releasing the funds, must also be weighed in assessing appropriate discipline.

Suspension is appropriate in those cases in which the attorney's conduct is flagrant, not so heinous as to warrant disbarment, but is too serious for a mere reprimand or probation. The Florida Bar v. Reed, 299 So.2d 583 (Fla. 1974). In addition, Florida Standard 6.12 provides:

> 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.

There do not appear to be cases with identical facts, but some similar and representative cases demonstrate that the discipline was appropriate in this case. A sixty (60) day suspension was granted in The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983) for lying to the Judge. A six month suspension was ordered in The Florida Bar v. Snow, 436 So.2d 48 (Fla. 1983) in which the Respondent, as in this case, made false representations. The false representations in Snow were to the adverse party in order to obtain evidence.

In other cases involving somewhat similar conduct, the Respondent was suspended for a period of time greater than forty-five days. In The Florida Bar v. Myers, 581 So.2d 128 (Fla. 1991), Respondent submitted a settlement agreement which was previously executed without apprising the Court that the party signing the agreement did so when represented by previous counsel (in contemplation of a subsequently failed reconciliation). Respondent was suspended for ninety days. Also, in The Florida Bar v. Bloom, 632 So.2d 1016 (Fla. 1994) Respondent received a 91 day suspension for a series of refusals to carry out court orders.

Though some of the above violations were somewhat more serious than those of Respondent in this case, the terms of suspension were longer. Also, the aggravating factor of past violations and considerable experience as an attorney were properly considered. A past disciplinary history, in particular, justifies increased discipline. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982). Respondent has failed to demonstrate any error in the forty-five (45) day suspension imposed under these circumstances.

Respondent does attempt to take issue with the Referee's reasoning, although his argument in this regard is not particularly clear. However, the Referee's reasoning is of no

consequence. The process of reasoning by which the trial court reached its conclusion is not regarded as the controlling factor in entering a reversal or affirmance. Perkins v. Coral Gables, 57 So.2d 663 (Fla. 1952); Re Wingo's Guardianship, 57 So.2d 883 (Fla. 1952); Bergin v. Dunne, 71 So.2d 746 (Fla. 1954). While Respondent quibbles with the alleged reasoning of the Referee, he fails to establish that any ruling by the Referee constituted error.

CONCLUSION

By reason of the foregoing, The Florida Bar requests this Honorable court to approve the Referee's findings of fact and recommendations, and approve the discipline that was recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of The Florida Bar was forwarded to H.T. Maloney, Attorney for Respondent at his official bar address of 600 So. Andrews Avenue, Suite 600, Ft. Lauderdale, Florida 33301-2802 on this 7 day of December, 1995.

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