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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

v.
BILLY A. BRAKEFIELD,
Respondent.

Case No. 85,003
TFB No. 94-11,120(6A)

INITIAL BRIEF

Petition for Review
In a Disciplinary Proceeding



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Table of Citations

1. FLORIDA BAR v. WASSERMAN, 654 So2d 905 (Fla 1995).
2. FLORIDA BAR v. ST. LAURENT, 617 So2d 1055 (Fla 1993).
3. FLORIDA BAR v. FORRESTER, 656 So2d 1273 (Fla 1995).
4. FLORIDA BAR v. DANIEL, 641 So2d 1331 (Fla 1994).
5. FLORIDA BAR v. CARSWELL, 624 So2d 259 (Fla 1993).
6. FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS, RULE 9.32.

STATEMENT OF THE CASE AND OF THE FACTS

On October 10, 1995 a FINAL REPORT OF REFEREE was signed by Hon. James S. Moody, Jr., Referee. Said report incorporated the REPORT OF REFEREE, dated July 20, 1995. It is the recommendation of the Referee that the Respondent be suspended from the practice of law for a period of six (6) months, and thereafter until he shall prove rehabilitation; that he be placed on one (1) year of probation consecutive to his current term of probation which ends on or about April 27, 1996; that prior to reinstatement, he be required to attend and successfully complete the The Florida Bar's Ethics School, at his own expense; and that he be assessed the Bar's costs in these proceedings. The terms of probation are recommended that the Respondent reimburse Francis R. Lakel, Esq., \$110.00 and otherwise abide by the Rules Regulating The Florida Bar.

The facts in this matter are greatly disputed. What is undisputed is that Joseph Scarfo owned two printing and packing businesses. Scarfo's stepson, Walter Bennetti, worked for him. At all time relevant to this matter, Respondent was a member in good standing of the Florida Bar. Respondent met Scarfo and Bennetti through utilizing their copying services.

The Referee found that the Respondent owned and operated a used car lot and did business, assumably legal business, out of this car lot. A simple check of the Florida Division of Motor Vehicle (DMV) would reveal that Respondent has never owned or operated a used car lot. The referee found that Respondent

performed an investigation into a potential claim of Scarfo against a supply company known as Multigraphics for, according to Scarfo, prematurely removing a copying machine from his business premises, thereby causing a loss of business and profit. The facts hereafter are subject to conflicting testimony. The Respondent's testimony was that the potential case was weak and Scarfo was so notified. Scarfo and Bennetti testified that the Respondent told them that suit had actually been filed. The referee found that the evidence in this matter did not rise to a clear and convincing level to make a finding of misrepresentation in this matter, but did make other findings relative to Multigraphics that he found to be violations.

The referee then considered Respondent's representation of Scarfo in a commercial landlord/tenant action filed against Scarfo for failure by Scarfo to pay rent. Said action was filed by Richard J. Cory, an attorney representing himself. Scarfo had not paid rent for several months. He claimed that this was intentionally withheld because of a bad odor emanating from a pet shop nearby and that the rent money was "placed in escrow". Bennetti later admitted that nosuch money was ever escrowed. The referee apparently failed to take into consideration that Scarfo was sued for non-payment of rent at his other business location which Respondent was able to sucessfully defend at a non-jury trial. Said defense was based on a problem with the introduction into evidence of a lease; Scarfo had in fact not paid his rent. He was later sucessfully evicted in anaction in which Respondent was not consulted. He was later evicted at yet another location after Cory. Despite his history of non-payment

of rent at his business locations, the referee apparently believed that all of Scarfo's actions here were in good faith, that Scarfo actually believed he had a cause of action or defense, and that Scarfo's hiring of Respondent and his instructions to said attorney were for more than for a brief delay to allow him to locate yet another location.

The Referee next considered Respondent's representation of Scarfo and his wife in an action by Bernard Cisco and Jacquelyn Cisco for non-payment of installment payments by the Scarfos on the purchase of the printing and shipping business located in the premises located in Cory's shopping center. The Referee found that Failed to appear at a deposition, failed to notify Scarfo of the deposition and failed to appear at a hearing on a Motion to Compel Attendance at Deposition and for an award of attorney's fees.

Finally, the Referee considered Respondent's alleged representation of Scarfo in a matter of damages to Scarfo's condominium unit. Scarfo's testimony is disputed by Respondent and was found by the Referee to not rise to the level of clear and convincing.

Respondent is Petitioning for Review the Referee's findings that Respondent's conduct, taken in its totality, violates Rules 4-1.1, Rule 4-1.3, Rule 4-1.4(a), Rule 4-1.4(b), and Rule 1.16(d), and the severity of the recommendation as to disciplinary measures to be applied.

SUMMARY OF ARGUMENT

Respondent's position is that the Referee's findings of fact are not adequately supported by the evidence presented. On the one hand he finds that the testimony of Scarfo is not up to a clear and convincing level, yet he goes on to find, based solely on Scarfo's testimony, that Respondent's conduct violated Bar Rules. That in a case which is based almost exclusively on disputed testimony, where the one parties testimony is not up to a clear and convincing standard, it is unfair and inequitable and not up to the requisite burden of proof to make findings of guilt of Rules violations. Such findings constitute an abuse of dicretion.

That the Referee's findings, even if taken in toto, fail to justify the severity of the recommended disciplinary measures. That the Supreme Court's record is replete with cases in which an attorney is found to have committed far more egregious conduct than is alleged here without the severity of the Referee's recommendations.

That the Referee failed to consider any mitigating factors such as the absense of dishonest or selfish motive on the part Respondent, personal problems of the Respondent during this time period, unreasonable delay in disciplinay proceedings resulting in prejudice to Respondent resulting from such delay, such as the normal inability to recall specific conversations two to three years after the fact, or remorse on the part of Respondent.

ARGUMENT

The Referee in a disciplinary proceeding sits as the trier of facts. As the trier of facts he is given wide discretion as to his findings of fact and his findings of facts will normally stand absent a showing of abuse of discretion. It is the Respondent's position that for the Referee to find a violation of Bar Rules based on less than clear and convincing evidence is such an abuse of discretion.

This case is based primarily and almost exclusively on the testimony of Joseph Scarfo. In considering his testimony, the Referee found in several instances less than a clear and convincing level, yet goes on to make findings of fact based on this same witness and testimony that the Respondent, despite refuting Scarfo's testimony, violated Bar Rules. The evidence presented is inadequate to support the findings made by the Referee. The evidence presented is legally insufficient to meet the burden of proof that Respondent did in fact violate said Rules.

The Referee has made various findings of fact. The Respondent challenges the legal sufficiency of those findings. However, if the Referee's findings do stand, it is the position of the Respondent that the Referee's Recommendation as to Disciplinary Measures to be Applied are too severe, considering the nature of the conduct, the character, actions and credibility of Joseph Scarfo, the nature of the alleged misconduct of the Respondent, the actual injury or lack thereof to Joseph Scarfo, and the totality of the circumstances. In deciding appropriate sanctions in disciplinary actions, three purposes

must be served: It must be fair to society, it must be fair to the attorney, and it must adequately deter other attorneys from engaging in similar conduct. FLORIDA BAR v. WASSERMAN, 654 So2d 905 (Fla 1995). Society demands that a disgruntled client have his day in Court to air his grievances, that is fair. However, the Court must consider the actions of that client as well as his testimony to be fair to the attorney. Sanctions should and must be imposed on attorneys guilty of misconduct and I as the Respondent herein have admitted to the Referee that I have violated the spirit of the Rules by failing to attend the deposition in the Cisco matter, but I deny the appropriate sanction should be as severe as recommended.

The history and record of the Supreme Court in attorney disciplinary matters is replete with cases in which an attorney has been found to have committed far more egregious conduct than is alleged here with less sanction imposed. In FLORIDA BAR v. ST. LAURENT, 617 So2d 1055 (Fla 1993), the attorney was guilty of violations including conversion of client's funds, a far more serious matter than any conduct alleged herein, and he was suspended for a period of ninety-one (91) days. FLORIDA BAR v. FORRESTER, 656 So2d 1273(Fla 1995), concerned an attorney found guilty of charging an excessive fee as well as trust account violations, again more serious violations than herein, he too was suspended for ninety-one (91) days. FLORIDA BAR v. DANIEL, 641 So2d 1331(Fla 1994), involved an attorney found guilty of neglect of a legal matter when previous disciplinary suspensions were in-

vovled was likewise suspended for ninety-one (91) days. FLORIDA BAR v. CARSWELL, 624 So2d 259 (Fla 1993) concerned an attorney found guilty of tampering with a witness, again a far more serious matter than involved here. He was suspended for one hundred eighty (180) days.

The Referee failed to consider any mitigating factors as set forth in the Florida Standards for Imposing Lawyer Sanctions, Rule 9.32. Respondent contends that this was an abuse of judicial discretion.

It is the province of the Supreme Court to impose sanctions, not the Referee and it is Respondent's position that the Referee's recommendations are too severe and unsupported by the record. It is Respondent's further position that the both the Report of the Referee and the Final Report of the Referee are subject to being stricken as not being timely submitted.

CONCLUSION

The Referee's findings of fact are inadequately supported by the record and the burden of proof necessary to make a formal finding of violations of Bar Rules has not been met with clear and convincing evidence. To find that the Respondent violated said rules with less than clear and convincing evidence amounts to an abuse of judicial discretion. The record contradicts the conclusions drawn by the Referee.

That even if the Referee's findings stand, his recommendation as to disciplinary measures are too severe and failed to adequately consider any mitigating factors for the conduct involved.

Respondent respectfully requests that this Court reverse the findings of the Referee, or at least to impose a less severe sanction on the Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by regular U.S. Mail to JOHN T. BERRY, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and BONNIE L. MAHON, Esq., Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, FL 33607, this 9 day of February, 1996.


BILLY A. BRAKEFIELD, ESQ.