IN THE SUPREME COURT
OF FLORIDA
(Before a Referee)

047

THE FLORIDA BAR

Complainant,

vs.

ROBERT P. JORDAN, II

Respondent.
_____/

CASE NO. 85, 109

FILED 12/11
SID J. WHITE
NOV 20 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

Petition For Review of

Referee's Decision

INITIAL BRIEF OF RESPONDENT

ROBERT P. JORDAN, II
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Palm Bay, Florida 32905
(407)725-1122
Florida Bar No. 294373

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STATEMENT OF THE CASE

On May 19, 1995, a hearing was held before Referee Judge Robert Hawley as the result of the Florida Bar accusing Respondent of having violated the following Rules Regulating the Bar:

1) 4-1.4(a) for failing to keep a client reasonably informed about the status of a matter and promptly complying with reasonable requests for information;

2) 4-1.4(b) for failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation;

3) 4-8.4(g) for failing to respond, in writing, to an inquiry by a disciplinary agency when such agency is conducting an investigation into a lawyer's conduct; and

4) 4-1.3 for failing to act with reasonable diligence and promptness in representing a client.

The referee found the Respondent guilty of violating Rules 4-1.4(a), 4-8.4(g) and 4-1.3.

A timely Petition For Review Of Referee's Decision was filed.

STATEMENT OF THE FACTS

In August, 1991, Charles Thomas contacted the Respondent to attempt to halt the scheduled auction of Mr. Thomas' household furnishings by Florida Moving Systems. Respondent was unable to stop the auction.

Subsequently, Mr. Charles Thomas retained Respondent to file a civil suit against Florida Moving Systems and North American Van Lines. Suit was filed.

During the course of litigation, Mr. Thomas gave a phone deposition but was subsequently ordered to appear for a deposition in May, 1993. Upon his appearance, Mr. Thomas was arrested as the result of having outstanding warrants in the State of Florida.

Mr. Thomas was informed of a deposition to be had in June, 1993, one day prior to trial.

Mr. Thomas informed Respondent that he was unable to appear in the State of Florida for either his deposition or trial.

Respondent filed a Motion For Protective Order and Motion To Continue on behalf of Mr. Thomas. The Motion To Continue was denied and a voluntary dismissal of the matter was entered.

Prior to the Motion To Continue was argued or voluntary dismissal was taken, both were discussed with Mr. Charles Thomas. Mr. Thomas agreed to both.

As the result of Mr. Thomas' May, 1993 arrest, Respondent represented Mr. Thomas in those criminal matters.

Mr. Thomas was informed of plea offers in his criminal matters which he rejected.

Respondent eventually filed Motions To Withdraw and notice of hearing which Mr. Thomas received. He failed to attend any of the hearings.

Mr. Thomas claims that he failed to appear for a trial in Florida, but the record reflects no bench warrant was ever issued.

In March 1993, Respondent was appointed to represent James Rooney in two appeals.

On May 14, 1993, both appeals were dismissed in error for no filing fee when in fact, Indigency Affidavits had been filed in a timely manner. The Respondent successfully sought reinstatement of the appeals on May 26, 1993.

On or about September 30, 1993, the Respondent received Orders to Show Cause why the appeals should not be dismissed. Respondent appeared and stated that he never received notice of reinstatement. The Appellate Court followed up with an Order on October 13, 1993 that Respondent shall file and serve the initial Briefs on or before November 12, 1993 and that failure to timely comply with that Order would result in a dismissal of the appeals without further notice. The Respondent failed to timely file the initials Briefs and the appeals were again dismissed on or about December 2, 1993.

Respondent filed a Writ of Habeas Corpus on behalf of Mr. Rooney in order to have the appeal reinstated. Mr. Rooney had filed his own Motion To Reinstate in one matter.

Both appeals were reinstated. Mr. Rooney was granted a resentencing in one appeal and the other matter was affirmed.

SUMMARY OF ARGUMENT

Point I

The Referee erred in finding that the Respondent failed to keep his client, Mr. Charles Thomas, reasonably informed.

The record is devoid of evidence to support the findings of the referee, in fact, the evidence clearly contradicts the referee's findings.

The client admits receiving copies of the complaint filed, the Answer filed by the Defendants, pre-trial witness lists in the civil matter. The client admits receiving copies of plea offers, motions to withdraw and notices of hearings in the criminal matters.

Though he did not admit to receiving copies of the Motions For Summary Judgment, he acknowledged he knew of the motion and when it was to be heard. Though he did not admit to receiving copies of notices of depositions, he appeared.

He does not argue that the Motion To Continue, Motion For Protective Order nor Voluntary Dismissal were improper or done without his knowledge or consent.

Point II

Even assuming that Respondent is guilty of not keeping his client informed, the proposed penalty is too severe.

Neither client has demonstrated any injury or potential injury, or a dishonest or selfish motive. In fact, the case of Mr. Rooney, Respondent attempted to rectify the situation be filing a Writ of Habeas Corpus on behalf of Mr. Rooney.

Public Reprimand is a proper sanction when there is a negligent violation of a duty owed. There is nothing in the record to demonstrate anything other than a negligent violation.

Point III

The costs assessed against the Respondent are improper since the Respondent should not have been found guilty of Rule 4-1.4(a) and any costs associated with that rule should be stricken. Violation of rule 4-8.4(g) was admitted.

THE REFEREE ERRED IN FINDING THAT RESPONDENT FAILED TO KEEP HIS CLIENT REASONABLY INFORMED AND PROMPTLY COMPLY WITH REASONABLE REQUESTS FOR INFORMATION

A referee's findings of fact regarding guilt are presumed unless they are clearly erroneous or without support in the record. The Florida Bar v. Glant, 645 So.2d 962 (Fla. 1994) In addition, it is the Respondent's burden to demonstrate that there is no evidence to support the findings of the referee or that the evidence clearly contradicts the findings. The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994)

Mr. Thomas admits receiving a copy of the complaint from Respondent. Tr 18, L11-14. Mr. Thomas admits being told of the Court Order requiring his attendance for deposition on June 9, 1993. Tr 24, L17-25. Mr. Thomas admits receiving the pre-trial witness list, which was discussed with him. Tr 50, L50; Tr 51, L1-17. Mr. Thomas admits being aware that Motions For Summary Judgment were pending and had notice of the hearing. Tr 51, L18-50, Tr 52, L1.

Respondent produced a copy of the Answer filed by Defendant along with the transmittal letter to Mr. Thomas. Tr 85, L4-12. Respondent produced a facsimile and transmittal form to Mr. Thomas showing a Motion For Leave To Amend was sent to Mr. Thomas. Tr 102, L6-10. In addition, Respondent produced a letter dated October 13, 1992, showing the sending of all pleadings from September 1, 1992 through October 13, 1992. Tr 103, L7.

One of Mr. Thomas' complaints is that he did not receive a copy of an Order that he appear in Brevard County for his deposition at least one week prior to the trial week. Tr 31, L20-22. However, it is undisputed that Mr. Thomas appeared for his deposition which was not taken because Mr. Thomas was arrested. Tr 90, L4-18.

Mr. Thomas says under direct examination that he didn't know the results of Defendant's Motion For Summary Judgment. Tr 23, L3-11. However under cross examination, he didn't recall if he was informed of the results. Tr 52, L2-5.

Mr. Thomas did not appear for his deposition of June 9, 1993 nor his trial set for June 10, 1993. Tr 75, L10-25; Tr 76, L1-25; Tr 77, L1-16. That is undisputed. The reasons for his not appearing are undisputed. He knew both dates. Tr 49, L3-16.

He cannot and does not complain that he had no knowledge of the depositions or of the trial because he had no intention of coming to the deposition or trial. Tr 76, L20-24.

Nowhere does he say that he didn't know of the Motion For Protective Order or Motion To Continue or objected thereto. Nowhere did he object to the filing of the voluntary dismissal because he knew of it and agreed to it. Tr 77, L1-13.

Mr. Thomas admits that Respondent initiated calls to Mr. Thomas fifteen (15) times. He admits to have called the Respondent at home and to have talked to Respondent quite often. Tr 46, L3-20.

The docket sheet clearly shows that Defendant's Motion For Summary Judgment was heard June 2, 1993. The Order was signed June 16, 1993. On June 7, 1993, the Court ordered Mr. Thomas' deposition to be taken June 9, 1993 and trial for June 10, 1993. That order was signed June 16, 1993.

The record clearly shows that though Mr. Thomas didn't receive those orders prior to the event noted in the Order, Mr. Thomas was made aware of each event and acted accordingly.

Regarding the criminal cases, it is disputed that Respondent represented Mr. Thomas. Correspondence was sent to Mr. Thomas regarding plea negotiations. Tr 83, L7-25. Mr.

Thomas received copies of the Motions To Withdraw and Notices of Hearings. Tr 56, L12-19. Mr. Thomas also received correspondence from Respondent that he should retain other counsel in both the civil and criminal matters. Tr 56, L1-10.

Mr. Thomas' main concern seemed to be that he failed to appear for a criminal trial and a bench warrant was issued. Mr. Thomas received Notice of Respondent's Motion To Withdraw, failed to attend that hearing but had attorney Gina Lauf appear on his behalf. Tr 68, L1-8. The docket sheet clearly shows no bench warrant being issued.

In reviewing Rule 4-1.4 of the Rules of Professional Conduct, the comment indicates that the client should have sufficient information to participate in decisions as to the objections of the representation and how those objections will be reached.

At no time does Mr. Thomas claim that his lack of knowledge impaired his ability to participate or make decisions. He only complains that he didn't receive copies of some documents. His actions in both the civil and criminal matters clearly indicate he had knowledge as to the status of his litigation and made decisions accordingly.

The referee's findings of fact are clearly erroneous and without support in the record.

THE REFEREE'S RECOMMENDATION IS TOO SEVERE

The Referee made the recommendation that Respondent be suspended from the practice of law for thirty (30) days having been found guilty of 4-1.4(a), 4-8.4(g) and 4-1.3 Rule Regulating the Florida Bar. The recommendation of the Referee is only persuasive while it is the Supreme Court's task to determine the appropriate sanction. The Florida Bar v. Reed, 644 So.2d 1355 (Fla. 1994)

A bar disciplinary action must serve three purposes: "the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct." The Florida Bar v. Rue, 643 So.2d 1080, 1081 (Fla. 1994)

Assuming that Respondent should have been found guilty of 4-1.4(a) Rules Regulating the Florida Bar, the proposed penalty is too severe.

Under Florida Standard For Imposing Lawyer Sanctions 7.3 indicates that a public reprimand is appropriate when a lawyer is negligently engages in conduct that violates a duty owed as a professional and causes injury or potential injury to the client.

In the Charles Thomas matter, assuming that Mr. Thomas had received absolutely no information regarding the status of the case, but voluntarily and knowingly chose not to appear for a deposition and trial and voluntarily and knowingly approved the voluntary dismissal of the case, he suffered absolutely no injury. His matter had been refiled at the time of the hearing before the referee.

In the James Rooney matter, Mr. Rooney's cases where in fact appealed. In one matter, the Court found an error in sentencing which had been preserved for appeal. In the other matter, his conviction and sentence were affirmed.

The fact is Mr. Rooney will serve the same amount of time because he was sentenced to serve thirty (30) years in the case that was affirmed on appeal and that time was to run concurrent with the sentence imposed in the other matter.

Mr. Rooney did not suffer any injury or potential injury.

A public reprimand serves the purpose of attorney disciplinary action.

In The Florida Bar v. Whitaker, 596 So.2d 672 (Fla. 1992) the Respondent was found guilty of 4-1.3 (lawyer shall act with reasonable diligence) and 4-1.4 (lawyer shall keep client reasonably informed) of the Rules Regulating The Florida Bar. Factually, Mr. Whitaker failed to file suit within the statute of limitations thereby barring his client from any recovery.

Even though there clearly was client injury, the Court felt that a public reprimand was proper; citing The Florida Bar v. Riskin, 549 So.2d 178 (Fla. 1989) and The Florida Bar v. Knowlton, 507 So.2d 1378 (Fla. 1988)

In The Florida Bar v. Price, 569 So.2d 1261 (Fla. 1990), where Respondent had failed to consult with clients about dismissing a bankruptcy action, dismissing action with the clients knowledge or consent and failing to tell them about the dismissal, the Court found that a public reprimand was proper especially in isolated instances of neglect or lapses of judgment.

In The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982), which was factually similar to the situation involving James Rooney, the Court found that a public reprimand was proper.

Public reprimand is the proper sanction.

THE COST ASSESSED TO RESPONDENT ARE IMPROPER

The Referee found that the sum of one thousand nine hundred dollars and fifty-four cents ($1,900.54) were reasonable costs incurred by the Florida Bar. These costs are improper.

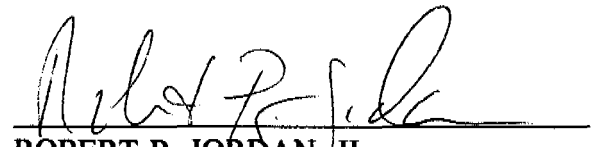
It is within the discretion of the referee to determine the Bar's entitlement to costs and the amount to be assessed but the final decision as to entitlement and costs lies with the Court. The Florida Bar v. Glant, 645 So.2d 962 (Fla. 1994)

Since the Bar failed to show that Respondent failed to communicate with his client, any costs associated with the investigation of the alleged violation of rule 4-1.4(a) should be stricken. Violation of 4-8.4(g) was admitted.

CONCLUSION

Based on the arguments and authorities cited herein, Respondent requests this Honorable Court to find that Respondent did not violate Rule 4-1.4(a), reduce the amount of costs to be paid by the Respondent and find that a Public Reprimand is the proper sanction.

Respectfully submitted



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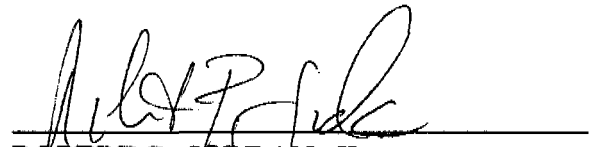
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to John B. Root, 800 N. Orange Avenue, Suite 200, Orlando, Florida 32801, by regular mail, this 16th day of November, 1995.



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