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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT B. MORRISON, JR.,

Respondent.

_________________________/

Case No. 85,179

TFB Nos. 94-10,655 (13F)
94-11,021 (13F)

ANSWER BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, the Florida Bar will be referred to as "The Florida Bar," or "the Bar." The Respondent, Robert B. Morrison, Jr., will be referred to as "Respondent."

"TR" will refer to the Transcript of testimony before the Grievance Committee in the disciplinary case styled THE FLORIDA BAR v. ROBERT B. MORRISON, TFB No. 94-11021 (13F), dated July 12, 1994.

"RR" will refer to the Report of Referee in Supreme Court Case No. 85,179, dated August 8, 1995.

"Rule" or "Rules" will refer to the Rules Regulating the Florida Bar. "Standard" or "Standards" will refer to the Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, ROBERT B. MORRISON, JR., has petitioned this Court to review the referee's recommendation that he be suspended from the practice of law for a period of one year and thereafter until he can prove rehabilitation. Complainant, THE FLORIDA BAR, contends herein that the recommended sanction is reasonable and warranted in view of:

a) the Respondent's conduct in the instant matters;

b) his similar conduct in prior matters;

c) the presence of other aggravating factors;

d) the absence of mitigating factors;

e) the relevant case authority; and

f) the record herein.

The Bar further asserts that a one-year suspension is permissible and warranted under the Florida Standards for Imposing Lawyer Sanctions, and is consistent with case precedent.

This case encompasses two unrelated counts brought against the Respondent for violating the Rules Regulating the Florida Bar. The sole question for review involves the appropriateness of the recommended suspension. In this case, the Respondent neglected

important legal matters entrusted to him by two separate clients, both of whom suffered harm as a result. Count I involves the Respondent's handling of legal matters for Virginia C. Bates, D.D.S. Count II involves the Respondent's handling of legal matters for Ms. Shelley Von Newkirk Tavernier. Because the appropriateness of any penalty imposed for neglect depends upon the facts of the particular case, the Bar herein sets forth the facts pertinent to each client's complaint.

A. Count I: Complaint of Virginia C. Bates, D.D.S.

Respondent's representation of Dr. Bates spanned three years and seven months. Dr. Bates retained him in March, 1989, and discharged him in November, 1993. In that time Dr. Bates paid to Respondent fees totaling $32,500.00.

In March, 1989, Dr. Bates hired the Respondent to represent her in a suit which had been filed on her behalf and was then pending in the United States District Court. (TR at 5). At the time Respondent assumed responsibility for this suit, a motion for dismissal, filed by the defendant, was before the court. (TR at 7). Respondent made no effort to notify the court that he would be appearing for Dr. Bates. Thereafter, in June, 1989, the court

notified Dr. Bates pro se that it was withholding its previous ruling on the motion to dismiss until she could retain substitute counsel. Respondent still filed no Notice of Appearance. In August, 1989, the court dismissed Dr. Bates' lawsuit without prejudice.

Not until January 23, 1990 did Respondent file a Notice of Appearance with the federal court. In May, 1990, Respondent did file an amended complaint, essentially reviving Dr. Bates' action. Twenty-one months later, in February, 1992, the defendant filed a motion to dismiss for failure to prosecute. Respondent filed no response. On April 14, 1992, the court issued an Order to Show Cause why Dr. Bates' suit should not be dismissed for failure to prosecute. (TR at 19). Respondent failed to timely respond to the Order. Accordingly, the court dismissed the action without prejudice on April 29, 1992.

Unfortunately for Dr. Bates, the operative limitations period had expired prior to this second dismissal. Respondent nonetheless continued to represent to her that her action could once again be "reinstated," and that he would be working toward that end. (TR at 62). Yet, no further documents were filed with the court; e.g., Respondent filed no motions to reconsider or to vacate the order of dismissal. (TR at 58-60). Later, in September, 1992, the

Respondent reiterated to Dr. Bates his assertions and intentions regarding reinstatement of her lawsuit. However, no other documents were ever filed.

In addition to the above instances of neglect, Respondent repeatedly failed to respond to Dr. Bates' ongoing requests for information concerning her case. At times, the Respondent's non-communication spanned several months, even though, for her part, Dr. Bates diligently pressed Respondent for information. Moreover, during the course of his representation, the Respondent made repeated promises regarding his planned performance, on which he invariably failed to deliver.

As to Count I, Respondent was found guilty of violating Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with requests for information); Rule 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct); and Rule 4-8.4(g) (a lawyer shall not fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct).

B. Count II: Complaint of Shelley Von Newkirk Tavernier

In July, 1989, Ms. Tavernier hired the Respondent to represent her in a personal injury action. Ms. Tavernier informed the Respondent, in late 1991, that she had been released from her physician's care. Respondent then advised Tavernier that he would prepare a narrative of the various medical treatments she had received, and that this narrative would be transmitted, along with a demand letter, to the tortfeasor or insurer. Respondent failed to prepare or to transmit either document to any party.

During the representation Ms. Tavernier contacted the Respondent's office many times requesting information about her case. Respondent failed or refused to return Ms. Tavernier's phone calls, or to otherwise tender information. On February 4, 1993, at Tavernier's request, she met with Respondent at his office. Respondent could not locate her file, and did not inform her as to the status of her case. Respondent's failure to take any action on Tavernier's behalf during nearly four years' of representation caused serious harm to Tavernier, in that she received no compensation for her injuries and no assistance with her outstanding medical bills during that period.

As to Count II, Respondent was found guilty of violating Rule

4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with requests for information); Rule 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct); and Rule 4-8.4(g) (a lawyer shall not fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct).

C. Respondent's Failure to Respond to the Disciplinary Authority

The referee's conclusion regarding Respondent's violation of Rule 4-8.4(g) shows that Respondent's pattern of misconduct extends to his own legal matters as well. In each of the two instant cases, the Bar furnished Respondent with the respective client complaint and requested a written response. Respondent received each request, but failed to respond in the prescribed manner or time. Accordingly, in each case, the Bar sent a second letter requesting Respondent to respond. Again, in each case, Respondent failed to respond.

As this disciplinary matter progressed, the Bar filed a

Request for Admissions. Respondent failed to respond. Based on this failure, the Bar filed a Motion to Deem Matters Admitted. Respondent filed no response to this motion, and the matters were deemed admitted.

D. Respondent's Similar Prior Misconduct and Violation of Probation Therefor

The referee recommended that Respondent be suspended from the practice of law for one (1) year and thereafter until proof of rehabilitation. Before making this recommendation the referee considered the Respondent's personal history and past disciplinary record. (RR at 2). The Respondent had previously received a public reprimand and was placed on probation for one year. That discipline was imposed on May 20, 1993, following Respondent's conviction for neglecting legal matters entrusted to him in Case Nos. 80,505 and 81,292. See The Florida Bar v. Morrison, 621 So. 2d 433 (Fla. 1993) (Note: published date of record is in error).

In each of the prior cases, as in the two instant cases, Respondent was found to have violated Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client), and Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with

reasonable requests for information).

Respondent's probation for this prior offense began on May 20, 1993, and ended May 20, 1994. Significantly, Respondent's representation of Dr. Bates included this probationary period, and some of his questionable conduct did in fact occur within that period. Specifically, one instance of his continuing violation of Rule 4-1.4(a) occurred in September, 1993 when Respondent again evaded Dr. Bates' plea for information. (See TR at 27-28). Dr. Bates' testimony as to this episode comports with her other recitations of Respondent's communication failures, and is uncontroverted. Therefore, the Bar calls to the Court's attention an additional aggravating factor not specifically found by the referee, i.e., that Respondent violated Rule 4-1.4(a) during his probation for violating the same rule.

E. Factors in Aggravation

The aggravating factors found by the referee were: a) Respondent's prior disciplinary offense; b) Pattern of misconduct; c) Multiple offenses; d) Obstruction of the disciplinary proceedings; e) Refusal to acknowledge the wrongful nature of his conduct; and f) Indifference to making restitution. (RR at 3). The referee found no factors in mitigation. Id. In addition, the

referee ordered restitution to Dr. Bates in the amount of $32,500.00. (RR at 2). Neither the fact of restitution nor the amount thereof has been placed at issue by the Respondent. Respondent seeks review only of the recommended one-year suspension.

SUMMARY OF THE ARGUMENT

The recommended suspension is appropriate and warranted, in view of Respondent's conduct and the adverse consequences stemming from it, Respondent's prior similar misconduct, and the aggravating factors. In previous neglect cases, this Court has placed emphasis on the relevant facts, and has applied discipline under the Florida Standards for Imposing Lawyer Sanctions (Standards) consistent with case precedent. The Bar contends that the facts of this case demand imposition of a one-year suspension, and that both the Standards and the prior case law support such a determination.

The Standards applicable to the instant cause also support the recommended sanction. Under the Standards, a lawyer who knowingly fails to perform legal services to the detriment of his clients may be disbarred or suspended, depending on the severity of the harm caused. Ultimately, the appropriateness of the penalty to be imposed must rest on what this Court deems to be fair and

reasonable under the relevant facts, the goals of attorney discipline, and case authority.

The reported cases dealing with neglect of legal matters run the disciplinary gamut from reprimand to disbarment. To a lesser or greater degree, all are factually distinguishable from the instant cause. However, significant case authority exists for approving the recommended suspension under the instant facts. The one-year suspension is wholly consistent with this Court's previous rulings in similar cases.

ARGUMENT

Once before, Respondent was convicted of failing to perform legal services entrusted to him. Like this case, that prior matter involved two separate instances of neglect. Here, however, Respondent's lack of diligence is more pronounced, and more egregious because his neglect caused significant harm. Thus, Respondent's professional conduct has worsened since the prior disciplinary matter.

The best evidence of this worsening is the fact that Respondent substantially neglected to participate in the instant disciplinary proceeding. He failed to respond to repeated requests from Bar counsel, then ignored a formal Request for Admissions,

then failed to contest the Bar's Motion to Deem Matters Admitted. These failings on his own behalf are similar to his neglect of his clients' matters. Respondent has demonstrated a marked inability to appreciate the consequences of neglecting legal matters entrusted to him; and whom his neglect affects, and to what degree it affects them, does not appear to be part of his calculus or concern.

A. The Recommended Suspension is Consistent with the Objectives of Bar Discipline

The Respondent seeks only review of the referee's recommendation as to length of suspension. In The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983), this Court defined the objectives of Bar discipline:

> "Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations." (emphasis supplied).

The Bar asserts that the emphasized third objective must serve a dual purpose when applied to Respondent. First, the penalty must

deter other lawyers from neglecting matters so completely as to effect a de facto abandonment of individual clients to their respective detriment. Second, the penalty must also deter other lawyers from ignoring the disciplinary process.

As for the first objective of Bar discipline, it is hardly debatable that society must be shielded from Respondent's repeated lapses in professional conduct, and must be protected from the type of harm created by those lapses. The second objective goes to the heart of the Bar's position in this Argument; that is, that the recommended one-year suspension with proof of rehabilitation strikes the appropriate balance between punishment for the conduct exhibited, and Respondent's opportunity for reform.

B. The Recommended Sanction is Permissible under the Standards for Imposing Lawyer Sanctions

The Florida Standards for Imposing Lawyer Sanctions (Standards) provide a format for Bar counsel, referees, and the Court to determine the appropriate sanction in disciplinary matters. Standard 3.0 states that, in imposing a sanction after a finding of lawyer misconduct, the Court should consider the following factors:

(a) the duty violated;
(b) the lawyer's mental state;

(c) the potential or actual injury caused by the lawyer's misconduct; and
(d) the existence of aggravating or mitigating factors.

As for subsection (a), the duties violated by Respondent are those of diligence to legal matters, communication with clients, and responsiveness to the disciplinary authority. As for subsection (b), Respondent has evinced no proof of any impaired mental state. Moreover, under subsection (c), the facts prove two instances of actual, serious harm to Respondent's clients as a result of his misconduct. Finally, following subsection (d), there are numerous aggravating -- and no mitigating -- factors for the Court to consider. Under the above guidelines, therefore, a stern penalty is both warranted and appropriate.

Rule 3-5.1(e), R. Regulating Fla. Bar, provides that "a suspension of more than 90 days shall require proof of rehabilitation and may require passage of all or part of the Florida bar examination." Under the instant facts, something more punitive than a 90-day suspension and less severe than disbarment is warranted and appropriate. Accordingly, the Bar agrees with the referee's recommendation and urges this Court to accept same.

In his Amended Brief, the Respondent essentially argues that a one-year suspension is unduly harsh under the circumstances, and

is inconsistent with case authority. The Standards constitute the proper starting point for determining the appropriate sanction for lack of diligence. Standard 4.41 states that "Disbarment is appropriate" when:

> (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client.

Alternately, Standard 4.42 states that "Suspension is appropriate" when:

> (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.

A majority of the consuming public might well consider what happened to Dr. Virginia Bates to fall within the definition of a "serious" injury. The Bar certainly feels that both Dr. Bates and Ms. Tavernier suffered serious injury as a direct result of Respondent's violations. Respondent has, however, been ordered to pay restitution to Dr. Bates. Because he is not contesting that portion of the recommended sanction, the Bar argues that suspension for a significant term is a more proper sanction than disbarment.

C. Case Authority Permits Imposition of a One-Year Suspension

Cases involving lack of diligence run the gamut of disciplinary sanctions from reprimand to disbarment. See e.g., The

Florida Bar v. Whitaker, 596 So. 2d 672 (Fla. 1992)(public reprimand); The Florida Bar v. Byron, 400 So. 2d 13 (1981)(public reprimand and 60-day suspension) The Florida Bar v. Hunt, 417 So. 2d 967 (Fla. 1982)(six-month suspension); The Florida Bar v. Fath, 386 So. 2d 787 (Fla. 1980)(two-year suspension). The Florida Bar v. Gunther, 400 So. 2d 968 (Fla. 1981)(disbarment). The Court must decide where, on this disciplinary continuum, the Respondent's offenses and attitude should rightly be placed, given the attendant circumstances. In cases involving neglect, this Court normally reserves disbarment for lawyers whose actions amount to an outright or de facto abandonment of their practice. The Bar contends that, although disbarment is technically warranted in this case, something less than disbarment is more appropriate.

In The Florida Bar v. Bartlett, 509 So. 2d 287 (Fla. 1987), this Court disbarred the respondent for neglect of legal matters entrusted to him. The Court held that, in the absence of any mitigating factors, disbarment was the appropriate sanction for the respondent's neglect of his client's case, where the respondent had previously been suspended for similar misconduct, and where he had failed to participate in the disciplinary proceeding. Id. At 288-89. In Bartlett, the respondent had previously been suspended for fifteen months for neglect. Id. At 289. In addition, the

respondent in Bartlett "did not answer the complaint, appear before the referee, or respond to this Court's call for briefs." Id.

As in Bartlett, Respondent has previously been disciplined for similar misconduct. In addition, Respondent failed to participate in the primary stages of the disciplinary process. He did, however, appear before the referee, and has filed a brief with this Court. Thus, while certain factors which warranted disbarment in Bartlett are likewise present here, they are present to a lesser degree. Accordingly, disbarment is not sought here.

The facts found in The Florida Bar v. Palmer, 504 So. 2d 752 (Fla. 1987) are more consistent with the instant facts. In Palmer, the respondent received an eight-month suspension after being convicted of neglecting legal matters, lying to his client, and allowing the client's action to be foreclosed by the running of the statute of limitations. Id. However, two significant distinctions exist between Palmer and the instant case. First, the respondent in Palmer had no prior disciplinary record. Id. Second, the Palmer Court found other significant mitigating factors, including the fact that Mr. Palmer was remorseful, and that he had borrowed money to satisfy the time-barred claim of his client. Id.

In contrast, Respondent has been previously disciplined. He has also manifested an "indifference" to making restitution to Dr.

Bates, and a refusal to acknowledge culpability. (RR at 3). The Bar contends that Respondent's indifference shows a lack of true remorse in the Respondent. Thus, the presence of these two aggravators militate for the imposition of a penalty more severe than the eight-month suspension meted out in Palmer, supra.

In The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1982), the Court held that in rendering discipline, the Court considers the respondent's previous disciplinary history and increases the discipline where appropriate. Id. at 528. The Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Id. More important, cumulative misconduct of a similar nature warrants an even harsher discipline than would dissimilar misconduct. Id.

Here, Respondent's present violations are virtually identical with his prior violations. The only important difference is that the instant conduct is more flagrant and harmful. Accordingly, this Court must give a sterner sanction than it normally would, due to Respondent's similar misconduct.

In The Florida Bar v. Rubin, 289 So. 2d 1 (Fla. 1974) the respondent represented a corporation in the filing of a suit in small claims court, and in filing an appeal to an adverse judgment in a separate small claims action. Rubin neglected to file either

the small claims suit or the appeal. Id. at 2. Rubin also undertook representation of a client in bringing suit for collection on a debt, and then neglected to file suit or account for the fees paid for that representation.

Rubin was also retained to file step-parent adoptions on behalf of a client who paid him to publish the adoption notice, in addition to agreed legal fees. Id. The circuit judge refused to sign the Order of Adoption presented by Rubin because he had not published notice to the natural father. Id. Rubin also failed to advise his client of the true status of the matter, though the client made numerous telephone calls to Rubin regarding the adoption and was repeatedly advised that everything had already been taken care of when, in fact, nothing had been done. Id.

The Court suspended Rubin for six months. Id. at 3. Rubin's misconduct is similar to that of the Respondent in that it involved multiple offenses, a pattern of misconduct, and failure to make restitution. Rubin is distinguishable from the instant case in that Rubin had no prior disciplinary record; also, there is no evidence that he failed, as did the Respondent, to respond to the Bar's inquiries as to his clients' grievances. Thus, Respondent's misconduct must be seen as more serious than that found in Rubin and, accordingly, warrants a longer suspension.

In The Florida Bar v. Patterson, 530 So. 2d 285 (Fla. 1988), the respondent was convicted of faulty representation, neglect of legal matters, failure to communicate with clients, and failure to refund unearned fees in a timely manner. Id. at 286. The Court suspended the respondent for one year, with the requirement that he make restitution to those harmed by his misconduct, and that he retake and pass the Florida bar examination. Id. Nothing in the reported opinion indicates that Mr. Patterson had any prior disciplinary record. The Court approved the referee's report and recommendations in their entirety. Id.

The instant case is fairly analogous to Patterson; in that case the Bar's motions to deem matters admitted and for judgment on the pleadings were granted. Id. at 285-86. Also consistent with the instant case is the fact that no mitigating evidence appears in the opinion to ameliorate the respondent's conduct. Therefore, the penalty imposed in Patterson is consistent with the referee's recommendation in this matter.

In The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993), the Court opined that Mr. Winderman's conduct was more egregious than that shown in Patterson. Id. at 486. Like Patterson, Mr. Winderman had no prior disciplinary record. In addition to his lack of diligence and failure to communicate, Mr. Winderman was

found guilty of incompetence, failing to abide by his client's objectives, and committing an act contrary to honesty and justice. Id. at 485-86. The referee had recommended a two-year suspension. Id. at 486. The Court suspended Winderman for one year, followed by a one-year probation after reinstatement. Id.

Though the conduct in Winderman is arguably more odious than Respondent's conduct, Respondent does in fact have a prior disciplinary record. In addition, the penalty imposed in Winderman is by turns more severe because, in Respondent's case, no probation has been recommended following reinstatement. Therefore, the instant matter is consistent with Winderman in that a somewhat less severe penalty has been recommended for somewhat less egregious conduct. Therefore, the recommendation is appropriate.

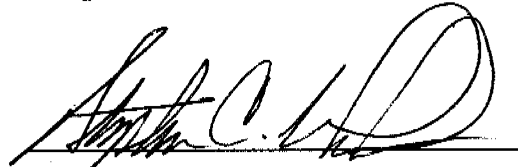
In The Florida Bar v. Segal, 441 So. 2d 624 (Fla. 1983), the respondent neglected legal matters entrusted to him, failed to carry out a contract of employment, and failed to pay promptly to a client funds belonging to the client. Id. at 625. The Court suspended Mr. Segal for one year and thereafter until rehabilitation was proven and restitution had been made. Id. In addition, Mr. Segal had failed to answer the Bar's complaint, and had likewise failed to respond to the Bar's request for admissions. Id.

The Segal opinion makes no mention of any prior disciplinary record with respect to Mr. Segal. Thus, the facts presented in Segal and the facts of the instant case are nearly identical. Segal's lack of prior discipline is an incongruity which would seem to call for a suspension of more than one year in Respondent's case. Nonetheless, the Bar asserts that the fact patterns are so symmetrical as to demand a similar sanction.

CONCLUSION

For all the foregoing reasons, Complainant, THE FLORIDA BAR, urges that the referee's recommended sanction of Respondent, ROBERT B. MORRISON, JR., be approved in its entirety.

Respectfully submitted,



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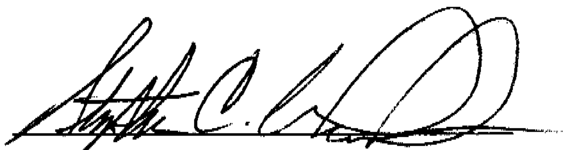
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief has been furnished by regular U.S. Mail to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; a tru and correct copy by regular U.S. Mail to Delano S. Stewart, Esq., Counsel for Respondent, at P.O. Box 172297, Tampa, Florida 33672-2297; and a copy by regular U.S. Mail to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 15th day of November, 1995.



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