IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

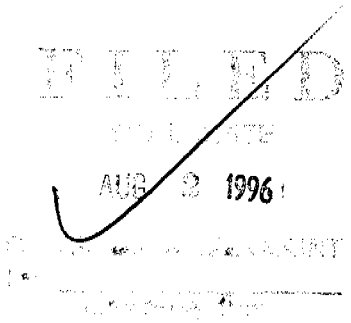
Complainant,

v.

ROBERT H. LECZNAR

Respondent.

Case No. 85,862
TFB No. 95-10,144 (6B)



RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Standards For Imposing Lawyer Sanctions

PRELIMINARY STATEMENT

The following abbreviations and symbols are used in this brief:

Comp. Br.	=	Complainant's Initial Brief
R.R.	=	Report of Referee

SUMMARY OF ARGUMENT

The referee below recommended a public reprimand while Complainant argues that a ninety (90) day suspension is the appropriate sanction. However, the cases cited by Complainant are far more egregious and factually dissimilar to the case below.

The referee below had the opportunity to hear and evaluate the witnesses called on behalf of Respondent. More importantly, the referee, could, and did, asses and consider Respondent's testimony and character and the circumstances surrounding this case.

Consideration of the appropriate case law and the Florida Standards for Imposing Lawyer Sanctions along with Respondent's background, character, and the attending mitigating circumstances require the imposition of a public reprimand as recommended by the referee.

ARGUMENT

I. THE REFEREE PROPERLY RECOMMENDED A PUBLIC REPRIMAND BASED ON THE RECORD BELOW, AS WELL AS PAST DECISIONS OF THIS COURT AND THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS.

A. The Referee's recommended sanction is supported by the facts and mitigation of this case as well as the past decisions of this court.

The referee below recommended a public reprimand as well as requiring Respondent to consult with the Law Office Management Advisory Service of The Florida Bar as the sanctions in this case. [R.R. at 6]. This court has held that a referee has the "power to recommend any permissible discipline they deem appropriate in any case before them." The Florida Bar v. Dubbeld, 594 So.2d 735, 737 (Fla. 1992). In the case at hand, the referee properly weighed the evidence along with the mitigating and aggravating circumstances and, subsequently, appropriately recommended a public reprimand.

Complainant argues that a ninety (90) day suspension is the appropriate sanction in this case. This court has previously indicated that "the power to disbar or suspend a member of the legal profession is not an arbitrary one to be exercised lightly... Such power should be exercised only in a clear case for weighty reasons and on clear proof." The Florida Bar v. Neale, 384 So.2d 1264, 1265 (Fla. 1980).

In support of its proposition, Complainant cites to four decisions of this court. First, Complainant relies on The Florida Bar v. Morrison, 669 So.2d 1040 (Fla. 1996). In Morrison, the accused attorney failed to file a notice of appearance, and did not timely respond to two defense motions, causing the court to dismiss the case. After refiling the complaint, the accused attorney failed to respond to a motion to dismiss and an order by the court. The court dismissed

the case and the statute of limitations expired. Furthermore, the accused attorney failed to respond to requests for information, failed to return phone calls and failed to timely answer correspondence from the client.

Morrison was also found guilty of a second count in which he did not actively pursue a claim for almost four years. As a consequence, his client did not receive compensation for her injuries, nor medical bill assistance during that time period. Again, Morrison did not return his client's phone calls nor update her on the status of the case.

After the Bar filed a two-count complaint, the accused attorney failed to respond . In arriving at the recommendation of discipline, the referee considered Morrison's prior misconduct for which he received a public reprimand and one year probation. Id. at 1041. Moreover, the referee weighed in a number of additional aggravating factors, including Morrison's obstruction of the disciplinary proceedings, his refusal to acknowledge the wrongful nature of his conduct and his indifference to making restitution. In contrast to the vast number of aggravating factors, the referee found no mitigating factors and consequently recommended a one year suspension which was imposed by this Court.

In the case at bar, Respondent, in the prosecution of two personal injury claims, did not name his client's insurance company as a party defendant and did not effect settlements with the insurance company. Subsequently, both lawsuits filed against the at-fault drivers were dismissed. Moreover, the statute of limitations expired with regard to both claims. In Morrison, this court found the accused attorney guilty of numerous violations involving two separate clients, whereas in the instant case, Respondent's conduct involved only one client. Furthermore, in Morrison, in addition to letting the statute of limitations expire, the accused attorney consistently failed to

respond to numerous motions and court orders, whereas, Respondent simply failed to name the insurance company as a defendant and later was foreclosed from doing so as the statute of limitations had expired.

Here, unlike in Morrison, the referee found that Respondent presented a number of mitigating factors. The referee found that "Respondent's involvement in the legal services plan and the loss of his paralegal demonstrates that Respondent had no selfish motive, but rather mismanaged his workload." [R.R. at 3]. Consequently, the referee found that the Respondent "unintentionally neglected his clients' matters." [R.R. at 4, 5]. Moreover, the referee found it significant that Respondent was very cooperative in the proceedings, unlike Morrison, and genuinely demonstrated an intent to rehabilitate his law practice. The referee further noted Respondent's sincere remorse for his misconduct. [R.R. at 3, 5, 6].

Furthermore, the referee found the testimony from Judge Marcia Bishop Glisson and attorney Ed Garrabrants, relating to Respondent's excellent professional reputation, to be a mitigating factor. [R.R. at 3, 4, 5]. Mr. Garrabrants stated "that he has confidence in Respondent's professional abilities and believes Respondent to have an affirmative reputation for ethics." [R.R. at 3-4]. Likewise, in support of Respondent, Judge Glisson stated "that she knew Respondent to be a prepared and diligent attorney during her dealings with him." [R.R. at 5].

In addition, the referee found that because the Respondent is a sole practitioner in a small community a suspension "would only set back his practice even further, and possibly cause irreparable harm to his current clients with pending lawsuits." [R.R. at 6]. This court, as cited in Complainant's Initial Brief, has consistently held that disciplinary action "must be fair to society." The Florida Bar v. Lawless, 640 So.2d 1098, 1100 (Fla. 1994). [Comp. Br. at 7]. Accordingly,

the referee found that it would be unfair to the small community and possibly cause irreparable harm to Respondent's clients if he were suspended from the practice of law. [R.R. at 6].

The referee clearly considered Respondent's prior admonishment as an aggravating factor when determining the appropriate sanction. [R.R at 3-6]. Unlike Morrison, the referee below found no other aggravating factors. In fact, Complainant concedes that Morrison is distinguishable because of its numerous aggravating factors and absolute absence of mitigating factors. [Comp. Br. at 9]. In light of the lack of aggravating circumstances and the vast number of mitigating factors present in the case at bar, Complainant has failed to show that a ninety (90) day suspension is proper and a public reprimand, as the referee recommended, is erroneous.

Complainant next relies on The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993). In Winderman, the accused attorney misrepresented several clients, rather than just one as in the case at bar. Winderman filed a complaint along with four amended complaints, all of which the court dismissed. Thereafter, the court gave Winderman the opportunity to file a fifth amended complaint, yet he failed to do so, and did not file any other action for his clients. Moreover, Winderman failed to communicate with his clients and advise them of the true progress of their case. Subsequently, he withdrew as counsel. In Winderman's motion to withdraw he falsely asserted that his client requested the withdrawal. Further, Winderman did not communicate with his clients nor appear in their behalf regarding two motions the opposition filed. The court dismissed with prejudice all claims by Winderman's clients. This court found Winderman guilty of eleven (11) rule violations, thus suspending Winderman for one year. Id. at 486.

Complainant admits that "Winderman's conduct was, however, more egregious than Respondent's, especially considering Winderman's lack of candor to the trial court regarding his

desire to withdraw." [Comp. Br. at 11]. Nonetheless, Complainant argues that Winderman involves the same type of conduct and harm as here, therefore supporting a suspension. [Comp. Br. at 11]. However, Complainant fails to recognize or acknowledge the most obvious and compelling aggravating factor which is present in Winderman and absent here. Winderman was guilty of a continuing pattern of misconduct which was likely to and did repeat itself. Conversely, the referee below noted that the isolated problems experienced by Respondent were a function of personnel problems and a glut of cases generated by Respondent's participation in a legal services plan. Accordingly, Complainant's reliance on Winderman is clearly misguided.

Complainant also unjustly relies on The Florida Bar v. Palmer, 504 So. 2d 752 (Fla. 1987). In Palmer, the accused attorney did not contact his client for six months and then falsely advised his client that there had been a delay because of a change in opposing counsel. Palmer failed to send his client copies of court documents as agreed. When his client expressed her concern with the statute of limitations, Palmer falsely told her that he had filed suit when he had not done so. Again, he lied to his client concerning the securing of court dates. Thereafter, Palmer lied to his client and told her that he settled the case and that the check was in the mail. However, in reality, the statute of limitations expired. As a result of all of the aforementioned misconduct, this court suspended Palmer for eight (8) months. Id. at 752.

The facts of Palmer are obviously dissimilar to the facts below. In Palmer, the accused attorney repeatedly lied to his client. Moreover, the court in Palmer only found two mitigating factors. Primarily, the court found that because the accused attorney paid his former client $10,000 in satisfaction of her claim, he was remorseful. In addition, the court considered that Palmer had no prior disciplinary record. In the case at hand, the referee noted that Respondent

entered into a settlement agreement with his former client but did not consider it as a mitigating factor, as the Palmer court did. [R.R. at 4]. Moreover, in the case at bar the referee found a lengthy list of mitigating factors, absent in the Palmer decision. Most significantly, Palmer chose not to contest the referee's recommendation.

Finally, Complainant relies on The Florida Bar v. Morse, 587 So. 2d 1120 (Fla. 1991). The accused attorney in Morse attempted to negotiate a settlement with the insurance company that insured a driver who injured a client of Respondent's firm. Morse attempted the settlement at no success, knowing that the statute of limitations had expired. Thereafter, Morse wrote a note to the attorney in his firm who was primarily handling the case stating that Morse would tell the client that the insurance company would not agree to settling for more than a previous settlement offer of $2500. The client thereafter received a trust check in the amount of $2500, labeled "final recovery."

At last, Complainant relies on a case involving an accused attorney who received a ninety (90) day suspension to support its proposition here of a ninety (90) day suspension. Yet Complainant fails to demonstrate, given the totality of the circumstances, that the instant case is as egregious as Morse. In fact, the Complainant concedes that "Respondent's misrepresentations and deception were not as extensive or egregious as those detailed in Morse." [Comp. Br. at 12]. Indeed, in Morse, the accused attorney misused trust funds which properly belonged to other clients to conceal the malpractice of his partner in a scheme to deceive the client. Furthermore, Complainant fails to acknowledge that Respondent has many more mitigating factors than the accused attorney in Morse. In Morse, the court noted that it found merely two mitigating factors; i.e., that the accused had no prior disciplinary record and that he had been out of law school for

less than four years. Id. at 1120. In contrast, in the case at bar, the referee below found numerous mitigating factors. Additionally, in the case at bar, Respondent was found guilty of failing to act competently and diligently while the attorney in Morse was found guilty of inter alia, conduct involving dishonesty, fraud, deceit and misrepresentation. Viewing Morse and Respondent's case in light of the totality of the circumstances, Respondent's case is distinctly less egregious and clearly does not merit a ninety (90) day suspension.

Accordingly, close analysis of the facts as well as the aggravating and mitigating circumstances establishes that the case below is substantially more deserving of leniency than the facts in Morrison, Winderman, Palmer or Morse.

Furthermore, other decisions of this court dictate that the referee's recommendation of a public reprimand is appropriate. This court dealt with a case with facts substantially similar to the facts below in The Florida Bar v. Kaplan, 576 So. 2d 1318 (Fla. 1991). In Kaplan, the accused was retained to recover damages in a personal injury suit involving a car accident. After discovering and informing his client that the other parties involved in the car accident did not have automobile insurance, Kaplan thereafter did not initiate communications with his client. Subsequently, the client and her son on numerous occasions tried to contact Kaplan to ascertain the status of her case. Kaplan failed and refused to respond to his client's and her son's attempts to communicate with him. Therefore, the client retained another attorney who attempted to contact Kaplan. Kaplan also failed and refused to communicate with the new attorney. Moreover, Kaplan failed to pursue the available uninsured motorist provision in his client's insurance policy by not taking actions to file or collect such proceeds. Furthermore, Kaplan did not give his client any notice that he was withdrawing from her case. Finally, Kaplan failed and

refused to turn over any paper or documents to his client's new counsel. Significantly, Kaplan had a record of three (3) prior private reprimands.

The facts of this case are similar to the one at bar in that both attorneys failed to pursue uninsured motorist claims and failed to communicate with their respective clients about the status of their claims. Admittedly, in the case at bar, the statute of limitations expired whereas in Kaplan the court made no reference to the case being time barred. However, Respondent has reached a monetary settlement with his clients below to compensate them. In Kaplan, in addition to not communicating with his client and not pursuing her claim, Kaplan refused to turn over papers and documents requested by her new counsel. Moreover, Kaplan did not properly withdraw from the case.

In Kaplan the court makes no reference to any mitigating circumstances. Whereas in the case at bar, the referee found a number of mitigating circumstances, as noted above. However, the Kaplan court considered Kaplan's three (3) prior misconducts resulting in three (3) private reprimands as aggravating factors, whereas, the referee below considered Respondent's one prior admonishment for minor misconduct. Id. at 1319. Respondent respectfully submits that as in Kaplan, a public reprimand is appropriate here.

Also, a public reprimand was administered by this court in The Florida Bar v. Riskin, 549 So. 2d 178 (Fla. 1989). In Riskin, this court found Riskin guilty of inadequate preparation. Id. at 179. Specifically, Riskin failed to file a cause of action until after the statute of limitations expired and failed to recognize that the case had worker's compensation potential for his client. The opposing counsel filed a motion for summary judgment and Riskin failed to respond to this motion in any way, thus, the motion was subsequently granted. Moreover, Riskin had been

privately reprimanded in the past for neglect of legal duty. As a result, this court held that "clearly this neglectful conduct warrants a public reprimand." Id. The court did not indicate that the accused attorney had presented any mitigation.

Similarly, in the case below, the statute of limitations expired, resulting in the case being time barred. Respondent here did have a number of mitigating circumstances, which is not apparent in Riskin. Accordingly, the facts below compare favorably to the facts in Riskin and the imposition of a public reprimand is appropriate.

In The Florida Bar v. Knowlton, 527 So. 2d 1378 (Fla. 1988), the court approved the referee's recommendation of a public reprimand. In Knowlton, the accused attorney failed to respond to his client's written requests for an update on the status and progress of her case. Specifically, Knowlton failed to respond to five different letters on five different occasions that his client wrote asking for an update on her case. During a telephone conversation with his client in June 1985, Knowlton told his client that he would send her a copy of a letter he was writing to her insurance company, however he never sent his client any letters. In fact, the statute of limitations expired in March 1985. Only after trying to retain another attorney did Knowlton's client learn that the statute of limitations on her case had run.

This case is factually similar to the case at bar because both attorneys failed to file claims before the statute of limitations expired. Moreover, by not responding to his client's repeated written requests for the progress of her case and by telling his client he would send her the letter he was writing to her insurance company, Knowlton, in essence, intentionally deceived his client and misrepresented to her that her case was progressing.

Complainant argues that because of Respondent's misrepresentations to his client about

the progress of his case that a suspension is the appropriate discipline. Yet, in both Riskin and Knowlton, the accused attorneys allowed the statute of limitations to expire thus causing their clients' claims to be time barred and they both failed to advise their clients of that fact. Moreover, Knowlton, by not responding to his client's request for information on the progress of her case, and by advising her that he was writing to the insurance company when, in fact, the statute of limitations had expired three months earlier, strongly suggests of concealment on his part.

Moreover, this court has often held that violations involving deceit or misrepresentation merit a public reprimand. See The Florida Bar v. Bell, 493 So.2d 457 (Fla. 1986) (holding that an attorney guilty of violating disciplinary rules which involve "conduct involving dishonesty, fraud, deceit, or misrepresentation," "knowingly making a false statement of fact or law," "counseling or assisting a client in conduct the lawyer knows to be illegal or fraudulent" and "conduct contrary to honesty justice, or good morals" should receive a public reprimand). Also, in The Florida Bar v. Bratton, 389 So. 2d 637 (Fla. 1980), the accused attorney, involved in two separate instances dealing with real estate transactions, was found guilty of two separate counts of "engaging in conduct involving dishonestly, fraud, deceit or misrepresentation" and also found guilty of knowingly making a "false statement of fact." The Bratton court imposed a public reprimand for the accused attorney's misrepresentations that rose to the level of Disciplinary Rule violations. Id. at 639. However, in the case at bar, Respondent was neither charged with nor found guilty of such a violation. It is indeed odd that Complainant urges such a harsh discipline upon Respondent for failing to advise his client of the true status of her case, yet did not see fit to specifically charge Respondent with such misconduct. In fact, the referee stated that Respondent had no "dishonest motive." [R.R. at 3]. Rather the referee found the Respondent possessed a "lack of candor."

[R.R. at 6].

Obviously, the facts below are more in line with those in Kaplan, Knowlton, and Riskin than they are with cases cited by Complainant. Moreover, the evidence of mitigation here is far greater than the mitigation set forth in all cases cited. Given the facts of this case and the overwhelming mitigating evidence, in addition to the monetary restitution, it is abundantly clear that the referee's recommendation of a public reprimand is appropriate.

B. The Referee's recommended sanction is consistent with the Florida Standards for Imposing Lawyer Sanctions.

The Florida Standards for Imposing Lawyer Sanctions require the referee and this court to consider mitigation when imposing discipline on an attorney for misconduct. The referee properly recommended a public reprimand based on Respondent's remorse, character, cooperative attitude, intent to rehabilitate his practice, unintentional neglect, withdrawal from the legal services plan and the fact he is a sole practitioner.

The Florida Standards for Imposing Lawyer Sanctions set forth appropriate discipline for specific types of misconduct. The Standards clearly state that they only apply absent any aggravating and mitigating circumstances. Complainant states that Standard 4.42(b) should be used in this case because Respondent's lack of diligence caused the dismissal of more than one lawsuit, thus creating a pattern of neglect. [Comp. Br. at 14]. Even absent mitigating circumstances, which is not the case here, Complainant is incorrect to argue that Standard 4.42(b) applies merely because two potential lawsuits were time barred resulting in Respondent engaging in a pattern of neglect. In fact, the lawsuits arose out of the representation of a single client. Respondent therefore respectfully submits that Standard 4.43 which states that a "[p]ublic

reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client" is more appropriately applied in this case.

In recommending discipline for Respondent's lack of candor, Complainant argues that Standard 4.62 which recommends suspension is appropriate. [Comp. Br. at 14]. However, Complainant again fails to recognize that this sanction is generally appropriate absent mitigating and aggravating factors. [emphasis added]. Obviously, substantial mitigation exists here. Inexplicably, Complainant does not mention Standard 5.13 which reads "[p]ublic reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." [emphasis added]. Certainly, Standard 5.13 is appropriate here and supports the referee's recommendation of a public reprimand.

Complainant contends that the referee was incorrect to find that Respondent "unintentionally neglected his clients' matter" when Respondent told his client that the case was progressing and mediation was scheduled, when it was never held. [Comp. Br. at 15]. However, there is no connection between Respondent neglecting his client's legal matters and subsequently telling them that their case was progressing. The referee clearly found that Respondent's lack of office assistance was the cause of the neglect, not the subsequent act of telling his client that the case was progressing. [R.R. at 5].

In addition, Complainant contends that Respondent's misrepresentation to his client should be an aggravating factor relating to his lack of competence and diligence. [Comp. Br. at 15]. However, there is no casual connection between the misrepresentations and the rule

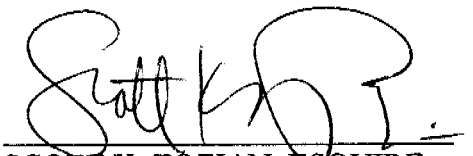
violation. Complainant maintains that the referee should have considered Standard 9.22(b) (presence of a dishonest or selfish motive). However, in failing to act competently Respondent's motive was not to be selfish or dishonest. His incompetence was precipitated by his lack of office assistance and organization. He did not set out to deceive his client.

CONCLUSION

In sum, it is clear that the referee properly recommended a public reprimand in light of the mitigating factors and lack of aggravating factors coupled with the case law and the Florida Standards for Imposing Lawyer Sanctions. In fact, Complainant admits that the cases upon which it relies impose sanctions which are too severe for the case at bar. [Comp. Br. at 18]. In contrast, Respondent submits case law with similar violations as the case at hand, thus mandating a public reprimand as recommended by the referee below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery this 1 day of August, 1996, to: David R. Ristoff, Esquire, Branch Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607.



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