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)

INITIAL 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 H. Lecznar, will be referred to as "Respondent."

"RR" will refer to the Report of Referee in Supreme Court Case No. 85,862, dated March 25, 1996.

"TR" will refer to the Transcript of testimony before the Referee in the disciplinary case styled THE FLORIDA BAR v. ROBERT H. LECZNAR, TFB No. 95-10,144(6B), dated November 20, 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 parties have stipulated to the facts of this case. The Report of Referee incorporated the substance and language of the parties' Stipulation of Facts, with minor alterations. In the interest of convenience and clarity, the Bar sets forth, verbatim, the Stipulation of Facts, in narrative form:

On or about November 10, 1987, Harold E. Leighty and Mary Leighty, husband and wife, retained Respondent to represent them in actions for damages as a result of permanent injuries suffered by Mary Leighty in two (2) automobile accidents which occurred on September 23, 1986, and September 9, 1987. Respondent filed suit on behalf of the Leightys against George Faust for the 1986 automobile accident, and against Tricia J. Carlson and Michael E. Fonseca for the 1987 automobile accident.

During the course of the representation, Respondent discovered that the at-fault drivers in both accidents were uninsured and that no liability insurance was available to his clients. Respondent was aware that on the dates of the automobile accidents, Mary and Harold Leighty had uninsured motorist coverage in effect pursuant to their contracts of insurance with Colonial Penn Insurance Company ("Colonial Penn"). Respondent neglected to name Colonial Penn as a party defendant

in either of the personal injury suits which he filed against the at-fault drivers on behalf of the Leightys. Respondent also neglected to pursue a settlement with Colonial Penn on the Leighty's uninsured motorist claims. Both of the lawsuits Respondent filed against the at-fault drivers on behalf of the Leightys were subsequently dismissed for lack of prosecution.

At the time he accepted the representation, Respondent knew, or should have known, that Florida Statute 95.11(2)(b) provides for a five (5) year Statute of Limitations with respect to any legal or equitable action on a contract, obligation, or liability founded on a written instrument. As a result of the dismissal of both personal injury actions against the at-fault drivers and Respondent's failure to negotiate a settlement with Colonial Penn during the statutory time limits, Mary and Harold Leighty lost the opportunity to obtain recovery from the responsible parties.

During the course of the representation, Mary and Harold Leighty met with Respondent on several occasions and also spoke with him by telephone regarding the status of their personal injury claims. During 1994, after the statutory time limits had expired, Respondent represented to the Leightys that mediations on their personal injury claims had been scheduled; however, no mediations were actually held. From approximately November 1987

through July 1994, Respondent repeatedly assured the Leightys that litigation on their claims was progressing. Upon checking with Colonial Penn in July of 1994 to determine the status of their claims, the Leightys learned that their case had been closed in 1992. Thereafter, the Leightys terminated Respondent's representation and retained another attorney. Mary and Harold Leighty subsequently learned that due to Respondent's failure to timely pursue claims on their behalf, they would be unable to recover from Colonial Penn due to the expiration of the five (5) year Statute of Limitations. (Stipulation of Facts).

Thereafter, the Leightys filed a civil action against Respondent, which lawsuit was pending at the time of the final hearing in the instant matter. Respondent entered into a joint stipulation and settlement agreement with the Leightys which disposed of all the disputes between the litigants, and provided for Respondent to make several installment payments to the Leightys in the total amount of $44,000.00.

Within the Stipulation of Facts, Respondent acknowledged and agreed that he has violated the following Rules Regulating The Florida Bar: Rule 4-1.1 (A lawyer shall provide competent representation to a client); 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 reasonable requests for information); and Rule 4-1.4(b) (A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

As to the appropriate sanction for these respective violations, the referee recommended that Respondent receive a public reprimand. The referee also recommended that Respondent "be required to consult with" The Florida Bar's Law Office Management Advisory Service (LOMAS) program "to arrange a consultation regarding improvement of office management systems." RR at 6.

The Florida Bar Board of Governors voted to file a Petition for Review of the referee's recommended discipline. The Board of Governors voted to seek a ninety (90) day suspension and probation for one (1) year, the terms of which would require Respondent to schedule and complete an evaluation with Law Office Management Service (LOMAS) within ninety (90) days of this Court's Order. Further, within ninety (90) days after completion of the LOMAS review, Respondent shall implement any changes as set forth within the LOMAS evaluation.

SUMMARY OF THE ARGUMENT

The Bar argues that the recommended discipline is too lenient, given Respondent's prior disciplinary record, the similar but more egregious nature of his instant misconduct, and the harm which resulted from the instant misconduct. Thus, the Bar contends that the referee did not give sufficient weight to the following facts:

1) Respondent's similar prior misconduct;

2) Respondent's misrepresentations to the Leightys regarding the true status of their lawsuits, and his dishonest or selfish motives for making the misrepresentations;

3) the harm suffered by the Leightys as a result of Respondent's incompetence and neglect.

4) Respondent's pattern of neglect; and

5) Respondent's multiple offenses.

The Bar contends that the referee did not give sufficient weight to these aggravating factors in determining the recommended sanction. As a result, the recommended sanction fails to achieve the objectives of Bar discipline, because it is inconsistent with the facts herein, as well as the relevant case law, and the Florida Standards for Imposing Lawyer Sanctions.

The Bar argues that the objectives of Bar discipline, the

Standards, the case authority, and consistency and justice are all better served by imposing on Respondent a 90-day suspension followed by a one-year probation, which probation should require an evaluation within 90 days by LOMAS, followed by Respondent's implementation, within ninety days, of any and all changes recommended by the LOMAS evaluation.

ARGUMENT

I. THE RECOMMENDED SANCTION IS INSUFFICIENT IN VIEW OF RESPONDENT'S MISCONDUCT AND PRIOR DISCIPLINARY RECORD.

A. The Recommended Sanction Fails to Serve the Purposes of Bar Discipline.

While a referee's recommendation regarding discipline is persuasive, this Court has the ultimate responsibility to determine and order the appropriate sanction in any given case. The Florida Bar v. Reed, 644 So. 2d 1355, 1357 (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. Lawless, 640 So. 2d 1098, 1100 (Fla. 1994).

In imposing attorney discipline, this Court must consider a respondent's previous discipline, and increase the discipline where appropriate. The Florida Bar v. Bern, 425 So. 2d 526, 528 (Fla. 1982). This case reveals that in August, 1994, Respondent received an admonishment for violating Rule 4-1.4(a) (failure to keep a client reasonably informed regarding the status of a lawsuit). See RR at 5.

In the instant matter, Respondent neglected two lawsuits, and allowed the Statute of Limitations to bar his clients' causes

of action. In cases of neglect, this Court duly considers the actual injury caused by the lawyer's misconduct. Standard 3.0(c), Standards for Imposing Lawyer Sanctions. Here, the Leightys' two separate lawsuits were time-barred through Respondent's lack of competence, lack of diligence, and failure to communicate. Though the Leightys agreed to settle their malpractice claim against Respondent for a stipulated amount, the Leightys were denied the opportunity to recover damages for their injuries from the parties responsible, due to Respondent's misconduct.

In cases involving similar misconduct with client injury, this court has imposed suspension as the appropriate sanction. In The Florida Bar v. Morrison, 669 So. 2d 1040 (Fla. 1996), Mr. Morrison neglected to pursue two lawsuits to the legal and financial detriment of his respective clients. In one case, Morrison failed to prosecute a federal lawsuit so that the court twice dismissed it without prejudice; the second dismissal occurred after the Statute of Limitations had run, effectively barring the client's cause of action. Id. at 1041. In another case, Morrison failed to pursue his client's personal injury action for over four years, causing financial harm to the client. Id. Morrison had been previously disciplined for similar misconduct. Id., n.1. In addition, Morrison failed to keep his

clients updated on the status of their cases. Id. at 1041. This Court gave Morrison a one-year suspension plus probation. Id. at 1042.

In rendering its opinion, this Court stated that "[t]he failure of an attorney to pursue representation on behalf of a client resulting in prejudice to a client's rights is an intolerable breach of trust." Morrison, 669 So. 2d at 1042. In many pertinent respects, the facts presented in Morrison coincide with the instant facts; namely, Respondent allowed two separate lawsuits to become time-barred through neglect, and failed to keep his clients informed as to the status of those cases. Moreover, Respondent was previously found to have violated Rule 4-1.4(a), and is now guilty of again violating that rule. Thus, the aggravating factor of similar prior misconduct is present in both Morrison and in the present case.

Morrison is distinguishable from the instant matter mainly due to the fact that Morrison presented no factors in mitigation of sanction, whereas Respondent has presented several. Morrison also presented this Court with a number of aggravating factors in addition to his prior disciplinary offense. See id. at 1041. Accordingly, the Bar argues that, although suspension is the appropriate sanction for Respondent's misconduct, a ninety (90)

day suspension is more appropriate in Respondent's case, as opposed to the one-year suspension handed down in Morrison.

In The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993), the respondent had represented several similarly situated litigants in a civil action. Though the trial court dismissed four amended complaints filed by Winderman, it provided Winderman the opportunity to file a fifth amended complaint. Id. at 485. Instead of filing another amended complaint, Winderman sought to withdraw from the lawsuit, and failed to advise his clients as to the true progress of their case. Id. In his motion to withdraw, Winderman falsely reported to the court that his original client had requested the withdrawal. Id. The court dismissed with prejudice all claims by Winderman's clients. Id. The Winderman opinion makes no mention of any prior disciplinary violations by Winderman. This Court suspended Winderman for one year, followed by a one-year probation. Id. at 486.

The pertinent factual correlation between Winderman and the instant case is that Winderman, like Respondent, allowed his clients' case to lapse due to his misconduct, and then failed to apprise them of the crucial fact that they no longer had a viable cause of action. Winderman's conduct was, however, arguably more egregious than Respondent's, especially considering Winderman's

lack of candor to the trial court regarding his desire to withdraw. Nonetheless, the salient fact is that the same type of misconduct, and the same type of resultant harm to clients, which appears in Winderman likewise appears in the instant record. Thus, a ninety (90) day suspension is more appropriate under the instant circumstances.

The facts of The Florida Bar v. Palmer, 504 So. 2d 752 (Fla. 1987) are closely analogous to the instant case. Palmer represented a client with a personal injury claim, but failed to contact the client for six months. To cover his neglect, Palmer falsely told the client that the case had been delayed due to a change in opposing counsel. When the client expressed concern over the running of the Statute of Limitations, Palmer assured her that he had already filed suit, when in fact he had not done so. Later, Palmer falsely told the client that the case had settled out of court, and that the settlement check was in the mail; however, no suit had ever been filed by Palmer, and no settlement had ever been negotiated. Id. at 752. Palmer had no prior disciplinary record. Id. The Court suspended Palmer for eight (8) months. Id.

As in the instant case, in The Florida Bar v. Morse, 587 So. 2d 1120 (Fla. 1991) Morse made false statements to a client in an

attempt to cover up the fact that the client's cause of action had become time-barred by the Statute of Limitations. Although Morse's law partner was the attorney responsible for neglecting the matter to the client's detriment, Morse "conspired to hide his partner's malpractice from their client," by misrepresenting the status and true outcome of the client's case. Id. at 1120. Morse did so by falsely stating that the firm had accepted a settlement offer of $2,500.00, and then tendering to the client a check for that amount, signed by Morse, drawn on his firm's trust account, and which bore the notation, "final recovery." Id. Though Morse was a young lawyer who with no prior disciplinary record, and was associated with a more senior attorney, this Court held that those considerations did "not significantly lessen his culpability," nor did they "eliminate his duty to refrain from deceiving their client." Id. at 1121. For his misconduct, Morse received a ninety (90) day suspension. Id.

The deception perpetrated on the injured client in Morse is analogous to Respondent's attempts to deflect attention away from his own malpractice in the instant matter. Although Respondent's misrepresentations and deception were not as extensive or egregious as those detailed in Morse, the Bar contends that they do constitute a significant and serious aggravating circumstance

surrounding Respondent's lack of diligence and incompetence. Further, the Bar notes that, in Morse, the respondent was not guilty of neglect or incompetence, as is Respondent here. In view of these facts, the Bar urges the Court to suspend Respondent for ninety (90) days.

B. The Recommended Discipline is Not Consistent with the Florida Standards for Imposing Lawyer Sanctions.

Given Respondent's instant misconduct, the harm resulting therefrom, his similar prior misconduct, and the aggravating factors present, the threefold objectives of Bar discipline cannot be adequately served by this Court's approval of the referee's recommended sanction. As for the discipline being fair to society, the societal interest is served when substantially similar sanctions are imposed for substantially similar misconduct. Public confidence in the rule of law suffers when those who misconduct themselves receive widely disparate sanctions from others whose conduct is similar. Because Respondent's recommended discipline is inconsistent with the Standards and the relevant case law, this Court's approval of the recommended discipline would not reasonably serve society's interest in these proceedings. Further, the recommended sanction fails to properly deter other attorneys from similar misconduct.

In cases involving lack of competence and lack of diligence, the Florida Standards for Imposing Lawyer Sanctions set forth the appropriate discipline, absent any consideration of aggravating or mitigating circumstances. In neglect cases, Standard 4.42(a) states that suspension is appropriate when "a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. Standard 4.42(b) states that suspension is appropriate when "a lawyer engages in a pattern of neglect and causes injury or potential injury to a client." The fact that Respondent's instant lack of diligence caused the dismissal of more than one lawsuit creates a pattern of neglect. Thus, Standard 4.42(b), which calls for suspension, applies directly to the pattern of neglect reflected in this record.

In this case, the referee was clearly troubled by Respondent's deception in misrepresenting to the Leightys the progress and status of their lawsuits. "The Referee finds this lack of candor to be the most serious of the four violations." RR at 6. Standard 4.62 directly addresses such behavior by Florida lawyers. Standard 4.62 states that "suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to a client." Because this language relates to Respondent's conduct in misrepresenting to the Leightys the true

status and progress of their lawsuits, the Bar urges the application of Standard 4.62 in this case.

In recommending discipline for Respondent's lack of diligence, the referee duly considered Respondent's mental state, pursuant to Standard 3.0(b). The referee found that Respondent had "unintentionally neglected his clients' matters." RR at 4-5. The Bar points out to this Court, however, that Respondent intentionally and repeatedly misrepresented material facts to the Leightys regarding the progress of their cases, and that he did so while their cases were legally viable, and thereafter. See Stipulation of Facts, paras. 12 and 13.

The referee failed to adequately consider Respondent's misrepresentations in aggravation of the stipulated Rules violations. The Bar notes that Respondent's misrepresentations were made with the express purpose of covering up his misconduct relating to lack of competence and lack of diligence. As such, his misrepresentations should properly be considered in aggravation of those violations. However, in finding that Respondent had acted incompetently, the referee considered Respondent's prior history as the only factor in aggravation. See RR at 3-4. While the referee properly considered Respondent's circumstances in mitigation of this violation, the Bar contends

that it was error not to consider Respondent's intentional deceit as stemming from a dishonest or selfish motive, which it clearly did. Therefore, Standard 9.32(b) (absence of a dishonest or selfish motive) cannot apply in mitigation of Respondent's sanction. Indeed, Standard 9.22(b) (presence of a dishonest or selfish motive) directly applies as an aggravating factor.

In finding that Respondent had violated Rule 4-1.3, the referee misstated that Respondent's deception constituted a lack of diligence.

> "The Referee finds that Respondent's representations through July 1994 to the Leightys that the litigation of their claims were (sic) progressing, although the cases against the at-fault drivers had been dismissed in 1992 and the Statute of Limitations had expired, constitutes a lack of diligence."

RR at 4 (emphasis added). The simple fact is that Respondent's failure to move the Leightys' cases forward constituted a lack of diligence; his deceitful and dishonest effort to mask that failure merely aggravated the misconduct. Thus, the referee merged the aggravating factor of a dishonest or selfish motive into the elements of the rule violation. This precluded the referee from a proper consideration of the appropriate sanction. As in the adjudication of incompetence, the referee found only one aggravating factor as to lack of diligence; namely,

Respondent's similar prior misconduct. The presence of this aggravating factor alone, the Bar contends, should militate for suspension. See Standard 9.22(a); Standard 4.42. The Bar also asserts, however, that Respondent engaged in a pattern of misconduct by allowing two distinct lawsuits to languish until their causes of action lapsed forever. Compare Standard 9.22(c) (pattern of misconduct constitutes an aggravating factor) with Standard 4.42(b) (suspension is appropriate when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client). Similarly, Respondent's four instant Rules violations constitute multiple offenses, under Standard 9.22(d). Thus, while the referee engaged in an extended discussion of Respondent's mitigating circumstances, the proper aggravating circumstances were either inadequately considered, or were incorrectly merged into the elements of the offense(s), or they were ignored. The Bar asserts that, when the factors in aggravation and mitigation are properly presented to and considered by this Court, Respondent's misconduct should warrant a 90-day suspension, with appropriate probation.

The Bar concedes that the instant case presents several mitigating circumstances, and notes that the referee considered all of these. The Bar concedes that Respondent's mitigating

factors do militate for a sanction less severe than those which were imposed in Morrison, Winderman, and Palmer, supra.

The foregoing discussion demonstrates that the following aggravating and mitigating circumstances are present in this case, and that all should be adequately considered in determining the appropriate sanction for Respondent's admitted violations of the Rules Regulating The Florida Bar:

Aggravating Factors:

Standard 9.22(a) Prior disciplinary offenses;

Standard 9.22(b) Dishonest or selfish motive;

Standard 9.22(c) Pattern of misconduct;

Standard 9.22(d) Multiple offenses.

Mitigating Factors:

Standard 9.32(e) Cooperative attitude toward proceedings;

Standard 9.32(g) Character or reputation;

Standard 9.32(j) Interim rehabilitation;

Standard 9.32(l) Remorse.

As the referee correctly pointed out, the fact of Respondent's forced or compelled restitution constitutes neither an aggravating nor a mitigating circumstance. See RR at 4; Standard 9.4(a).

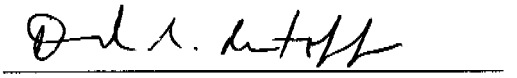
In sum, the presence of numerous aggravating factors in this

case, and the fact that such factors were not duly considered as such, militates for a sanction more severe than a public reprimand. The totality of circumstances present here calls for a 90-day suspension, with probation of one year for Respondent.

CONCLUSION

For all the foregoing reasons, the discipline recommended by the referee in this case should be disapproved, and Respondent should receive a ninety (90) day suspension and probation for one (1) year, the terms of which would require Respondent to schedule and complete an evaluation with Law Office Management Service (LOMAS) within ninety (90) days of this Court's Order. Further, within ninety (90) days after completion of the LOMAS review, Respondent shall implement any changes as set forth within the LOMAS evaluation.

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 Airborne Express to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy by regular U.S. Mail to Scott K. Tozian, Esq., Counsel for Respondent, at 109 North Brush Street, Suite 150, Tampa, Florida 33602; 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 17th day of June, 1996.

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