097

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court
Case No. 86,271

v.

ROBERT PAUL JORDAN, II

Respondent.
_____/

On Petition for Review of
the Referee's Report in a
Disciplinary Proceeding.

INITIAL BRIEF OF RESPONDENT

PATRICIA S. ETKIN
Counsel for Respondent
The Florida Bar No. 290742
WEISS & ETKIN
8181 West Broward Boulevard,
Suite 262
Plantation, Florida 33324
(954) 424-9272

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STANDARDS FOR IMPOSING LAWYER SANCTIONS

RULES REGULATING THE FLORIDA BAR

RULES OF PROFESSIONAL CONDUCT

RULES OF DISCIPLINE

INTRODUCTION

In this brief, Robert Paul Jordan is referred to as either "Respondent" or "Jordan"; The Florida Bar will be referred to as either the "Complainant" or "the Bar"; Lawrence Flowers, Sr., will be referred to as "Flowers"; Jacob Flowers will be referred to as "Mr. Flowers"; Isabelle Flowers will be referred to as "Mrs. Flowers"; Jere F. Spearman will be referred to as "Spearman" and the Report of Referee pertaining to Supreme Court Case No. 85,109 will be referred to as "non-final report".

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings before the Referee.

"RR" refers to the Report of Referee.

"FS" refers to the Factual Stipulation introduced into evidence in the proceedings before the Referee.

"EX" refers to Complainant's Exhibits introduced into evidence in the proceedings before the Referee.

"R.EX" refers to Respondent's Exhibits introduced into evidence in the proceedings before the Referee.

STATEMENT OF THE CASE

This disciplinary proceeding commenced in August 1995 with the filing of a Complaint against Respondent alleging a violation of Rules 4-1.1 (competence), 4-1.3 (diligence), 4-1.4 (communication), 4-3.2 (expediting litigation) and 4-8.4(g) (failing to respond, in writing, to inquiry by disciplinary agency) of the Rules Regulating The Florida Bar.

A Referee was appointed by order dated August 28, 1995.

The final hearing before the Referee was held on December 5, 1995. The Florida Bar filed a Joint Stipulation of Facts executed by both Bar Counsel and Respondent (EX 1) at the commencement of the final hearing. In addition, testimony and evidence pertaining to the allegations set forth in the Bar's complaint were presented to the Referee.

At the conclusion of the Bar's case in chief and prior to the entry of findings of guilt as to the violations charged, the Referee was presented with evidence and argument relating to discipline (TR 110-137) which specifically included a "non-final" report of referee in an unrelated disciplinary proceeding which is currently on appeal (EX 42). This non-final report was admitted into evidence over Respondent's objections (TR 115).

At final hearing, Bar Counsel recommended a ninety-one (91) day suspension with proof of rehabilitation and payment of costs (TR 124). Respondent agreed that a suspension was "probably" appropriate and suggested a ten (10) day suspension (TR134).

The Referee filed a Report of Referee dated January 24, 1996 rejecting the disciplinary sanctions recommended by both Bar Counsel and Respondent at final hearing and, instead, recommended that Respondent be suspended from the practice of law for

one (1) year, that he be required to pay costs, that he be required to show rehabilitation before being "readmitted" and "if and when he is remitted [sic] that he be required to practice under another attorney's supervision" (RR5).

The Report of Referee was considered and approved by the Board of Governors of The Florida Bar at its meeting held March 1996.

Respondent has petitioned for review of the Referee's findings of fact and recommendations as to discipline.

STATEMENT OF THE FACTS

Flowers, a criminal defendant who was incarcerated, filed a motion on his own behalf for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 (FS 2, RR 2). An evidentiary hearing on the motion was scheduled for July 3, 1991 (EX 24).

Flowers' parents, Mr. and Mrs. Flowers, retained Respondent on or about June 25, 1991 to represent Flowers at the evidentiary hearing. Respondent received $1,500 to undertake the representation. (FS 2, RR 2).

On June 28, 1991, Respondent served a Motion to Continue the post-conviction hearing scheduled for July 3, 1991 (EX 25) together with an Amended Motion for Post-Conviction Relief (EX 26).

Respondent met with Flowers at the Indian County Jail on or about July 1, 1991 at which time he received from Flowers the appellate brief and answer brief pertaining to the appeal of Flower's criminal conviction (EX 8, TR 88).

On two occasions thereafter the evidentiary hearing was postponed: in one instance, Flower's former counsel failed to appear as a witness at the hearing; in the other Flowers was not transported to appear at the hearing (TR 79).

A post-conviction evidentiary hearing was eventually held on October 23, 1991. Respondent appeared at the hearing on behalf of Flowers (R.EX 1, TR 79). The motion for post-conviction relief was denied (R.EX 1 at 31, 32). The court issued an order dated October 29, 1991, denying the motion for post-conviction relief (EX 27). Respondent did not receive a copy of this order (TR 79); the cover page of the transcript of the evidentiary hearing inaccurately reflects Respondent's appearance on behalf of Flowers as a Public Defender (R.EX 1, EX 12 at 10).

On November 19, 1991, Respondent forwarded a Notice of Appeal of the denial of the motion for post conviction relief (EX 28, 29, R.EX 4). Respondent undertook the filing of the notice without having received the order for the sole purpose of preserving Flowers' right to appeal (TR 92, 93).

On August 27, 1992, the Fourth District Court of Appeal issued an order to show cause why the appeal should not be dismissed (EX 30). Respondent filed a Response to the rule to show cause which reflected that a Notice of Appeal was filed on behalf of Flowers "in an abundance of caution", that no order denying the motion was issued and requested that the lower court enter an order setting forth the reasons for denial of the motion so that Flowers can prosecute the appeal (EX 31). The appellate court issued an order abating the proceedings and relinquishing jurisdiction for 30 days with a directive that the lower court issue final written order (EX 32).

In anticipation of receiving an order from the lower court, October 2, 1992, Respondent forwarded a letter to Mr. and Mrs. Flowers which indicated that a new contract for an appeal would be necessary (EX 17). Respondent undertook action to pursue the appeal without requiring a new contract (TR 32, 33).

On or about November 9, 1992, a Motion to Dismiss Appeal for Lack of Prosecution was filed on behalf of the State (EX 34). Respondent filed a Response to the State's Motion to Dismiss (EX 35). The motion to dismiss was denied pursuant to court order dated December 15, 1992. Appellant was afforded thirty (30) days to file a brief. (EX 36).

By letter to the Flowers dated November 18, 1992, Respondent's secretary requested $112.50 as cost for the transcript of the evidentiary hearing which was

necessary for the appeal (EX 18). Mrs. Flowers delivered the funds to Respondent (TR 33) and thereafter a transcript was prepared (R.EX 1). Although Respondent prepared a brief for filing with the court, he apparently neglected to file it and the unsigned copy remained in his file (EX 12 at 44, TR 64, 68).

On April 29, 1993, the appellate court issued an order to show cause why the appeal should not be dismissed (EX 37). Respondent did not respond and the appeal was dismissed (EX 38). Respondent testified that he was unaware of orders of the appellate court until after the appeal was dismissed (TR 80, 97, 99). The orders which Respondent does not recall receiving include the December 15, 1992 and April 29, 1993 order (TR 97,98).

At the time that Respondent learned of the dismissal of the appeal, Flowers was represented by new counsel (TR 80, 99, 100) and therefore Respondent did not advise him that the appeal had been dismissed (TR 103). Flowers learned that his appeal had been dismissed in August 1993, after contacting the appellate court (FS 14, RR3). The appellate efforts which were subsequently undertaken by other counsel on behalf of Flowers were unsuccessful (R.EX 2, TR 80).

During the course of the representation, Respondent communicated with Flowers through his family members, principally his parents, Mr. and Mrs. Flowers (R.EX 3 at 3) and sometimes through his sister (EX 18, TR 49). Respondent testified that the majority of his communication with Mr. and Mrs. Flowers was by telephone and that there were numerous calls (TR 72).

Notwithstanding the Bar's allegation of a lack of communication, Mrs. Flowers acknowledged in her testimony that she discussed amending the petition [motion for post-

conviction relief] with Respondent at his office (TR 42). She further confirmed that she attended the hearing on the motion (TR 42), appeared for a hearing when her son had not been transported (TR 42-43), was advised by Respondent that he had filed a Notice of Appeal on behalf of her son (TR 45) and explained the problem (TR 46).

Spearman, Flower's sister, testified that she was present when Respondent discussed amending the petition [motion for post-conviction relief] (TR 54),that she attended the hearing on the motion (TR 55), that she was in Respondent's office three to four times with her parents, but was not there every time they went (TR 59).

Respondent was requested by Mr. Flowers to visit Flowers in jail (TR 24, 26). Mr. Flowers acknowledged that Respondent visited Flowers in jail on one occasion (TR 24).

Respondent was requested to return to Flowers the appellate briefs which Flowers gave to Respondent during his visit with him at the jail (TR 88, 25,38,41). Respondent advised Mrs. Flowers that he or his secretary would send the documents. (TR 60). Respondent testified that the items in question were returned to Flowers where he was incarcerated but were not sent by certified mail (TR 63). Respondent does not dispute that the items were not resent to Mr. and Mrs. Flowers but explains that he had directed his secretary to send them (TR. 85, 89-91). Respondent directed his secretary to make copies to keep and send the originals; the copies which were retained are in Respondent's file (TR 89).

Respondent did not respond to the initial inquiries from The Florida Bar, specifically letters sent in August and September 1994 (RR 4). Respondent did, however, respond to the inquiry of the grievance committee. The Bar acknowledged subsequent

cooperation by Respondent (TR 124). Notwithstanding Respondent's response to and cooperation with the Grievance Committee, Respondent admitted that his actions in not responding to the Bar's initial inquiry constitutes a violation of Rule 4-8.4(g), Rules Regulating The Florida Bar (TR 75).

SUMMARY OF ARGUMENT

Significant procedural improprieties occurred during the course of the final hearing which resulted in the Referee's consideration of prejudicial, inadmissible and improper evidence as a basis for findings and recommendations.

These improprieties include a failure to bifurcate the final hearing as originally suggested by the Bar and a procedure which specifically permitted consideration of evidence and argument as to discipline **prior** to findings of guilt. As a result, the Referee issued findings relating to aggravating factors and recommendations as to discipline which were clearly disproportionate to the misconduct charged.

In addition, the Referee considered a referee's report, currently on appeal, in an unrelated disciplinary proceeding and improperly included the proposed disciplinary sanction set forth therein as prior discipline and an aggravating factor. This non-final report should not have been presented to or considered by the Referee for any purpose.

Finally, the disciplinary sanction recommended by the Referee is clearly excessive, notwithstanding any aggravating factor which may properly be considered.

The errors which occurred rendered the disciplinary proceedings fundamentally unfair and warrant dismissal. Alternatively, the Referee' recommendation for a one-year suspension followed by probation for an indefinite period of time should be rejected. In lieu thereof this Court should approve as a disciplinary sanction a suspension for a period of ten (10) days followed by two-years probation which would require consultation with and quarterly review by LOMAS and the filing of quarterly status reports on pending cases.

ARGUMENT

I. DISMISSAL OF THIS DISCIPLINARY PROCEEDING IS WARRANTED BASED UPON EVIDENCE AND ARGUMENT AS TO DISCIPLINE WHICH WAS IMPROPERLY PRESENTED TO AND CONSIDERED BY THE REFEREE PRIOR TO A FINDING OF GUILT

At the commencement of the final hearing, Bar Counsel stated to the Referee that disciplinary proceedings are bifurcated and that **if** there is a finding of guilt by the Referee, **then** the Bar proceeds to address discipline (TR 10).

Bar Counsel made several efforts to reiterate this position to the Referee after closing argument and prior to commencing the dispositional phase of the final hearing:

> With respect to the bifurcation that just means that you have to make a recommendation or finding that Mr. Jordan is guilty on one or more of the rules charged. Once you make that finding then we can proceed into the disciplinary portion of the case (TR 111).
>
> * * * *
>
> I mean, you will be making a finding as to whether or not you recommend he be found guilty of the charges **before** we reach the disciplinary portion. (TR 111). [Emphasis added]
>
> * * * *
>
> According to the rules, the disciplinary portion, as to whether or not there are mitigating factors, aggravating circumstances, whether or not what standards apply is done **after** you make a determination as to whether or not there's a finding of guilty regarding the rules (TR 112). [Emphasis added]
>
> * * * *
>
> The only issue -- perhaps I am not articulating it correctly -- is that there has to be some kind of finding by you that he has violated one or more of the rules, **then** we can present the aspects with respect -- (TR 113). [Emphasis added]

The Referee's response to Bar Counsel on the issue of bifurcation is indicative of his strong desire to proceed with argument and evidence as to discipline prior to issuing findings in order to avoid another hearing.

> [Referee]: Well, I am simply trying to save myself from having another hearing. If I make a finding -- I mean he's admitted violation of one of the rules. . . .
>
> [Bar Counsel]: You can move forward into discipline phase with respect to that rule. It's only if you make recommendations as to the other rules then obviously will be considered and whatever discipline sanctions you recommend to be imposed.
>
> [Referee]: Yes, ma'am I don't want to have another hearing.
>
> [Bar Counsel]: I appreciate that.
>
> [Referee]: . . . So I would like you to proceed.
>
> [Bar Counsel]: Okay.
>
> [Referee]: Unless you can point me to something in the rule that says I can't do that.
>
> [Bar Counsel]: There has been at least a finding on admission by the respondent with respect to that one rule, so I can I think we are fine. (TR 113-114).

Bifurcation did not occur; a dispositional hearing followed. During the dispositional hearing the Bar introduced into evidence the affidavit of The Florida Bar, Assistant Director of Lawyer Regulation, with attachments, detailing prior discipline (EX 41). This affidavit was supplemented by a referee's report in an unrelated disciplinary proceeding, currently on appeal, wherein the referee recommended a one-month suspension ("non-final report") (EX 42; TR 114, 115,118-119, 121-122).

After introducing evidence as to both prior and proposed discipline, the Bar proceeded with argument as to discipline and supported its position by references to case

law (TR 116-117, 123-128) as well as to the Standards for Imposing Lawyer Sanctions. The Bar argued that the evidence and case law justified a ninety-one (91) suspension with proof of rehabilitation as a disciplinary sanction (124, 128).

The failure to bifurcate the final hearing was improper and contrary to Rule 3-7.6(k)(1)(D), Rules Regulating The Florida Bar. This rule states, that a referee's report shall include:

> a statement of any past disciplinary measures as to the respondent that are on record with the executive director of The Florida Bar or that otherwise become known to the referee through evidence properly admitted by the referee during the course of the proceedings (**after a finding of guilt**, all evidence of prior disciplinary measures may be offered by bar counsel subject to appropriate objection or explanation by respondent) . . . [Emphasis added]

The practice of bifurcation in disciplinary proceedings is in accordance with the established principle that sentencing follows adjudication and damage follows liability. In the instant case, however, instead of insisting upon bifurcation, as originally espoused by Bar Counsel and in accordance with Rule 3-7.6(k)(1(D), the Bar attempted to accommodate the Referee's desire to dispense with bifurcation by creating an exception to the principle, to wit: if any one of the violations is admitted, bifurcation is not required. The Bar relied upon Respondent's admission as to one of the violations charged, to wit, not responding to the Bar's initial inquiries (TR 75, 109), as justification to proceed with the presentation of evidence and argument as to discipline **prior** to findings of guilt.

Without bifurcation, potentially prejudicial evidence may be introduced which would have a tendency to suggest that a respondent has bad character or propensity to engage in unethical conduct. This prejudicial evidence may improperly influence a referee to issue findings based upon prior bad acts rather than upon careful consideration of the

evidence which is relevant to the case at issue and to weigh such evidence based upon the clear and convincing standard of proof.

The clearly prejudicial effect of permitting evidence and argument as to discipline to precede a finding of guilt is demonstrated in the instant case by the Referee's comments which occurred during the dispositional portion of the hearing, after evidence of prior and proposed discipline was presented by the Bar:

> [Referee]: Let me ask you. On this question of whether Mr. Jordan received these orders from the District Court, is it the Bar's position that he didn't get them, or that he got them and he hasn't [sic] honest and forthright about whether he got them or not?
>
> [Bar Counsel]: It's somewhat suspicious, frankly, Your Honor, that he did not change his record Bar address, and seemed to receive all other correspondence and documents in question except two very important ones that needed his immediate follow-up. **The Bar would submit perhaps due to sloppy record keeping or inappropriate way of date stamping documents when they came in, they may have been misplaced, therefore not acted upon appropriately, and misplaced**. . . . (TR 125) [Emphasis added]

Notwithstanding Bar Counsel's suggestion that inadequate office practices may explain why Respondent was unaware of receipt of correspondence and documents, the Referee made a specific factual finding reflecting a lack of candor (RR 3, No. 15), an offense not charged in the Bar's complaint. The Referee's reference to the non-final report in the lack of candor finding (RR 3, No. 15) leads to a conclusion that this finding was based upon the evidence pertaining to discipline which was improperly admitted prior to findings of guilt. This finding was thereafter considered by the Referee as an aggravating factor (false statement) in support of the Referee's recommendation for a one (1) year suspension (RR 5). Significantly, during argument with regard to aggravating factors, Bar

Counsel, herself, specifically rejected submission of false evidence as an applicable factor (TR 123).

In addition to prejudice, the failure to bifurcate adversely affects the disciplinary system by not providing a respondent with a reasonable opportunity to obtain evidence and prepare argument as to discipline or mitigation. In order to ensure that evidence and argument pertaining to discipline is relevant to the particular findings of the referee, the findings must first be established. Offering a respondent an opportunity to present evidence and argument on discipline **prior** to findings of guilt forces a respondent (and the Bar) to present irrelevant material in an effort to ensure that evidence and argument pertaining to all possible findings are presented, thereby causing delay.

Further, the failure to bifurcate does not afford a respondent a meaningful opportunity to present evidence and argument on mitigation and discipline and is therefore fundamentally unfair. See The Florida Bar v. James W. Peeples, Supreme Court Case No. 83,046, order dated September 15, 1994 wherein disciplinary proceedings were remanded to the referee for further proceedings which included allowing a respondent an opportunity to argue mitigation or discipline (APP A).

The standard of fundamental fairness simply cannot be met when procedures such as bifurcation which are designed to ensure the integrity of the disciplinary process are ignored in order to avoid the inconvenience of another hearing.

This Court has approved the dismissal of disciplinary proceedings as a result of violations of procedures set forth in the Rules Regulating The Florida Bar. The Florida Bar v. Catalano, 651 So.2d 91 (Fla. 1995). This disciplinary proceeding was unfair to

Respondent as well as violative of the principle of bifurcation and the mandate of Rule 3-7.6(k)(D), Rules Regulating The Florida Bar. The proceeding should be dismissed.

II. PROPOSED DISCIPLINE SET FORTH IN A REFEREE'S REPORT WHICH HAS NOT BEEN APPROVED BY THE COURT DOES NOT CONSTITUTE PRIOR DISCIPLINE AND ANY DISCIPLINARY RECOMMENDATION WHICH IS BASED UPON CONSIDERATION OF PROPOSED DISCIPLINE SHOULD BE REJECTED.

During the presentation of evidence and argument on discipline in the instant case, the Bar introduced a referee's report in an unrelated disciplinary proceeding ("non-final" report) [EX 42]. The Respondent objected asserting that the report was not final in that it was on appeal (TR 115). The Bar responded to Respondent's objection by acknowledging that the non-final report was not final but argued that it was relevant to the proceedings (TR 115). The non-final report was admitted into evidence (TR 115).

The Referee subsequently questioned the propriety of considering this non-final report (TR 121). The Bar reassured the Referee that case law supported consideration of the non-final report as "cumulative misconduct". The Bar cited The Florida Bar v. Golden, 566 So.2d 1286 (Fla. 1990) in support of its position (TR 121).

The Referee sought further clarification:

> [Referee]: My question was – I guess I wasn't clear. Can the Court consider the Referee's Report that is not final as **prior misconduct**?
>
> [Bar Counsel]: The Bar would submit that you can, to the extent that it is a recommendation by a Referee that he be found guilty of those charges even though it's not a final order of the Court based upon the Florida Bar v. Golden (TR 121-122). [Emphasis added]

The Bar's position is erroneous and reliance upon Golden is misplaced. Although Golden involves an issue of cumulative misconduct, it did not involve an issue of consideration by a referee of a non-final report in an unrelated disciplinary proceeding.

Golden's prior misconduct was established by a Supreme Court order, not a non-final referee's report. See The Florida Bar v. Golden, 544 So.2d 1003 (Fla. 1989).

Based upon the assurances given by the Bar, the Referee considered the non-final report and specifically referenced in his report the proposed suspension set forth in the non-final order as **prior** discipline and as an aggravating factor (RR 5).

The argument that proposed discipline does not constitute prior discipline is evidenced by the affidavit of the Bar's Assistant Director of Lawyer Regulation (EX 41). This affidavit constitutes a statement of past disciplinary measures which are on record with The Florida Bar; to wit an admonishment in 1992; and a public reprimand in 1993 (EX 41). Significantly, there is no reference in the affidavit to the suspension proposed in the non-final report as constituting part of Respondent's disciplinary record. It is apparent, therefore, that discipline recommended by a referee's report does not become part of a respondent's disciplinary record until a final order of discipline is issued by the Supreme Court. Accordingly, proposed discipline set forth in a referee's report which is pending on appeal should not be admissible in disciplinary proceedings as evidence of prior misconduct.

As further support for inadmissibility of non-final reports consider, for example, the effect on a disciplinary proceeding if an appeal of a non-final report results in rejection of the referee's findings or recommendations. There is no opportunity to reverse the impact that consideration of these findings or recommendations had upon a subsequent referee. Arguably the recommendations of the subsequent referee would now be invalid, with no opportunity for redress.

This same principle would apply to consideration of a non-final referee report in an unrelated matter which is introduced into evidence to establish cumulative misconduct. In either case, non-final reports should not be admissible to establish either prior misconduct or cumulative misconduct.

In the instant case, the non-final report is currently on appeal, therefore, the referee's findings and recommendations set forth therein are not final. Consideration by the Referee of the non-final report was improper and any findings or recommendations based upon this improper evidence should be rejected.

III. THE REFEREE'S RECOMMENDATION OF A ONE (1) YEAR SUSPENSION, PROOF OF REHABILITATION AND REQUIREMENT THAT RESPONDENT PRACTICE UNDER ANOTHER ATTORNEY'S SUPERVISION, IF AND WHEN HE IS REINSTATED, IS CLEARLY EXCESSIVE

The instant disciplinary proceeding is based upon allegations of neglect, incompetence and lack of communication with respect to the representation of a client in a criminal matter. In addition, it is alleged and Respondent does not dispute that he did not respond to the Bar's initial inquiry (TR 75, 109). Respondent did, however, respond to the inquiry of the grievance committee member (TR 75,77, 82,109) two to three months later (EX 12 at 46).

With regard to discipline, the Bar recommended only a ninety-one (91) day suspension with proof of rehabilitation (TR 124). The Referee, however, rejected the Bar's recommendations as to discipline and recommended a significantly harsher sanction, a one-year suspension followed by a perpetual probation which requires that Respondent practice under another attorney's supervision (RR 5).

In his report the Referee cites seven (7) cases which he considered in recommending discipline. Of these cases, only three (3) involve allegations of misconduct which are similar to the allegations in the instant case, to wit: The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982) and the two cases involving Rolle, The Florida Bar v. Rolle, 661 So.2d 296 (Fla. 1995) and 661 So.2d 301(Fla. 1995). These three cases indicate that the range of appropriate discipline for neglect and inadequate communication is between a public reprimand and a six-month suspension.

Neely involved the failure to file a brief on behalf of a client in a criminal matter, the dismissal of the appeal and subsequent actions of respondent which ultimately led to a judgment of contempt and a $250 fine. Neely received a public reprimand for neglect of a legal matter and was placed on one-year probation.

The Rolle cases involved several instances of neglect of client matters and inadequate client communication. Notwithstanding the fact that the respondent in Rolle had a prior disciplinary history and that he virtually ignored the disciplinary proceedings (including failing to appear at several hearings before the referee), the most severe sanction which the Court imposed was a six month suspension in one case [661 So.2d 296 (Fla. 1995)] to run concurrently with a ninety-one day suspension in the other [661So.2d 301(Fla. 1995)].

Based upon the cases cited, there is simply no justification for the referee's recommendation for a one-year suspension.

Further, review of several other cases support the imposition of a public reprimand alone or in conjunction with probation as appropriate discipline. In The Florida Bar v Whitaker, 596 So.2d 672 (Fla. 1992) this Court approved a public reprimand for neglect

of client matters and inadequate communication. In addition, the respondent in Whitaker was placed on probation for 24 months during which time he was required to periodically review his caseload with a designated grievance committee member, to submit a plan of procedure and policy to facilitate adequate communication with clients and to implement a "tickler" system.

In The Florida Bar v. Knowlton, 527 So.2d 1378 (Fla. 1988), the respondent received a public reprimand for neglect of a legal matter which involved allowing a statute of limitations to run on a client's claim. In addition, the respondent in Knowlton failed to respond to client inquiries concerning the progress of the case.

In The Florida Bar v. Riskin, 549 So.2d 178 (Fla. 1989) the respondent received a public reprimand for neglect of a legal matter and incompetence. Like Knowlton, the neglect in Riskin involved allowing the statute of limitations to expire. In addition, Riskin failed to oppose a motion for summary judgment based upon the expiration of the statute of limitations. Riskin had prior discipline, to wit: a private reprimand for neglect.

Analysis of these cases supports a finding that the Referee's recommended discipline is clearly excessive when considering those aggravating factors which are based upon properly admissible evidence.

In the case *sub judice*, however, the referee cited several aggravating factors as set forth in Florida Standards for Imposing Lawyer Sanctions for which there is no proper evidentiary basis (RR 5), to wit:

(a) The Referee's inclusion of a "proposed suspension" as a prior disciplinary offense. Section 9.22 refers only to sanctions which have been "imposed" **not**

proposed. The standard does not recognize proposed discipline as a prior disciplinary offense.

(d) Standard 9.22 (d) bad faith in that the Respondent intentionally failed to respond to the disciplinary agency. The fact that Respondent did not respond to the initial inquiry by the Bar staff and responded two to three months later is no more indicative of bad faith than the fact that the Florida Bar did not file a formal complaint with The Supreme Court until two to three months after a finding of probable cause (EX 13). Although an earlier response on the part of Respondent might have been desirable, there is no evidence that an insignificant delay in responding warrants a finding of bad faith obstruction of the disciplinary process.

(e) submission of false statements during the hearing on the issues of receipt of various court orders. There is no clear and convincing evidence upon which to base a finding that Respondent's statements to the Referee were false. Respondent was not charged with making any false statement. In fact Bar Counsel suggested that inadequate office procedures resulting in the misplacement of documents as a reasonable explanation for a lack of awareness of an order (TR 125).

(f) substantial experience in the practice of law in that Respondent has been a member of the Bar since 1980. Length of membership is not necessarily indicative of experience. In the instant case, although Respondent may have been a member of The Florida Bar since 1980, his testimony establishes that he

has handled only a couple of appeals and only three or four criminal appeals (TR 100).

In the case *sub judice* Respondent was retained to represent a client at an evidentiary hearing on a motion for post-conviction relief (FS 2). He met with the client (TR 88), the client's family (TR 42, 46, 59), filed an amended motion (EX 26) and appeared at the evidentiary hearing (R.EX 1, TR 79). In an effort to preserve the client's right to an appeal, Respondent timely filed a notice of appeal prior to receiving the court order denying the motion (TR 92, 93). He successfully responded to an order to show cause (EX 32) as well as a motion to dismiss (EX 36). Respondent's actions through December 1992 are not indicative of neglect.

Thereafter, Respondent prepared a brief which he neglected to file (TR 64, 68) and did not respond to an order to show cause (EX 12 at 25). Regardless of whether Respondent received and misplaced the orders, he did not follow through on the filing of the brief or, at a minimum contact the court for status information. In addition, Respondent was aware that his client requested the return of certain papers and he did not ensure that these papers were mailed or received (TR 88-91).

Respondent's actions subsequent to December of 1992 are indicative of neglect, which may warrant some form of discipline. There is, however, no evidence of any bad motive In fact, the actions undertaken by Respondent to appeal the order denying the motion for post-conviction relief were beyond the scope of his representation agreement with the client (TR 62, 89). Such action was taken only to protect the client by preserving his right to appeal (TR 92,93). Nevertheless, regardless of Respondent's motive, once action was undertaken, he had the responsibility to follow through.

With respect to responding to the Bar inquiry, Respondent admitted that he did not respond to the initial inquiry (TR 109). He did, however, respond two to three months later, he did cooperate (TR 109), and he did appear before the grievance committee (EX 12). Respondent would maintain that his actions considered in its full context do not warrant the imposition of any disciplinary sanction and do not justify any finding of bad faith. Assuming, arguendo, that some form of discipline is appropriate, the sanction should be minimal.

This Court has utilized a broad scope of review in reviewing a referee's recommendations for discipline in order to ensure that punishment is appropriate. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989). The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) sets forth the purposes of discipline and establishes the standards used to evaluate a disciplinary sanction:

> 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 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. Id. at 132.

Applying the purposes of discipline set forth in Pahules to the instant case, it is apparent that the discipline recommended by the Referee is clearly excessive, even considering Respondent's prior discipline as an aggravating factor. Although pursuant to Standards 4-4.2(b) and 8.2, Florida Standards for Imposing Lawyer Sanctions a suspension may be warranted, Respondent would urge the Court to reject the discipline recommended by the Referee and in lieu thereof to impose a suspension for ten (10) days

followed by probation for a period of two (2) years. The terms of probation would consist of consultation with Law Office Management Advisory Service (LOMAS), quarterly review and certification by LOMAS that adequate procedures are being maintained and the filing with Staff Counsel of The Florida Bar of quarterly status reports on all pending cases.

Unlike the discipline recommended by the Referee, the discipline suggested by Respondent meets all of the criteria established by Pahules: it punishes, it reforms and it deters.

CONCLUSION

The Referee's recommendation of discipline is unduly harsh and should be rejected. Respondent requests that the Supreme Court approve a ten (10) day suspension, followed by two years probation requiring consultation with and quarterly review by LOMAS, and the filing of quarterly status reports on all pending cases. Alternatively, Respondent requests the entry of an order dismissing this proceeding based upon procedural improprieties with respect to the failure to bifurcate the final hearing and the rendition of findings and recommendations by the referee which are based upon prejudicial, inadmissible evidence.

Respectfully submitted,

PATRICIA S. ETKIN
Counsel for Respondent
The Florida Bar No. 290742
8181 West Broward Blvd.
Suite 262
Plantation, Florida 33324
(954) 424-9272

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of Respondent was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927 and that a true and correct copy was mailed to John T. Berry, Staff Counsel, The Florida Bar 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to Rose Ann DiGangi, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801 this 31 day of May, 1996.

PATRICIA S. ETKIN
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court
Case No. 86,271

v.

ROBERT PAUL JORDAN, II

Respondent.
_____/

APPENDIX TO RESPONDENT'S INITIAL BRIEF

INDEX TO APPENDIX

Supreme Court of Florida

THURSDAY, SEPTEMBER 15, 1994

THE FLORIDA BAR,

Complainant,

v.

JAMES W. PEEPLES, III,

Respondent.

CASE NO. 83,046

Respondent's Motion to Remand to Referee is granted and this matter is remanded for the limited purpose of taking evidence on Bar's claims for cost and allowing Respondent the opportunity to argue mitigation or discipline.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

KBB
cc: Hon. Charles E. Smith,
Referee
Mr. John A. Weiss ✓
Ms. Jan K. Wichrowski
Mr. John A. Boggs