IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT JEROME NESMITH,

Respondent.
_____/

Case No. 89,239
[TFB Case No. 96-30,681 (09D)]

THE FLORIDA BAR'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on February 20, 1997, shall be referred to as "T", followed by the cited page number(s).

The Report of Referee dated May 2, 1997, will be referred to as "RR", followed by the referenced page number(s).

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

STATEMENT OF THE CASE

On July 24, 1996, the Ninth Judicial Circuit Grievance Committee "D" found probable cause against the respondent. The bar filed its formal complaint against the respondent on November 1, 1996 which was assigned Supreme Court Case No. 89,239. The respondent filed an answer to the complaint on or about December 2, 1996. The Honorable Robert E. Pyle, Circuit Judge, was appointed as referee on November 12, 1996. The final hearing was conducted on February 20, 1997 and the referee issued his report on May 2, 1997. The referee recommended the respondent be found guilty of violating R. Regulating Fla. Bar 4-1.3 for failing to act with reasonable diligence and promptness in representing a client. As discipline, the referee recommended the respondent appear before the Board of Governors of The Florida Bar for a public reprimand, and that he pay the bar's costs in prosecuting this case totaling $1,221.96.

The Board of Governors of The Florida Bar considered this case at their May 1997 meeting. The board voted to seek review of the referee's discipline recommendation of a public reprimand and, instead, seek a 91 day suspension based upon the relevant case law and the respondent's prior disciplinary history involving similar misconduct. The bar served its Petition for Review on June 6, 1997.

STATEMENT OF THE FACTS

Unless otherwise noted, the following facts are derived from the Report of Referee.

The respondent was retained to represent Christopher Doyle on criminal charges in the Ninth Judicial Circuit, Orange County, Florida. Mr. Doyle was charged with attempted first degree murder and possession of a firearm by a convicted felon, and those charges were severed for trial. The trial of the attempted first degree murder charge resulted in a finding of guilt and Mr. Doyle was sentenced to 35 years in prison.

The respondent was paid an additional $4,500 to handle Mr. Doyle's appeal. $1,500 of that sum was used toward a fee owed to the respondent by a Mr. Miller, who delivered the money to the respondent. Approximately $1,000 was expended by the respondent for filing fees and other costs associated with the appeal.

The respondent filed a notice of appeal on August 3, 1995. The initial brief was due to be filed on November 30, 1995 [Bar Ex. 1]. Mr. Doyle filed a grievance against the respondent with The Florida Bar on October 16, 1995. As a result of the grievance, the respondent moved to withdraw on November 8, 1995 from further representation of Mr. Doyle in his cases still

pending before the trial court. The respondent's request was granted and new counsel was appointed in those cases.

On November 30, 1995, the respondent filed a Motion For Extension of Time to File Initial Brief. The respondent amended the motion to comply with Fla. R. App, P. 9.300(a) on December 6, 1995. The Fifth District Court of Appeal granted the respondent's request and extended the filing date of the initial brief to December 29, 1995, The respondent filed a Second Motion For Extension of Time to File Initial Brief on December 29, 1995. The Fifth District Court of Appeal granted the respondent's request and extended the filing date of the initial brief to January 30. 1996. However, the court indicated that no further enlargements of time would be granted for the purpose sought by the respondent [Bar Ex. 5].

On January 30, 1996, the respondent filed a motion to withdraw as counsel for Mr. Doyle in the appeal. At that time, Mr. Doyle had accused the respondent of being bought-off by the State, instructed the respondent to take no further action on the appeal, and advised he had retained new counsel. The Fifth District Court of Appeal denied the respondent's motion to withdraw on February 13, 1996. The respondent filed a motion requesting an extension of time to file the initial brief on February 26, 1996. The motion was denied by the court on February

27, 1996 as failing to comply with Fla. R. App. P. 9.300(a) [Bar Ex. 9].

On March 20, 1996, the Fifth District Court of Appeal issued an order to show cause within ten days why the appeal should not be dismissed for failure to file an initial brief. The respondent did not comply with that order and the appeal was dismissed on April 10, 1996. As a result of the respondent's failure to file an initial brief on behalf of Mr. Doyle and his failure to comply with the court's March 20, 1996 show cause order, the referee found that the respondent violated R. Regulating Fla. Bar 4-1.3.

SUMMARY OF THE ARGUMENT

In this case, the respondent has been found guilty of neglecting a client's appeal for which the referee has recommended the respondent receive a public reprimand. The respondent has two prior disciplinary infractions resulting in public reprimands for neglecting client matters. The referee's recommended discipline in this case is in conflict with other discipline cases wherein the Court imposed greater discipline due to the cumulative effect of similar past and present violations. Because this is the respondent's third neglect case, proof of rehabilitation is warranted. Based upon the respondent's prior discipline and the relevant case law, a 91 day suspension is the appropriate discipline in this case.

ARGUMENT

A 91 DAY SUSPENSION IS THE APPROPRIATE DISCIPLINE IN THIS CASE RATHER THAN THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND GIVEN THE CASE LAW AND THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY.

The referee has recommended the respondent be found guilty of neglect, under R. Regulating Fla. Bar 4-1.3, for failing to file a brief in his client's criminal appeal and failing to respond to the appellate court's order to show cause. For this violation, the referee has recommended the respondent receive a public reprimand to be administered by the Board of Governors of The Florida Bar. This Court has held that a referee's recommendation of discipline will not be second-guessed so long as that discipline has a reasonable basis in existing case law. The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997). In the instant matter the referee's recommended discipline is in conflict with other discipline cases involving neglect, where the appropriate level of discipline was found to be suspensions rather than reprimands. In light of the respondent's prior disciplinary history, a 91 day suspension is warranted in this case.

In The Florida Bar v. Weed, 513 So. 2d 126 (Fla. 1987), the attorney received a 60 day suspension for failing to timely

prosecute clients' appeals in three cases and took no action until the appellate court ordered him to appear personally and show cause why the appeals should not be dismissed. The appellate court permitted the three appeals to go forward after the attorney was required to file initial briefs under strict deadlines. However, the appellate court disciplined the attorney by ordering a public reprimand. In the bar disciplinary case, the court found that because the attorney had been previously admonished twice by the appellate court for similar conduct and had a prior private reprimanded for neglect, another public reprimand would not be sufficient.

In The Florida Bar v. Golden, 530 So. 2d 931 (Fla. 1988), the attorney received a 90 day suspension for neglecting a client's civil case. The attorney failed to timely file an amended complaint as requested by the court, despite an admonishment by the court to file the complaint in a timely fashion. The appellate court upheld the dismissal of claims against two of the defendants and specifically criticized the attorney for disregarding the lower court's order. In the disciplinary case, the court found that, "[a]ll lawyers have an obligation to pursue diligently matters they undertake . . . [a] separate obligation arises to comply with a court order. Failure to do so demonstrates a lack of zealousness or dedication to one's professional responsibilities." Id at 932. The attorney had a prior public reprimand and a suspension. Like Golden, the

respondent in the present matter not only neglected his obligation to his client, he also failed to recognize his obligation to the court when he did not comply with an order to show cause.

An attorney's neglect of a legal matter by failing over a period of nearly three years to obtain a corporate charter for his clients warranted a four (4) month suspension, The Florida Bar v. Collier, 435 So. 2d 802 (Fla. 1983). In The Florida Rar v. Fussell, 474 So. 2d 210 (Fla. 1985), the attorney was suspended for, in part, filing a motion for postconviction relief only after being dismissed by the client and failing to file a motion for reduction of sentence after assuring the client the motion would be filed. The attorney in Fussell had the prior discipline of a six (6) months suspension, a public reprimand, and two private reprimands. The referee had recommended a two (2) year suspension, but the court found that in light of the mitigating factors present, a one (1) year suspension was appropriate. A one (1) year suspension was also warranted in The Florida Bar v. Mims, 501 So. 2d 596 (Fla. 1987), where the attorney failed to comply with court orders, failed to appear at a scheduled pretrial conference, and admitted to neglecting a client's case. Prior to being reinstated, the attorney in Mims was required to satisfactorily pass the ethics portion of The Florida Bar examination.

Although other case law suggests a suspension is appropriate in neglect cases, it is even more warranted in the instant matter due to the respondent's prior discipline of two public reprimands for similar misconduct. The Florida Bar v. Nesmith, 659 So. 2d 1090 (Fla. 1995), concerned the respondent's representation of a client in a civil matter. The respondent was found guilty of failing to provide competent representation to a client by failing to provide appropriate documents for execution by the court [Rule 4-1.1]; neglect in allowing the client's case to be dismissed through the respondent's failure to supply a proposed judgment [Rule 4-1.3]; inadequate communication with the client [Rule 4-1.4]; conduct prejudicial to the administration of justice by the respondent's failure to supply a proposed judgment to the court and thereby suffering the dismissal of the client's case after the court had ruled in favor of the client [Rule 4-8.4(d)]; and failing to respondent in writing to the bar's investigative inquiries [Rule 4-8.4(g)].

In The Florida Bar v. Nesmith, Case No. 88,153 (May 1, 1997), the respondent was found guilty of neglect and incompetence in one count and failing to properly supervise a non-lawyer employee in the second count. The respondent's neglect in the first count involved his sister's bankruptcy filing. The respondent prepared and signed the bankruptcy petition and sent it to his sister and she filed it several months later. The respondent took no action to inform the bankruptcy court that he

did not represent his sister after she filed the petition. The court provided notices to the respondent, as counsel of record, that the bankruptcy would be dismissed for failure to file required documentation. The respondent took no action and the bankruptcy was dismissed, a foreclosure action proceeded and the respondent's sister was evicted from her home. As to the second count, in the disciplinary proceedings the respondent had his secretary prepare a motion for continuance of a pretrial conference. The respondent signed the motion and faxed it to the referee, but did not serve the motion upon the bar or bar counsel as required. In addition to the public reprimand, the respondent was required to attend ethics school and was placed on probation for a period of two (2) years. During the probation period, the respondent is to be monitored by a supervising attorney with monthly reports to The Florida Bar; within thirty (30) days of the Court's order he must undergo an evaluation by Florida Lawyers Assistance, Inc. (FLA) for substance abuse and, if necessary, actively participate in the program offered by FLA; and also within thirty (30) days of the Court's order the respondent is required to undergo a psychological evaluation by a psychiatrist or psychologist approved by FLA and participate in any recommended therapy.

This Court has long held that it deals more harshly with cumulative misconduct that it does with isolated misconduct and that cumulative misconduct of a similar nature should warrant an

even more severe discipline than might dissimilar conduct. The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1982). The respondent has two prior reprimands involving neglect and the referee's recommendation of a public reprimand in the present matter does not comport with the Court's long standing policy of increasing the level of discipline based upon a respondent's prior disciplinary history. For example, in The Florida Bar v. Grant, 514 so. 2d 1075 (Fla. 1987), a case substantially similar to the instant matter, the attorney was suspended for four (4) months, requiring proof of rehabilitation, for neglecting a legal matter in light of two prior public reprimands for the same disciplinary violation. A six (6) month suspension was appropriate in The Florida Bar v. Rolle, 661 So. 2d 296 (Fla. 1995) for neglect a client's federal criminal case. The court found that the suspension was justified in that a prior private reprimand for similar misconduct had failed to deter the attorney and he was receiving a 91 day suspension in another case pending before court for neglect.

The Florida Standards for Imposing Lawyer Sanctions support a suspension in this case. Standard 4.42 calls for a suspension when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) engages in a pattern of neglect and causes injury or potential injury to a client. Certainly, the respondent was aware he was negligent in failing to file his client's brief. At the very

 the appellate court's order to show cause should have made the respondent aware he was not handling his client's appeal in an appropriate manner. The respondent's prior disciplinary history, also an aggravating factor under Standard 9.22(a), requires a suspension under Standard 8.2 where a lawyer has been publicly reprimanded for the same or similar conduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

The bar submits that a 91 day suspension, requiring proof of rehabilitation prior to reinstatement is supported by existing case law. The respondent has received two prior public reprimands for neglecting client matters and the present case is his "third strike at the ball and proof of rehabilitation is due." The Florida Bar v. Laing, 22 Fla. L. Weekly s220 (April 24, 1997). In attorney discipline cases, the main concerns of the bar are protection of the public, to serve as a deterrent to other members of the profession from engaging in similar misconduct, to impose the appropriate discipline upon the errant lawyer, and to encourage reformation and rehabilitation. The Florida Bar v. Sommers, 508 so. 2d 341 (Fla. 1987). In the present case, the bar is most concerned with exacting the appropriate discipline upon the respondent that will encourage his reformation. It is apparent that the respondent's two prior reprimands have failed

to make him sufficiently aware of the necessity of diligence in all aspects of his practice. It is doubtful another public reprimand will reinforce this obligation. However, a suspension, and having to prove rehabilitation, should provide the respondent with the opportunity for the reformation that he clearly needs.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation of a public reprimand administered by the Board of Governors of The Florida Bar and instead impose a 91 day suspension and payment of the bar's costs totaling $1,221.96.

Respectfully submitted,

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By: 

ERIC M. TURNER
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent, Robert Jerome Nesmith, 105 East Robinson Street, Suite 500, Orlando, Florida, 32801; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 27th day of June, 1997.

Respectfully submitted,

Eric M. Turner

ERIC M. TURNER
Bar Counsel

Appendix

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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

Case No. 89,239
[TFB Case No. 9630,681 (09D)]

ROBERT JEROME NESMITH,

Respondent.

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held on February 20, 1997. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar	Eric M. Turner
For the Respondent	Robert Jerome Nesmith, pro se

II. Findings of Each Item of Misconduct af Which the Respondent is Charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

1. The respondent was retained to represent Christopher Doyle on criminal charges in case number CR94-10136, Ninth Judicial Circuit, Orange County, Florida. Although charged with murder and possession of a firearm by a convicted felon, the charges were severed for trial.

2. The trial of the murder charge resulted in a finding of guilt and a sentence of 35 years.

3. Doyle paid the respondent an additional $4,500.00 to handle the appeal. It was uncontroverted that $1,500.00 of that sum was allocated for a fee owing to the respondent by Mr. Miller, who delivered the monies to the respondent.

Approximately $1,000.00 was expended by the respondent for filing fees, transcripts and other costs which attend taking an appeal.

4. The respondent filed a notice of appeal on August 3, 1995

5. Doyle filed a grievance against the respondent with The Florida Bar on October 16, 1995.

6. On November 8, 1995, the respondent requested to withdraw from further representation of Doyle in the cases still pending before the circuit court. The request was granted and counsel was appointed.

7. The respondent requested an extension to file the appellate brief on November 30, 1995. The respondent amended the motion to comply with Fla. R. App. 9.300(a) on December 6, 1995.

8. The Fifth District Court of Appeal granted the request and extended the filing date of the initial brief to December 29, 1995.

9. The respondent filed a second request for extension to file the initial brief on December 29, 1995.

10. The Fifth District Court of Appeal granted the request and extended the filing date until January 30, 1996.

11. On January 30, 1996, the respondent filed a motion to withdraw as counsel for Doyle. The Fifth District Court of Appeal denied the motion on February 13, 1996.

12. On February 26, 1996, the respondent filed a motion requesting an extension of time to file the initial brief. The motion was denied on February 27, 1996.

13. On March 20, 1996, the Fifth District Court of Appeal issued an order to show cause within ten days why the appeal should not be dismissed for failure to file an initial brief

14. The respondent did not comply with the order and the appeal was dismissed on April 10, 1996.

15. The respondent did not refund any money to Doyle. Nothing in the record indicates that a refund was sought.

16. When the respondent filed his Motion to Withdraw on January 29, 1996, Doyle had accused him of being bought-off by the State, fired him with specific and emphatic instructions to take no further action on the appeal and informed the respondent that he had engaged new counsel. At that time Doyle had filed a grievance against the

respondent.

III. Recommendation as to Whether or Not the Respondent Should be Found Guilty: As to each count of the complaint, I make the following recommendations as to guilt or innocence:

As to the alleged violation of Rule 4-1. 1, I recommend that the respondent be found not guilty.

Much as I am sure the respondent felt, I am tom between the literal meaning of the Rule and the fact that the Court directed ordered the respondent to file a brief or show cause why the case should not be dismissed. Applying the clear and convincing standard of proof, however, I find the respondent did not offend this rule.

Mr. Nesmith identified appealable issues and undertook substantial research. In order to be paid for his efforts, however, he was obliged to engage in a great deal of "hand-holding" with his client. But for Doyle's explicit instructions when he fired the respondent, presumably a brief would have been seasonably filed. Indeed, Doyle even informed Nesmith that he had secured successor counsel who had advised Doyle to under no circumstances allow the respondent to file a brief or do "anything else to mess up the case". In the face of such instructions, it was not unreasonable for Nesmith to stop all efforts on Doyle's appeal in the expectation that new counsel would promptly appear and assume the case. Nesmith took all reasonable opportunity to preserve Doyle's appellate rights until by his own acts, Doyle stopped him from proceeding. Nowhere has it been demonstrated that Nesmith failed to provide competent representation.

As to the alleged violation of Rule 4-1.3, I recommend that the respondent be found Guilty.

This recommendation is made with some reluctance, as the violation, in this Referee's view, consists exclusively of the respondent's failure to file a brief or otherwise act with diligence and promptness when the Court issued its Order to Show Cause. That should have "broken the deadlock" between the respondent's duty to his client and his duty to the Court.

It is otherwise established by the clear and convincing evidence that the respondent performed all acts attendant upon the appeal seasonably and competently. It defies logic to otherwise conclude. Even after Doyle had fired the respondent, informed him new counsel would shortly appear, and directly or indirectly berated Mr. Nesmith, nevertheless his efforts continued on Doyle's behalf to preserve the appellate rights pending appearance of the phantom successor counsel. Again, upon the entry of the Order to Show Cause, Mr. Nesmith should have promptly and diligently responded and his failure to do so has offended the Rule.

With respect to the violation of Rule 4-1.5, I recommend the respondent be found not guilty.

As outlined in Section II, page 2, paragraph 3, above, Mr. Nesmith netted approximately

$2,000.00 for his efforts on Mr. Doyle's appellate quest. That is small compensation for the time expended on Mr. Doyle's behalf That Mr. Doyle became upset, imagined some conspiracy between the State and Mr. Nesmith is insufficient reason upon which to force Mr. Nesmith to "'donate" his time. From the clear and convincing evidence, Mr. Nesmith rendered yeoman service to Mr. Doyle until stopped by Mr. Doyle. He more than earned his meager fee.

IV. Recommendation as to Disciplinary Measures to be Awvlied: I recommend that the respondent receive a public reprimand administered by The Florida Bar Board of Governors.

V. Personal Historv and Past Disciplinary Record: After the finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(d) (a) (D), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 46
Date admitted to Bar: 6/16/89
Prior disciplinary convictions and disciplinary measures imposed therein:

Date	Discipline Imvosed	Supreme Court case no.
6/1/95	Public reprimand	83,922
5/1/97	Public reprimand, 2 yrs probation	88,153

VI. Statement of costs and manner in which costs should be taxed: I find the following costs *were* reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs:	
	1. Transcript	$ -0-
	2. Bar Counsel Travel Costs	$ -0-
B.	Referee Level Costs	
	1. Transcript Costs	$3 12.20
	2. Bar Counsel Travel Costs	-0-
C.	Administrative Costs	$ 750.00
D.	Miscellaneous Costs	
	1. Investigator Expenses	$ 107.76
	2. Witness Fees	$ -o-
	3. copy costs	% 52.00
	4. Telephone Charges	$ -0-
	5. Translation Services Fees	$ -0-
	TOTAL ITEMIZED COSTS:	$1221.96

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 2 day of May, 1997.

Robert E. Pyle, Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee to:
Eric M. Turner, Bar Counsel, The Florida Bar, 880 North Orange Ave, Ste 200, Orlando, FL 32801

Robert Jerome Nesmith, Respondent, 105 E. Robinson St., Ste 500, Orlando, FL 32801

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