IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT J. NESMITH,

Respondent.

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

RESPONDENTS REPLY BRIEF

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STATEMENT OF THE CASE

On February 20, 1997 a final hearing was held on this matter. On May 2, 1997 the referee issued his report. The referee recommended **that** the respondent be found guilty reluctantly of Fla. Bar **4-1.3** for failing to respond to the courts order to show cause.

STATEMENT OF THE FACTS

The respondent was paid $3000.00 to handle an appeal for defendant Doyle. Approximately $1000.00 was expended for filing fees and cost associated with the appeal. The respondent filed a notice of appeal on August 3, 1995. Defendant Doyle Filed a grievance against the respondent on October 16, 1995 accusing him of being bought out by the State Attorney's Office and demanded that the respondent take no further action on his appeal.

The respondent filed two request for extension of time to allow the defendant to ascertain new counsel and immediately requested a motion to withdraw from the defendant's Circuit Court cases. On January 30, the respondent after many prior conversations with the defendant, filed a motion with the DCA requesting permission to withdraw from the case, On February 13, 1996 the DCA denied the request. the Respondent filed another motion for extension of time which was denied. This motion was denied on February 27, 1996.

The Respondent, due to the extreme stress related to this matter, was placed on medical leave for six weeks by his physician. During this period of time, The DCA issued a Order to Show Cause which was never received by the respondent. On April 10, 1996, the appeal was dismissed. The referee found that the respondent violated Fla. Bar Rule 4-1.3.

SUMMARY OF THE ARGUMENT

The Referee reluctantly found the respondent guilty of not responding to the DCA Order To Cause, even though the respondent was out on medical leave during this period of time, and the Respondent accepted that. The respondent has two prior public reprimands. Certainly to classify the reprimand of 1997 as neglect is stretching.

The referee's recommended discipline in this case is consistent with the Respondents prior history and the facts surrounding them and the facts of this case, the culpability of the respondent and an understanding of the paradox this respondent was placed in.

ARGUMENT

A DAY SUSPENSION IS NOT APPROPRIATE DISCIPLINE IN THIS CASE RATHER THAN THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND GIVEN THE PRIOR CASE LAW AND THE SPECIFICS OF THIS CASE.

The referee has ***reluctantly*** recommended that the respondent be found guilty of neglect for failing to respond to the DCA's order to show cause and has recommended that the respondent be appropriately reprimanded. This court has held that a referees recommendation discipline will not be second guessed so long as that discipline has a reasonable basis in existing law. The Florida Bar v. Lecznar, 690So. 2d 1284 Fla. 1997). In the instant case, in respects to facts of the case and the fact that the referee specifically found that the Respondent performed all acts attendant upon the appeal seasonably and competently (A3).

Florida Bar v. Weed 513 So. 2d 126 (Fla. 1987), is distinguishable in that the Respondent in that case failed to file appeals in ***three*** cases and took no action until ordered to appear-personally and show why the appeals should not be dismissed. In the instant case the Respondent did all that was asked of him by his client and more in trying to affect his appeal. The only reason that this came about at all is because the **defendant himself ordered that the respondent have any further contact with his appeal** (Tr. 44-25, 45-1, 46-7).

Florida Bar v. Golden, 530So. 2d 93 1 Fla. 1988), is also distinguishable from the facts of the instant case. In Golden, the respondent failed to file amended complaint pursuant to directions by the court and then subsequently three weeks after an appellate brief was due tiled it three weeks late which was subsequently accepted by that court. In the instant case again the client, the boss of the respondent demanded that he not file a

brief on his behalf for fear that the respondent and the State were in bed together among other things. Obviously, while the defendant has a right to an appeal he also has a right not to have one.

The Respondent in this case, has a duty to the court and tried manifestly to adhere to that obligation. However his ability to respond to the court orders are only possible if indeed he receives them. *Empty* envelopes from the DCA were received by the respondent but only after he returned from an extended medical leave brought on by this whole episode. (tr. 21-10).

In Florida Bar v. Fussell, 474 So, 2d 210 (Fla. 1985), the attorney was suspended for.. filing a motion for postconviction relief only after being dismissed by his client, failing to file a motion for reduction of sentence after assuring the client that he would. Completely inapposite to the instant case.

In Florida Ear v. Nesmith, Case No. 88,153 (May 1, 1997), The respondent was found guilty of neglect in one count essentially for providing his sister a petition to use as a format to complete a Home Bankruptcy kit. The sister told the Respondent that it was an emergency in order to save her house. The respondent also sent her the filing fee in order to facility this but she was not given permission to file the documents that were sent to her. Approximately 90 day after this impending emergency this sister informs the respondent that she had not filed the Bankruptcy and that she had spent the money. She then requested that the respondent send her the filing fee again because she was in dire need. This time she filed the documents intended as aids and apparently signed by the respondent. Upon receiving letters from the Bankruptcy Court the defendant contacted the sister and inquired about the papers that he was receiving. The sister told the respondent that she was just trying to buy time to save her house and that she was going to get it refinanced. The Respondent forwarded all papers to the sister and told her that he could have no part of that, The court found that the respondent had an obligation to so inform the court.

The Bar states that in attorney discipline cases, the main concern of the bar are protection of the public.. to impose the appropriate discipline upon the lawyer. The bar states that is most concerned with exacting the appropriate discipline upon the respondent. It is apparent that the Bar's concern about the welfare of the many attorney's who are wrongly manipulated by the client's for which they must represent or about the health of the attorney's that try to help their clents but can't, do the threats and confusion caused by them.

As Stated by the Referee in the instant case the Respondent

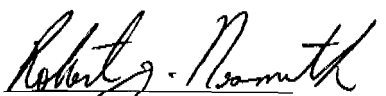
> **" But for Doyle's explicit instructions, when he tired the respondent, presumably a brief would have been seasonably filed. lndeed Doyle even informed Mr. Nesmith that he had secured successor counsel who had advised Doyle to under no circumstances allow respondent to file a brief or do anything to mess up the case."**

Therefore the Public Reprimand under the circumstances of this case and his prior disciplinary history is indicated.

CONCLUSION

WHEREFORE, the Respondent request this Honorable Court uphold the recommendation of the Referee in this matter.

Respectfully Submitted,



Robert J. Nesmith, Esq
Respondent
Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Respondent's Reply Brief have been sent by 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 Hand Delivery to Bar Counsel, The Florida Bar , 880 North Orange Ave., Orlando, Florida, 32801-1085, this 26th day of August, 1997.

Respectfully Submitted,

Robert J. Nesmith

ROBERT J. NESMITH,
Respondent
Pro Se