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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
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THE FLORIDA BAR,

Complainant,

Case No. 89,239

[TFB Case No. 96-30,681 (09D) 1

v.

ROBERT JEROME NESMITH,

Respondent.

THE FLORIDA BAR'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
SYMBOLS AND REFERENCES iv
STATEMENT OF THE CASE AND FACTS 1
ARGUMENT 3

A 91 DAY SUSPENSION IS THE APPROPRIATE DISCIPLINE IN THIS CASE GIVEN THE REFEREE'S FINDINGS OF FACT, THE CASE AND THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY.

CONCLUSION 7
CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

CASES

The Florida Bar v. Bartlett, 509 So. 2d 287 (Fla. 1987) . . . 5
The Florida Bar v. Nesmith, 659 So. 2d 1090 (Fla. 1995) . . . 5
The Florida Bar v. Nesmith, Case No. 88,153 (May 1, 1997) . . . 5

RULES REGULATING THE FLORIDA BAR

4-1.3 3

FLORIDA RULES OF APPELLATE PROCEDURE

9.210(b) (3) 2
9.210(c) 2
9.420(d)

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 AND FACTS

The Florida Bar submitted its initial brief in this case on June 27, 1997. The respondent's answer brief was due on or before July 22, 1997, which includes five additional days after service by mail as permitted by Fla. R. App. P. 9.420(d). The respondent did not file his answer brief by July 22, 1997. Instead, the respondent called the bar's Orlando branch office on July 28, 1997 to request another copy of the bar's initial brief claiming he never received the copy mailed to the respondent's record bar address on June 27, 1997. The respondent or his agent picked up another copy of the initial brief from the bar's Orlando branch office on July 29, 1997.

Because the respondent had purportedly not been served with the bar's initial brief, he would have twenty (20) days from July 29, 1997, the day he received a copy, to file his responsive brief. As the additional copy of the bar's brief was not served on the respondent by mail, he had only twenty (20) days, or until August 18, 1997, within which to file his answer brief. The respondent did not file his answer brief by August 18, 1997. The respondent submitted a reply [sic] brief on August 26, 1997, which the bar received on August 28, 1997.

The respondent's statement of the facts at page 2 of his reply [sic] brief does not comport with the referee's findings of fact as stated in his report of May 2, 1997, and is unsupported

by record citations. As such, the respondent's brief does not comply with Fla. R. App. P. 9.210(b)(3) and 9.210(c) which requires that references to the appropriate record pages shall be made in the statement of the facts portion of an answer brief. Thus, the statement of the facts section of the respondent's brief should be stricken.

ARGUMENT

A 91 DAY SUSPENSION IS THE APPROPRIATE DISCIPLINE IN THIS CASE GIVEN THE REFEREE'S FINDINGS OF FACT, THE CASE AND THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY.

In this case, the referee found the respondent guilty of violating R. Regulating Fla. Bar 4-1.3 (failure to act with reasonable diligence and promptness in representing a client) regarding his failure to file a brief and his failure to diligently and promptly respond to the appellate court's order to show cause. It is undisputed that the respondent did not file a file on behalf of his client, Christopher Doyle. It is clear from the evidence at the final hearing, that from the date the notice of appeal was filed on August 3, 1995, to April 10, 1996, when the appeal was dismissed, the respondent took no action to prepare or file a brief for Mr. Doyle. Although Mr. Doyle told the respondent in October, 1995 that he did not want him to represent him any further in the appeal, the respondent did not file a motion to withdraw in the appellate case until January 30, 1996, the date the brief was due based upon the respondent's second motion for extension of time. The respondent's motion to withdraw was denied by the appellate court on February 13, 1996, yet the respondent still took no action to file the brief. At the very least, the respondent should have filed the motion to withdraw as soon as he learned his client did not want his

representation, or filed a brief when the court did not permit his withdrawal.

It is undisputed that the respondent did not respond to the appellate court's order to show cause issued on March 20, 1996. At the final hearing and in his brief, the respondent claims that he was out of his office on medical leave and did not receive the order to show cause from the Fifth District Court of Appeal [T, pp. 21, 43, 48]. However, the referee made no findings in his report about the respondent's alleged absence from his office or that the respondent did not receive the court's order to show cause. Rather, the referee specifically found that the respondent did not comply with the appellate court's order to show cause [RR, p. 2], and that upon entry of the order the respondent should have promptly and diligently responded [RR, p. 3].

It should be noted that the respondent does not claim he failed to receive other orders from the appellate court regarding Mr. Doyle's appeal, just the order to show cause. The respondent has apparently received other documents from The Florida Bar sent to his record bar address, but he claims he did not receive the bar's initial brief in this case which was sent to his record bar address on June 27, 1997. That the respondent should have difficulty receiving mail from the Fifth District Court of Appeal and The Florida Bar, specifically important documents such as an order and a brief, is not credible.

The case law cited in the bar's initial brief in this case supports a 91 day suspension in consideration of the respondent's prior disciplinary history of two public reprimands for misconduct similar to the instant matter. In ~~The Florida Bar v. Nesmith~~, 659 So. 2d 1090 (Fla. 1995), the respondent was found guilty of incompetence, neglect, inadequate communication with a client, conduct prejudicial to the administration of justice in allowing a client's civil case to be dismissed, and failing to respond to the bar's investigative inquiries. In The Florida Bar v. Nesmith, Case No. 88,153 (May 1, 1997), the respondent was found guilty of neglect, incompetence and failing to properly supervise a non-lawyer employee. At page five of his brief in this case, the respondent takes issue with the findings of fact in Case No. 88,153. The respondent's description of the facts is not what the referee found in her report dated March 10, 1997. The respondent did not contest the referee's report at the time and it was approved by the Court on May 1, 1997. The respondent cannot now dispute those findings.

The respondent has been disciplined in the past for neglect for which he received two public reprimands. In the present case the respondent has again been found guilty of neglect. "Repeated similar instances of attorney misconduct should be treated cumulatively so that the lawyer's disciplinary history can be considered as grounds for more serious punishment than his misconduct, considered in isolation, might seem to warrant." The

Florida Bar v. Bartlett: 509 so. 2d 287 (Fla. 1987). The respondent's cumulative misconduct warrants a harsher discipline than the public reprimand recommended by the referee in this case. As the respondent's brief demonstrates, he does not accept that he has engaged in a pattern of similar misconduct and it is apparent the two prior public reprimands have not encouraged his rehabilitation. A 91 day suspension, requiring proof of rehabilitation, is the appropriate discipline in this case.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, recommendation as to guilt, and discipline recommendation of a public reprimand to be 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Reply Brief 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 ^{8th} day of September, 1997.

Respectfully submitted,



Eric M. Turner
Bar Counsel