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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

KEITH F. ROBERTS,

Respondent.

Case No. 94,170
TFB No. 98-10,972(13D)

INITIAL BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as **"The Florida Bar"** or **"The Bar".** The Respondent, Keith F. Roberts, will be referred to as **"Respondent".**

The Report of Referee dated April 16, 1999 will be referred to as **"RR"**.

"TFB Exh." will refer to exhibits presented by The Florida Bar and **"R. Exh."** will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No. 94,170.

"Rule" or **"Rules"** will refer to the Rules Regulating The Florida Bar. **"Standard"** or **"Standards"** will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS

Respondent failed to comply with The Florida Bar's Continuing Legal Education Requirements (hereinafter CLER) and became CLER delinquent in November of 1997. Respondent received a letter from The Bar in December of 1997 which notified Respondent of his delinquent status and advised him that pursuant to Rule 1-3.4(a) a delinquent member should not engage in the practice of law. (TFB Exh. 2). The letter further advised Respondent of the action required to correct his CLER delinquency. Respondent received another letter from The Bar in January of 1998 which advised him that he had been suspended from the practice of law for his failure to comply with the CLER requirements. (TFB Exh. 4). Respondent failed to notify his clients of his suspended status and continued to practice law. In fact, Respondent did not submit his Petition for Reinstatement to The Bar until July 13, 1998. (TFB Exh. 8).

On July 14, 1998, Respondent testified under oath at a Grievance Committee hearing and asserted that he was an active member in good standing of The Florida Bar. Respondent misrepresented his membership status to the Grievance Committee despite his knowledge that The Bar considered Respondent suspended.

STATEMENT OF THE CASE

The Thirteenth Judicial Circuit Grievance Committee "D" found probable cause on July 14, 1998, for violation of Rules Regulating The Florida Bar, Rules 1-3.4(a) (Any member who is suspended by reason of failure to complete continuing legal education requirement shall be deemed a delinquent member. A delinquent member shall not engage in the practice of law in this state and shall not be entitled to any privileges and benefits accorded to members of The Florida Bar in good standing); Rule 1-3.6 (Any person now or hereafter licensed to practice law in Florida who fails to comply with continuing legal education shall be deemed a delinquent member. While occupying the status of a delinquent member, no person shall engage in the practice of law in Florida nor be entitled to any privileges and benefits accorded to members of The Florida Bar in good standing); and Rule 4-5.5(a) (A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction). On August 11, 1998, The Thirteenth Judicial Circuit Grievance Committee "D" found probable cause for the violation of Rule 4-8.4(c)(A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation). On October 22, 1998, The Florida Bar filed a Complaint in this matter. By order dated October 28, 1998, Judge Mark I. Shames was appointed Referee.

A final hearing in this matter was held on March 26, 1999, On March 29, 1999, the Referee issued a Preliminary Report of Referee and found the Respondent guilty of violating the following Rules Regulating The Florida Bar: Rule 6-10.4 (Reporting Requirements); Rule 1-3.6 (Delinquent Members); Rule 1-3.4 (CLER Delinquent Members); Rule 4-8.4(c)(Conduct involving dishonesty, fraud, deceit or misrepresentation). A sanctions hearing was held on April 9, 1999. On April 16, 1999, the Referee issued a Final Report of Referee recommending that the Respondent be suspended from the practice of law for ninety (90) days and assessed costs against Respondent. (RR p. 4.).

In making his recommendation for discipline, the Referee considered Respondent's prior disciplinary record as an aggravating factor. This Court previously imposed a ninety (90) day suspension and three years probation on Respondent in an unrelated matter. The Florida Bar v. Roberts, 689 So.2d 1049 (Fla. 1997). Additional aggravating factors considered by the Referee included the fact that he admittedly delayed full compliance with the reinstatement requirement due to concerns about the consequences, and his misrepresentation to the Grievance Committee concerning his standing to practice law. (RR p. 4.). In mitigation, the Referee considered that Respondent's conduct caused no actual harm while accepting

that Respondent's conduct created a potential for harm as well as prejudice to the administration of the legal system.

The Referee's report was considered by the Board of Governors of The Florida Bar at its meeting which ended May 2 1, 1999, at which time the Board voted to file a petition for review of the Referee's report and seek a ninety-one (91) day suspension. The Florida Bar filed its Petition for Review of Referee's Report with this Court on or about June 4, 1999.

SUMMARY OF THE ARGUMENT

The Referee's recommended discipline of a ninety (90) day suspension will not serve to protect the public or the legal system, is not sufficient punishment for the breach of ethics committed, nor will it serve to deter Respondent or other attorneys from engaging in similar misconduct in the future. Respondent continued to practice law while under suspension and made misrepresentations to a Bar grievance committee regarding his membership status, Respondent was previously suspended for ninety (90) days in an unrelated matter. This Court should now suspend Respondent for ninety-one days based on the serious nature of Respondent's misconduct, The Florida Standards for Imposing Lawyer Sanctions and relevant case law. A ninety-one (91) day suspension in this case is fair to society, fair to Respondent and severe enough to deter Respondent and other attorneys from engaging in similar misconduct.

ARGUMENT

I. A NINETY-ONE (91) DAY SUSPENSION IS THE APPROPRIATE SANCTION FOR PRACTICING LAW WHILE UNDER SUSPENSION FOR CLER DELINQUENCY AND MISREPRESENTING MEMBERSHIP STATUS TO A GRIEVANCE COMMITTEE DURING DISCIPLINARY PROCEEDINGS BASED ON THE RECORD, CASE LAW, AND STANDARDS FOR LAWYER SANCTIONS.

In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), this Court defined the objectives of Bar discipline as follows:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: 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 a 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.* (Court's emphasis)

(Id. at 986.). The referee's recommended discipline does not satisfy these three purposes.

The Florida Bar submits that the Referee's recommended discipline of a ninety (90) day suspension will not serve to protect the public or the legal system, is not sufficient punishment for the breach of ethics committed, nor will it serve to deter Respondent or other attorneys from engaging in similar misconduct in the future. This Court should suspend Respondent for ninety-one (91) days based on the serious nature of Respondent's misconduct, The Florida Standards for Imposing Lawyer Sanctions and relevant case law. A ninety-one (91) day suspension in this case is fair to society, fair to Respondent and severe enough to deter Respondent and other attorneys from engaging in similar misconduct.

The Florida Standards for Imposing Lawyer Sanctions provide a format for bar counsel, referees, and the Supreme Court to determine the appropriate sanction in attorney disciplinary matters. Standard 7.2 provides that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system. Standard 7.0 provides that absent aggravating or mitigating circumstances the sanction provided in Standard 7.2 is generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, or unlicensed practice of law.

Standard 9.22 provides a list of aggravating factors that may justify an increase in the degree of discipline to be imposed. Aggravating factors which apply in the instant case include:

(a) prior disciplinary offenses;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; and
(i) substantial experience in the practice of law.

Respondent was previously suspended for ninety (90) days followed by three years probation in The Florida Bar v. Roberts, 689 So.2d 1049 (Fla. 1997). However, this previous suspension and probation did not prevent Respondent from intentionally violating The Bar's Rules within months of his previous suspension. For this offense he should receive a more severe sanction. Cumulative misconduct is a relevant factor when determining the appropriate sanction in a disciplinary matter. Cumulative misconduct should be dealt with more harshly than isolated misconduct. The Florida Bar v. Wilson, 714 So.2d 38 1, 384 (Fla. 1998); The Florida Bar v. Nesmith, 707 So.2d 33 1,333 (Fla. 1998); The Florida Bar v. Rolle, 661 So.2d 296 (Fla. 1995); and The Florida Bar v. Laing, 695 So.2d 299,304 (Fla. 1997).

In The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982), this Court stated that

> [i]n rendering discipline, this Court considers the respondent's previous disciplinary history and increases the discipline where appropriate. The Court deals more

> harshly with cumulative misconduct than it does with isolated misconduct.

(Id. at 528.)(citations omitted).

In addition to Respondent's prior disciplinary record, aggravating factors include Respondent's intentional delayed compliance with the Bar's reinstatement requirements and his misrepresentation of his membership status while testifying before a Bar Grievance Committee. In further aggravation, Respondent has substantial experience in the practice of law having been admitted to The Florida Bar in 1977, more than twenty years ago.

In The Florida Bar v. Wasserman, 654 So.2d 905 (Fla. 1995), Wasserman received a sixty (60) day suspension for continuing to practice law after receiving notice from the bar that he had been suspended for failure to pay outstanding disciplinary costs. Wasserman testified that he did not notify his clients or judges of his suspension because he did not think his suspension was legal. (Wasserman at 906.). In finding Wasserman guilty of Rule 4-8.4(c), the referee found that "a lawyer misrepresents himself, if only by silence, if he continues to practice after he is notified of his suspension, takes no formal steps to challenge a position he believes to be without legal authority, and continues to hold himself out as a member of the Bar in good standing." (Wasserman at 906.). Factors considered in mitigation in

Wasserman included severe financial difficulties and the fact that Wasserman met his obligations to The Bar within sixty-eight (68) days of his suspension. Factors considered in aggravation included Wasserman's prior discipline consisting of two public reprimands and an admonishment. (Wasserman at 906.).

In the instant case, Respondent not only misrepresented his membership status through silence but through misleading testimony before the Grievance Committee. Unlike Wasserman, who met his obligations with The Bar within sixty-eight (68) days of notification of suspension, Respondent did not petition for reinstatement until the day before the Grievance Committee hearing, seven (7) months after receiving notice of his suspended status. Instead, Respondent intentionally and deliberately chose to continue practicing when he knew The Bar considered him suspended. Unlike Wasserman, Respondent's prior discipline consisting of a ninety (90) day suspension is more severe than Wasserman's previous disciplinary history. Due to the aggravating factors present in the instant case, Respondent should receive a ninety-one (9 1) day suspension.

In Levkoffida Bar v. , 5 11 So.2d 556 (Fla. 1987), Levkoff submitted a guilty plea for a consent judgment and agreed to a ninety (90) day suspension for practicing law for seven (7) months while under suspension for non-payment of dues. The referee recommended that Levkoff s suspension run concurrently with his

suspension for non-payment of dues. This Court disagreed with the referee's recommendation that the suspension run concurrently and was of the opinion that "such a suspension has no real meaning." (Levkoff at 556.). Instead, this Court ordered Levkoff to submit to a ninety (90) day suspension to commence upon his reinstatement to The Florida Bar after having completed all applicable requirements for reinstatement after a dues delinquency. (Levkoff at 556.).

Like Levkoff, Respondent continued to practice law for seven months after receiving the Bar's notice of suspension. In addition to being found guilty of practicing while suspended, Respondent was found guilty of making misrepresentations while testifying before the Grievance Committee. By itself, Respondent's untruthful testimony before a Grievance Committee would warrant a suspension. The Florida Bar v. Lund, 410 So.2d 922 (Fla. 1982). See also The Florida Bar v. Langford, 126 So.2d 538 (Fla. 1961). Unlike Levkoff, Respondent's prior disciplinary history included a ninety (90) suspension. Due to the aggravating factors and the additional Rule violation involved in the instant case, Respondent should receive a ninety-one (91) day suspension.

In The Florida Bar v. Beach, 675 So.2d 106 (Fla. 1996), Beach received a ninety (90) day suspension for assisting in the unlicensed practice of law and sharing a legal fee with a non-attorney. The referee considered that Beach had a prior

disciplinary record which consisted of a twenty-eight (28) day suspension. (Beach at 108.). In approving the referee's recommendation of discipline, this Court noted that there was no evidence in the record that Beach's violation of the Rules was willful or deliberate.

In the instant case, Respondent's choice to practice law while suspended was willful and deliberate. It was also Respondent's choice to misrepresent his membership status to the Grievance Committee. Respondent's prior discipline of a ninety (90) day suspension is more severe than the prior discipline considered in Beach. Therefore, Respondent should receive a ninety-one (91) day suspension rather than the ninety (90) day suspension imposed in Beach.

In The Florida Bar v. Weil, 575 So.2d 202 (Fla. 1991), Weil was suspended for six (6) months for practicing law while suspended for non-payment of dues. Weil was delinquent in his payment of Bar dues for the periods of July 1988 through July 1989 and July 1989 through July 1990. As a result, Weil became a delinquent member and was suspended as of October 1, 1988. Weil was notified by the Bar of his delinquent status and that he was prohibited from practicing law. However, he continued to practice law as a city attorney during the period he was suspended for non-payment of dues, (Weil at 203.). Weil failed to respond to The Bar's request for admissions and failed to appear during disciplinary proceedings. (Weil at 203.).

The referee in Weil found that Respondent's failure to appear during disciplinary proceedings and his failure to even apply for reinstatement demonstrated a lack of regard for professional regulations and a willful indifference to the disciplinary system. Weil also had a prior disciplinary record consisting of two public reprimands. The referee recommended disbarment, however this Court rejected the referee's recommendation and imposed a six (6) month suspension. (Weil at 204.).

Respondent's actions in the instant case also demonstrate a certain lack of regard for professional regulations and the disciplinary system. First, Respondent failed to comply with CLER requirements. Then, after he became suspended for CLER delinquency he delayed filing a petition for reinstatement until the day before the Grievance Committee hearing regarding this matter. Respondent then proceeded to misrepresent his membership status to the Grievance Committee. While Respondent's misconduct is not as egregious as that of Weil, his prior discipline of a ninety (90) day suspension is more severe than that of Weil. Therefore, Respondent should receive a ninety-one (91) day suspension.

CONCLUSION

Pursuant to the foregoing facts and evidence, the applicable Standards for Imposing Lawyer Sanctions, and the pertinent case law, Respondent should be suspended from the practice of law in Florida for ninety-one (91) days and should be assessed The Florida Bar's costs in these disciplinary proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Initial Brief has been furnished by Airborne Express to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to Keith F. Roberts, Respondent at 1092 South MacDill Avenue, Tampa, Florida 33629-5903; and a copy by regular U. S. Mail to John Anthony Boggs, Esa , Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 22nd day of June, 1999.

CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this brief has been written in font size Times New Roman 14 pt.

Monica Ann Frost
Assistant Staff Counsel