IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LARRY B. ROBERTS

Respondent.
_____/

Case No. 94,828
TFB No. 98-11,347(6E)

COMPLAINANT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, THE FLORIDA BAR, Complainant, will be referred to as "The Florida Bar" or "The Bar". The Respondent, LARRY B. ROBERTS , will be referred to as "Respondent".

"T" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No.94,828 held on June 11, 1999.

The Report of Referee in this case, dated September 1, 1999, will be referred to as "RR".

Respondent's Initial Brief in Supreme Court Case No. 94,828 will be referred to as "RB".

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar.

STATEMENT OF THE CASE AND THE FACTS

In September 1996, Mrs. Bush retained Respondent to represent her in a dissolution. Mrs. Bush's testimony was that Respondent advised her that he was very busy, but would take the case, and asked that she get her documents together. Respondent said he would take care of his end. The testimony before the Referee was not that Mrs. Bush "insisted" (RB, p. 1) that Respondent take the case. Attorney James Robert Neiset, as attorney for the husband, sent a letter to Respondent advising of the representation. Respondent confirmed he was representing Mrs. Bush. Both acknowledged the parties' desire to resolve the matter amicably as soon as possible. (T, p. 11). For the next two months, Respondent did not respond to efforts by Mr. Bush's counsel to discuss the dissolution and resolution (T, p. 12), and consequently Mr. Neiset advised his client to file a Petition for Dissolution (T, p. 12). Settlement discussions were certainly "at a standstill"(RB, p. 1), having never started. After the dissolution was filed, Attorney Neiset received a letter dated November 26, 1996 from Respondent, indicating that his client was upset that Neiset had filed for dissolution because Mr. Roberts was under the impression they were in the process of negotiating. (T, p.13).

When the responsive pleadings were received from Respondent, they were signed by Attorney Saxon Gaskin, who had no affiliation with Respondent's law firm. (T, p. 14). Mr. Gaskin had a separate practice in the office building of Respondent (T, p. 40). Respondent had referred Mrs. Bush's case to Attorney Gaskin without discussing the matter with his client prior to doing so (T, pp. 40; 42).

After Mrs. Bush's case was farmed out to Attorney Gaskin, she attempted to get her records from Respondent. The records she initially received contained only a veterinarian's bill from among what she had given Respondent. The rest of the records which had been provided to Respondent were not located by him until April. They had apparently been turned over by Respondent to an accountant, but no record of that fact was in the Bush's files given to Gaskin nor in Respondent's records (T, p. 41).

Mrs. Bush became dissatisfied with Attorney Gaskin after he had missed appointments, and she confronted Respondent. Mrs. Bush testified that Respondent and she got into a heated argument when she confronted him about Gaskin, and Respondent offered at first to return her retainer. Then Respondent said he would take the case back. The testimony was not that at that time Respondent advised her that he was going to retire (T, pp. 45-46). Mrs. Bush did

not indicate that Respondent qualified his involvement by saying that the representation was to be "at least through a case management conference scheduled for March 21, 1997" (see RB, p.1).

On about May 27, 1997, Mrs. Bush received a letter from Respondent saying he was going to close his office. He advised that he would be at mediation (T, p. 57). However, when Mrs. Bush subsequently attempted on several occasions to confirm that Respondent would be at the upcoming mediation, she was unable to speak with him (T, p. 56). On June 6, she tried to call him to get information on the mediation, but he did not return the call (T, p. 56). In fact, she was told he was out of state (T, p. 57). Attorney Neiset sent a letter to Respondent addressing an issue of Social Security and health care insurance coverage for Mrs. Bush, but never received a reply (T, p. 23). Mr. Neiset never received any communication from Respondent regarding the substance of the mediation. By letter dated May 12, 1997, the mediator, Attorney Kevin Fantauzzo, had requested of Respondent and Attorney Neiset a summary of the issues prior to the mediation (T, p. 20). On or about May 27, Mr. Neiset received correspondence from Respondent saying that he would not be the attorney for Mrs. Bush at the mediation (T, p. 22). On June 23, having given up on Respondent, Mrs. Bush hired Attorney Roxanne Seeley. Ms. Seeley was sent a stipulation for substitution of counsel on June 27, 1997. The

Court approved the substitution on July 8, 1997. Matters were resolved at the mediation.

Disciplinary proceedings were held before Referee Raul C. Palomino, Jr. on June 11, 1999. In his Referee Report of September 11, 1999, Judge Palomino found that Respondent had violated Rules 4-1.4(a) (failing to keep his client informed of the status of the representation) and Rule 4-1.4(b) (failing to explain the matter sufficiently to his client to allow her to make an informed decision regarding the representation). He recommended that Respondent be suspended for six months, and thereafter until rehabilitation is proven; that the suspension run concurrently with a ninety-day suspension received in Supreme Court Case Number 92,857; and that once readmitted, Respondent be on probation for one year. In addition, Respondent was to pay the costs of the action. Respondent did not appear at the final hearing before the Referee except through counsel, nor did he appear before the grievance committee.

SUMMARY OF THE ARGUMENT

In determining the discipline to be recommended to this Court, the Referee should not be prohibited from taking into account all other misconduct for which the Respondent has been disciplined. It is the overall history of conduct along with current circumstances which allows the Referee to make an informed judgment about what discipline is necessary to protect the public. A flat prohibition against using Rule violations that occur subsequent to an activity being complained of (RB, p. 4) would place the Bar in an untenable position. If the Bar had a pending disciplinary action against a Respondent, and then prior misconduct came to light, the Bar would have to elect between delaying the pending case, so the Court could weigh the overall pattern of misconduct, or going forward and having the Court unable to consider the overall picture when deciding what discipline would best protect the public.

ARGUMENT

ISSUE I: Whether the Referee appropriately considered the totality of Respondent's Record of Disciplinary Rule offenses when recommending discipline in the instant case.

ISSUE II: Whether the Referee can consider as an aggravating condition conduct which occurred at or near the same time as the misconduct in the instant case as aggravation, if the discipline order for that conduct was issued after the violations in the instant case.

ISSUE III: Whether the recommendation of a six-month suspension followed by a one-year period of probation, is excessive for the misconduct in the current case, in light of Respondent's history of misconduct.

With minor exceptions, the facts of the instant case are uncontested. The primary issue before the Court is whether the Referee's recommendation of a six-month suspension is reasonably supported by existing case law. In reviewing a referee's recommendation of discipline, the Court's scope of review is somewhat broader than that afforded to findings of fact because, ultimately, it is the Court's responsibility to order an appropriate discipline. The Florida Bar v. Fredericks, 731 So. 2d 1249, 1254 (Fla. 1999). "Discipline must be fair to the public and to the respondent and must be severe enough to deter others who might be prone or tempted to become involved in like violations". The Florida Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989), quoting The Florida Bar v. Lord, 433 So. 2d 983, 986

(Fla. 1983).

In the instant case, Respondent's misconduct included a number of actions, or inactions. After agreeing to represent a client in a dissolution, he referred the case to a non-associated attorney without informing the client that the attorney was not associated with Respondent's firm; he misplaced the client's records for several months; he failed to consult with the client, in spite of her requests, after a case management hearing; he advised the client he was withdrawing and closing his office, but then agreed to handle a mediation, yet then did not return his client's telephone calls regarding the mediation. Respondent's client became alarmed and felt forced into retaining other counsel a few weeks before mediation.

Were it not for Respondent's prior disciplinary record, as well as misconduct which took place during the same time period and led to discipline, the instant case would not warrant a six-month suspension. This on-again, off-again representation, fraught with poor communication and lack of progress, took place over a span of less than a year. The client retained other counsel who successfully completed the case. Nevertheless, misconduct in this case, along with Respondent's other violations of Bar Rules, makes the Referee's recommendation reasonable.

Respondent's appeal asserts that the Referee erred in considering conduct

that occurred subsequent to the time of the conduct involved in the present proceeding. He also asserted that the recommendation of a six-month suspension was excessive (RB, p. 5). The Referee did list, among the five prior disciplinary offenses Respondent has received, a ninety-day suspension on April 1, 1999, for lack of communication, failure to hold a client's funds in trust, and collecting unearned fees. That discipline clearly occurred after the conduct in the instant case. The Referee recommended that the six-month suspension proposed in the instant case run concurrently with the ninety-day suspension in the April 1999 case.

Of course, Respondent would prefer that the Referee be denied the opportunity to use all evidence available to him. However, the Referee did not err in taking into account the totality of Respondent's misconduct in formulating an opinion on what discipline would best protect the public. The conduct in the instant case further clarified the image of a practitioner who has a pattern of failing to meet his legal responsibilities.

In The Florida Bar v. Grant, 514 So. 2d 1075 (Fla. 1987), the Court was faced with an instance of "prior misconduct" where one of the disciplines noted by the Referee was ordered after the conduct for which respondent was being tried. In the case before the Court, over a period of two years, Grant had failed to return many of the telephone calls his client made to him, made some misleading

statements about the status of the case, and was finally discharged by his client. No law suit had been filed in the client's contingency fee case when Grant was discharged, but the subsequent attorney did obtain a final judgment. The Court found that Grant had neglected a legal matter, failed to carry out his duty to his client, and demonstrated a clear absence of care or attention to his obligation. Grant had two prior disciplines, both public reprimands. The Court noted that one of those disciplines was issued subsequent to the acts complained of in the case at Bar. Also, Mr. Grant had been reprimanded during the period that he was neglecting the client's case being considered. Grant argued that the discipline was too harsh, that a suspension would have a devastating effect on his practice, that a suspension was unnecessary to protect the public and to deter others, and that the discipline was too harsh when compared to similar cases. The Court accepted the Referee's recommendation of a four-month suspension, noting that "cumulative misconduct is generally dealt with more harshly than isolated misconduct". Further, the Court wrote, "cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct". (Id. at 1076). Grant also was placed on probation for eighteen months following reinstatement. The Court considered the prior conduct for which a discipline order had been issued after the conduct in the case under consideration.

With regard to the instant matter (Roberts), in 1984, Respondent received a private reprimand for minor misconduct for neglecting a legal matter. He was at the time of the misconduct involved in a hotly contested dissolution of his marriage, and left his law practice without taking steps to avoid foreseeable prejudice to the rights of his clients and without giving them due notice. (Grievance Committee Report of Minor Misconduct, TFB No. 06C83163, May 5, 1984). In 1992, Respondent received a Report of Minor Misconduct in The Florida Bar v. Larry B. Roberts, TFB No. 92-11,014(6E), after he pled no contest and got a withhold of adjudication to an "open house party charge" related to having minors at his home consuming alcohol. Respondent had previously been charged with, and convicted of, driving under the influence of alcohol or a controlled substance in 1987, and night prowling in 1983. As part of this discipline, he was referred to the Florida Lawyer's Assistance Program. Then in 1993, Respondent received a Minor Misconduct in TFB No. 93-11,255(6D) for his conduct in a modification of dissolution proceeding. He had prepared a Deed and Note, but omitted material terms, such as the amount and date due, then asserted that the Deed and Note had been discarded. He did not adequately explain the terms of the document to his client. There was no evidence of intent to defraud the client, and no harm from the execution or discarding of the instruments. Respondent was found guilty of failing

to communicate properly with his client. Next, on December 7, 1994, in TFB No. 94-11,269(6A), Respondent tendered a plea to the grievance committee to minor misconduct for hiring a suspended lawyer without providing the required notification to the Staff Counsel of The Florida Bar, along with a full job description of that suspended lawyer's job responsibilities. Respondent also permitted the suspended lawyer to occasionally have contact with clients, apparently to obtain factual information, but not to give legal advice. He admitted that by so doing he violated Rule 3-6.2, Rules Regulating The Florida Bar. The committee accepted the plea.

Then there is the discipline, noted in the Referee's Report, to which Respondent objects. In Supreme Court Case No. 92,857 (TFB No. 97-11,707(6E)), discipline was ordered on April 1, 1999. The Order was issued subsequent to the time of the misconduct in the instant case. Respondent received a ninety-day suspension, to be followed by a one-year probation, including trust accounting workshop, restitution of $1,354.93 plus accumulated interest, and payment of the Bar's costs. Respondent had used a deposit for fees prior to its being earned by him, and had not placed the money into a trust account. Also, he had failed to advise the client that her case was dismissed and that attorney's fees and costs had been awarded against her. Also, Respondent had been hired on a contingency fee

basis in June 1995 to handle legal matters regarding an insurance policy. His client paid a retainer on this separate legal matter. Respondent did not advise the client of the status of the case after it was moved to Federal Court. After Summary Judgment was granted against his client, Respondent filed a Notice of Appeal, but then had the appeal denied for failure to file timely and for not having a basis for arguing excusable neglect. The Dismissal was on March 6, 1997. The conduct for which Respondent is currently being brought to task was during the same period for which Respondent was disciplined by the ninety-day suspension.

In light of the laundry list of Respondent's prior offenses, the current recommendation is not erroneous. The Referee should not be precluded from seeing the additional misconduct in the current case as, in essence, "the straw that broke the camel's back".

The Florida Bar v. Rolle, 661 So.2d 296 (Fla. 1995) is somewhat instructive. In Rolle, the respondent was charged with neglecting client matters. Rolle failed to appear in Court on behalf of his client, and it was necessary for the court to appoint a public defender. Rolle failed to timely file a Petition to Appear Pro Hac Vice, as recommended to him by the Court. Eventually, Respondent was admitted and allowed to appear as co-counsel. However, prior to trial he notified the client he would not appear at trial. He did not, prior to the trial, advise his client nor

anyone else in writing or orally that he was withdrawing his services as attorney for the defendant. Also, although he offered to refund a portion of the fees, as of the time of the Referee's hearing , he had not done so.

The Referee found Rolle guilty of lack of diligence (Rule 4-1.3). He recommended a six-month suspension, which Rolle appealed as too harsh compared to discipline in other cases. The Referee had taken into consideration a prior public reprimand, and also that Rolle was in the process of being suspended for ninety-one days in another case pending before the Court for neglecting client matters. This latter was not "prior discipline." The six-month suspension was recommended to run concurrently with the ninety-one day suspension. The Court noted that the prior reprimand had not deterred Respondent from engaging in similar misconduct. Rolle was given a six-month suspension.

In the instant case, Respondent's prior discipline which did occur prior to the Bush matter (excluding the 90 day suspension), did not deter the misconduct in the Bush dissolution. Further, the overall picture of Respondent's conduct, with or without that for which the ninety-day suspension was ordered, presents a pattern which warrants a six-month suspension.

Respondent cites The Florida Bar v. Glick , 693 So.2d 550, 552 (Fla. 1997) as an instance where a ten-day suspension was received for failing to provide

competent representation, lack of diligence, failing to keep a client informed about the status of representation, failing to explain the matter fully to the client, and failing to abide by the client's decision regarding settlement (RB, p.7). Glick is not instructive regarding the appropriate discipline where there is a history of discipline. In fact, in Glick at 552, the Court notes that a mitigating factor in the case was the lack of a prior disciplinary record.

CONCLUSION

The Referee's recommendation of a six-month suspension, followed by a one-year period of supervision, has reasonable support in the record. While the conduct in the instant case would not warrant a six-month suspension standing alone, the Respondent's history of violations does. The Referee was not able to consider the Respondent's demeanor, as he did not attend the final hearing except through counsel.

Respectfully submitted,

Thomas E. DeBerg
Assistant Staff Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief has been furnished by U. S. Mail to Debbie Causseaux, Acting Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U. S. Mail to Thomas G. Hersem, Esq., Counsel for Respondent, 1421 Court Street, Suite B, Clearwater, FL 33756-6172; and a copy by regular U. S. Mail to John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 07 day of February, 2000.

CERTIFICATION OF FONT SIZE AND STYLE

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

Thomas E. DeBerg