IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

CASE No.: 94,828
T.F.B. No.: 98-11,347(6E)

LARRY B. ROBERTS,

Respondent.
_____/

RESPONDENT'S AMENDED INITIAL BRIEF

Thomas G. Hersem, Esq.
1421 Court Street, Suite B
Clearwater, FL 34616
Telephone: (813) 446-1415
SPN #0004297/BAR #227722
Attorney for Respondent

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II: THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT'S LICENSE BE SUSPENDED FOR A PERIOD OF SIX (6) MONTHS, AND UNTIL REHABILITATION IS SHOWN, FOLLOWED BY A ONE (1) YEAR PERIOD OF PROBATION FOR MISCONDUCT IN VIOLATING RULE 4-1.4(a) and (b).

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PRELIMINARY STATEMENT

LARRY B. ROBERTS is the Respondent and will hereafter be referred to as ROBERTS. THE FLORIDA BAR is the Complainant and will hereafter be referred to as TFB. The transcript of the proceedings before the Referee will be referred to in parenthesis with a capital letter T, followed by a dash and a number which will correspond to the page of the transcript (T -).

RESPONDENT'S STATEMENT OF CASE AND FACTS

ROBERTS maintained his office for the practice of law in Pinellas County, Florida. In September, 1996, ROBERTS was retained to represent one Barbara Bush in her marital dissolution case (T - 34). At the commencement of the representation ROBERTS informed Ms. Bush that he was very busy and would not be able to devote a lot of time to her matter until sometime after the first of the year (T - 39). Ms. Bush insisted that ROBERTS represent her. ROBERTS, upon being retained, communicated with the attorney representing Mr. Bush, and advised him of his representation (T - 11). There was some discussion regarding settlement but no offer was ever made by either party, through their attorney . In November, when settlement negotiations were at a standstill, Ms. Bush, through his counsel, James R. Nieset, filed his Petition for Dissolution of Marriage and served Ms. Bush (T - 13). At that time, in an attempt to have Ms. Bush properly represented, ROBERTS referred Ms. Bush Saxon Gaskin, an attorney who maintains his separate practice in the offices of ROBERTS (T - 40). Ms. Bush executes an engagement agreement with Mr. Gaskin and he commences active representation in the dissolution proceeding (T - 41). However, due to being unhappy over the way she is being treated, and the fact that Mr. Gaskin fails to keep two appointments with her, Ms. Bush sets an appointment with ROBERTS and advises him of how unhappy she is. ROBERTS advises Ms. Bush that he is busy and planning on

retiring and offers to return her retainer payment (T - 45). Ms. Bush refuses the offer and ROBERTS agrees to represent her, at least through a case management conference scheduled for March 21, 1997. On March 18, 1997, an order is entered substituting ROBERTS for Mr. Gaskin as Ms. Bush's attorney in her marital dissolution proceeding (T - 18).

Differences now arise between Ms. Bush and ROBERTS. Ms. Bush complains that ROBERTS would not communicate with her and was unresponsive to several attempts to discuss her case with her (T - 52, 53). When the parties did not settle their differences following the case management conference the matter was scheduled for mediation in mid July, 1997. Then on May 27th, 1997 ROBERTS sent Ms. Bush a letter advising her that his office was going to close on May 30th. (T - 54). Even though ROBERTS assures Ms. Bush that he will represent her at mediation (T - 57) Ms. Bush is uncomfortable with the situation and seeks other counsel. In mid June, 1997, Ms. Bush retains Ms. Roxanne Seeley (T - 58). Ms. Seeley represents Ms. Bush at the mediation and following mediation the parties enter into an agreement settling the outstanding issues in their dissolution proceeding (T - 29).

Based upon Ms. Bush's written complaint TFB files a grievance, ROBERTS does not appear at the grievance committee's hearing, and the matter is referred to a Referee. ROBERTS makes his appearance before the Referee through his attorney, but does not

personally appear (T - 4). Following the hearing the Referee made his recommendation citing ROBERTS prior disciplinary proceedings in aggravation. ROBERTS prior disciplinary proceedings consists of one (1) private reprimand in 1984, two (2) admonishments, one in 1992 and one in 1993, and one (1) three (3) month suspension. The three (3) month suspension occurred in April, 1999 and involved conduct that occurred subsequent to the conduct being complained about in the instant proceeding. (It is important to note that it is one of Respondent's contentions that this proceeding was brought because TFB did not obtain the results [punishment] it was looking for in the proceeding resulting in the three (3) month suspension.)

On September 1, 1999, Raul C. Palomino, Jr., Referee, appointed to conduct the disciplinary proceedings herein issued his Report of Referee and found Respondent guilty of violating Rule 4-1.4(a): "A lawyer shall keep a client reasonably informed of the status of the representation;" and Rule 4-1.4(b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make an informed decision." The Referee, recommended that the "Respondent shall be disciplined by a six (6) Month suspension from the practice of law and thereafter until rehabilitation is proven. . ." TFB approved the Referee's Report. The Respondent, ROBERTS, timely filed his Petition for Review upon the grounds that the Referee improperly considered, in aggravation, ROBERTS three (3) month suspension and was overly harsh in recommending that ROBERTS'

license to practice law be suspended six (6) months and until rehabilitation is shown, followed by a one (1) year period of probation.

SUMMARY OF ARGUMENT

In the instant proceeding the Referee recommended, and TFB approved, a sentence that was to harsh for the misconduct ROBERTS was found guilty of committing. The Referee, in making the recommendation, improperly considered a prior disciplinary disposition, in April, 1999, in aggravation, so as to increase the severity of the discipline. The Referee should not have used the disciplinary action taken against ROBERTS, in April, 1999, because it involved activity that occurred subsequent to the activity being complained of herein. Like in a criminal proceeding when the judge is not entitled to consider prior convictions for crimes committed subsequent to the date of the crime being sentenced to enhance the sentence, the Referee herein should not be allowed to enhance ROBERTS' discipline because of a prior discipline for subsequent conduct.

If the Court removes from the consideration, in aggravation, the prior discipline occurring in April, 1999, ROBERTS, present discipline of six (6) month suspension or until rehabilitation is proven, followed by a one (1) year term of probation is to severe. Based upon the severity of the misconduct he was found guilty of ROBERTS present discipline should be suspension for a period of no greater than one (1) month.

ARGUMENT

I: THE REFEREE COMMITTED ERROR WHEN HE CONSIDERED, IN AGGRAVATION, RESPONDENT'S PRIOR DISCIPLINARY PROCEEDING REGARDING CONDUCT THAT OCCURRED SUBSEQUENT TO THE TIME OF THE CONDUCT INVOLVED IN THE PRESENT PROCEEDING.

II: THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT'S LICENSE BE SUSPENDED FOR A PERIOD OF SIX (6) MONTHS, AND UNTIL REHABILITATION IS SHOWN, FOLLOWED BY A ONE (1) YEAR PERIOD OF PROBATION FOR MISCONDUCT IN VIOLATING RULE 4-1.4(a) and (b).

The Referee, in considering Respondent's conduct that led to the disciplinary proceeding in Supreme Court Case Number 92,857, T.F.B. File No. 97-11,707(6E), in aggravation, committed error. Prior disciplinary offenses is one of the aggravating factors set forth in the Florida Standards for Imposing Lawyer Sanctions. Prior disciplinary offenses should be limited to prior conduct and not subsequent conduct. This is not a criminal proceeding. However, the questions raised regarding what discipline must be administered for misconduct in a disciplinary proceeding must be considered quasi-criminal. In the instant proceeding the Referee considered, in aggravation, ROBERTS disciplinary proceeding for conduct that occurred subsequently to the time of the actions that brought the charges heard herein.

The question of what constitutes prior conduct that should be considered in

determining the punishment to be administered is not new in the law. The issue has arisen many times in the criminal justice system. The views on how to punish criminals has filled a plethora of volumes of treatises. In order to establish as fair and equitable, coupled with the right of society to punish, offenders of the "rules" of our society this Honorable Court, has adopted Rule 3.701, Rules of Criminal Procedure that establishes "Sentencing Guidelines. This Rule states that the ". . . The severity of the sanction should increase with the length and nature of the offender's criminal history." The Rule goes on to define "prior record" as: ". . . any past criminal conduct on the part of the offender, resulting in conviction, prior to the commission of the primary offense." Case law has established that the courts, in determining what activity should be considered "prior record", could not consider offenses that were committed subsequent to the "present" offense. See Rule 3.701, Rules of Criminal Procedure and White v. State, 535 So.2d 677 (Fla. 5th DCA 1988). Had this been a criminal proceeding the act of the Referee, in considering ROBERTS disciplinary proceeding for activity that occurred subsequent to the activity for which he is now being disciplined for, would be found to be improper. Upon review, if it was established that the "sentence" handed down was to severe for the offense, taking into account only those "crimes" that the offender had committed prior to the instant acts, the "sentence" would be reversed.

It is Respondent's position that a suspension of six (6) months, and until

rehabilitation is shown, followed by a one (1) year period of probation is to severe for the misconduct Respondent has been found guilty of committing. As this Honorable Court has enunciated many times the discipline dispensed for an attorney's unethical conduct must serve three (3) 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 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." The Florida Bar v. Lord, 433 So.2d 983, 486 (Fla. 1983), citing The Florida Bar v. Thue, 244 So.2d 424, 425 (Fla. 1971), citing The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970); The Florida Bar v. Glick, 693 So.2d 550, 552 (Fla. 1997), citing The Florida Bar v. Pahules, cited supra.

In determining what sanction to impose upon the attorney for his misconduct, this Honorable Court has always espoused the position that: "In rendering discipline, this Court considers the respondent's previous disciplinary history and increases the discipline where appropriate." See The Florida Bar v. Bern, 425 So.2d 526, 528 (Fla. 1982), citing The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981); The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981); The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979). When after examining the respondent's prior history it is found that the improper conduct is of a similar, cumulative nature, then the court is warranted to impose an even more severe

discipline.

In the instant proceeding, the Referee's recommended sentence, approved by the Bar, is to harsh. If we remove, as an aggravating factor, the disciplinary proceeding identified in the Supreme Court Case Number 92,857, T.F.B. File No. 97-11,707(6E) because it is not prior disciplinary history, then a one month suspension, at the most, would be an appropriate discipline. In The Florida Bar v. Glick, cited supra, this Court approved the referee's recommended ten-day suspension after finding an attorney guilty of failing to provide competent representation and acting with reasonable promptness, failing to keep the 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. See also the case of The Florida Bar v. Jordan, II, 682 So.2d 547 (Fla. 1996). In Jordan, II, this Honorable Court found that a one-month suspension was appropriate for an attorney's failure to keep his client informed as to the status of his representation, failed to respond to the Bar's inquiry concerning his conduct, and failed to act with the appropriate degree of reasonable diligence and promptness in representing the client. It was reasoned that the severity of the sentence was warranted due to the attorney's history of prior misconduct involving the same type of client neglect. Both of these cases concern an attorney who was found guilty of violating appropriate attorney-client conduct similar to the improper conduct that ROBERTS was found to have committed.

The Referee, in the instant proceeding, found the Respondent guilty of failing to keep his client reasonably informed of the status of his representation and guilty of failing to explain the matters involved in his representation to the extent reasonably necessary for the client to make an informed decision. As shown by the previous two cases cited herein, for this type of misconduct the Court generally has approved punishment ranging from a private reprimand to a one-month suspension. It is clear, from the record, which shows, with the exception of the Respondent's disciplinary proceeding in 1999, that the Respondent has had only minor disciplinary problems in the past. There is absolutely no showing that the Respondent is involved in a cumulative and continuing course of conduct that would pose such a threat upon his clientele that a six (6) month, or until rehabilitation is proven, suspension, followed by a one (1) year period of probation is justified. This would be especially true if the position argued by counsel that the Bar decided to proceed with this grievance only after it failed to obtain the results being sought in the disciplinary proceeding that culminated in April of 1999.

CONCLUSION

In conclusion, the misconduct that the Respondent was found guilty of does not warrant a six (6) month suspension or until rehabilitation is shown, followed by a one (1) year period of probation, either by the facts established by the Referee or by the Respondent's history of prior disciplinary proceedings. This Honorable Court, in the case of The Florida Bar v. Brakefield, 679 So.2d 766 (Fla. 1996), upheld a six month suspension and a one year period of probation for an attorney's misconduct. In that case the attorney was found guilty of violating:

> "1. As to rule 4-1.1 which requires an attorney to provide competent representation, . . ."
> "2. . . . Rule 4-1.3 requiring a lawyer to act with reasonable diligence and promptness in dealing with clients."
> "3. . . . Rule 4-1.4(a) which requires a lawyer to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."
> "4. . . . Rule 1.4(b) which requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The severity of ROBERT'S misconduct, in the instant proceeding, does not rise to the level of the misconduct that Brakefield was found guilty of, nor does it entitle the Referee to recommend, and the Bar to approve, a six month suspension similar to the suspension approved in the case herein cited.

Respectfully submitted,

_____

THOMAS G. HERSEM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to LARRY DeBERG, Staff Counsel, The Florida Bar, Tampa Airport, Mariott Hotel, Suite C-49, Tampa, FL 33607; and JOHN ANTHONY BOGGS, Attorney at Law, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this _____, day of February, 2000.

_____

Thomas G. Hersem
1421 Court Street, Suite B
Clearwater, FL 34616
Telephone: (727) 446-1415
SPN #00042497 / BAR #227722
Attorney for Respondent