

SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

CASE NO.: SC95556

Complainant,

Lower Tribunal No.: 99-50,564(15E)

vs.

JEFFREY BRIAN LATHE,

Respondent.

INITIAL BRIEF OF RESPONDENT JEFFREY BRIAN LATHE

(Revised to meet font requirements)

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STATEMENT REGARDING SIZE AND STYLE OF TYPE

This brief was prepared using 14 point proportionately spaced Times New Roman.

STATEMENT REGARDING JURISDICTION

This is a Petition for Review of a Report of Referee filed in a disciplinary complaint proceeding brought by the Petitioner against Respondent. This Court has jurisdiction over this cause pursuant to *Article V, Section 15, Fla. Constitution* and *Rule Reg. Fla. Bar 3-7.7*.

STATEMENT OF THE CASE AND FACTS

The Petitioner brought its disciplinary Complaint against the Respondent as a result of the actions of the Respondent during the course of a lawsuit pending in the Circuit Court in Lake County, Florida styled Florida Select Citrus, Inc. v. Big Squeeze Corp. d/b/a Big Squeeze Juice and Michael Fisher, Case No. 97-2866 CA. The Respondent represented the Defendants in that case. In that lawsuit, the Respondent's clients had been ordered to appear for deposition in Orlando, Florida on August 6, 1998. On the day before the deposition, August 5, 1998, a matter arose which created a conflict on the Respondent's schedule for August 6, 1998. The Respondent contacted opposing counsel for the Plaintiff on August 5, 1998 by telephone and by telefax letter, advising of the conflict and requesting the courtesy of a rescheduling of the deposition from August 6, 1998 to later in the same week. Opposing counsel refused to reschedule the deposition, and later filed a Motion for Sanctions against the Defendants when they did not appear for deposition on August 6, 1998.

During the hearing on the Motion for Sanctions, the Respondent made a misrepresentation of fact to the trial judge regarding the reason why the Defendants did not appear for deposition as ordered. The Respondent stated that he had been contacted by a judge's office in Palm Beach County, Florida, and was directed to appear for a pretrial conference in Palm Beach County on August 6, 1998. Although the Respondent did appear at a pretrial conference before the Palm Beach County judge on August 6, 1998, the Respondent was not directed to do so by the judge. After making initial inquiry regarding the situation, the trial judge in Lake County determined that the

Respondent had in fact appeared before the Palm Beach County judge on August 6, 1998. He entered an order denying the Plaintiff's Motion for Sanctions, but directing the Defendants to appear for deposition.

The Plaintiff's counsel pursued the matter, and determined that the Respondent had not in fact been directed to appear at pretrial conference by the judge in the Palm Beach County case. He brought a further Motion for Sanctions directed against the Respondent, which resulted in an Order awarding significant monetary sanctions against the Respondent.

The Petitioner later filed its disciplinary Complaint against the Respondent, alleging the Respondent's violation of the Rules Regulating the Florida Bar, *to wit*, Rule 3-4.3 (the commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, and whether or not the act is a felony or a misdemeanor, may constitute a cause for discipline); Rule 4-3.3(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal); Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

A final hearing on the Petitioner's Complaint was held on October 11, 1999 before the Hon. Gary Cowart, Circuit Court Judge of the Seventeenth Judicial Circuit of Florida sitting as Referee. At the conclusion of the hearing, counsel for the Petitioner provided

the Referee with a proposed Report of Referee, which included both factual findings and proposed disciplinary measures. The Referee made only minor changes to the proposed Report, and on October 28, 1999 signed the Report of Referee. The Referee found the Respondent guilty of all of the Rule violations alleged by the Petitioner in its Complaint, and recommended that the Respondent be suspended from the practice of law for a period of ninety-one (91) days and thereafter until he proves rehabilitation. The Referee also assessed costs of \$1,477.20 against the Respondent.

The Respondent respectfully seeks review in this Court of the Report of Referee.

SUMMARY OF ARGUMENT

The Respondent will be confining his argument on review in this Court to issues relating to the Referee's recommendation as to the disciplinary measures to be applied. The Respondent does not contest the Referee's recommendation that the Respondent be found guilty of violation of Rules Regulating the Florida Bar.

The Referee's recommendation of suspension of the Respondent from the practice

of law for a period of ninety-one (91) days and thereafter until the Respondent proves rehabilitation is erroneous and unjustified under the circumstances of this case. Although the Respondent's suspension is indicated by application of the Florida Standards for Imposing Lawyer Sanctions, a suspension period of between thirty (30) days and sixty (60) days is an appropriate disciplinary sanction.

ARGUMENT

The Referee's recommendation as to disciplinary measures to be applied is erroneous, unlawful, and unjustified. In recommending a suspension period of ninety-one (91) days, the Referee in his Report makes reference to the cases of The Florida Bar v. Cibula, 725 So.2d 360 (Fla.1998), The Florida Bar v. Norvell, 685 So.2d 1296 (Fla.1996), The Florida Bar v. Schramm, 668 So.2d 585 (Fla.1996), The Florida Bar

v. Colclough, 561 So.2d 1147 (Fla.1990), and *The Florida Bar v. Fischer*, 549 So.2d 1368 (Fla.1989).

In each of these cases, this Court reviewed episodes of attorney misconduct that were greater in number and more serious in character than the present case. In *Cibula*, an attorney testifying under oath as a witness at two separate court hearings regarding his non-payment of an alimony obligation misrepresented his income. In *Cibula*, the referee found the attorney guilty of violating the same Rules Regulating the Florida Bar that are at issue in this case, and recommended a suspension period of sixty (60) days, with automatic reinstatement at the end of the suspension period. On review, this Court found that a suspension period of ninety-one (91) days was warranted based on the attorney's misconduct, because he had twice intentionally lied to a court while under oath.

Norvell involved the case of an attorney who had previously resigned from the practice of law in Florida after his conviction on a felony drug offense. After nearly a decade away from practice, the attorney was readmitted to active practice. Shortly after his readmission, he was involved in a case where he made misrepresentations in an affidavit filed in a bankruptcy proceeding, and he acquired a pecuniary interest in litigation in which he was involved as attorney for one of the parties. As in *Cibula*, the referee found the attorney guilty of violating five separate Rules Regulating the Florida

Bar, including the Rules at issue in the present case. The referee recommended a suspension period of ninety (90) days. On review, this Court ruled that a ninety-one (91) day period of suspension with proof of rehabilitation was an appropriate disciplinary measure.

In Schramm, the attorney was charged with two separate episodes of lying to the court and with an episode of failing to represent a client diligently, resulting in the loss of the client's home through foreclosure of a mortgage. The referee in Schramm found the attorney guilty, and recommended a ninety-one (91) day suspension period with proof of rehabilitation. On review, this Court adopted the disciplinary recommendation of the referee, based upon the multiple violations involved in the case.

In Colclough, the attorney made several misrepresentations of fact to a court and to opposing counsel, and later obtained a money judgment for costs on an *ex parte* basis without properly notifying opposing counsel of a hearing on the issue. The referee found the attorney guilty, and recommended a suspension period of twelve (12) months. On review, this Court approved the referee's finding of guilt, but reduced the suspension period to six (6) months.

In Fisher, the attorney was charged with having his legal secretary pose as a court clerk and contact a Florida Highway Patrol trooper by telephone, telling him that the

hearing on the attorney's traffic infraction charge was cancelled, so that the trooper would not appear as a witness at the hearing. Through this artifice, the attorney was able to get the traffic infraction charge dismissed when the trooper did not appear at the hearing.

The referee found the attorney guilty of violating eight different disciplinary rules, and recommended a suspension period of sixty (60) days, with automatic reinstatement. On review, this Court increased the suspension period to ninety-one (91) days, finding that the attorney had perpetrated a fraud and had manipulated the court.

At final hearing on October 11, 1999, the Respondent offered into evidence copies of several cases on the issue of the proper measure of discipline to be imposed (See Respondent's Exhibit Register, Exhibit "D"). Although these cases were accepted into evidence, the Referee absolutely failed to consider them, and made no mention of them in his Report. This was erroneous and unjustified, as the cases deal with situations where the attorney conduct was similar to that in the present case, but the disciplinary sanction uniformly was less severe than the ninety-one (91) day suspension recommended by the Referee herein.

In *The Florida Bar v. Sax*, 530 So.2d 284 (Fla.1988), the referee found that the attorney submitted a notarized pleading to the court when he knew or should have known

that the pleading contained a factual averment that was not true, and that the attorney executed the document outside the presence of the notary and after the jurat of the notary had been affixed to the pleading. In that case, the referee found the attorney guilty of violating the Code of Professional Responsibility, and recommended the disciplinary measure of a public reprimand. On review, this Court approved the referee's report, and reprimanded the attorney.

In *The Florida Bar v. Kravitz*, 694 So.2d 725 (Fla.1997), the attorney was charged with multiple violations of the Rules Regulating the Florida Bar. The attorney intentionally misrepresented a factual matter to a trial judge during a hearing. The judge to whom the misrepresentation was made held the attorney in contempt of court because he had intentionally misrepresented factual information, and ruled that the attorney had violated Rule 4-3.3(a)(1) of the Rules Regulating the Florida Bar (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal). The attorney was directed by the trial judge to deliver a copy of the contempt order to the Bar.

Later in the case, after the judge who had found the attorney in contempt had recused himself, the attorney submitted to the successor trial judge proposed orders granting the attorney's motion for rehearing on the contempt issue and vacating the order

finding the attorney in contempt. The attorney supplied the orders to the judge with a covering letter indicating that opposing counsel did not oppose entry of the orders. In fact, the attorney never had presented the proposed orders to his opposing counsel before submitting them to the court.

The referee found the attorney guilty of violating the Rules Regulating the Florida Bar, and recommended the disciplinary sanction of one (1) year probation and the taking of a refresher course in ethics for attorneys. After its initial review of the matter, this Court remanded the case to the referee for the purpose of holding another hearing on the issue of sanctions and the measure of discipline recommended. The referee after conducting that hearing submitted a second recommendation of discipline that was quite similar to the first.

On review, this Court rejected the Bar's request for a ninety (90) day suspension. This Court imposed a thirty (30) day suspension as the appropriate disciplinary measure, making reference to the Florida Standards for Imposing Lawyer Sanctions 6.12. The thirty day suspension was found to be appropriate even though this Court found a pattern of knowing misrepresentations to the trial court. This Court also directed the attorney to successfully complete the Bar's Practice and Professionalism Enhancement Program as

a condition to reinstatement to the Bar.

In *The Florida Bar v. Corbin*, 701 So.2d 334 (Fla.1997), the attorney was charged with violating the same Rules Regulating the Florida Bar that are at issue in the present case. The referee found that the attorney had misrepresented material facts to a trial court during the course of litigation, that he had submitted an affidavit in the litigation that he knew was false, and that he misled the Bar during the course of its investigation of the matter. The referee recommended that the attorney be suspended for six (6) months.

On review, this Court ruled that the six month suspension was unduly harsh, and ruled that a ninety (90) day suspension would be an appropriate disciplinary measure.

Another case was mentioned in passing by the referee in his Report and apparently rejected. In *The Florida Bar v. Oxner*, 431 So.2d 983 (Fla.1983) the referee found that the attorney had lied to a trial judge twice in order to obtain a continuance of a hearing. The referee recommended a suspension of sixty (60) days. On review, this Court approved the referee's recommendation of a sixty day suspension.

In addition to the Referee's error in failing to consider the Respondent's cases on the issue of the disciplinary sanction to be imposed, the Referee failed to note in his Report several matters in mitigation as provided in the Florida Standards for Imposing Lawyer Sanctions. Those matters include the fact that the Respondent made full and free disclosure to the disciplinary board and maintained a cooperative attitude toward the proceedings, and the fact that other penalties and sanctions were imposed upon the Respondent.

It is respectfully submitted that the Referee's recommendation of suspension for ninety-one (91) days is excessive and unduly harsh. The Respondent submits that the circumstances of this case are closer to those in Oxner, where this Court ordered a sixty (60) day suspension, or those in Kravitz, where this Court ordered a thirty (30) day suspension, along with attendance and successful completion by the attorney of the Bar's Practice and Professionalism Enhancement Program.

CONCLUSION

The portion of the Referee's Report recommending that the Respondent be found guilty of violating Rules Regulating the Florida Bar should be accepted. The portion of the Referee's Report recommending that the Respondent be suspended from the practice of law for a period of ninety-one (91) days and thereafter until the Respondent proves rehabilitation should be rejected. Instead, this Court should impose the disciplinary sanction of a suspension period of between thirty (30) and sixty (60) days, and should direct the Respondent to attend and successfully complete the Bar's Practice and Professionalism Enhancement Program.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was served by U.S. Mail this _____ day of April, 2000 upon Ronna Friedman Young, Esq., The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, FL 33309, and Billy Jack Hendrix, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

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