IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

MARJORIE HOLLMAN SHOUREAS,

Respondent-Appellant.
_____/

SC03-293

The Florida Bar File
Nos.2002-51,797(17J)
and 2003-50,524(17J)

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar." Marjorie Hollman Shoureas, Appellant, will be referred to as "respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Lastly, the symbol "TFB" followed by a letter and number will designate the bar's trial exhibits.

STATEMENT OF CASE AND FACTS

On April 8, 2003, the Referee, the Honorable Edward A. Garrison, entered a default in favor of The Florida Bar and on May 7, 2003, the Final Hearing was held and based upon this default the Respondent was found guilty of neglecting two clients' cases and of failing to adequately communicate with these two clients. Further, the Respondent was found guilty of two counts of failing to respond to The Florida Bar.

A short analysis of the facts of this case is important to understand the nature of the misconduct at issue. In the first situation addressed by the Referee, the Respondent was found guilty of neglecting Felipe Mantorval's personal injury case against Publix Supermarkets. RR2. The Respondent was retained by Mantorval in October of 2000, which is approximately six months after Ms. Shoureas was admitted to The Florida Bar. RR2 & RR11. At a point unknown in the record,[1] Mantorval moved to Brazil, but claims to have made "numerous attempts to contact respondent." RR2. The Report of Referee continues that the Respondent did not return Mantorval's calls (presumably to Brazil) and that

[1] As this case proceeded upon a default, the matters plead in the Bar's complaint were accepted as true. However, this has left the record not fully developed as to the facts. For example, we do not know when Mantorval moved to Brazil and how or if this complicated communication with the client and for how long.

Mantorval was unable to ascertain the status of his case. RR2-3. It seems that in August 2001, Mantorval borrowed money from Pilot Finance and pledged his potential settlement as collateral for the loan. RR3. Pilot Finance attempted to discuss the status of Mantorval's case with the Respondent and the Referee has found that the Respondent failed to respond to these requests for information. RR3. Notwithstanding that Pilot Financial is not a client, the Referee has improperly found Respondent guilty, in Count III, of both provisions of the client communication rule[2] and a procedural rule. RR8. Lastly, the Respondent was found guilty of having failed to Respond to the grievances filed by Mantorval and Pilot Finance. RR8.

The second matter addressed in the Report of Referee concerns the Respondent's representation of Sylvia Herrera. According to the Report of Referee Herrera retained the Respondent in March 2002 for a dissolution of marriage proceeding and paid the small sum of $450.00 to commence services in this regards. RR5. Based upon the default, the referee has found that the Respondent "took little or no significant action in the case" and that she failed

[2] R. Regulating Fla. Bar 4-1.4.

to adequately communicate with Herrera. RR5. The Referee has also found the Respondent guilty of failing to respond to Herrera's grievance.

After finding the Respondent guilty of all matters referenced in the Bar's complaint, the Referee has recommended that the Respondent be disbarred for this misconduct and that restitution of $400.00 be made to Mantorval and $450.00 to Herrera. It is the Respondent's position that this sanction is not warranted under the circumstances and case law, and she is therefore appealing the Referee's sanction recommendation[3].

SUMMARY OF ARGUMENT

The Respondent comes before this Court having been convicted of neglecting two client matters, failing to communicate with these same clients and failing to respond to the Bar, after having previously been suspended for ninety-one days for similar misconduct. The Referee has recommended the Bar's capitol offense - disbarment. It is respectfully contended that this sanction does not fit the misconduct for which the Respondent was convicted.

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[3] The Respondent does not take issue with the restitution award.

The Respondent was defaulted below and the factual record of this case is therefore very limited. Somehow the Referee has extrapolated from this meager record and the fact that the Respondent has neglected four client cases (over two distinct disciplinary matters) that this is sufficient evidence of abandonment of a law practice, even though when this case came on for final hearing the Respondent was already serving a suspension from the practice of law and was therefore unable to be representing clients at that time.

The Referee has also found the Respondent guilty of violating the client communication rule, by failing to communicate with a nonclient. This ruling is clearly erroneous and should be reversed.

Lastly, disbarment is reserved for cases of gross misconduct and in situations where there is no hope at reformation or rehabilitation of the accused lawyer. A review of this case will demonstrate that this is not a case of gross misconduct and that this lawyer, who was admitted in March of 2000 is capable of rehabilitation and should be given the chance to demonstrate same to the Court.

ARGUMENT

I. DISBARMENT IS NOT THE APPROPRIATE SANCTION FOR A LAWYER WHO, NEGLECTS TWO CLIENT MATTERS, FAILS TO ADEQUATELY COMMUNICATE WITH

THOSE TWO CLIENTS AND FAILS TO RESPOND TO THE FLORIDA BAR CONCERNING THESE GRIEVANCES.

At issue in this appeal is whether a lawyer, who neglects two client matters, fails to adequately communicate with those two clients and fails to respond to The Florida Bar concerning the grievances filed by these clients warrants the ultimate sanction of disbarment. It is the Respondent's position that disbarment is too draconian a sanction under the facts of this case and that a rehabilitative suspension is appropriate. See for example The Florida Bar v. Davis, 379 So. 2d 942 (Fla. 1980) [Disbarment is an extreme penalty and should be imposed only in cases where rehabilitation is improbable.].

It is well settled that a referee's findings of fact and guilt[4] are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support." The Florida Bar v. Canto, 668 So.2d 583 (Fla. 1996); The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). However, this Court has consistently held that it has a broader discretion when reviewing a sanction recommendation because the

[4] The Respondent is appealing one finding of guilt (addressed later in this brief), but the real issue in this brief concerns the appropriate level of sanction.

responsibility to order an appropriate sanction ultimately rests with the Supreme Court. The Florida Bar v. Thomas, 698 So. 2d 530 (Fla. 1997).

A. The Factual Predicate for the Disciplinary Sanction.

The Respondent has been found guilty of two distinct acts of client neglect[5] and related lack of communication charges and for failing to respond to the grievances filed by these particular clients. In the first instance, the Respondent is charged with neglecting a personal injury case for Mantorval and in the second instance she is charged with neglecting a dissolution of marriage action for Herrera. As this Report of Referee is predicated upon a default, certain key facts such as the harm, if any, suffered by these clients is not present in the record. The lack of communication charges suffer from the same lack of specificity. In any event, for purposes of this appeal it is conclusively proven that the Respondent did in fact neglect two client matters, failed to adequately communicate with these two clients and later

[5] The Bar has combined a R. Regulating Fla. Bar 4-1.1 lack of competence violation with each neglect count. While not ignoring that this is a separate violation, these two charges often go hand and hand and as such the undersigned will be generally referring to these two counts of misconduct as neglect counts.

failed to respond to The Florida Bar concerning the two grievances. The Court must therefore decide what sanction is appropriate for this misconduct.

B. Neglect normally warrants a public reprimand.

As noted in The Florida Bar v. Price, 569 So. 2d 1261, 1263 (Fla. 1990):

> (d)ecisions of this Court have established that "(p)ublic reprimand is an appropriate discipline for isolated instances of neglect or lapses of judgement." (Citations omitted).

In Price, the attorney was found guilty of neglect of a client matter, as well as conduct prejudicial the administration of justice and failing to follow the objectives of his client. Mr. Price received a public reprimand.

Similarly, an attorney was publicly reprimanded for neglect of a client matter by missing a statute of limitations and for failing to advise his client of same. The Florida Bar v. Whitaker, 596 So. 2d 672, 674 (Fla. 1992). The Court went on to state that:

> Our case law demonstrates that public reprimand is more appropriate in cases such as this which involve neglect of client matters. (Citations and footnote omitted).

It is also important to note that a public reprimand is not precluded if the accused lawyer neglected more than one client matter. See for example The Florida Bar v. Barcus, 697 So. 2d 71 (Fla. 1997). In Barcus, the lawyer neglected several distinct cases for related clients and this Court reduced the referee's recommended thirty day suspension to a public reprimand. In making this change the Court relied upon The Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to as "Standard ___"). While the Court discussed Standard 4.42 to explain why suspension is not appropriate due to the lack of intent and ultimate harm to the client, the better Standard for this case is Standard 4.43 which comments that:

> Public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.[6]

In the case at hand the record is devoid of any mention of harm or injury to either client. The record also makes no mention that respondent's action were anything but negligent. Accordingly, Standard 4.42 would not apply to this case either as this Standard requires a finding of (a) a knowing failure to provide services or (b) a pattern of neglect that "causes injury or potential injury to a client."

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[6] An admonishment would be appropriate if little or no harm to the client was found. Standard 4.44.

C. Mitigation and Aggravation require adjustment of a sanction.

Certain mitigation and aggravating factors are used to enhance or minimize the disciplinary sanction that is to be imposed. In this case the Referee has found several aggravating factors and ignored a mitigating factor[7] that was present in the record before him. The Referee has found five aggravating factors. The Respondent agrees that three of the factors apply, but strongly disagrees with two factors and the overall weight given to these aggravating factors.

Prior to discussing aggravation, the Respondent wants to point out the mitigating factor that appears in the record of this case, but is not mentioned by the Referee. At page 11 of the Report, the Referee notes that the Respondent was admitted to the practice of law on March 31, 2000. The conduct at issue occurred prior to her three-year anniversary as a member of The Florida Bar. Accordingly, Standard 9.32(f) [inexperience in the practice of law] applies in this case and should be considered as an important element of mitigation because inexperienced lawyers have a more difficult time in extracting themselves from unfortunate situations, such as the one presented in this case where disciplinary charges are pending and the lawyer has not found a way to defend herself until this appeal.

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[7] As the Respondent was defaulted and did not appear at the final hearing, she did not present other mitigating factors that may be present in this case.

The first aggravating factor found by the Referee is the Respondent's disciplinary record. The Referee correctly states that the Respondent received a 91-day suspension from the practice of law in Supreme Court Case No. SCO2-2226. This suspension was ordered on February 20, 2003, is also based upon a default and finds the respondent guilty of neglecting two client matters, along with communication violations and failing to respond to the Bar. The Respondent acknowledges that this is an appropriate aggravating factor, but would make two arguments as to the weight to give the 91-day suspension. Firstly, while not attempting to make it look like the Respondent is now appealing the 91-day suspension, it is important to note that perhaps a 91-day suspension for two isolated neglect of client matters was a rather stern sanction for the first discipline imposed on a relatively new lawyer and that a public reprimand may have been more appropriate under the circumstances. See for example Price; Barcus. Secondly, this appears to be similar to the situation faced by the Court in imposing a proper sanction on a different lawyer. The Florida Bar v. Maier, 784 So. 2d 411 (Fla. 2001). In Maier, the Court suspended the lawyer for sixty days when that lawyer neglected a client matter, failed to properly communicate with the client and also failed to respond to the Bar notwithstanding a more

extensive disciplinary record. Maier had a thirty-day suspension and two admonishments for similar misconduct. The Court in Maier stated that:

> . . . we do not believe that a public reprimand is sufficient in light of the fact that Maier's violations in the instant case involve the same type of misconduct that were the subject of her three previous disciplinary actions. See generally Florida Bar v. Morrison, 669 So.2d 1040, 1042 (Fla.1996) (finding that "[i]n rendering discipline, this Court considers the respondent's previous history and increases the discipline where appropriate"). Since this is Maier's fourth disciplinary proceeding in the last seven years, and Maier was suspended for thirty days in 1998, see Florida Bar v. Maier, 707 So.2d 1127 (Fla.1998), we believe that a sixty-day suspension is appropriate in the instant case.

The operative term from the Morrison decision, as discussed in Maier, is that the "Court considers the respondent's previous history and increases the discipline where appropriate." Even though the Maier Court was faced with a lawyer with a much longer disciplinary record,[8] the Court took what was a public reprimand type of violation and enhanced it to a short term suspension. This Court should do likewise in this case.

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[8] Compare Shoureas's 91 day suspension to Maier's three disciplinary orders, which included a thirty day suspension and two admonishments. Even in the Bar were to argue that the two disciplinary records are similar, there is no palatable reason not to follow the reasonable Maier enhancement, rather than the excessive leap from short term suspension to disbarment.

The second aggravating factor found by the referee is found at page 9 of his report, wherein he finds "a pattern of misconduct" and "multiple offenses." The Respondent candidly admits that on the record before this Court this finding is appropriate. However, the Respondent contends that this finding, standing alone, should not enhance public reprimand type violations to a disbarment.

The Referee has also made finding that the "Respondent has obstructed these disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency." See Standard 9.22(e). Apparently, the Referee is referring to the fact that (1) the Respondent was found guilty of failing to respond to the Bar during the underlying grievance procedures and (2) that she allowed a default to be entered against her by not responding to the Bar's complaint. As to the first instance, the Respondent is already being disciplined for a substantive violation of R. Regulating Fla. Bar 4-8.4(g) [failing to respond to the Bar.][9] and it seems patently unfair to also use the same issue as an enhancement of that same discipline. While understanding that the second noted matter (not responding to the Bar's

[9] A public reprimand is the normal sanction for this type of violation. See for example The Florida Bar v. Vaughn, 608 So. 2d 18 (Fla. 1992).

Complaint] is an aggravating factor, the Respondent has already suffered the consequences of her actions in that a default was entered against her.

The Referee also finds that the Respondent was "indifferent to making restitution"and apparently is using this finding to aggravate the discipline to be imposed. RR10.. See Standard 9.22(j). This finding is "clearly erroneous and lacking in evidentiary support." Canto. While the Referee is recommending that restitution in the amount of $400.00 be made to Mantorval, there is no mention, at all, in the factual findings established by the default regarding what monies were paid to Respondent by Mantorval or even if he requested a refund of the monies that he paid to the respondent.[10] Similarly, the findings of fact make no mention that Herrera demanded a refund of the $450.00 that she paid for the initials services to be rendered in her divorce and yet the referee has ordered a refund of that fee and found that the respondent was indifferent to making restitution. Most respectfully, there is no basis for the Referee, on this record, to have made such a finding.

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[10] At the final hearing the Bar relied upon the default and did not present any further evidence. Accordingly, the only facts that constitute the factual record of this case come from the Bar's complaint and the Bar's complaint does not make mention of the amount of monies paid by Mantorval.

The last finding that appears to be considered as aggravation is the Referee's finding of abandonment. See RR 10 (E) & (F). This finding is likewise "clearly erroneous and lacking in evidentiary support." Canto. The record in this case reveals that the Respondent neglected two client matters and if you consider the Referee's knowledge of the 91-day suspension case, the Referee was aware of two more neglected clients. The record, established by the default, is devoid of any mention of other neglected clients and further makes no mention of an abandonment. Further, the record on appeal has no information concerning the Respondent's other clients (during the period prior to her suspension), whether she continued to work on other client matters or even if she continued to appear in her office on a daily basis. Lastly, at the time that the Referee conducted the final hearing and executed the Report of Referee, in June of this year, the Respondent had already suspended from the practice of law for some four months and therefore could not be representing clients pursuant to Court order. Therefore, there is no factual basis to support a finding of abandonment on the record before this Court.

D. The Sanction Recommendation.

It is anticipated that The Florida Bar will primarily rely upon the precedent set forth in the Report of Referee to establish its support of the disbarment recommendation. Thus, it is important to analyze these cases and to demonstrate that each of these other disciplinary matters are either more serious than the matters currently before this Court.

In the first case cited by the Referee, The Florida Bar v. Setien, 530 So. 2d 298 (Fla. 1988), the lawyer was disbarred for neglecting five client matters and for issuing multiple bad checks. The Court found that when the "Composite conduct of (a) lawyer is gross" disbarment is warranted. Id., at 300. Setien's misconduct is greater than the Respondent's in that he neglected one more client, with harm to the client, issued multiple bad checks and the record was clear that he abandoned his practice and was even "in hiding" for a time. Id.

In another cited case the lawyer was disbarred for accepting fees on four cases and then promptly abandoning the practice of law. The Florida Bar v. Ribowsky-Cruz, 529 Sop. 2d 1100 (Fla. 1988). In the case at hand, there are two clients and no record of abandonment.

The Referee next cites to The Florida Bar v. Friedman, 511 So. 2d 986 (Fla. 1987). The misconduct in Friedman was significant. The Court found wholesale abandonment, neglect, fraud, misrepresentation, and conversion of trust funds. In reaching the decision to disbar the Court noted:

> That act (abandonment of practice), in conjunction with the specific acts of neglect, fraud, misrepresentation, breach of fiduciary responsibility, conversion of funds and trust account violations set forth in The Florida Bar's complaint amply supports this disciplinary recommendation. Id., at 987.

There is no true comparison of the facts of Friedman to the case at bar. Further, there are no trust account issues or fraud or misrepresentations present in this case. Thus, Friedman should not be considered as valid authority on this particular case.

Likewise The Florida Bar v. Murray, 489 So. 2d 30 (Fla. 1986), which is cited in the Report of Referee, is much more serious than four instances of neglect, with no known harm. In Murray, the lawyer was disbarred for abandonment of his practice with significant real harm to the clients.

Lastly, the Referee relies upon The Florida Bar v. Bartlett, 509 so. 2d 287 (Fla. 1987). Admittedly, there are some similarities in Bartlett in that the lawyer was found not to have participated in the disciplinary process[11] and stood convicted of neglect. However, the differences are significant. The Court noted that Bartlett had already been ***suspended twice*** for neglect of client matters over a two and a half year period. Id., at 288. Further, these suspensions were for thirty days and fifteen months. Id., at 289. In the case sub judice, the Court has a lawyer who was suspended once and for ninety-one days and not twice for more than five times that in toto.

While not mentioned by the Referee, The Florida Bar v. Wells, 602 So. 2d 1236 (Fla. 1992) may provide some guidance. In Wells, the Court found seven neglect cases, bounced trust checks, improper trust account record keeping, a DUI and cocaine possession by the lawyer, who also had prior discipline. The Court chose not to disbar Wells, but instead imposed and eighteen month suspension. The Court's decision seems to have been decided in a balancing of

[11] While the Respondent, has been dilatory in her own defense and did not participate in the early stages of this case, she is now meeting her professional responsibilities to the Court and to the Bar.

the three basic standards/requirements of imposing lawyer sanctions[12] and decided that "encouraging reformation and rehabilitation" was more appropriate under the circumstances of this particular case.

Deciding an ultimate sanction recommendation in this case may be difficult as the Court must look at what appears to be public reprimand like offenses combined with an enhancement for a prior ninety-one day suspension for similar misconduct. As the two disciplines will be close in time, the logical point would be to make the sanction sterner than the first sanction and then the question becomes how much sterner. It is respectfully submitted that a six-month suspension, with the restitution awarded by the Referee, with an appropriate term of probation would meet all of the requirements of sanction an attorney. A six-month suspension would be fair to both the public and the accused. It would be sufficiently harsh to punish the violation and yet encourage reformation. Lastly, a six-month suspension would function as deterrent to others who might be tempted to engage in similar misconduct.

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[12] Fairness to both the public and the accused; sufficient harshness to punish the violation and encourage reformation; and severity appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

II. THE FINDING OF GUILT ON COUNT III IS ERRONEOUS AS A MATTER OF LAW AND THE COURT SHOULD REVERSE SAME.

The Referee has found the Respondent Guilty of having violated R. Regulating Fla. Bar 3-4.2 and both provisions of R. Regulating Fla. Bar 4-1.4. RR8. The factual predicate for these violations are:

1. Mandorval, a personal injury client, borrowed money from Pilot Financial and authorized the reimbursement of same from any settlement proceeds.

2. Mandorval authorized the Respondent to release otherwise confidential information concerning the status of the matter to Pilot Financial.

3. Pilot Financial attempted to communicate with the Respondent but the Respondent did not return phone calls or e-mails. RR3.

These facts must form the basis of the Rule violations or the Respondent should be found not guilty of Count III of the Bar's Complaint.

R. Regulating Fla. Bar 3-4.2 states in toto: "Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is cause for discipline." This is a procedural rule and not a substantive rule. It does not seem appropriate to use a procedural rule to bootstrap a violation when there is a substantive rule that sets the standards for the conduct at issue. All this rule does is establish that the Court has jurisdiction to discipline a lawyer for violation the Rules of Professional Conduct.

The rule that sets the standard in this instance is R. Regulating Fla. Bar 4-1.4 and the Referee has found the Respondent guilty of both portions of the rule which reads as follows:

> Rule 4.14 COMMUNICATION
>
> (a) **Informing Client of Status of Representation.** A lawyer shall keep a client reasonably informed about the status of a matter and promptly with reasonable requests for information.
>
> (b) **Duty to Explain Matters to Client** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A careful examination of this rule reveals that a lawyer is obligated to communicate with his client by (a) keeping them informed on the status of their case and (b) giving them sufficient information to make decisions regarding same. This

rule makes no mention of an obligation to communicate with nonclients. Pilot Financial is not a client and therefore the Respondent had no ethical obligation mandated by R. Regulating Fla. Bar 4-1.4(a) or (b) to communicate with Pilot Financial. To find otherwise would place an extremely undue burden on the lawyers of this state to "adequately communicate"with individuals who happen to be doing business with their clients. Accordingly, the Respondent should be found not guilty of Count III of the Bar's Complaint.

CONCLUSION

The Respondent has engaged in unethical misconduct that standing alone would warrant a public reprimand. The Referee has recommended that this public reprimand type violation be enhanced to a disbarment based upon a recent ninety one day suspension and for other aggravating factors that he believed to be present in the record. It is Respondent's position that disbarment under the facts of this case is too draconian and that a six-month suspension, restitution to the clients and an appropriate period of probation is a proper sanction for her misconduct.

WHEREFORE, the Respondent, Marjorie Hollman Shoureas, respectfully requests this Court to find her not guilty of Count III of the Bar's complaint and impose a six-month suspension from the practice of law as a sanction for the remaining disciplinary violations.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished served via U.S. Mail on this 2nd day of September, 2003 to Adria Quintella, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Fort Lauderdale, FL 33309 and to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by McAfee.

_____

KEVIN P. TYNAN