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 REPLY 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.

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.

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. The Bar mistakenly believes that it should, but has failed in its brief to demonstrate why this extreme sanction fits the facts of this case.

In its brief, the Bar first takes issue with the fact that the Respondent is even seeking relief from this Court. The Respondent in her Initial Brief admitted at Page 17, that she had " been dilatory in her own defense and did not participate in the early stages of this case"but that "she is now meeting her professional responsibilities to the Court and to the Bar." Perhaps, if the sanction recommendation was consistent with case law and the basic precepts of lawyer

sanction, no appeal would have been necessary.

A. Standard of review.

As was noted in the Initial Brief that a referee's findings of fact and guilt 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). In this case, by virtue of the default entered by the Referee, the factual predicate for the facts of the case and the rule violations are solely contained in the Bar's Complaint and no where else.[1]

However, this Court has consistently held that it has a broader discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. The Florida Bar v. Thomas, 698 So. 2d 530 (Fla. 1997). The Bar's Answer brief fails to make the distinction between an appealing party's factual burden and the Court's discretion in recommending sanction. While the Respondent is appealing one finding of guilt (addressed later in this brief), the real issue in this brief concerns the appropriate level

[1] The transcript of the Final Hearing reveals that no testimony was taken and therefore, the Bar's Complaint is the only source for support of the Referee's factual findings and findings of guilt.

of sanction.

B. Suspension and not disbarment is the appropriate sanction.

The Respondent has been found guilty of two distinct acts of client neglect[2] and related lack of communication charges and for failing to respond to the grievances filed by these particular clients. 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).

The Bar in its Answer brief ignores this basic precept and instead points to various cases where disbarment was ordered. The Bar also ignores the Respondents argument that if a public reprimand is the appropriate level of discipline "for isolated instances of neglect" such as the two acts of negligence in this case, then any enhancement as a result of

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[2] 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.

the aggravating factors in this case does not rise to the level of a disbarment.

A clear example of the Bar's misunderstanding of the premise is the first case cited by the Bar in its sanction argument. The Florida Bar v. Gunther, 400 So. 2d 968 (Fla. 1981). In Gunther, the lawyer was disbarred for "twenty-six counts of neglecting legal matters entrusted to him." In the case at hand there are two client matters that were neglected and even combined with the prior discipline there are only four client matters - a far cry from the twenty six clients in Gunther.

The next example given by the Bar to support its disbarment analysis is The Florida Bar v. Mitchell, 385 So. 2d 96 (Fla. 1980).[3] In Mitchell, an uncontested case, the Court disbarred a lawyer for eleven counts of misconduct, inclusive of neglecting "several cases" by failing "to file claims, make court appearances or prosecute appeals". He did not return money advanced to him and he issued a bad check. The Court made reference to the Report of Referee that it was the "totality and frequency of the different complaints" that resulted in his disbarment recommendation. Id., at 97. The "totality and frequency of the different complaints" in the case at hand is four and not the eleven found in

[3] The Respondent will not reargue cases previously distinguished in the Initial Brief.

Mitchell.

The last case cited by the Bar that warrants discussion is the Murray decision, which was also an uncontested case. The Florida Bar v. Murray, 489 So. 2d 30 (Fla. 1986). The Bar points out at page 12 of its brief that Murray was disbarred for neglect notwithstanding a potential mitigation factor of drug and/or alcohol addiction. What the Bar fails to discuss is the significant harm caused by Murray's neglect. Murray's neglect included:

1. Neglecting a criminal matter by failing to convey a plea offer which offered probation as a resolution of the case and the client, who did not know of the plea offer went to trial and was convicted and sentenced as an habitual offender.[4]

2. Neglecting two distinct civil matters for a different client. Murray failed to appear at hearings and both cases were dismissed.

3. Neglecting a third client's civil matter by missing key hearings and an order of dismissal was entered against his client.

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[4] This was reversed on appeal by a new attorney.

4. Despite accepting a full fee to complete an adoption, Murray performed no services to forward the adoption.

An examination of the Report of Referee in the instant action does not reveal any finding concerning harm to the two client's that were neglected. Accordingly, the case at hand is distinguishable from Murray. Rather, the misconduct in this case is similar to that found in 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 operative term 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,[5] 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

Deciding an ultimate sanction recommendation in this case may be difficult as the Court must look at what

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[5] 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.

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 disciplining 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.

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

In Count III of the Bar's complaint, the Referee has found the Respondent Guilty of having violated the client communication rule. R. Regulating Fla. Bar 4-1.4. RR8. However, the person (entity) that was not communicated with was not the actual client. Rather it was a third party with whom the client had a business relationship. As was explained in the Initial Brief, the factual predicate for the guilty finding in Count III are as follows:

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. The Bar does not appear to take issue with this statement, but instead argues that there is some form of agency relationship between Pilot and Mandorval that created the absolute obligation to communicate with Pilot in the same manner as if they were clients. However, a review of the record in this case and in particular the Referee's findings in this regards, there is no mention of an agency relationship between Pilot and Mandorval.

A careful examination of R. Regulating Fla. Bar 4-1.4 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 ___ 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.

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KEVIN P. TYNAN