IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC09-1929
[TFB Nos. 2009-30,456(09D);
2009-30,495(09D)]

v.

JAIME ROBERTO,

Respondent.
_____________________________/

THE FLORIDA BAR'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this brief, The Florida Bar shall be referred to as "The Florida Bar" or "the Bar."

The transcript of the hearing held on March 17, 2010, shall be referred to as "TI" followed by the cited page number(s). (TI-__)

The transcript of the hearing held on April 19, 2010, shall be referred to as "TII" followed by the cited page number(s). (TII-__)

The Report of Referee dated April 19, 2010, shall be referred to as "ROR" followed by the referenced Appendix page number(s). (ROR-A_)

The Bar's exhibits will be referred to as "B-Ex." followed by the exhibit number. (B-Ex.__)

STATEMENT OF THE CASE AND FACTS

On October 14, 2009, The Florida Bar filed a two-count complaint against respondent, which was subsequently assigned Supreme Court Case No. SC09-1929. The Honorable Tonya B. Rainwater was appointed as referee on October 26, 2009. Judge Rainwater entertained the final hearing on March 17, 2010, and conducted a disciplinary hearing on April 19, 2010. The referee entered her final report of referee on April 19, 2010, finding respondent guilty of violating the following Rules Regulating The Florida Bar: 4-1.8(e) for providing financial assistance to clients; and, 4-7.4(a) for improperly soliciting clients. The referee further recommended that respondent be placed on a one-year period of probation; that he initiate a LOMAS review and comply with their recommendations; that he complete an ethics course; and that he pay costs totaling $4,402.27 (ROR-A4-A8).

Respondent filed his Petition for Review/Initial Brief on or about May 12, 2010. On May 26, 2010, this Court found that respondent's Initial Brief did not comply with Florida Rule of Appellate Procedure 9.210, and ordered respondent to file an amended brief on or before June 15, 2010. The Bar filed its Cross-Petition for Review on June 1, 2010. On August 11, 2010, this Court dismissed respondent's Petition for Review for his failure to file an Initial Brief and transcripts and further ordered the Bar to file its Initial Brief and transcripts on or

before September 15, 2010.

The following factual summary is taken from the report of referee contained in the appendix herein and as otherwise noted:

In January 2008 and February 2008 respondent began representation of two female clients, Michelle Danna and Jennifer Ragin, in separate criminal matters. During the representation and the completion of legal work, respondent never collected a monetary fee from Ms. Danna or from Ms. Ragin.

Respondent engaged in sexual relations with Ms. Danna during the time that he was handling her criminal case (TI-159). Ms. Danna alleged that the sexual relationship was in exchange for payment of legal fees (B-Ex. 5). The referee did not find Ms. Danna's testimony regarding sex in lieu of legal fees to be credible, and the referee did not find that respondent's sexual relationship with Ms. Danna exploited the attorney-client relationship. The referee did find that "whenever a lawyer engages in a sexual relationship with a client, there is the appearance of impropriety, and the potential for exploitation" (ROR-A2).

Respondent testified that during his representation, he and Ms. Ragin had one consensual sexual encounter (B-Ex. 8 p. 19, l. 16-18; TI-13). Ms. Ragin maintained that she declined respondent's sexual advances, which continued over a period of several months (TI-23-26). The referee found that The Florida Bar failed to prove

by clear and convincing evidence that respondent's relationship with Ms. Ragin was in exchange for legal services or that it exploited the attorney-client relationship. The referee found that respondent's behavior with Ms. Ragin led to informality and to the appearance that respondent might be willing to exchange services for sex.

Respondent paid money for Ms. Danna's business-purpose license and deposited approximately $130 into Ms. Danna's commissary account at the jail during her incarceration (B-Ex. 8 p. 48, l. 11-19). During the time that respondent was representing Ms. Ragin, he gave Ms. Ragin approximately $250 to buy clothes or other personal goods (TI-177). Subsequently, in or around August 2008, during a time in which Ms. Ragin was back in the Osceola County Jail, respondent deposited approximately $60 into Ms. Ragin's commissary account at the jail (TI-28, 56).

Respondent had Ms. Danna refer prospective criminal clients to him for representation. The referrals were at respondent's request because Ms. Danna knew many people in Osceola County, and respondent stated that he needed clients (TI-153). Respondent purchased a cellular phone for Ms. Danna's use in pursuing client referrals (B-Ex. 8 p. 40, l. 20-25). Respondent also admitted to giving Ms. Danna $200 for her potential client referrals (B-Ex. 8 p. 41, l. 2-4). The referee found no evidence that respondent received legal fees based on the client referrals.

SUMMARY OF THE ARGUMENT

The Florida Bar argues that the referee in this matter erred by finding respondent not guilty of violating Rule 4-1.7(a) (for engaging in a conflict of interest). This finding should not be upheld as it is clearly erroneous and without support in the record. The referee specifically stated in her report that respondent's conduct created a conflict of interest, and this finding does not logically comport with the referee's finding of not guilty on Rule 4-1.7(a). The evidence supports that respondent's conflicts involved his own sexual gratification, his inability to clarify legal fees due to his personal relationships with the clients, and his actions of improperly providing his clients with financial assistance.

The Bar has met its burden of proof by clear and convincing evidence to support the referee's findings of violations of Rules 4-1.8(e) and 4-7.4(a), and respondent made numerous admissions supporting his violations of these rules. Respondent admitted to providing his clients with financial assistance and further admitted to providing Ms. Danna with a cellular telephone for the purposes of soliciting potential clients.

Finally, the Bar maintains that the discipline recommended by the referee, a one-year period of probation, is not supported by the existing case law or the Florida Standards for Imposing Lawyer Sanctions. The Bar submits that based on

the facts, the available case law and the Florida Standards for Imposing Lawyer Sanctions, the appropriate level of discipline is a one-year suspension from the practice of law. Respondent's conduct in this matter damaged the integrity of the legal profession and should not be taken lightly.

ARGUMENT

POINT I

THE REFEREE ERRED BY FINDING RESPONDENT NOT GUILTY OF VIOLATING RULE 4-1.7(a).

This Court has stated that a referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Barrett, 897 So.2d 1269, 1275 (Fla. 2005). The Florida Bar maintains that the referee erred in this matter by finding respondent not guilty of violating Rule 4-1.7(a) (for engaging in a conflict of interest). This finding should not be upheld as it is clearly erroneous and without support in the record.

Despite finding respondent not guilty of violating Rule 4-1.7(a), the referee presented the following findings in her report:

> It is the opinion of this referee that an attorney should not have a sexual relationship with a current client and recommends that The Florida Bar review the applicable rules and consider such changes. Pursuant to the Rules Regulating The Florida Bar, **respondent's conduct during his representation of Ms. Danna and Ms. Ragin did create a conflict of interest**. Conduct such as that engaged in by respondent, taints how the legal profession is viewed by members of the public and by people who seek the professional services of an attorney. (emphasis added), (ROR-A4).

While the referee did not find the Bar's witnesses to be credible as to the

exchange of sexual favors for legal fees (ROR-A2), the referee did make the above-referenced findings to support that respondent's overall conduct created a conflict of interest with his clients. Respondent engaged in a pattern of conflicts by having sexual relations with at least one client and by providing monetary assistance to two clients. Respondent's conflicts caused disagreements and uncertainty as to the amount of legal fees incurred.

It is undisputed that respondent engaged in a sexual relationship with his client, Michelle Danna, during the course of representation. Respondent openly admitted to having sexual relations with Ms. Danna in his law office (TI-159). Respondent also explicitly admitted, both in his deposition and during the final hearing, to one brief sexual encounter with Ms. Ragin (B-Ex. 8 p. 19, l. 16-18); TI-13) (Although this testimony is in the record, the referee did not include it in her findings of fact). While the referee did not find that respondent specifically sought sexual favors from Ms. Ragin in return for legal services, the referee did find that there was the appearance of impropriety in the manner of respondent's legal representation of Ms. Ragin (ROR-A3). Respondent did not display a professional demeanor with Ms. Ragin, and he frequently met with her at restaurants and in her home (ROR-A3).

It is important to note that respondent's sexual relationships with his clients

occurred prior to the recent amendment of Rule 4-8.4(i), which became effective on February 1, 2010. In re Amendments to the Rules Regulating The Florida Bar, 24 So.3d 63 (Fla. 2009). The referee found that respondent did not violate the previous version of Rule 4-8.4(i), which required clear exploitation of the attorney-client relationship. Even if respondent's actions did not violate the previous version of Rule 4-8.4(i), the Bar submits that respondent's behavior did create an inherent conflict of interest with his clients. An attorney-client relationship is not equal, because the attorney is placed in a position of authority which can easily be abused. Furthermore, Ms. Danna and Ms. Ragin were both criminal clients, who were short on funds, facing incarceration and the loss of their freedom (B-Ex. 5; TI-25). They were in a more vulnerable position than if respondent was simply handling civil matters on their behalves.

Prior to the amendment of Rule 4-8.4(i), in a concurring opinion in The Florida Bar v. Bryant, 813 So.2d 38, (Fla. 2002), Justice Pariente expressed her concern for attorney misconduct regarding sexual relationships with clients. The following excerpt is taken from a law review article quoted in Justice Pariente's concurring opinion:

> On its face an attorney-client sexual relationship is likely to raise several conflict of interest issues. For instance, the termination of the sexual relationship can result in the termination of the legal representation

> to the detriment of the client. A sexual relationship may raise disagreement on lawyer's fees. It is recognized that a sexual relationship may alter the lawyer's objectivity and detachment resulting in incompetent representation. A sexual relationship will undoubtedly result in a change in attorney-client self-interest. An attorney in a sexual relationship with a client may not pursue his client's interest zealously out of fear that conclusion of the legal matter would end the sexual affair. Id. at 45, quoting Abed Awad, Attorney-Client Sexual Relations, 22 J. Legal Prof. 131, 173-75 (1998) (footnotes omitted).

As emphasized above, this matter contains evidence of disagreement and ambiguity regarding legal fees. Upon commencing representation, respondent failed to clearly explain the issue of fees with his clients. Respondent's failure to clarify fees caused confusion for the clients and led respondent to engage in further unprofessional behavior. Despite testifying that Ms. Ragin's legal fees totaled approximately $12,000 (TI-137), respondent further testified that "money was not discussed, because there's no way [Ms. Ragin] was going to pay it" (TI-138, l. 4-5). During his cross-examination of Ms. Ragin, respondent stated that at one point he asked Ms. Ragin to sign over her vehicle as partial payment for the cases respondent was handling for her (TI-52-53). There is no evidence that respondent presented his clients with written fee agreements or bills for his legal services.

Ms. Danna and Ms. Ragin both maintained that respondent sought sexual services in lieu of fees (B-Ex. 1-3, 5; TI-24). The majority of the uncertainty

regarding fees can be attributed to the inappropriate personal relationship respondent shared with his clients. The referee acknowledged that "respondent's behavior led to informality and to the appearance that respondent might be willing to exchange services for sex" (ROR-A-2). Respondent's personal relationship with his clients was unprofessional and created a clear conflict of interest. Due to the circumstances, it is not unforeseen that the clients would assume respondent expected sex in lieu of legal fees. At the conclusion of the final hearing, the referee stated that respondent's conduct "creates grave concern for members of the bar and The Florida Bar and how our profession is seen by members of the public and by people who seek services of attorneys" (TI-211 l. 18-23).

The referee further found that "[d]uring the representation and the completion of legal work, respondent never collected a monetary fee from Ms. Danna or Ms. Ragin, but instead provided funds to them" (ROR-A3). In a standard attorney-client relationship, the client would be paying fees for the attorney's services. At the final hearing, respondent testified that he essentially felt sorry for the women, so he deposited money into their jail commissary accounts (TI-144). Due to the inappropriate dynamic of the attorney-client relationships, respondent's representation of Ms. Danna and Ms. Ragin created personal conflicts of interest for the parties involved. Respondent failed to act with the independent professional

judgment required of an attorney. The referee noted that respondent instead appeared to act from a "misguided sense of philanthropy" (ROR-A5).

Based on the foregoing, the evidence shows that respondent engaged in conflicts of interest. Respondent's conflicts involved his own sexual gratification, his inability to clarify legal fees due to his personal relationships with the clients, and his actions of improperly providing his clients with financial assistance. The Bar submits that the referee erred by finding respondent not guilty of violating Rule 4-1.7(a). Attorneys are held to a higher standard of behavior than the general public, and respondent's personal conflicts with his clients deprived them of professional legal representation with clear attorney-client boundaries.

POINT II

THE REFEREE'S RECOMMENDATIONS AS TO FACTS AND FINDINGS OF GUILT REGARDING RESPONDENT'S VIOLATIONS OF RULES 4-1.8(e) AND 4-7.4(a) ARE WELL SUPPORTED BY RESPONDENT'S ADMISSIONS AND THE COMPETENT RECORD EVIDENCE.

The standard of proof in a bar disciplinary proceeding is clear and convincing evidence. The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994), citing The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). The Bar has met its burden of proof by clear and convincing evidence. This Court has consistently held that where a referee's findings are supported by competent substantial evidence, it is

precluded from reweighing the evidence and substituting its judgment for that of the referee. The Florida Bar v. Vining, 721 So.2d 1164, 1167 (Fla. 1998), quoting The Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992). The referee's findings and recommendations regarding respondent's violation of Rules 4-1.8(e) and 4-7.4(a) are clearly supported by the record.

In regard to Rule 4-1.8(e), respondent made numerous admissions regarding the fact that he provided financial assistance to both Ms. Danna and Ms. Ragin. In his deposition and at the final hearing, respondent admitted to putting money into the jail commissary accounts of Ms. Danna and Ms. Ragin (B-Ex. 8 p. 48, l. 11-19; TI-56). Respondent admitted depositing money into Ms. Danna's account on two separate occasions (B-Ex. 8 p. 48, l. 11-19). Both Ms. Danna and Ms. Ragin confirmed that respondent placed money into their jail commissary accounts during times when they understood respondent to be their attorney (B-Ex. 1-3, 5; TI-28). The referee correctly found that respondent deposited approximately $130 into Ms. Danna's commissary account and $60 into Ms. Ragin's account while they were incarcerated (ROR-A3).

In addition to placing money into Ms. Ragin's jail commissary account, respondent also provided her with approximately $250 on a separate occasion. Respondent admitted to providing Ms. Ragin with approximately $250, which Ms.

Ragin then used for personal expenses (TI-177). Ms. Ragin confirmed that respondent provided her with money, although Ms. Ragin testified that it was approximately $500 (B-Ex. 1-3; TI-22).

In addition to placing money into Ms. Danna's jail commissary account, respondent also paid approximately $200 for her business-purpose driver's license. Once again, respondent openly admitted to providing his client with financial assistance (TI-136, 188). Respondent maintains that he gave Ms. Danna the $200 because "it would have greatly affected the outcome of the case if she didn't have a valid license" (T-188, l. 11-12). Based on the foregoing, the referee found that respondent's financial assistance to Ms. Ragin and Ms. Danna was not considered to be costs of litigation and thereby violated the provisions of The Rules Regulating The Florida Bar (ROR-A3).

In fairness, the Bar recognizes that in The Florida Bar v. Taylor, 648 So.2d 1190 (Fla. 1994), the Court found an attorney not guilty of violating Rule 4-1.8(e) for giving an indigent client $200 and used clothing for her child. In contrast to Taylor, this respondent engaged in a pattern of providing money to more than one client with whom he had sexual relations. The Bar also submits that providing money to incarcerated clients contributed to respondent's conflict of interest. Therefore, the Court's finding in Taylor may be distinguished, and this Court

should adapt the referee's finding that respondent violated Rule 4-1.8(e).

In regard to Rule 4-7.4(a), respondent similarly made numerous admissions to support the referee's guilty finding. Respondent openly admitted to providing Ms. Danna with a cellular phone so that she could solicit legal business for him (B-Ex. 8 p. 40, l. 20-25; p. 41, l. 1-4, 19-22). Respondent admitted that at least part of the reason he provided Ms. Danna with a cellular phone was because he needed to build his caseload (TI-153). Respondent also admitted to giving Ms. Danna $200 for her potential client referrals (B-Ex. 8 p. 41, l. 2-4). Respondent stated that he met with potential clients referred by Ms. Danna, but none of them hired respondent, and he did not collect any fees from Ms. Danna's referrals (B-Ex. 8 p. 40, l. 20-25; p. 41 l. 1; TI-153). Respondent's admissions clearly support the referee's finding that respondent violated Rule 4-7.4(a) by engaging in solicitation.

As set forth above and in detail in the report of referee, the record contains substantial, competent evidence that clearly and convincingly supports the referee's findings of facts and recommendations of guilt regarding respondent's monetary assistance to clients as well as his solicitation of potential clients. Therefore, this Court should approve the referee's findings of fact and recommendations of guilt as to Rules 4-1.8(e) and 4-7.4(a).

POINT III

A ONE-YEAR SUSPENSION IS THE APPROPRIATE DISCIPLINE IN THIS MATTER GIVEN THE FACTS, CASE LAW, AND STANDARDS FOR IMPOSING LAWYER SANCTIONS.

"When reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order an appropriate sanction." The Florida Bar v. Spear, 887 So.2d 1242, 1246 (Fla. 2004). As a general rule, the Court will not second-guess a referee's recommendation of discipline as long as the discipline is authorized under the Florida Standards for Imposing Lawyer Sanctions and has a reasonable basis in existing case law. Id. at 1246. The Bar maintains that the discipline recommended by the referee, a one-year period of probation, is not supported by the existing case law or the Florida Standards for Imposing Lawyer Sanctions. The Bar submits that based on the facts, the available case law and the Florida Standards for Imposing Lawyer Sanctions, the appropriate level of discipline is a one-year suspension from the practice of law.

The referee found respondent guilty of soliciting clients and providing his clients with prohibited financial assistance. The Bar further submits that respondent's overall representation of Ms. Danna and Ms. Ragin resulted in a serious conflict of interest. Viewed together, this conduct warrants more than a

period of probation.

In The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994), an attorney was suspended for 91 days and placed on a two-year period of probation for sharing fees with non-lawyers and for providing financial assistance to clients. The referee recommended that Rue receive a public reprimand, but the Court held that suspension was more appropriate in light of the pattern of misconduct and the nature of the misconduct. Id. at 1082. Like Rue, respondent provided inappropriate financial assistance to his clients. Respondent also essentially shared fees with Ms. Danna when he provided her with a cellular phone and $200 for client referrals.

In The Florida Bar v. Stafford, 542 So.2d 1321 (Fla.1989), an attorney was suspended for six months for misconduct which included engaging in a relationship with a police officer who solicited clients for Stafford. Stafford paid the police officer referral fees on nine or ten occasions. The Court in Stafford emphasized that attorneys are generally suspended for engaging in solicitation. Id. at 1322.

In The Florida Bar v. Wolfe, 759 So.2d 639 (Fla. 2000), the Court suspended an attorney for one year, in part, for in-person solicitation of clients in areas where their homes had been damaged by tornadoes. The Court in Wolfe noted that in solicitation cases, “[t]he exact nature of the disciplinary action to be taken is a problem which must be resolved on the basis of the factual situation presented by

each particular case." Id. at 644, quoting State ex rel. Florida Bar v. Dawson, 111 So.2d 427, 431 (Fla. 1959). The Bar believes that respondent's solicitation in this matter was egregious. Respondent presented his criminal client with a cellular telephone and cash in an attempt to build his caseload. Respondent's behavior was exceptionally unethical and unprofessional, and it should be taken seriously and addressed accordingly. There is simply no basis in case law for a sanction of probation involving this type of misconduct.

The Bar also emphasizes that respondent's overall conflict of interest in placing his own interests above his clients' interests and above the obligations of his profession, warrants a sanction greater than probation. Probation alone is "susceptible of being viewed by the public as a slap on the wrist when the gravity of the offense calls out for a more severe discipline." The Florida Bar v. Wilson, 425 So.2d 2, 3 (Fla. 1983).

A suspension is also supported by the Florida Standards for Imposing Lawyer Sanctions. Suspension is appropriate pursuant to Standard 7.2 when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Suspension is also appropriate pursuant to Standard 4.32 when a lawyer knows of a conflict of interest and does not fully disclose to a client the

possible effect of that conflict, and causes injury or potential injury to a client.

The referee in this matter was mistaken that the Bar did not offer any aggravating factors (ROR-A7). During the disciplinary hearing held on April 19, 2010, bar counsel alleged the existence of a pattern of misconduct [Standard 9.22(c)] as an aggravating factor (TII-6). Respondent admittedly engaged in sexual relations with two criminal clients, he provided both of those clients with unwarranted financial assistance, and he used a client to solicit legal business. Respondent did not engage in an isolated instance of misconduct, which would be more appropriate for a term of probation.

A judgment must be fair to society, fair to the respondent, and severe enough to deter others who may be tempted to become involved in like violations. Spear, 887 So.2d at 1246, citing The Florida Bar v. Lord, 433 So.2d. 983, 986 (Fla. 1983). To support the recommendation of a one-year suspension, the Bar has considered the egregious nature of respondent's misconduct in this matter in conjunction with the following cases: The Florida Bar v. Bennett, 276 So.2d 481, 482 (Fla. 1973); The Florida Bar v. Brown, 905 So.2d 76, 82 (Fla. 2005); and The Florida Bar v. Valentine-Miller, 974 So. 2d 333, 338 (Fla. 2008), which uphold the proposition that attorneys are held to the highest ethical standards not only because the Rules of Professional Conduct mandate such a level of conduct but more importantly so as to

not damage the public's trust in the legal profession.

CONCLUSION

When choosing to increase discipline recommended by a referee, this Court has stated that "if the discipline does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it." The Florida Bar v. Wilson, 425 So.2d 2, 4 (Fla. 1983). The referee's recommendation of a one-year period of probation is disproportionate to the level of respondent's egregious misconduct. The nature of respondent's misconduct reflects adversely on the reputation and dignity of the legal profession and merits a suspension from the practice of law.

WHEREFORE, The Florida Bar submits that respondent should be sanctioned to a one-year suspension from the practice of law and payment of costs now totaling $8,438.49 with interest accruing at the legal rate 30 days after this Court's order becomes final.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief have been sent by First Class Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by electronic filing to the Clerk of the Court; a copy of the foregoing has been furnished by First Class Mail to Jaime Roberto, Respondent, 16877 East Colonial Drive, PMB #192, Orlando, Florida 32820-1910; and a copy of the foregoing has been furnished by First Class Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this _______ day of August, 2010.

Respectfully submitted,

____
Keshara Darcel Davis
Bar Counsel

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

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

____
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