

FILED

SID J. WHITE

JAN 28 1987

CLERK, SUPREME COURT

By _____
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

CONFIDENTIAL
Case # 66,462
TFB # 06A85H21

vs.

MICHAEL H. FARVER

RESPONDENT.

RESPONSE TO FLORIDA BAR INITIAL BRIEF
AND ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Respondent will rely on the Statement of the Case filed by The Florida Bar, with the following additions, clarifications, and corrections:

The Complaint filed against the respondent on or about 24 January, 1985, followed a previous finding of No Probable Cause by the Grievance Committee for the Sixth Circuit on or about 23 August, 1983, and a subsequent re-opening of the case and finding of Probable Cause on or about 18 October, 1984.

This disciplinary proceeding is before this Court upon the complainant's Petition for review and the respondent's Cross-Petition as to the recommended sanction of a one (1) year suspension, the requirement of proof of rehabilitation as a prerequisite to reinstatement, and for a clarification of the findings of fact and guilt as determined by the referee.

STATEMENT OF FACTS

The respondent will rely upon the Statement of Facts filed by The Florida Bar, with the following additions, clarifications, and corrections:

The respondent disputes the interpretation of the facts referred to in paragraph #3 of the Statement of Facts, in that the respondent specifically acknowledged, from the origination of the disciplinary proceeding, that he continued to handle legal matters outside the scope of those services contemplated by the "Legal Clinic", and the findings of fact by the referee do not clearly indicate if in fact payment for said services rightfully belonged to the "Clinic."

The restitution paid by the respondent was disputed by the respondent in that it contained unverified claims and personal expenses; however, the amount claimed was paid as a condition of the Pre-Trial Intervention Agreement entered into by the respondent.

SUMMARY OF ARGUMENT

Since this Court has the inherent authority to increase or decrease the disciplinary sanctions recommended by a referee, the respondent requests that this Court decrease the recommended disciplinary sanction from the one (1) year recommendation to a suspension of Sixty (60) Days, with credit for the previous Sixty (60) day suspension served by the respondent in December, 1985, January, 1986, and February, 1986. Any additional sanctions imposed should be limited to a period of probation or supervision and/or community service, given the respondents lack of any previous disciplinary record, the time elapsed since the alleged infraction, and the respondents conduct since that time.

ARGUMENT

THE REFEREE ERRED IN DETERMINING THAT THE RESPONDENT SHOULD BE SUSPENDED FOR A PERIOD OF ONE YEAR

The argument of the Florida Bar, and the cases cited in support of their position, all fail to recognize a crucial distinction in the conduct of the respondent in this matter.

The referee correctly found that the agreement between the parties was not a written agreement, and the testimony indicated that there were no specific agreements regarding work-in-progress, etc., as would normally be included in an employment agreement. Additionally, the record indicates that the respondent has readily admitted from the outset that he handled legal matters outside the scope of his employment, based upon his understanding of the parties employment agreement.

This distinction clearly distinguishes the respondent's conduct from the parties cited by the Florida Bar in The Florida Bar v. Baum, 305 So.2d 429 (Fla. 1978), 369 So.2d 585 (Fla. 1979), The Florida Bar v. Bunch, 195 So.2d 558 (Fla. 1967), The Florida Bar v. Greenberg, 247 So.2d 332 (Fla. 1971), The Florida Bar v. Ryan, 394 So.2d 997 (Fla. 1981), and The Florida Bar v. Schemwell, 361 So.2d

⁴²¹ (Fla. 1978). In each of these instances, the alleged misconduct involved a willful taking with full knowledge of the rights of the injured party. In the instant case, the activities of the respondent were taken openly, without any attempt to disguise the activity, based upon the respondent's understanding of the terms of the parties employment agreement. The alleged misconduct is in the nature of a dispute over fee distribution between attorneys, and not one of willful misappropriation of funds.

An additional and critical distinction can be drawn between the cases previously cited and the respondent's conduct. The fees paid the respondent were for legal services which were in fact rendered to the client by the respondent. There are no allegations or findings that these services were not properly rendered, or that the client was dissatisfied in any manner with the respondent.

Finally, the alleged monies in dispute involve fee income only. There are no facts or information to indicate that there was any dispute over client Trust or Escrow funds, and the respondent in fact reimbursed the firm for funds which could not even be confirmed, due to the poor recordkeeping of the firm.

Mitigating factors to be considered by the Court include the fact that the respondent undertook the activity complained of out of a perhaps mistaken impression of his rights and the terms of his employment agreement; cooperated from the outset with the Florida Bar; repaid the entire disputed balance even though several thousand dollars were not confirmable or were, in the eyes of the respondent, justified; that no Escrow or Trust funds were involved in the dispute; that the work paid for by the clients was in fact performed to their satisfaction; that the respondent entered a conditional guilty plea and undertook to close his

practice for a sixty (60) day period pursuant to a negotiated agreement with the Florida Bar, and that the alleged misconduct took place in excess of six years ago, and during that time, the respondent has labored to build a practice and has not been disciplined for any other actions since the alleged misconduct in 1980.

CONCLUSION

The issue before the Court is whether a six year old dispute regarding the terms of an employment contract between attorneys, not reduced to writing, in which the employee repays to the firm the disputed funds, including nonconfirmed and personal expenses, after having performed the services contracted for in a satisfactory manner, justifies a sanction more severe than that imposed and agreed to by the accused attorney in his conditional guilty plea, to wit: a sixty (60) day suspension from the practice of law.

Based upon the facts and circumstances of this particular case, the respondent recommends that the Court impose the sanction originally agreed to by the respondent, with such additional terms and conditions as the Court deems proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular U.S. Mail to Steve Rushing, Florida Bar Counsel, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, and to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, on the 21 day of January, 1987.



JAMES R. NIESET, ESQUIRE