

IN THE SUPREME COURT OF FLORIDA



DEC 29 1968

CLERK, SUPREME COURT
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Deputy Clerk

THE FLORIDA BAR,

Complainant,

v.

STANLEY B. GELMAN,

Respondent.

CASE NO.: 68,198

CASE NO.: 68,512

RESPONDENT'S REPLY BRIEF

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ARGUMENT

I. THE REFEREE'S IMPROPERLY FOUND THAT RESPONDENT'S CONDUCT IN CASE NO. 68,198 CONSTITUTED UNETHICAL BEHAVIOR.

While the facts on this count are virtually undisputed, there is one significant controversy. Contrary to Mr. Lewis' testimony, Respondent testified that the copy of the letter that he showed to Mr. Lewis at the dismissal hearing was already interlineated with the words "one-fourth." (TR-104)

When asked why Respondent's check also contained the words "one-third", as did the letter delivered to Mr. Hart, he testified that:

I probably picked it up from the letter, then before the letter went out, realized it was one-fourth, did not correct the check, and corrected the letter. (TR-98).

Respondent's explanation is perfectly logical.

The primary flaw in the Bar's case is that it has shown no motive for Respondent's falsifying the document. It certainly was of no financial benefit to Respondent to lie about his alteration of the letter. Nor was it material to Respondent's client's law suit. It is undisputed that Respondent's client exercised his option to purchase one-fourth of the stock on June 7, 1983. That attempt was sufficient basis for Mr. Williams' case.

There is no basis for the Referee's conclusion that the timing of Respondent's suit was critical due to the bankruptcy. In fact, the bankruptcy had been pending long before Respondent filed suit. Furthermore, the bankruptcy was to Respondent's client's benefit. Ultimately, it found that Mr. Hart had fraudulently transferred assets to Hart Enterprises and ordered that company to return them to their place of origin. That order obviated the necessity of Respondent's client recovering from Hart Enterprises.

The Referee's entire finding that Respondent engaged in unethical conduct is predicated upon a typographical error and the failure to keep proper file copies. Judge Eastmoore's finding of dishonesty, fraud and misrepresentation is predicated entirely upon the typographical error and is not based on any showing that Respondent in any way gained from any such misconduct. While Respondent is not arguing that the showing of personal gain is essential to a finding of misrepresentation, it certainly should be a factor to be considered in determining if the Florida Bar has met its burden of showing by clear and convincing evidence that misconduct occurred.

Mr. Lewis was mistaken in his recollection that the letter that Respondent showed him was different from the one that was ultimately filed in the court records. Respondent visited no fraud upon the court at any time. Furthermore, there is no showing of any basis for Respondent's making any such misrepresentation to the court.

The Referee's findings in this Count are not supported by the evidence and should be dismissed.

II. THE REFEREE IMPROPERLY FOUND THAT RESPONDENT VIOLATED DR 5-105 IN HIS REPRESENTATION OF LOUIS PERFETTO AND J. CHRISTOPHER ROHMAN.

There is no evidence in the record that shows that Respondent was representing Barnett Banks of Florida at the same time that he was representing clients with interest adverse to Statewide Collection. Such a showing is absolutely essential for a finding that Respondent violated DR 5-105. That rule only prohibits the simultaneous representation of clients with adverse interests.

In its answer brief, Complainant refers to Respondent's representation of Barnett Banks. However, there is a distinction between Barnett Banks of Florida and the individually owned Barnett Banks scattered throughout the state. It is undisputed that Respondent never worked for Barnett Banks of Florida. (TR-55) Statewide Collection is a wholly-owned subsidiary of that corporation. Because Respondent never worked for Barnett Banks of Florida, he did not violate DR 5-105 in his representation of persons with interest adverse to Statewide.

Furthermore, there is no showing that Respondent had, at the time of his representation of Perfetto and Rohman, work pending with any particular Barnett Bank. Respondent's representation of the individual Barnett Banks was on a case by case basis and involved replevins--matters that were quickly wrapped up. In fact, even

Mr. Meyers acknowledged that Respondent completed his replevin cases "in a hurry" (TR-31). Mr. Meyers also acknowledged that his request that Respondent withdraw from the representation of Mr. Perfetto was based on the "appearance of impropriety." (TR-33) An individual does not violate any disciplinary rules if he fails to avoid the appearance of impropriety. In fact, that prohibition is merely the caption of Canon 9 of the Code of Professional Responsibility. It is not a disciplinary rule.

The Florida Bar has not shown that Respondent represented two clients with adverse interests simultaneously. Without such evidence in the record, the Florida Bar has not met its burden of proving by clear and convincing evidence that the violation of Disciplinary Rule 5-105 occurred. Accordingly, Judge Eastmoore's conclusion that DR 5-105 was violated is not predicated upon evidence in the record and it should be reversed.

III. THE REFEREE'S FINDING THAT RESPONDENT LEARNED
IN 1983 THAT HE FAILED TO SATISFY A JUDGMENT
FOR WHICH HE RECEIVED TRUST FUNDS IN 1973 IS
ERRONEOUS.

Complainant tacitly acknowledges that the Referee improperly found that Ms. Sebra's judgment was still outstanding in 1983. In fact, Respondent first learned that the judgment was still outstanding on June 19, 1985, as argued in Respondent's initial brief.

Judge Eastmoore's erroneous finding must have made it appear to him, and makes it appear in his report, that Respondent waited three years to retire the Sebra judgment after he learned

about it. In fact, he retired it in ten months. Respondent's failure to pay-off the judgment more quickly is reprehensible, but it is not unethical. He was going through a difficult divorce at the time he learned of the outstanding lien, and was hospitalized for one month immediately after the Christmas 1985 holidays, which further contributed to his delay in retiring Ms. Sebra's obligation.

Respondent does not argue to this Court that he is free from fault in his handling of Ms. Sebra's \$345.00. In fact, he received those funds in trust in 1973 and, due to a failure to properly abide by trust accounting records, those funds were misplaced after he split up with the law partner that he had several years after he received Ms. Sebra's funds.

At the time of his last correspondence regarding Ms. Sebra's funds, it was understood between Respondent and her lawyer that the latter would undertake to retire the lien. Respondent then next heard about Ms. Sebra's funds in 1985--twelve years later.

Respondent is guilty of neglect in failure to keep trust accounting records. He is not, however, guilty of dishonesty, fraud, deceit or misrepresentation, a violation of DR 1-102(A)(4) as alleged by the Referee. There is no evidence that Respondent ever lied to anyone regarding the funds. Furthermore, there is no evidence that Respondent ever intended to misappropriate any trust funds. A mistake in recordkeeping is all that occurred.

Such a mistake warrants, at most, a public reprimand. See, for example, The Florida Bar v. Neely, 488 So. 2d 5 (Fla. 1986). There, the court acknowledged that trust recordkeeping violations warrant a public reprimand. In that particular Neely case, because Respondent had been previously disciplined by a ninety (90) day suspension in 1979, and a public reprimand in 1982, the court ordered a sixty (60) day suspension.

Respondent avers to this court that a public reprimand is appropriate for his mishandling of Ms. Sebra's case.

IV. THE DISCIPLINE RECOMMENDED BY THE REFEREE, SUSPENSION FOR SIX MONTHS, IS UNDULY HARSH AND SHOULD BE REDUCED, AT MOST, TO THIRTY DAYS' SUSPENSION WITH AUTOMATIC REINSTATEMENT.

Judge Eastmoore's recommended discipline is entirely too harsh under the circumstances involved in the case at hand.

Even assuming, for the purpose of argument, that Respondent is guilty of all violations found by the Referee, a six-month suspension is completely unwarranted. As indicated in the prior point on appeal, Gary Neely was only suspended for sixty (60) days for trust account violations on his third trip before this court. When Respondent's offenses are compared to the offenses contained in the cases cited in Respondent's initial brief, it becomes clear that the Referee's recommendation was far more harsh than that visited by this court in cases involving even more serious misconduct.

The primary flaw in the Referee's recommendation is

that, after concluding his six month suspension, Respondent will have to undergo reinstatement proceedings. Those proceedings last at least nine (9) months, converting Respondent's discipline into a suspension approaching one and one-half years. Such a discipline is too Draconian for the circumstances here at hand.


Suspending Respondent from the practice of law for any period of time is a stern discipline. Pursuant to the dictates of the integration rule, a copy of Respondent's Order of Suspension must be sent to every one of his clients. Furthermore, he must completely abstain from the practice of law during the period of suspension, he must remove his name from his law office shingle, from the manner in which the telephone is answered and from any correspondence that goes out from the law office. The financial penalties stemming from these acts impose punishment that will catch any lawyer's attention. There is no need to completely ruin a lawyer's career if other discipline will accomplish the same purpose. In the case at hand, suspending Respondent for thirty (30) days will accomplish the goals that are primary in this court's mind, i.e., protection of the public and rehabilitation of the lawyer. The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970).

CONCLUSION

The Referee's findings and conclusions that Respondent violated the Code of Professional Responsibility and the Integration Rule in Case No. 68,198 and Count I of Case No. 68,512 are unwarranted and should be reversed. His finding that Respondent engaged in dishonest conduct and misappropriation of trust funds as to Count II of Case No. 68,512 is unwarranted. Respondent's misconduct as to that Count involved failure to maintain trust account records and neglect only.

Respondent's misconduct warrants at most a public reprimand or a short-term suspension. It certainly does not merit suspension requiring proof of rehabilitation, (i.e., three months or more). Imposing the six month suspension recommended by the Referee is unduly harsh and should be reduced.

Respectfully submitted,

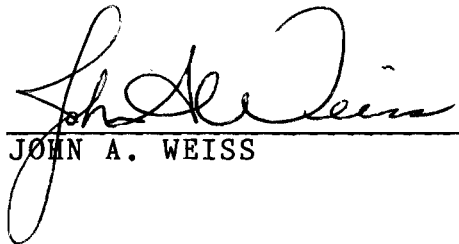


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing reply brief has been mailed to James N. Watson, Jr., Esquire, Bar Counsel, The Florida Bar, Tallahassee, FL 32301-8226, on this 29th day of December, 1986.



JOHN A. WEISS