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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 74,764
[TFB No. 89-30,368 (09D)]

v.

T. MICHAEL PRICE,

Respondent.

FILED
JUN 28 1990
CLERK, SUPREME COURT
Deputy Clerk

INITIAL BRIEF

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SYMBOLS AND REFERENCES

The Florida Bar shall be referred to as the Bar.

The Report of Referee shall be referred to as RR.

The transcript of the final hearing held March 8, 1990, shall be referred to as T.

Bar exhibits will be referred to as B-Ex.

Respondent's exhibits will be referred to as R-Ex.

STATEMENT OF THE CASE

The Ninth Judicial Circuit Grievance Committee "D" voted to find probable cause on April 21, 1989. The Bar filed its Complaint on September 22, 1989. The final hearing was held on March 8, 1990. The Report of Referee, dated March 27, 1990, was filed on April 6, 1990. The Referee recommended the respondent be found guilty and receive a private reprimand. The Board of Governors considered this case at its May, 1990, meeting and voted to seek appeal of the Referee's recommended discipline. The Bar filed its petition for review on May 25, 1990.

STATEMENT OF THE FACTS

The Bar does not take issue with the Referee's findings of facts in this case.

Reynold and Janice Hand were experiencing financial difficulties and, in or around 1985, the mortgage on their home was being foreclosed. (T. pp. 11-13). The only major asset they owned was their home and they wanted to preserve it. (T. pp. 57 and 14). Mr. Hand's brother, Michael Hand, an attorney, suggested that they consider filing a Chapter 13 bankruptcy. (T. p. 11). Because Michael Hand did not handle such types of bankruptcy he contacted the respondent and made an appointment for his brother Reynold. (T. pp. 56-57). According to Reynold Hand, he first met the respondent on June 5, 1985, which was only one day before the foreclosure sale scheduled for the morning of June 6, 1985. (T. pp. 13 and 15). According to the respondent's testimony, his appointment book indicated that Mr. and Mrs. Hand met with him on June 4, 1985, instead of June 5. (T. p. 85, R-Ex A). Reynold Hand, his wife and Brandon Chapman, Michael Hand's law partner, attended this first meeting. (T. pp. 12 and 59). Mr. and Mrs. Hand believed they had retained the respondent at the time of the first meeting. (T. p. 17). Reynold offered a business check to pay the respondent's fee but the respondent requested that he be paid in cash before filing the Chapter 13 petition. (T. pp. 46-47). Ms. Chapman then offered to pay the respondent with a trust account check drawn on funds previously

deposited by Reynold Hand in the law firm's trust account. (T. pp. 15-16 and 47). Ms. Chapman did not have a trust account check with her and offered to return to her law office and obtain one. (T. p. 47). Ms. Chapman testified that the respondent assured her it would be acceptable for the check to be delivered to him the next day. (T. p. 47). On June 6, 1985, Mrs. Hand picked up the check and delivered it to the respondent at an undetermined time. (T. p. 48). The petition for Chapter 13 bankruptcy dated June 6, 1985, was not filed until Friday, June 7, 1985, after the house was sold at the foreclosure sale. (B-Ex 9). The respondent had told Mr. and Mrs. Hand that the Chapter 13 petition could be filed after the sale of the house if done before the certificate of title was issued. (T. pp. 88-89).

The second mortgagee filed a motion seeking relief from the stay of action and a hearing was held on August 13, 1985. (T. p. 18; B-Ex 3; B-Ex 11 p. 3). The presiding bankruptcy judge, George L. Proctor, requested that counsel for both parties provide to him within ten days memoranda of law concerning the effect of the bankruptcy code on the equity of redemption under a real estate mortgage foreclosure. (T. pp. 18, 118; B-Ex 3). He stated that he would rule based on what was before him. A specific case was discussed during the hearing and on August 20, 1985, Judge Proctor wrote both the respondent and the attorney for the mortgagee, provided them with the case's citation and suggested that they comment on it in the memorandum if they believed it was relevant. (B-Ex 3).

Counsel for the second mortgagee filed his memorandum on August 21, 1985, in which he discussed the case to which Judge Proctor referred. (T. pp. 19, 63; B-Ex 11 pp. 3-4). The respondent did not file a memorandum because he did not believe it was necessary. (T. pp. 62, 129). Judge Proctor ruled in favor of the second mortgagee and entered an order granting relief from the stay of action and lien enforcement on September 4, 1985. (B-Ex 4). The respondent advised his clients of the judge's decision by letter dated September 5, 1985, and indicated that the judge had reversed himself on his earlier position in other similar cases. He further advised the Hands they would lose their house but that they could appeal on or before September 16, 1985. If they wanted him to handle the appeal his fee would be \$855.00. (B-Ex 1).

The confirmation hearing was held on September 10, 1985. The respondent attended the hearing but neither Reynold nor Janice Hand were present because they had not received prior notice of the hearing from the bankruptcy court and respondent did not notify them of the hearing. (B-Ex 11). Judge Proctor advised the respondent that two options remained: dismissal or conversion to Chapter 7. (T. p. 136). The respondent elected to dismiss the Chapter 13 action without his clients' prior knowledge or consent. (T. pp. 23, 139). The respondent testified he failed to advise the Hands that the bankruptcy action had been dismissed because he believed a copy of the court's order would be sent to them by the clerk. (T. p. 143).

Although this is the normal procedure from the Bankruptcy Clerk's office, in this instance the Hands never received notification that their action had been dismissed. (T. p. 23). Mr. Hand only learned of the dismissal after his brother, Michael Hand, discovered it by accident while in the clerk's office on another matter. (T. p. 67).

Reynold Hand, through Michael Hand, terminated the respondent's services by letter dated September 10, 1985. (B-Ex 2). Michael Hand then entered as attorney of record and handled the appeal which was ultimately unsuccessful. (B-Ex 2, B-Ex 7). Reynold and Janice Hand have now lost their home. (T. p. 25).

SUMMARY OF ARGUMENT

Reynold and Janice Hand retained the respondent to preserve the only major asset they owned, their house. The Hands believed that if they were able to obtain a stay of foreclosure proceedings by filing for bankruptcy before the sale they could obtain refinancing for the house. The respondent, however, assured them that they could file the petition for bankruptcy after the foreclosure sale and before the confirmation hearing and still be able to redeem their house. Based upon the respondent's advice the Hands did not pay him until shortly after the foreclosure sale had occurred. Had they been aware of the uncertainty in preserving their interest in the house after the foreclosure sale had occurred, they could have paid the respondent prior to the sale and the petition for Chapter 13 bankruptcy could have been timely filed. Had that been done, then no doubt this grievance could have been avoided. The respondent is the one who misunderstood the law and should pay the price, not his clients who relied upon his advice and knowledge. Under the circumstances, prudence dictated that he file the petition for bankruptcy prior to the foreclosure sale because the consequences were serious if he was mistaken in his advice. The respondent certainly knew that Mr. and Mrs. Hand intended to retain him because they had already tendered an offer of payment. The only reason the respondent was not paid at the time of the first meeting was because Ms. Chapman did not have a trust account check with her.

The respondent compounded the problem by failing to file the memorandum of law suggested the judge. Although he was not ordered to do so, the Bar submits that ordinary care dictates that when a judge makes a suggestion or a request, an attorney would be well advised to comply with it. Because an attorney's memorandum could, conceivably, change the judge's mind, a memorandum of law on the issue should certainly have been filed. For whatever reason, the respondent decided not to comply with the judge's request. The respondent then chose to dismiss the action without consulting his clients. (T. pp. 23, 139). The Bar submits the Hands were severely prejudiced as a result.

The respondent's behavior throughout his handling of his clients' case indicates a pattern of bad judgment and neglect. The respondent's cavalier attitude towards his clients' bankruptcy case is simply inappropriate for a member of The Florida Bar. The respondent also stated before the referee at the final hearing that as a general rule it is his policy not to return telephone calls. (T. p. 101). Apparently respondent believes that it is the client's responsibility to maintain communication and not his.

ARGUMENT

THE APPROPRIATE LEVEL OF DISCIPLINE SHOULD BE A PUBLIC REPRIMAND GIVEN THE FACTS OF THIS CASE.

The Bar does not take issue with the referee's findings of fact or recommendation as to guilt. The Bar does submit, however, that the referee's recommendation of a private reprimand is an insufficient level of discipline given the facts of the case.

Reynold and Janice Hand retained the respondent to handle a relatively simple, one asset Chapter 13 bankruptcy. Their only concern was in protecting their home in which they had a substantial equity stake. (T. pp. 13, 26-27). The Hands did wait until the last minute to seek legal advice due to other, unrelated personal problems. (T. p. 16). They were advised by the respondent that he would not file a bankruptcy petition until after he was paid. (T. p. 40). The respondent should have known, however, that he had been retained by the Hands at the time of the initial meeting. Mr. Hand had proffered payment which the respondent had declined because it was a business check. (T. p. 46-47). The respondent's position in this respect is understandable. After all, if a check from a debtor/client in a bankruptcy action should be returned for insufficient funds then the attorney's chances of being paid for his services rendered, as well as his future services, is very slim indeed.

In this instance, though, Ms. Chapman, an attorney, had told the respondent she would provide him with a trust account check that same day. (T. p. 47). It was the respondent who stated that payment the following day would be acceptable. (T. p. 47). Ms. Chapman's testimony was that she too believed, in her professional opinion, that the respondent had been retained at the initial meeting. (T. p. 48). The Bar submits that the most prudent course for the respondent would have been for him to file the petition for bankruptcy before the foreclosure sale rather than take the risk that the court would rule as it ultimately did. He advised the Hands that it would be better to file before the foreclosing sale because there was no way to know who might successfully bid for the house. (T. p. 89). Had a petition been filed before the sale, the Hands believed that they could have refinanced the house and thereby saved it. The respondent had been assured of payment by a fellow attorney who would provide a trust account check. The respondent's job at that point was to protect the interests of his clients. It is this that he neglected to do.

Good judgment, also dictated that the respondent should have provided Judge Proctor with a memorandum of law when the judge suggested that one be prepared. To fail to do so is simply neglecting a client's best interests. While this was not an order, adequate representation of the clients required that their cause be zealously pursued even if the chances of success, in the respondent's opinion, were slim. If it is true, as the

respondent testified, that Judge Proctor had ruled favorably for debtors on this issue in the past, then the Bar submits that at the very least a persuasive argument could have been made. (T. p. 93). Michael Hand testified that after conducting research on his own he believed a valid argument in favor of Reynold Hand's position could have been made. (T. p. 63). Even the respondent testified that he could have attempted to distinguish the cases dealing with Chapter 11 bankruptcies including the case mentioned by Judge Proctor. (T. pp. 123-124). Instead, the respondent decided that the memorandum would be useless. The respondent testified he chose not to prepare the memorandum because he knew his clients would lose on the issue and the only question was whether or not Judge Proctor would make his ruling prospective only. (T. p. 129). This admission by the respondent exemplifies the incorrectness of his initial advice to his clients which was that the bankruptcy could properly be filed after the foreclosure sale. He acted on his own advice to the detriment of his clients. The respondent admitted that he did not know how to argue the issue. (T. pp. 122-124). He believed that had any relevant case law existed in support of the debtors' position, opposing counsel would have cited it in his memorandum. (T. p. 128). It appears the respondent was content to allow opposing counsel to perform legal research for him. This again exemplifies the respondent's neglect in advancing his clients' cause. The judge ruled in favor of the second mortgagee and the stay of foreclosure action was lifted. (B-Ex 5). The referee, in his report, questioned whether or not the respondent's failure

to prepare the memorandum rose to a level warranting discipline. The Bar submits that although there is no assurance a different result could have been obtained had the respondent filed the memorandum, his failure to file it is an example of his failure to seek the lawful objectives of his clients in this matter.

Another issue at hand is the respondent's action in electing to dismiss the Chapter 13 bankruptcy without his clients' knowledge or consent. The respondent made no attempt to communicate with the Hands before any court hearings or appearances or to explain to them what to expect. (T. pp. 170-171). Instead, the respondent relied upon the Clerk of the Court to communicate with his clients. (T. p. 170). Reynold Hand testified that he never received notification of the hearing. (T. p. 23). Not only did the respondent elect to dismiss his clients' case, he did not even have the courtesy to contact them and to inquire as to why they had failed to appear and inform them of the dismissal. In fact, throughout his representation the respondent exhibited a woeful lack of interest in his clients.

It is apparent from the respondent's own testimony that the best interest of his clients may not always be first and foremost in his thoughts. For example, he testified that his standard policy is not to return telephone calls. (T. p. 101). Such a policy has the effect of making it difficult for clients to contact him. It appears that rather than shoulder the burden

himself as required by the Rules of Discipline and Rules of Professional Conduct, the respondent has chosen to place the entire responsibility of notifying clients of hearings and orders with the clerk's office.

The respondent did little to represent the Hands zealously. He did not entirely neglect the case, but he did nothing more than prepare the necessary paperwork and attend scheduled hearings. He performed the bare minimum amount of work required for the fee he was paid. Failing to prepare the memorandum of law had the effect of increasing the respondent's profit in this case. By electing to dismiss the Chapter 13 action he also avoided the necessity of having to represent the Hands in a Chapter 7 bankruptcy which would have required additional work without an additional fee. The election of dismissal was in the respondent's best interest. But was it in the client's best interest? The Bar submits that it was not.

In addition, the respondent's handling of his own defense in the Bar proceedings further indicates a failure to attend to his professional duties. The Bar prepared and sent a Requests for Admission which the respondent received. Regardless of whether or not he prepared a response, as he maintained at the final hearing, none was received by the Bar or tendered at the final hearing. (RR p. 2; T. p. 9). Florida Rule of Civil Procedure 1.370(a) provides that a failure to respond within thirty days after service of a requests for admission will result in the

statements contained therein being deemed admitted. See also, The Florida Bar v. Baron, 408 So.2d 1050 (Fla. 1982).

The respondent's neglect in this matter was not gross. The Bar submits, however, that the respondent's neglect of his clients' interests in this case warrants something stronger than a private reprimand.

In The Florida Bar v. Stein, 484 So.2d 1233 (Fla. 1986), an attorney received a public reprimand and three year period of probation for failing to follow up on a legal matter on behalf of a client. The attorney was retained and paid \$1,000.00 to represent a client in an appeal of a zoning matter to the City of Fort Lauderdale Board of Adjustment. The attorney failed to appear at a meeting of the board and requested a continuance for one month until the board's next meeting. He then failed to follow up on the matter and did absolutely nothing on behalf of his client until after it came to his attention that he had missed the board's next meeting. Because he failed to appear, his client's petition was denied and she was assessed penalties that were eventually reduced to the amount of \$2,800.00. As terms of his probation the attorney was ordered to make restitution to his client, submit quarterly status reports to the Bar and have his work supervised by an attorney appointed by the Bar.

In The Florida Bar v. Fuller, 389 So.2d 998 (Fla. 1980), an attorney was suspended for one month for neglect, failure to carry out a contract of employment and failure to communicate with his client. The attorney had been retained by two Canadian businessmen to pursue claims against a Florida corporation and was paid \$1,100.00 as a retainer. After accepting the retainer the attorney failed to communicate effectively with his clients and did not proceed with the action as originally agreed. The attorney also was ordered to make restitution prior to being reinstated. He had no prior disciplinary history and the referee found that he appeared to be genuinely remorseful.

In The Florida v. Fath, 368 So.2d 357 (Fla. 1979), an attorney was suspended for three months for failing to represent a client despite accepting a fee. The attorney was retained to represent a client who had been charged with careless driving, driving under the influence of alcohol and leaving the scene of an accident. The trial was set but the client failed to appear because he received no notice from either the court or his attorney. The court records did contain an inaccurate address but the attorney had his client's correct home address and telephone number. The attorney did appear at the trial but the court issued a bench warrant for the client's arrest and ordered his driver's license suspended for five years. The attorney then failed to advise his client of the action taken by the court and the client learned of it only when he attempted to renew his driver's license several months later. Thereafter, the client

contacted the attorney for an explanation and was advised that the attorney would take care of the matter. The attorney did nothing to rectify the problem but continued to accept money from his client for legal services. The client and his wife were unsuccessful in their attempts thereafter to contact the attorney despite repeated attempts by telephone. The attorney also failed to appear at the final hearing in the Bar disciplinary case. The attorney had no prior disciplinary history but the referee found that his blatant disregard for the disciplinary proceedings warranted the more severe discipline. His reinstatement was conditioned upon payment of costs of the disciplinary proceeding and restitution to his client.

The Florida Standards for Imposing Lawyer Sanctions, approved by the Board of Governors in 1986, also support a public reprimand in this case. Standard 4.43 calls for a public reprimand 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. Negligence is defined by the Standards as the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

In determining the appropriate level of discipline three considerations must be made as set forth in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). First, the judgment must be

fair to both society and the respondent, protecting the former from unethical conduct without unduly denying them the services of qualified lawyer. Second, the discipline must be fair to the respondent with it being sufficient to punish the breach and at the same time encourage reform and rehabilitation. Third, the judgment must be severe enough to deter others who might be tempted to engage in similar conduct. The Bar submits that a public reprimand would best serve these three purposes and to reenforce this Court's view that protection of a favorable image of the profession is an equally important purpose. The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984). In Larkin, supra, this Court also stated that "[t]he mishandling of trust funds and neglect of a client's case are among the most serious violations which an attorney can commit." Neglect of legal matters and inadequate communication are two of the most common complaints the Bar receives from members of the public concerning attorneys. If an attorney accepts a case he should do what is necessary to adequately represent his client's interests and not merely do the minimum amount of work required and nothing more. "[A] lawyer should view his work 'not as mere money getting but as service of the highest order, not as a mere occupation but as a ministry'." The Florida Bar v. Dawson, 111 So.2d 427, 432 (Fla. 1959), quoting Hepp v. Petrie, 185 Wis. 350, 200 N.W. 857, 861.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will review the Report of Referee, approve his findings of fact and recommendation of guilt but impose nothing less than a public reprimand as well as order payment of costs of this proceeding currently totaling \$1,479.95.

Respectfully submitted,

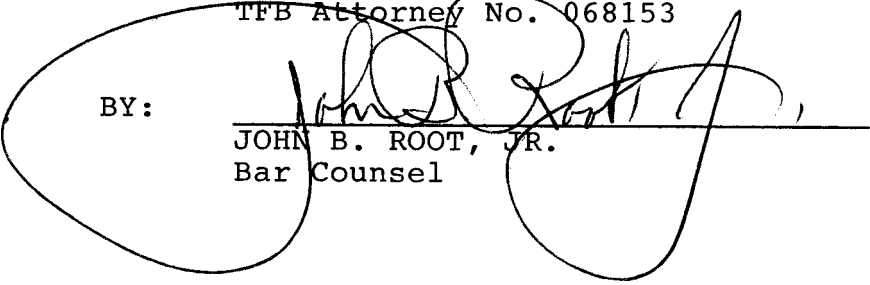
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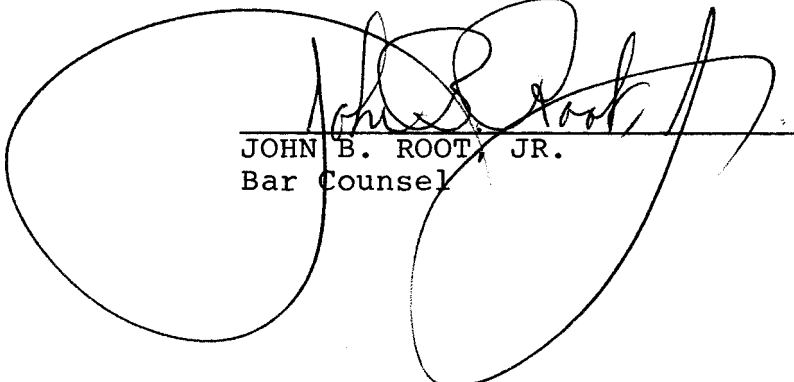
BY:



JOHN B. ROOT, JR.
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief have been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1925; a copy of the foregoing has been furnished by ordinary mail to T. Michael Price, Respondent, at 425 West Colonial Drive, #102, Orlando, Florida 32804-6863; and a copy of the foregoing has been furnished by ordinary mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 26th day of June, 1990.



JOHN B. ROOT, JR.
Bar Counsel