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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

Case No. 77,999

vs.

TFB File No. 91-00592-04A

JAMES A. BAZLEY,
Respondent.

_____ /

INITIAL BRIEF OF COMPLAINANT

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TABLE OF CONTENTS

TABLE OF CITATIONS	-ii-
PRELIMINARY STATEMENT	1
STATEMENT OF CASE	2
STATEMENT OF FACTS	3-4
SUMMARY OF ARGUMENT	5
ARGUMENT	6-12
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

<u>Cases Cited</u>	<u>Page Number</u>
<u>The Florida Bar v. Alford</u> 441 So.2d 615 (1983)	8
<u>The Florida Bar v. Carlson</u> 154 So.2d 689 (1963)	9
<u>The Florida Bar v. Gaskin</u> 403 So.2d 425 (1981)	8, 9
<u>The Florida Bar v. Netzer</u> 462 So.2d 1103 (1985)	9
<u>The Florida Bar v. Orman</u> 409 So.2d 1023	8
<u>The Florida Bar v. Pahules</u> 23 So.2d 130 (1970)	12
<u>The Florida Bar v. Palmer</u> 504 So.2d 752 (1987)	7
<u>The Florida Bar v. Reessimav</u> 474 So.2d 1177 (1985)	9

PRELIMINARY STATEMENT

The Appellant in these proceedings, JAMES A. BAZLEY, will be referred to as Respondent in this Brief. The Appellee will be referred to as The Florida Bar.

All references to the Referee's Report will be designated by (RR-_____). References to the transcript of the final hearing will be designated by (TR-_____).

STATEMENT OF CASE

On May 30, 1991, The Florida Bar filed a complaint against James A. Bazley and on June 7, 1991, the Chief Justice appointed the Honorable Robert K. Mathis, Circuit Judge, Seventh Judicial Circuit, as Referee in this case. The final hearing was held September 10, 1991 and the Referee filed the Report of Referee on October 16, 1991.

The Report of the Referee recommends that Respondent receive a public reprimand, be suspended for thirty (30) days and be placed on probation for a period of eighteen (18) months. As conditions to his probation, Respondent is required to pass the ethics portion of the Florida Bar exam, file semi-annual reports of case load status and participate in an alcohol abuse program.

On November 20, 1991, The Florida Bar filed its Petition for Review seeking the review of the recommended discipline of the Report of the Referee.

STATEMENT OF FACTS

The following facts of this case are set forth in the Report of the Referee and are undisputed pursuant to Respondent's answer to The Florida Bar's Request for Admissions.

At all times relevant to the complaint in this matter, Respondent was a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.

In August 1987, Respondent agreed to represent Thomas R. Mangan in regards to an injury Mangan suffered while working for Goodhousekeeping Gas Company (RR-1).

Respondent orally agreed to represent Mangan for a 25% contingency fee in his lawsuit. Respondent then received the facts of the injury, determined there was a basis for a civil suit and so informed Mangan (RR-1).

In later 1987, Respondent subsequently determined that a civil suit was barred by the Workmen's Compensation statute but failed to notify Mangan of this determination (RR-2).

From August 1987, until early 1990, Respondent misled Mangan about the status of the lawsuit. Respondent told Mangan that he had filed a lawsuit against Goodhousekeeping Gas when he had not. When questioned by Mangan, Respondent told Mangan he was pursuing the matter. In June 1990, Respondent told Mangan he had won the lawsuit and was proceeding to collect the judgment for \$14,000.00 (RR-2).

Respondent continued to misrepresent the status of the lawsuit by continuing to tell Mangan he was finalizing his

collection efforts on the judgment. During the period from August to November 1990, Respondent advanced Mangan payment of the fictitious judgment totalling \$2,375.00 (RR-2).

Respondent finally admitted to Mangan that he had never filed a lawsuit against Goodhousekeeping Gas Company and there has never been a judgment entered.

Respondent felt he owed Mangan some compensation for his inaction and agreed to pay him the amount of the fictitious judgment, less the 25% contingency fee. Respondent later executed a promissory note for \$9,000.00 in settlement of all claims by Mangan. Respondent has not made full payment on this note (RR-3).

At the time of the final hearing, Respondent had failed to return Mangan's file, records and medical documents to him as requested, thereby prejudicing Mangan (RR-3).

Respondent was shown to have received a private reprimand in 1988 for failing to timely file a mortgage as he was required (RR-5, T-12).

SUMMARY OF ARGUMENT

The Florida Bar submits that based upon the undisputed facts and the admission of misconduct by Respondent that the recommendation by the Referee as to the discipline is inappropriate in view of similar case law and prior misconduct by Respondent. A more appropriate discipline would be a period of rehabilitative suspension of eighteen (18) months.

ARGUMENT

THE RECOMMENDED DISCIPLINE WAS INAPPROPRIATE
BASED UPON THE FACTUAL BASIS OF THE
MISCONDUCT.

In the instant matter Respondent was found to have entered into a contingency fee contract to pursue a personal injury action for his client.

Some time after accepting the case Respondent determined that in his opinion the basis for his client's action was barred by the workmen's compensation laws. Rather than informing his client of his opinion and withdrawing from his agreed representation Respondent chose to neglect his client's rights and chose to misrepresent the circumstances of his case.

Respondent chose a deliberate course of lying and deceit in his further dealings with his client. Respondent continued to misrepresent his beliefs about the viability of the client's cause of action and the status of the lawsuit.

For a period of almost three years Respondent misled his client as to the status of the lawsuit. The lies of Respondent followed the natural progression of any lawsuit. Respondent began by misleading his client about the investigation of the injury and the cause of action. Respondent then lied in telling his client that a lawsuit had been filed. Without the benefit of a trial, Respondent misrepresented to his client that he had prevailed in the lawsuit and had won a \$14,000.00 judgment. When pressed for further information Respondent

again misled his client by telling him he was having trouble collecting the judgment.

After advancing his client almost \$2,400.00 in personal funds Respondent finally admitted to his client that there was no lawsuit and that Respondent had been lying to him for almost three years.

After finding Respondent guilty of ethical misconduct on all the violations cited in the complaint the Referee recommended that Respondent be given a public reprimand, suspended for 30 days, placed on probation for a period of eighteen months with several conditions. The Florida Bar takes exception to the recommended discipline and would ask that Respondent receive a more severe sanction of a period of rehabilitative suspension for a period of eighteen months. The Florida Bar would concur with the balance of the recommended discipline.

The misconduct engaged in by Respondent is not unfamiliar to this Court. In the matter of The Florida Bar v. Palmer, 504 So.2d 752 (1987) the attorney engaged in similar misconduct. In Palmer, the attorney accepted a personal injury action on a contingent fee basis, continually lied to his client regarding the status of the case, including telling the client the suit had been filed when it had not. Palmer finally told his client there had been a settlement and her judgment money was being mailed. None of these facts were true.

The referee in Palmer recommended Palmer be suspended for eight months even in light of the fact the attorney had

satisfied his client's claim by a personal loan, was remorseful and had been under the stress of his mother's illness and attendant death. There was also a lack of a prior disciplinary record. The Court approved the referee's recommendation and suspended the attorney for eight months.

In the matter of The Florida Bar v. Orman, 409 So.2d 1023 (1982) this Court suspended the attorney for a period of eighteen months. In Orman the attorney had neglected filing a patent application he had agreed to do for his client. The attorney continually lied to his client about his filing of the patent until such time as the client requested her file and money returned.

In The Florida Bar v. Alford, 441 So.2d 615 (1983) this Court suspended the attorney therein for three years for misconduct similar to Respondent's in the instant matter. In Alford the attorney had failed to carry out a contract of employment and prejudiced the client during the course of the professional relationship.

The Court has addressed this particular type of action by Respondent before and has stressed its displeasure as to its effect on the profession. In The Florida Bar v. Gaskin, 403 So.2d 425 (1981) the attorney neglected a legal matter entrusted to him, failed initially to communicate with his client and falsely reported the status of the matter to his client. Addressing the nature of this misconduct the Court held that:

"Gaskin's actions cannot be condoned. When a lawyer fails to fulfill his responsibilities the image of the entire legal profession is tarnished. Perhaps even more egregious is the false reporting of the status of the matter. Absolute candor to a client by a lawyer is mandated because the very foundation of an effective attorney-client relationship is predicated upon mutual trust. Lawyers should never mislead their clients." Gaskin, p. 426.

This Court also held that a suspension for six months was appropriate where an attorney failed to take action on behalf of a client and who repeatedly deceived and misled the client by advising that her legal matters were progressing when in reality the matters had not been filed in Court. The Florida Bar v. Carlson, 154 So.2d 689 (1963). Again in The Florida Bar v. Reessimav, 474 So.2d 1177 (1985) this Court approved a six month suspension in a case where an attorney incompetently handled a legal matter and neglected a legal matter entrusted to him.

In The Florida Bar v. Netzer, 462 So.2d 1103 (1985) the Court suspended the attorney therein for a period of one year where the attorney was retained in an action on a promissory note. The attorney neglected his client's cause which resulted in a default against the client. In addition the attorney repeatedly assured his client that the matter was being handled in response to periodic inquiries by the client.

A review of the Florida Standards for Imposing Lawyer Sanctions supports a term of suspension. Under Section 4.4 "Lack of Diligence" subsection 4.42 provides that suspension is

appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect with respect to client matters and causes injury or potential injury to a client. Section 4.52 provides that suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knows he is not competent and causes injury or potential injury. Section 4.62 provides that suspension is appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to the client. Section 7.2 provides that suspension is appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to the client. Section 7.2 provides that suspension is appropriate 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.

It is abundantly clear under the cited sections of the standards that the appropriate sanction under the instant facts is a term of suspension. The sole remaining question is whether it should be a term of non-rehabilitative suspension or a term of rehabilitative suspension.

In considering what sanction to impose it is permissible to consider mitigating and aggravating factors. Considering the admitted facts in this matter it is clear that the following factors should be considered as aggravating:

Section 9.22(a) prior disciplinary offense; (c) a pattern of misconduct; (i) substantial experience in the practice of law.

In considering the severity of the discipline to be involved in this matter it is important to look at the totality of the circumstances. Respondent had received a private reprimand in 1988 for improperly handling a mortgage closing wherein he failed to properly file the mortgage. At the time he was receiving the private reprimand and thus being clearly aware of the effect of ethical misconduct he continued to engage in the instant misconduct. Respondent testified he did not know how to tell Mr. Mangan he could not help him and just hoped the matter would go away.

Respondent's wish that this matter would simply go away was not realized. Instead, for every inquiry made by his client, Respondent told another lie. This stretched on for almost two more years. Respondent's pattern of misconduct clearly tracked the natural progression of any lawsuit and effectively prevented the client from obtaining other counsel during this period of time.

Respondent has alluded to a problem with alcohol during this time but in his own testimony he stated he only drank after work, at home and was capable of functioning while at work. There was no expert testimony as to how drinking such may have contributed to this mishandling of Mr. Mangan's case. This should not be considered in mitigating the appropriate discipline.

This Court has established a three prong test on the appropriateness of imposed sanctions. The discipline must be just to the public, fair to the attorney and deter other attorneys from similar misconduct. The Florida Bar v. Pahules, 23 So.2d 130 (1970). The discipline requested by the Bar herein meets all the above criteria. An eighteen month term of rehabilitative suspension is fair to the public, is fair to Respondent in that it will allow him to resume the practice of law after proving rehabilitation and will act as a deterrence to any lawyer who believes he can neglect a client's matter and then proceed to conceal his neglect behind a pattern of lies.

CONCLUSION

The recommended discipline by the Referee of a public reprimand and a thirty day suspension is inappropriate. In view of the calculated misrepresentations by Respondent to his client and his prior discipline the appropriate discipline should be a period of rehabilitative suspension of eighteen months with a condition of reinstatement being the successful passage of ethics portion of The Florida Bar Exam.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Complainant regarding Supreme Court Case No. 77,999; TFB File No. 91-00592-04A has been forwarded by regular U.S. mail to JAMES A. BAZLEY, Respondent, at his record bar address of Post Office Box 2349, Orange Park, Florida 32067-2349, on this 20th day of December, 1991.



JAMES N. WATSON, JR.
Bar Counsel

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