IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

GERALD M. KUCHINSKY,

Respondent-Appellant.
_____/

SC03-1744

The Florida Bar File
No.2002-51,794(17C)

RESPONDENT'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CASES AND CITATIONS

CASES PAGE(S)

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar." Gerald M. Kuchinsky, Appellant, will be referred to as "respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Lastly, the symbol "TFB" followed by a letter and number will designate the bar's trial exhibits.

SUMMARY OF ARGUMENT

A lawyer failed to file an appellate brief because he could not find a good faith argument to defend his client's position on the matter before the appellate court. Rather than withdraw or take other remedial action, he allowed the time to expire to file a brief and for this act he should be disciplined. The difficulty in this case is the enhancement value to assign to the Respondent's very old disciplinary record. It is the Respondent's position that there is no significant reason to deviate from the public reprimand normally meted out for neglect of a client matter.

The Respondent is 60 years old and has practiced law for more than 27 years with only minor blemishes that occurred many years ago. He believes that he works hard for his clients and provides excellent and ethical representation. Unfortunately, in the case at hand, he slipped below the standard of care necessary to have fully represented this client. Recognizing his failings to this client, he fully refunded all monies paid to him by the client and was attempting to schedule a meeting with a malpractice attorney, his client and himself when he was discharged from representation.

The Respondent is professionally embarrassed and extremely remorseful for his actions in not filing a brief. The Bar and the Referee and the Referee seek to severely punish the Respondent by suspending him from the practice of law. At this late stage

in his life a lengthy suspension could end the Respondent's legal career. This Court has repeatedly stated that there are three main considerations in deciding upon a disciplinary sanction (protection of the public, deterrence and encouragement of rehabilitation). The sanction recommended by the Referee and that urged by the Bar focus on the punishing the Respondent, rather than finding an appropriate sanction that meets all three criteria.

ARGUMENT

I. A SIXTY DAY SUSPENSION IS NOT THE APPROPRIATE SANCTION FOR A LAWYER WHO FAILS TO FILE AN APPELLATE BRIEF ON BEHALF OF A CLIENT.

At issue in this appeal is whether a lawyer, who provides good and valuable services to a client, but who fails to file an appellate brief on behalf of a client, should be suspended from the practice of law for sixty days and placed on two years probation with various conditions and terms for such probation. It is the Respondent's position that this sanction does not comport with the Florida Standards for Imposing Lawyer Sanction or relevant case law. The Florida Bar also believes that the Referee's recommended sanction is incorrect and urges a harsher sanction than that allowed under current case law.

The Bar at page 21 of its Answer Brief admits that the baseline sanction for neglect of a client matter is a public reprimand, but nonetheless contends that a rehabilitative suspension should be imposed. In order to reach that conclusion, the Bar ignores certain key facts of this case and desires to enhance the recommended sanction with a very old disciplinary record. Each area will be addressed below.

A. The Respondent communicated with his client.

The Bar's brief, at pages 11 and 12, attempts to lead the Court into believing that the Respondent never communicated with his client by making reference to various phone calls made by Ms. Sichewski to the Respondent that Ms. Sichewski stated were not returned. The Bar makes reference to page 27 through 40 of the trial transcript in an attempt to support its position of no communication. However, these same pages of the trial transcript which record Ms. Sichewski's testimony reveal the following:

1) January 16, 2001 phone call initiated by the Respondent to communicate information relative to the sale of property in China (TT 28, l. 21-24);

2) Potential phone call on February 12, 2001 (TT 29,l.1-7);

3) Substantive phone call on February 22, 2001(TT 29, l. 7-9);

4) Respondent personally visited his client at her place of employment on May 3, 2001(TT29, l. 15-18);

5) May 14, 2001 phone call to discuss drug search of Sichewski's home and related matters (TT29, l. 20-25);

6) Potential visit at Sichewski's job location on May 11, 2001 (TT30, l. 1-4);

7) Respondent personally visited his client at her place of employment on September 4, 2001 (TT31, l. 19 to TT 32, l.2);

8) Telephone call from Respondent's secretary conveying information on the Shanghai property sale (TT32, l. 3-5);

9) Phone call on October 16, 2001 regarding many issues (TT32, l. 22-25);

10) Personal visit at Ms. Sichewski's place of business on November 8, 2001 (TT34, l.10-14);

11) Telephone call on November 14, 2001 (TT34, l.18-22);

12) November 20, 2001 phone call (TT35, l. 6-10);

13) Respondent called his client on November 30, 2001 (TT36, l. 1-2);

14) Telephone call on December 4, 2001 (TT36, l. 9-10);

15) December 6, 2001 office visit to execute and discuss petition for modification (TT36, l. 12-18);

16) December 20, 2001 brief phone call (TT37, l. 16-17);

17) January 17, 2002 phone call (TT 38, l. 7-10);

18) January 22, 2002 phone call (TT39, l. 4-8);

19) January 23, 2002 phone call (TT39, l. 6-8).

Thus, the same pages of transcript cited by the Bar to stand for the proposition that the Respondent never communicate with his client, reveal phone call, office visits and even personal visits at Ms. Sichewski's place of employment. This is Ms. Sichewski's testimony on direct examination by the Bar and not as the Bar claims in its brief at page 13, that the only testimony presented to show there was communication came from "the Respondent's recollection".

The Bar also tries to save its argument on this point by claiming that the Respondent did not send any correspondence to confirm his conversations with his client. While this may have been a better practice for a client who called, by her own testimony, on an almost daily basis from time to time, it is not unethical or a violation of the communication rule to speak with a client, impart information and then not send a letter confirming the information already provided.

B) The Respondent did not make a misrepresentation to his client.

It is the Bar's burden to show, by clear and convincing evidence, that the Respondent intentionally made a misrepresentation to his client about the status of her appeal. The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). The Respondent's position on this point is clear. See Initial Brief at pages 11 and 12. The Respondent stated under oath that he discussed this topic with her on several occasions. He discussed it not only in terms of the fact that he had not filed a brief, but in terms of

filing a petition for modification so he could undue any harm caused by the appellate decision. See TT73, l.11 to TT74, l.6. It is also uncontroverted that the Respondent hired an attorney to schedule a meeting between Ms. Sichewski, himself and that attorney to fully explain the ramifications of the malpractice claim. However, that meeting was not held as the Respondent was discharged. TT83-86.

As the Bar points out, Ms. Sichewski claims that she did not know about the lost appeal until such time as her new lawyer told her. However, she admits to having a personal meeting wherein a petition for modification was discussed and executed by her. TT 36-37. It is the Respondent's testimony that he explained the reason for needing the petition for modification (ie. the lost appeal) at such meeting. TT 78-82.

The Bar presented no other evidence on this point, (other than Ms. Sichewski's testimony). Instead the Bar argues for the first time, on appeal, that further 'evidence" of the misrepresentation is that the Respondent did not file the petition for modification until November of 2001. However, the Respondent could not have filed the petition for modification of issues pending in the appellate court until such time as a mandate was issued by that Court. As the Bar points out in its own brief, the Fourth District Court of Appeals remanded the case to the trial court on October 10, 2001. Thus, the time frame between the remand and the petition for modification is not unreasonable.

The Bar tries to paint a picture of a client who was misled, but her testimony, taken as a whole reveals she understood what she wanted to understand and blamed the Respondent for things that he was not responsible for or that he did not do. For example, Ms. Sichewski blames the Respondent for losing her status as the primary residential parent, but this issue was lost well before the Respondent even entered the case.

In conclusion on this point, the Respondent told his client that he had not filed a brief, the consequences thereof and explained the steps he was taking to solve the problem and there is no corroborating evidence to prove Ms. Sichewski's contrary testimony. See The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999) [Client's claim of 11 years of misrepresentations on status of case corroborated by other witnesses].

C) The sanction recommendation.

While the Respondent takes issue with some of the probationary terms set forth by the Referee because they have no nexus to the ethical violations[1], the real dispute

[1] There was no testimony adduced at trial that the Respondent did not have a tickler system for his deadlines or that case management was a problem for him. Rather, the testimony was that he could not find a good faith basis to file a brief and made a poor decision not to withdraw from representation. Thus, the probationary terms related to case management and purchase of computer software has no reasonable nexus to the problem at hand. Further,

in this case is the recommended suspension and now the Bar's contention that the suspension should be longer than that asked for by the Referee. It was the Referee's belief that a sixty day suspension was warranted and the Bar now urges a ninety one day suspension.

As is noted above the Bar accepts the premise that isolated acts of negligence normally result in public reprimands.[2] Nonetheless, the Bar asks this Court for a rehabilitative suspension, apparently because of the Respondent's disciplinary record. While the Respondent understands that is important to include disciplinary history in a Report of Referee and to consider same when deciding upon an appropriate sanction, it is also important to decide upon the proper weight or value to assign same based upon the type of discipline and the age of same. As is explained in some detail in the Briefs so far the Respondent has a 1993 admonishment, a 1998 public reprimand and a 1996 admonishment.[3] A careful analysis of these prior cases reveals that each

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the requirement of Ethics School and passing the ethics portion of the Bar Exam appear to be redundant.

[2] See Answer Brief at page 21.

[3] In 1993, Mr. Kuchinsky received an admonishment for failing to timely withdraw from representation. Mr. Kuchinsky received a public reprimand in 1994 based upon a failure to act with reasonable diligence or to expedite litigation in relationship to actions occurring in 1990 and 1991. Both of these disciplinary actions are for conduct that occurred more than 13 years ago and the sanctions themselves are ten years old. The only disciplinary sanction of

of them are very old and that the conduct at issue is even older, with the most "recent" misconduct being seven years ago. Standard 9.22(a) of the Standards for Imposing Lawyer Sanctions states that a finding of minor misconduct (admonishment) older than seven years "shall not be considered an aggravating factor." Thus, the 1993 admonishment should not be used as aggravation and the 1998 admonishment for misconduct that occurred more than eight years ago should be discounted. The Florida Bar v. Nunes, 743 So. 2d 393 (Fla. 1999).

A crucial factor when looking at the proper enhancement occasioned by the disciplinary record herein is that the Respondent, a 27 year lawyer, has never been suspended from the practice of law. Yes, he has had some bumps in the road, but his prior disciplinary files show an acceptance of responsibility such as that found in this case. Not only did the Respondent fully refund any fee he collected[4] prior to Ms. Sichewski filing a Bar complaint, he hired an attorney to attempt to fully explain the ramifications of his malpractice to his client and to effectuate a resolution of same.

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somewhat recent vintage is an admonishment from five and a half years ago for conduct that occurred in May and July of 1998 (almost eight years ago). Quite frankly, Mr. Kuchinsky's disciplinary record is stale and should not be used to create a large enhancement of the current sanction. See the Standards for Imposing Lawyer Sanction, standard 9.22(a).

[4] The Bar's reference, at page 5 of its brief, to a recoupment order, concerns fees paid to the prior appellate lawyer on Ms. Sichewski's case.

The Initial Brief filed by the Respondent discusses the relevant case law on how the Court has used prior records to "increase the discipline where appropriate." The Florida Bar v. Morrison, 669 So. 2d 1040 (Fla. 1996). These cases included The Florida Bar v. Maier, 784 So. 2d 411 (Fla. 2001), wherein the Court examined a public reprimand type case but enhanced the sanction to a 60 day suspension due to that lawyers' prior 30 day suspension and two admonishments all within the past seven years of the instant proceeding. In the case at hand the prior discipline is spread out over more than ten years and this Respondent has never been suspended. If the Court believes a suspension is warranted in this case it is surely not the 91 days urged by the Bar or the 60 days recommended by the Referee, but a more measured approach of a 10-15 day suspension. While a public reprimand is the appropriate sanction for this case a 10-15 days suspension would not be inconsistent with the basic precepts of lawyer sanction which are:

> First, the judgement must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics

> and at the same time ***encourage reformation and rehabilitation.*** Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). [Emphasis supplied.]

The Bar's discussion of case law is found on pages 17 through 20 of its Answer Brief. For the most part these cases were previously addressed and distinguished by the Respondent in his Initial Brief at pages 18 and 19. Each of the cases presented by the Bar (even resolving the misrepresentation issue in this case in their favor) are much more serious than that found here. For example in The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993), the lawyer neglected a client matter and was also convicted of lying to the court and in other cases, the lawyers had more significant disciplinary records, inclusive of prior rehabilitative suspensions and multiple acts of neglect. See for example The Florida Bar v. Roberts, 770 So. 2d 1207 (Fla. 2000) [private reprimand, three admonishments and a 91 day suspension]; The Florida Bar v. Jordan, 682 So. 2d 548 (Fla. 1996) [four other disciplinary cases, neglect and failing to respond to the Bar]; The Florida Bar v. Brakefield, 679 So. 2d 1249 (Fla. 1996) [complete neglect of three distinct clients]; Fredericks [11 years of lying to a client about nonexistent lawsuits and recoveries].

The case law and Standards for Imposing Lawyer Sanctions clearly point out that the baseline sanction in this case is a public reprimand and at most require a short suspension of 10-15 days should the Court desire to enhance the sanction by virtue of the Respondent's prior disciplinary record.

CONCLUSION

On balance this is not a difficult case to resolve. The Respondent failed to file a brief. It had consequences and he is deeply remorseful for same and attempted to make his client whole before his discharge, by hiring a lawyer to resolve his malpractice issue and by giving a full fee refund before this grievance was filed, even though he provided other good and valuable services to this client for more than a year on trial level issues.

The Referee in this case has improperly enhanced the recommended sanction by placing too much weight on the Respondent's very old disciplinary record. The conduct at issue in this case ordinarily results in a public reprimand and any enhancement from this mark is amply met by the probationary and rehabilitative terms (Ethics School, passage of Ethics Exam) set forth by the Referee.

WHEREFORE, the Respondent, Gerald M. Kuchinsky, respectfully requests this Court to find him not guilty of having violated R. Regulating Fla Bar 4-1.4(a) &

(b) and 4-8.4(c) and impose a public reprimand as a sanction for the remaining disciplinary violations.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished served via U.S. Mail on this ___ day of December, 2004 to Lillian Archbold, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by McAfee.

Respectfully submitted,
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