

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/ Petitioner,

v.

JOSEPH R. DE LUCCA,

Respondent.

Supreme Court Case
No. SC09-412

The Florida Bar File
No. 2006-50,985(15A)

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Complainant/ Petitioner, The Florida Bar, is seeking review of a Report of Referee recommending at least a 91-day rehabilitative suspension.

Complainant/ Petitioner will be referred to as The Florida Bar, or as The Bar. Joseph De Lucca will be referred to as Respondent, or as Mr. Joseph De Lucca throughout this brief.

References to the Report of Referee will be by the symbol RR followed by the appropriate page number.

References to specific pleadings will be made by title. References to the transcript of the final hearing are by symbol TR, followed by the appropriate page number. (e.g., TR 289).

References to Bar exhibits will be by the symbol TFB Ex. followed by the appropriate exhibit number (e.g., TFB Ex. 10).

STATEMENT OF THE CASE AND FACTS

The referee conducted a final hearing on May 21, 2009. The respondent failed to appear at the final hearing; instead, respondent appeared by telephone. The respondent failed to produce any exhibits or evidence in support of his defense other than his own testimony.

Respondent pled guilty on November 10, 2008, to one criminal count of neglect of a child in violation of Florida Statutes, Section 827.03(3)(c). (RR 2) Neglect of a child is a third degree felony under Florida law. R. Regulating Fla. Bar 3-7.2(a), required respondent, as a member of The Florida Bar, upon institution of this felony charge by the filing of an information, to notify the executive director of The Florida Bar within 10 days of the institution of the felony charge. R. Regulating Fla. Bar 3-7.2(e) further required respondent within 10 days of an entry of a determination or judgment for this criminal offense, to notify the executive director of such determination or judgment. The referee found, after a final hearing, that respondent had failed to comply with either of the aforementioned Florida Bar Rule requirements by neither notifying the executive director upon being charged with a felony offense nor notifying the executive director of his final determination of guilt. (RR 2)

The Florida Bar filed its notice of judgment of guilt against respondent on March 4, 2009. On March 6, 2009, the Court, in reliance on the Bar's notice of judgment of guilt, suspended respondent and allowed him thirty days from the date of

the order to “... close out his practice and to protect the interests of existing clients.” The Court further required respondent to comply with Rule 3-5.1(g), R. Regulating Fla. Bar.

Rule 3-5.1(g), R. Regulating Fla. Bar, placed an affirmative duty on respondent to provide notice of his felony suspension to all clients, opposing counsel, co-counsels, and courts by way of filing a sworn compliance affidavit with The Florida Bar within 30 days of service of the suspension order. The referee also found that respondent had failed to comply with this specific requirement of the Court’s order. (RR 2-3) Furthermore, respondent admitted that he failed to comply with this specific requirement of the Court’s suspension order. (TR 17-19)

Based on the testimony and exhibits introduced at the final hearing, the referee found that respondent had violated the following ethical rules:

By the conduct set forth above, respondent violated R. Regulating Fla. Bar **3-4.4** [In addition, whether the alleged misconduct constitutes a felony or misdemeanor The Florida Bar may initiate disciplinary action regardless of whether the respondent has been tried, acquitted, or convicted in a court for the alleged criminal offense.]; **3-5.1(g)** [Upon service on the respondent of an order of disbarment, suspension, disciplinary resignation, emergency suspension, emergency probation, or placement on the inactive list for incapacity not related to misconduct, the respondent shall, unless this requirement is waived or modified in the court’s order, forthwith furnish a copy of the order to: (1) all of the respondent’s clients with matters pending in the respondent’s practice, (2) all opposing counsel or co-counsel in the matters listed in (1) above, and (3) all courts, tribunals, or adjudicative agencies before which the respondent is counsel of record. Within 30 days after service of the order the respondent shall furnish bar counsel with a sworn affidavit

listing the names and addresses of all persons and entities that have been furnished copies of the order.]; **3-7.2(c)** [Upon the institution of a felony criminal charge against a member of The Florida Bar by the filing of an indictment or information the member shall within 10 days of the institution of the felony criminal charges notify the executive director of The Florida Bar of such charges. Notice shall include a copy of the document(s) evidencing institution of the charges.]; **3-7.2(e)** [A member of The Florida Bar shall within 10 days of entry of a determination or judgment for any criminal offense, which was entered on or after August 1, 2006, notify the executive director of The Florida Bar of such determination or judgment. Notice shall include a copy of the document(s) on which such determination or judgment was entered.]; **4-8.4(a)** [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.]; **4-8.4(b)**[A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.]; and **4-8.4(c)** [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.]. (RR 3-4)

The referee's recommended sanction of at least a 91-day suspension was based on the following facts:

I recommend that respondent be suspended for an indefinite period, but most certainly not less than 91 days. I base this decision upon not only the disciplinary violations set forth above, but also on my observations of respondent during the final hearing in this cause. I believe that respondent is in a diminished state as it relates to his mental capacity both by his own admission and by his presentation. Respondent further admitted that he has been declared totally disabled by the Social Security Administration for both physical and psychological reasons. I find there is a great potential for injury to future clients if respondent continues to practice law. And I find that respondent is incapable of practicing law at even a minimum standard based upon his physical and emotional conditions. For these reasons, I have chosen not to recommend disbarment, although I am aware that disbarment is the presumptive sanction after conviction of a felony. Further, due to respondent's current

fragile mental and emotional state, I believe that he is currently incapable of engaging in the active practice of law. (RR 4-5)

The referee further found the following aggravating and mitigating factors within his report of referee:

B. Aggravating Factors: 9.22

(a) prior disciplinary offenses;

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency [Specifically, respondent failed to produce any documentary evidence of his claimed mental and physical conditions];

Prior Discipline: By Supreme Court of Florida Order dated February 4, 1980, respondent was suspended for a period of 3 years after conviction on felony charges. Respondent was reinstated to the active practice of law by Supreme Court order dated April 8, 1985. By Supreme Court order dated March 6, 2009, respondent was again suspended after conviction of a felony. By Supreme Court order dated March 11, 2009, respondent was suspended on an emergency basis, based on allegations of trust accounting violations.

C. Mitigating Factors: 9.32

(c) personal or emotional problems;

(h) physical or mental disability or impairment;

(l) remorse. (RR 7)

The Florida Bar recommended disbarment, but the referee recommended only at least a 91-day suspension. The Florida Bar challenges the referee's findings of fact as they relate to the recommended discipline and mitigating factors found within his report. The Florida Bar further files its petition on the recommended discipline. Disbarment is the presumptive sanction for felony offenses regardless of the mitigation purportedly found by the referee. The referee's sanction is too lenient

considering the severity of the ethical violations and the aggravators found in this case.

SUMMARY OF ARGUMENT

The referee correctly found respondent guilty of all ethical rule violations based upon respondent's criminal conduct. The referee found that respondent violated the following ethical rules:

R. Regulating Fla. Bar **3-4.4** [In addition, whether the alleged misconduct constitutes a felony or misdemeanor The Florida Bar may initiate disciplinary action regardless of whether the respondent has been tried, acquitted, or convicted in a court for the alleged criminal offense.]; **3-5.1(g)** [Upon service on the respondent of an order of disbarment, suspension, disciplinary resignation, emergency suspension, emergency probation, or placement on the inactive list for incapacity not related to misconduct, the respondent shall, unless this requirement is waived or modified in the court's order, forthwith furnish a copy of the order to: (1) all of the respondent's clients with matters pending in the respondent's practice, (2) all opposing counsel or co-counsel in the matters listed in (1) above, and (3) all courts, tribunals, or adjudicative agencies before which the respondent is counsel of record. Within 30 days after service of the order the respondent shall furnish bar counsel with a sworn affidavit listing the names and addresses of all persons and entities that have been furnished copies of the order.]; **3-7.2(c)** [Upon the institution of a felony criminal charge against a member of The Florida Bar by the filing of an indictment or information the member shall within 10 days of the institution of the felony criminal charges notify the executive director of The Florida Bar of such charges. Notice shall include a copy of the document(s) evidencing institution of the charges.]; **3-7.2(e)** [A member of The Florida Bar shall within 10 days of entry of a determination or judgment for any criminal offense, which was entered on or after August 1, 2006, notify the executive director of The Florida Bar of such determination or judgment. Notice shall include a copy of the document(s) on which such determination or judgment was entered.]; **4-8.4(a)** [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.]; **4-8.4(b)**[A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.]; and **4-8.4(c)** [A lawyer shall not engage in

conduct involving dishonesty, fraud, deceit or misrepresentation.]. (RR 3-4)

Respondent is a convicted felon. Respondent was suspended from the practice of law in 1980 for a federal felony drug conspiracy conviction. The Court must determine whether the referee's findings concerning mitigation were supported by clear and convincing evidence. However, regardless of the purported mitigation found by the referee, the presumptive sanction of disbarment is still appropriate.

The Florida Bar substantiated, by clear and convincing evidence, the aggravators found by the referee. These aggravators (obstruction of the disciplinary process and prior disciplinary offense), along with the case law and The Florida Standards For Imposing Lawyer Sanctions, support a greater than 91-day suspension for respondent. The Florida Bar respectfully requests that this Court disbar the respondent and order him to pay The Florida Bar's costs.

ARGUMENT

I. THE REFEREE’S FACTUAL FINDINGS AS TO MITIGATION WITHIN THE FINAL REPORT OF REFEREE WERE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE. THE REFEREE’S RELIANCE ON RESPONDENT’S UNSUBSTANTIATED TESTIMONY DID NOT SUPPORT A FACTUAL FINDING OF MITIGATION FOR THIS COURT’S CONSIDERATION.

In disciplinary cases, the party contesting the referee’s findings of fact and conclusions as to guilt must demonstrate either a lack of record evidence to support such findings and conclusions, or that the evidence in the record clearly contradicts such findings and conclusions. *The Florida Bar v. Feinberg*, 760 So.2d 933 (Fla. 2000), citing *The Florida Bar v. Sweeney*, 730 So.2d 1269, 1271 (Fla. 1998). A referee’s findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. *The Florida Bar v. Canto*, 668 So.2d 583 (Fla. 1996); *The Florida Bar v. Porter*, 684 So.2d 810 (Fla. 1996); and *The Florida Bar v. Forrester*, 656 So.2d 1273 (Fla. 1995), quoting *The Florida Bar v. Marable*, 645 So.2d 438 (Fla. 1994). This standard also applies when reviewing a referee’s finding of mitigation and aggravation. *The Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003).

The respondent testified that he suffered from physical and mental disabilities related to both of his legs and specifically his knees. (TR 62-64) Importantly, the respondent failed to appear at the final hearing and testified telephonically. (TR 3-5) He further testified that he was deemed totally disabled by the Social Security

Administration for both physical and mental disabilities and had been on pain medication for several years. (TR 29) The referee accepted the respondent's unsubstantiated testimony concerning his disabilities without requiring any corroboration by way of medical records or other documentary evidence. (TR 95)

The Florida Bar inquired about proof of his physical or mental disabilities through medical records or any other corroborating evidence. (TR 32) The Florida Bar pointed out to the referee that although respondent's disciplinary file had been pending for over a year, respondent had failed to provide any detailed medical records to The Florida Bar substantiating his claims of physical or mental disabilities. (TR 59) Respondent acknowledged that he never provided these medical records to The Florida Bar prior to the final hearing date, but instead offered to provide them after the final hearing. (TR 24-25) The referee properly found respondent's actions as dilatory and an aggravating factor, i.e., bad faith obstruction of the disciplinary process, rather than a mitigating factor for this Court's consideration. (RR 7)

On the other hand, the aggravators were substantiated by clear and convincing evidence. The Florida Bar filed an affidavit corroborating the respondent's prior disciplinary record; and respondent's testimony clearly established his failure to produce any documentary proof of his claimed mental and physical conditions during his pending disciplinary case. (TFB Ex. 3; TR 54, 99)

In conclusion, respondent's testimony and credibility should be deemed less reliable in light of his prior felony conviction. The referee's factual findings supporting mitigation concerning respondent's physical or mental disabilities are wholly lacking in evidentiary support and should not be considered by this Court when determining the appropriate sanction for the respondent.

II. THE REFEREE'S RECOMMENDATION OF AT LEAST A 91-DAY SUSPENSION FOR RESPONDENT'S ETHICAL MISCONDUCT SHOULD BE INCREASED TO DISBARMENT. THE DISBARMENT RECOMMENDATION IS SUPPORTED BY THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND EXISTING CASE LAW.

While a referee's findings of fact should be upheld unless clearly erroneous, this Court is not bound by the referee's recommendations in determining the appropriate level of discipline. *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986), and *The Florida Bar v. Rue*, 643 So.2d 1080 (Fla. 1994). This Court has clearly stated that the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997), and *The Florida Bar v. Wilson*, 643 So.2d 1063 (Fla. 1994).

In *The Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970), this Court held that three purposes must be kept in mind when determining the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must

be fair to the attorney; and 3) the judgment must be severe enough to deter other attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *The Florida Bar v. Sweeney*, 730 So.2d 1269 (Fla. 1998), and *The Florida Bar v. Lecznar*, 690 So.2d 1284 (Fla. 1997). Finally, the Court will not second-guess a referee's recommended discipline "as long as that discipline has a reasonable basis in existing case law." *The Florida Bar v. Laing*, 695 So.2d 299, 304 (Fla. 1997).

Florida Standard for Imposing Lawyer Sanctions 5.11 provides that disbarment is appropriate when: (a) lawyer is convicted of a felony under applicable law. This Court has further held that the presumptive sanction for felony offenses is disbarment. The burden is on the attorney to overcome the presumption of disbarment. *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997). In *The Florida Bar v. Heptner*, 887 So. 2d 1036 (Fla. 2004), the Court held that in rendering discipline, "the court deals more harshly with cumulative misconduct than it does with isolated misconduct."

Respondent failed to overcome the presumption of disbarment with his self-serving and uncorroborated testimony concerning his physical and mental disabilities. Furthermore, respondent's felony conviction and felony suspension for a prior federal conspiracy drug charge in 1980 were appropriate aggravation for this Court's consideration. *See U.S. v Joseph R. Delucca, Et Al.*, 630 F.2d 294 (5th Cir. 1980).

Disbarment is the appropriate sanction in light of the case law and Florida Standards for Imposing Lawyer Sanctions. The referee's imposition of at least a 91-day suspension should have been greater in light of the respondent's ethical misconduct and given the respondent's prior disciplinary record.

CONCLUSION

The Florida Bar respectfully requests that this Court reject the factual findings concerning mitigation in that they were not supported by clear and convincing evidence. The Florida Bar also requests that this Court disbar respondent for his ethical misconduct and order the respondent to pay The Florida Bar's costs in this case. The increase in discipline is supported by the Florida Standards Imposing Lawyer discipline and existing case law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Florida Bar's Initial Brief regarding Supreme Court Case No. SC09-412, The Florida Bar File No. 2006-50,985(15A) was e-filed and furnished by regular U.S. Mail to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, FL 32399-1927 and a true and correct copy has been mailed by Certified Mail #7008 1140 0003 7593 8941, return receipt requested and by regular U.S. Mail to Joseph R. De Lucca, Esq., respondent, 5089 Greenwich Preserve Court, Boynton Beach, FL 33436-5802, on this _____ day of August, 2009.

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

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Alan Anthony Pascal, Bar Counsel