RECEIVED 08/08/2016 FLORIDA SUPREME COURT

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

MARIA ELENA PEREZ,

Respondent.

_____/

Supreme Court Case No.
SC14-733

The Florida Bar File Nos.
2013-70,658 (11K)
2013-70,671 (11K)
2013-70,691 (11K)

REPORT OF REFEREE ACCEPTING CONSENT JUDGMENT

I. SUMMARY OF PROCEEDINGS

Pursuant to Rule 3-7.6 of the Rules of Discipline, the undersigned was duly appointed as referee to conduct disciplinary proceedings.

On April 14, 2014, The Florida Bar filed its formal Complaint against Respondent. The initial pleadings, responses thereto, motions, exhibits, Conditional Guilty Plea for Consent Judgment, and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

In these proceedings, The Florida Bar was represented by Thomas Allen Kroeger, Bar Counsel, Miami Branch Office. Respondent was represented by Kevin P. Tynan, Richardson and Tynan, PLC.

II. FINDINGS OF FACT

A. Jurisdictional Statement. Respondent is, and at all times during these proceedings was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary of Case.

As to The Florida Bar File Nos.
2013-70,658 (11K) and
2013-70,691 (11K)

In April of 2010, Respondent began representing Nevin Shapiro ("Shapiro") in connection with federal criminal charges arising out of the District of New Jersey, a Securities and Exchange Commission Complaint lodged in the Southern District of Florida, as well as involuntary bankruptcy proceedings in the Southern District of Florida. All of these matters related to Shapiro's running of a Ponzi scheme, which ultimately ended in Shapiro's conviction for money laundering and wire fraud. Respondent also represented Shapiro in a state court defamation action brought against him in September of 2011 by former rap artist Luther Campbell.

Respondent's representation of Shapiro in the involuntary bankruptcy proceedings was aimed at facilitating Shapiro's cooperation with the bankruptcy trustee's efforts to recover victim proceeds which were lost during the Ponzi scheme. By cooperating with the trustee, Shapiro hoped to make creditors whole and potentially mitigate his sentence in the federal criminal matter. Shapiro's

cooperation with the Trustee was also aimed at unearthing evidence and testimony that would corroborate Shapiro's earlier cooperation efforts with the federal government which commenced with Shapiro's predecessor attorneys and which included, but was not limited to, cooperation regarding the location and expenditures of Ponzi Proceeds, some of which were used to commit NCAA violations and likewise open a Sports Agency with Michael Huyghue and fund a University of Miami Student Lounge.

To obtain testimony and evidence in aid of his recovery efforts, Shapiro expressed his desire to conduct Rule 2004 examinations of multiple individuals, including but not limited to, Sean Allen, Michael Huyghue, David Leshner, Craig Currie, Eric Sheppard, and others who received, witnessed, or otherwise participated in fraudulent conveyances derived from the Ponzi scheme.

These individuals had been previously identified by Shapiro to the trustee as having received Ponzi funds; however, the trustee was prioritizing the larger claims first. While Shapiro wanted to conduct the Rule 2004 examinations, his family did not have the financial means to pay for them.

During the course of the Ponzi scheme, Shapiro used a portion of the fraudulent proceeds to engage in improper booster activities supporting the athletic programs of the University of Miami ("UM"), providing cash and other

impermissible benefits. In early 2011, Shapiro, of his own volition and not on the advice of legal counsel, contacted the National Collegiate Athletic Association ("NCAA") to provide information regarding the improper benefits he provided to student athletes to aid in in their investigation of the University of Miami.

The individuals who Shapiro wished to examine in the ongoing bankruptcy proceedings also possessed information relevant to the NCAA's investigation. After discussions between Shapiro and the NCAA regarding his desire to conduct Rule 2004 examinations, NCAA investigators approached Respondent and offered to reimburse Respondent for her legal fees and costs associated with taking the bankruptcy examinations. In exchange, the NCAA would have the opportunity to attend the examinations, submit potential questions, and receive copies of the examination transcripts and the video tape portions of the Rule 2004 examinations.

In September, 2011, Shapiro, Respondent, NCAA Directors of Enforcement Staff Ameen Najjar ("Najjar") and Richard Johanningmeier, and NCAA supervisors and senior staff Julie Roe Lache, Tom Hosty and Jim Isch, began coordinating the Rule 2004 examinations. Respondent had proposed conducting examinations of nine (9) individuals for an estimated $14,420.00 dollars in legal fees and costs. However, the NCAA authorized reimbursement and payment of legal fees for seven (7) individuals: Sean Allen ("Allen"), Michael Huyghue

("Huyghue"), Mario Sanchez ("Sanchez"), David Leshner ("Leshner"), Eric Sheppard ("Sheppard"), Carlos Noriega ("Noriega"), and Ricky Grilasca ("Grilasca").

At all times relevant, the bankruptcy trustee was aware that Respondent was working with the NCAA and would be conducting Rule 2004 examinations of Allen, Huyghue, Sanchez, Leshner, Sheppard, Noriega and Grilasca. In fact, an attorney for the trustee, Andrea Rigali, telephonically attended the Rule 2004 examination of Huyghue. A University of Miami representative, Sandra Upegui, also telephonically attended the Rule 2004 examination of Michael Huyghue.

On December 8, 2011, Respondent subpoenaed Allen for a Rule 2004 examination. Allen had been an equipment manager with UM and served as Shapiro's personal assistant and employee during the relevant time period that the Ponzi scheme occurred. Allen had previously retained attorney Devang Desai ("Desai") in connection with the NCAA's investigation of the University of Miami which commenced in August, 2011. Desai continued to represent Allen in connection with the Rule 2004 examination, and telephoned Respondent on or about December 12, 2011, and December 13, 2011, in order to discuss the examination. On December 14, 2011, Desai sent Respondent correspondence confirming that he would accept service on behalf of Allen and agreed to hold the

examination on December 19, 2011. In the correspondence, Desai expressed his understanding that only Respondent would conduct the Rule 2004 examination of Allen and that no other individuals or attorneys would attend.

After Respondent's conversations with Desai on December 13, 2011, she emailed Najjar inquiring into whether he was planning on attending Allen's Rule 2004 examination. Respondent also advised Najjar that Allen's attorney wanted to confirm that no one else would be present at the examination. Najjar responded on December 14, 2011, stating that he would attend the Rule 2004 examination of Allen. On December 18, 2011, Najjar emailed a list of questions he wanted Respondent to consider asking Allen. Although Najjar was physically present at the location where the examination was being held, he did not attend and exited the building as Allen and Desai appeared for the examination.

At no time prior to the examination did Respondent inform Desai of Najjar's initial plan to attend the examination or that she and Shapiro had a working relationship with the NCAA. Respondent contends that since August 16, 2011, her working relationship with the NCAA, and that of her client Shapiro, was a matter of public knowledge given the publicity in the local media about Shapiro and UM.

The court reporter from Allen's examination submitted an invoice to Respondent in the amount of $1,085.25, which she forwarded to the NCAA in

early January, 2012. In turn, the NCAA issued a check in or about mid-February, 2012, for all costs and which was made payable to Respondent's operating account. However, given the fact that Respondent had advanced certain costs monies, not including the court reporter costs, the Respondent overlooked her need to transfer $1,085.00 dollars of the funds to her trust account for the benefit of the court reporter. Nevertheless, the court reporters' invoice for the Allen examination was indeed paid in July, 2014.

In email correspondence with the NCAA, Respondent indicated that it was her intention to obtain Sanchez's testimony by deposing him in the Luther Campbell defamation case. The Campbell defamation case was triggered by a quote Shapiro had given in a Yahoo! Sports article suggesting that the improper benefits he bestowed upon UM student athletes was a continuation of Campbell's own booster activities.

On several occasions in late 2011 and early 2012, Respondent attempted to serve Sanchez, Shapiro's former bodyguard, with a subpoena for a Rule 2004 examination. However, as a result of Sanchez's repeated moves from various addresses, he could not be served. On June 5, 2012, Sanchez was successfully served with a Rule 2004 examination subpoena, as well as a deposition subpoena in the Luther Campbell state court defamation case. Both subpoenas required

Sanchez to appear on July 9, 2012. Subsequently, Sanchez contacted Respondent's office regarding the Campbell subpoena, requesting that Respondent agree to interview him informally. Respondent agreed.

In an affidavit provided to The Florida Bar, Sanchez stated that he met with Respondent on July 9, 2012 and spoke off the record. He further stated that, during this interview, Respondent did not ask him any questions regarding Luther Campbell, but did ask a series of questions pertinent to the NCAA and bankruptcy matters.

Conversely, Respondent contends that Sanchez possessed relevant information regarding the defamation action, for example, having been present on an occasion when Campbell boasted about his own UM booster activities to Shapiro and witnessing Shapiro commit NCAA violations along with Campbell.

On December 9, 2011, Respondent subpoenaed Leshner, a UM booster, for a Rule 2004 examination to take place on December 27, 2011. Leshner did not appear for the deposition, nor did he contact Respondent to discuss the subpoena's validity.

In early 2012, Respondent again attempted to subpoena Leshner. However, on March 1, 2012, attorney David Pollack ("Pollack") emailed Respondent stating that he was representing Leshner in connection with the Rule 2004 examination.

Pollack stated in his email that Leshner resided in California and thus the subpoena from a Florida court was unenforceable.

Respondent contends that, based upon information in her possession, Leshner was not a bona fide California resident, and she suspected that he was attempting to avoid service. Respondent proceeded to send correspondence directly to Leshner along with a third subpoena. In the letter, Respondent acknowledged that she had received a phone call from an individual asserting that he was Leshner's attorney.

On March 22, 2012, Respondent filed a Subpoena Duces Tecum for Video Deposition in the Luther Campbell defamation case requiring Sanchez's appearance on April 19, 2012. However, as a result Sanchez's repeated moves, Respondent was not able to properly effectuate service. Nevertheless, as discussed above, on June 5, 2012, Sanchez was effectively served with the deposition subpoena. The subpoena failed to indicate on the Certificate of Service that a copy was served on Campbell's attorney, Michael Carney, and instead erroneously identified an Assistant State Attorney as having received a copy of the Subpoena for deposition.

On April 19, 2012, Carney filed a Motion for Protective Order claiming that he had not received Respondent's subpoena and had no knowledge of the

depositions. Respondent contends that, consistent with the fax transmittal sheets from her office, she did in fact serve a copy of the Notice of Taking Video Deposition and Subpoena for Deposition on Carney via fax and U.S. mail.

On June 1, 2012, Respondent filed both a Notice of Taking Video Deposition and Subpoena Duces Tecum for Video Deposition in the Campbell defamation action requiring Sanchez' appearance on July 9, 2012. While the notice states that a copy was sent to Carney's firm, the certificate of service in the subpoena mistakenly reflects service only on Sanchez, the court reporter and an unidentified assistant state attorney. However, Respondent maintains that a copy of both the Notice of Taking Video Deposition and Subpoena Duces Tecum for Video Deposition was sent to Carney via U.S. mail after service via fax was unsuccessful. Conversely, Carney contends that he did not actually receive same.

Respondent contends that Shapiro and the NCAA have overlapping interests with regard to the Campbell defamation action and in demonstrating that Shapiro's statements regarding Campbell's previous NCAA violations were true.

According to the trustee assigned to Shapiro's involuntary bankruptcy proceedings, an additional $35 million were recovered as a result of the examinations conducted by Respondent on behalf of Shapiro.

On August 2, 2012, Respondent sent the NCAA several invoices totaling $57,155.80, but subsequently in September, 2012, and October, 2012, the Respondent sent the NCAA revised invoices reflecting the $250.00 dollar per hour rate which reduced the legal fees owed to the Respondent to $33,000.00. Of that amount, Respondent initially billed approximately $14,000.00 for attending continuing legal education courses and trainings necessary to gain electronic filing privileges in the bankruptcy court. Respondent contends that NCAA enforcement staff authorized these expenses.

After the NCAA reviewed the Respondent's invoices together with the Respondent and after having discussed same with the original NCAA enforcement staff members, the NCAA agreed to pay Respondent a total amount of $18,325.00 dollars.

As to The Florida Bar File No. 2013-70,671 (11K)

Saul Acuna-Acosta a/k/a Samuel Medina Flores ("Acuna-Acosta") was arrested in January 2008 and charged by the federal government with possession and intent to sell drugs. Shortly thereafter, Acuna-Acosta retained Respondent who successfully negotiated a plea deal.

Although Acuna-Acosta had knowingly, intelligently and voluntarily waived his appellate rights as a condition of his plea, he requested that Respondent file a notice of appeal on his behalf. Respondent did so.

Despite having filed the Notice of Appeal, Respondent failed to file the necessary filing fee as the client had not provided costs monies to the Respondent. Consequently, the appeal was dismissed for non-payment. Respondent cured this deficiency by advancing her own funds and successfully reopened the appeal.

Once Respondent succeeded in reopening the appeal on January 14, 2009, the Eleventh Circuit issued a briefing notice, which provided that the Initial Brief would be due on April 11, 2009 (since this was a Saturday, the brief would have been due no later than April 13, 2009).

Respondent attempted to file a Motion for Additional Time to file the Initial Brief, but same was rejected as untimely. Therefore, since the Brief had not been received on April 13, 2009, the court issued a dismissal notice on April 15, 2009, providing Respondent fourteen (14) days to correct the previous deficiencies.

Although Respondent filed a brief on May 7, 2009, it was deemed untimely and deficient. All additional efforts by Respondent to effectuate timely filing and/or to correct the deficiencies failed. Consequently, the appeal was ultimately dismissed.

On July 25, 2009, Acuna-Acosta filed a pro se Motion to the District Court alleging ineffective assistance of counsel by Respondent based on her failure to perfect his appeal. The Motion requested his sentence be vacated pursuant to 28 U.S.C. § 2255, based on Respondent's mistake.

The proceedings relative to Acuna-Acosta's motion culminated in an order from the trial judge finding that Respondent had failed to provide competent and diligent representation in violation of Rule 4-1.1 and 4-1.3 of the Rules Regulating The Florida Bar.

III. RECOMMENDATIONS AS TO GUILT

As to The Florida Bar File Nos. 2013-70,658 (11K) and 2013-70,691 (11K), I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: 4-1.5, 4-3.1, 4-3.4, 4-4.1, 4-4.2, 4-4.4, 4-8.4(a)(c)(d), and 5-1.1(b).

As to The Florida Bar File No. 2013-70,671 (11K), I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: 4-1.1 and 4-1.3.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

4.4 Lack of Diligence

4.42 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 and causes injury or potential injury to a client.

4.5 Lack of Competence

4.52 Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence, and causes injury or potential injury to a client.

6.1 False Statements, Fraud, and Misrepresentation

6.12 Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is being improperly withheld, and takes no remedial action.

6.3 Improper Communications with Individuals in the Legal System

6.32 Suspension is appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

7.2 Violations of Other Duties Owed as a Professional

7.2 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, the public, or the legal system.

V. AGGRAVATION AND MITIGATION

I considered the following aggravating and mitigating factors prior to recommending discipline:

9.2 Aggravation

9.22 Factors which may be considered in aggravation. Aggravating factors include:

a) dishonest or selfish motive;

i) substantial experience in the practice of law;

9.3 Mitigation

9.32 Factors which may be considered in mitigation. Mitigating factors include:

a) absence of a prior disciplinary record;

c) significant health issues related to the birth of Respondent's first and only child during the Acuna-Acosta representation;

g) if this case proceeded to a final hearing, Respondent was prepared to introduce evidence of her good character and reputation;

i) the events concerning Acuna-Acosta occurred in 2008 through 2009, and the matters related to Nevin Shaprio occurred in 2010 through 2012.

In addition to the foregoing, Respondent would have introduced evidence that she provided valuable pro bono legal services since the commencement of her practice on her own, as well as through the "Putting Something Back" pro bono legal services program.

VI. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Bar v. Feinberg, 760 So.2d 933 (Fla. 2000): A lawyer who spoke with an opposing party, without opposing counsel's awareness, and was later untruthful concerning the incident, was found guilty of violating Rules 4-4.1(a), 4-4.2, and 4-8.4(c)(d) and received a public reprimand.

The Florida Bar v. Nunes, 661 So.2d 1201 (Fla. 1995): The Court imposed a 10-day suspension and publicly reprimanded a lawyer who knowingly contacted the opposing party without the consent of the party's counsel.

The Florida Bar v. Charnock, 661 So.2d 1207 (Fla. 1995): The Court imposed a 30-day suspension for a lawyer who, among other things, created a frivolous defense in a foreclosure matter, finding he violated Rules 4-4.4 and 4-8.4(c)(d).

The Florida Bar v. Berthiaume, 78 So.3d 503 (Fla. 2011): The Court sanctioned an attorney with a 91-day suspension for issuing a fraudulent subpoena to a bank to produce records when there was no legal authority for the subpoena. The Court imposed the 91-day suspension despite the attorney's absence of a prior disciplinary record and other mitigating factors.

The Florida Bar v. Gwynn, 94 So.2d 423 (Fla. 2012): The Court imposed a 91-day suspension against an attorney who, among other serious misconduct, made false accusations against opposing counsel, and filed frivolous motions and pleadings.

VII. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that she be disciplined by:

a. A ninety-one (91) day suspension from the practice of law.

In addition, I recommend that the suspension become effective sixty (60) days from the entry of the Supreme Court's order or opinion imposing discipline in order to allow Respondent additional time to close out her practice and protect the interests of existing clients.

VIII. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following personal history of Respondent, to wit:

Age: 44

Date admitted to the Bar: May 23, 2001

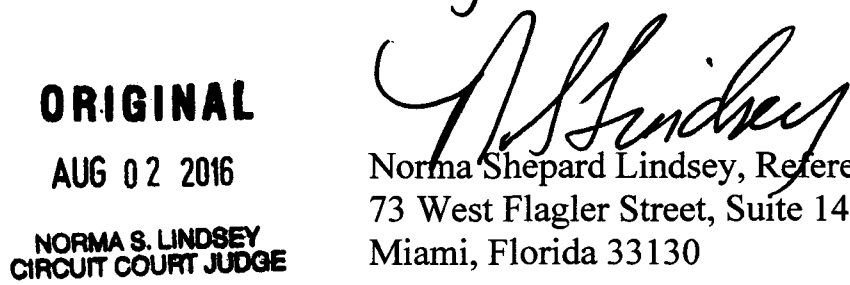
Prior Discipline: None

IX. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find that The Florida Bar reasonably incurred costs in the amount of $4,278.46. I recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue, and that should such cost judgment not be satisfied within thirty (30) days of said judgment becoming final, Respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

[SIGNATURE FOLLOWS ON NEXT PAGE]

Dated this 2 day of August, 2016.



Norma Shepard Lindsey, Referee
73 West Flagler Street, Suite 1407
Miami, Florida 33130

Original to:

John A. Tomasino, Clerk of the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1927

Conformed Copies to:

Kevin P. Tynan, Richardson & Tynan P.L.C. 8142 North University Drive, Tamarac, FL 33321; ktynan@rtlawoffice.com

Thomas Allen Kroeger, Bar Counsel, Miami Branch Office, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131-2404; tkroeger@flabar.org

Adria E. Quintela, Staff Counsel of The Florida Bar, Fort Lauderdale Branch Office, Lakeshore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323; aquintel@flabar.org