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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 80,982

TFB No. 92-10,497(13D)

v.

TARYN XENIA TEMMER,

Respondent.

_____ /

ANSWER BRIEF
OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

The Florida Bar adopts the symbols and references used by respondent as follows: The transcript of the final hearing will be referred to as T.R., the Report of Referee will be referred to as R.R., The Florida Bar's exhibits will be referred to as TFB Ex., and respondent's exhibits will be referred to as R. Ex. Additionally, Respondent's initial brief will be referred to as I.B.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar agrees with the Statement of the Case and Facts set forth in respondent's Initial Brief with the following additions and/or corrections:

The referee did not make specific factual findings that respondent was instructed by her attorney to deny the allegations of drug use or that these instructions came after respondent informed her attorney that she had, in fact, used cocaine with the complainant, as asserted in respondent's initial brief. (I.B. pp. 3-4) The referee stated at the final hearing that it was not relevant whether respondent "was encouraged to lie or did so on her own volition from the standpoint of her problem." (T.R. p. 179, L. 8-11) and that "whether she (respondent) was told to make this response or not isn't a matter of great consequence because she shouldn't have. I mean, when it comes to saying things that are significant and untrue, no attorney can stand behind a defense of legal advice." (T.R. pp. 177, L. 21-25 and p. 178, L. 1) The referee did not find that respondent had been instructed to lie in her response after informing her attorney of the drug use.

Testimony from medical professionals called on behalf of respondent recommended continuing counseling and therapy for respondent's emotional and psychological problems. (T.R. pp. 40, L. 19-25, p. 72, L. 2-19, p. 81, L. 24-25 and p. 82, L. 1-7)

The Referee's Report states the reasons for the recommended discipline of a rehabilitative suspension to be followed by probation. The referee did not "opine" that the basis for the recommendation was "the fact that the respondent initially denied Mr. Alvaro's allegations and also that she resumed drug usage after Mr. Alvaro's complaint was filed", as stated in respondent's Initial Brief. (I.B. at p. 6) The Referee's Report states as follows: "The basis for this recommendation, in addition to the underlying use of drugs, is that the respondent, Taryn Xenia Temmer, was not candid with respect to the original complaint and did resume the use of cocaine for a significant time following the first complaint. I also took into consideration that Ms. Temmer sought professional assistance for her drug use." (R.R. p. 3) (emphasis added)

SUMMARY OF ARGUMENT

The referee's recommendation that respondent receive a ninety-one (91) day suspension followed by probation is warranted considering the facts of the case, the Florida Standards For Lawyer Sanctions, and the aggravation of respondent's false statement to The Florida Bar.

The recent amendment to 4-8.4, Rules Regulating The Florida Bar does not permit a materially false response to an initial complaint and the serious nature of the misconduct outweighs any evidence that respondent does not have an ongoing drug dependency problem.

Although all possible mitigating and aggravating factors are not specifically enumerated in the Report of Referee, the referee allowed both parties to present argument at the final hearing regarding mitigating and aggravation.

ARGUMENT

I. THE REFEREE PROPERLY RECOMMENDED A REHABILITATIVE SUSPENSION FOLLOWED BY PROBATION BASED ON THE SERIOUSNESS OF THE MISCONDUCT, RESPONDENT'S FALSE DENIAL OF THE ALLEGATIONS IN HER RESPONSE TO THE FLORIDA BAR, AND HER RESUMPTION OF COCAINE USE AFTER THE FALSE RESPONSE TO THE BAR.

A. Respondent's misconduct and the evidence presented support the referee's recommendation of a ninety-one (91) day suspension followed by a three (3) year probationary period with conditions.

Respondent's misconduct included the use of crack cocaine and marijuana. Although respondent claims that the basis for the referee's recommendation was respondent's perceived lack of candor and resumption of drug use, the referee, on page 3 of the report, states, "(t)he basis for this recommendation, in addition to the underlying use of drugs, is that the respondent, Taryn Temmer, was not candid with respect to the original complaint and did resume the use of cocaine for a significant time following the first complaint." (R.R. p. 3) (emphasis added) The referee clearly stated his reasons for recommending the rehabilitative suspension and probation.

Any evidence that respondent does not have an ongoing drug dependency is outweighed by the seriousness of the underlying misconduct. The evidence supports a suspension requiring respondent to show her present fitness before reentering the practice of law. Here, the referee determined that the serious

misconduct and aggravation outweighed any mitigation of a lack of drug dependency, competency and character or reputation.

It is clear from a review of the transcript of the final hearing that respondent apparently managed to hide her cocaine and marijuana use from a substantial number of people, including her employer, fellow lawyers, judges, and friends. According to the testimony of Marilyn Bailey, a psychotherapist called by respondent as a witness, respondent continued to seek psychological treatment after beginning her second liaison with Mr. Alvaro in December of 1991, however, respondent did not admit to Ms. Bailey that she had resumed the use of crack cocaine with Alvaro at that time. When asked on cross-examination whether this information would be important to the counseling, Ms. Bailey replied, "Well, I would be concerned." (T.R. p. 74, L. 9) Respondent's employer at the time, Jan Soeten, testified that when he confronted respondent regarding her continued contact with the complainant and drug use, respondent lied to him and denied the accusations. (T.R. p. 122, L. 9-16)

The need for drug rehabilitation is but one factor to consider in determining whether respondent should be required to be reinstated by petition and show fitness to resume the practice of law; other factors include the seriousness of the misconduct and the existence of aggravating circumstances. Respondent's misconduct in this case supports the referee's recommendation of a rehabilitative suspension and probation.

B. Respondent's false denial of the allegations contained in the initial complaint was improper and constitutes serious misconduct.

Respondent falsely "categorically denied" the allegations of crack cocaine use in her response to the Bar, going so far as to claim that the complainant, Mr. Alvaro, was making "false and libelous" accusations. (TFB Ex. #3) Respondent continued to deny the allegations until shortly before the final hearing in this cause.

Respondent claims that she was merely acting on "advice of counsel," a former Bar prosecutor, when she made the false response. The referee found that respondent's response "included a false categorical denial of the essential allegations." (citation omitted) (R.R. p.2) The referee stated at the hearing that, "no attorney can stand behind a defense of legal advice" when making significant, untrue statements. (T.R. p. 177, L. 25 and p. 178, L. 1)

Respondent claims that the recent amendment to 4-8.4, Rules Regulating The Florida Bar (effective July 1, 1993) insulates her from blame in this case. This claim is clearly wrong and an improper interpretation of the rule.

Rule 4-8.4(g) requires a lawyer to respond, in writing, "to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct." Respondent

relies on the comment to the rule which states that, "(w)hile a response is mandatory, the lawyer may deny the charges or assert any available privilege or immunity or interpose any disability that prevents disclosure of certain matter... This obligation is necessary to ensure the proper and efficient operation of the disciplinary system." (emphasis added)

The new language does not condone a false denial of allegations made against the attorney. This would undermine the goal of any inquiry made by the Bar into alleged ethical improprieties, that of ascertaining the truth of the allegations. It is submitted that the public and the profession should not tolerate the submission of significant and material false responses denying ethical impropriety. If respondent determined that a response might subject her to potential criminal charges, she should then have asserted the appropriate privilege in the response. Respondent's false response subverted the truth finding process, caused an unnecessary delay and expense in finding the truth of the matter, and prevented the "proper and efficient operation of the disciplinary system."

II. THE REFEREE ALLOWED PRESENTATION OF ARGUMENT REGARDING AGGRAVATION AND MITIGATION AT THE FINAL HEARING AND THERE IS NO EVIDENCE THAT THE REFEREE FAILED TO CONSIDER OR GIVE PROPER WEIGHT TO THE ARGUMENTS. THE REFEREE IS NOT CONSTRAINED BY DISSIMILAR CASE LAW WHEN THE FACTS SHOWED THAT RESPONDENT MADE A FALSE STATEMENT IN HER RESPONSE TO THE FLORIDA BAR AND RESUMED THE USE OF COCAINE AFTER FILING THE FALSE RESPONSE.

Respondent, in her initial brief, cites The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), in arguing that a suspension should not be imposed in this case. The Pahules case enumerates three purposes of Bar disciplinary proceedings: that the discipline be fair to society, fair to respondent, and "severe enough to deter others who might be prone or tempted to become involved in like violations." Pahules at 132 (emphasis supplied).

The referee's recommendation of a rehabilitative suspension was based on the serious misconduct underlying the case and the additional aggravation of respondent's false statements in response to the initial complaint and is severe enough to deter others from engaging in the same misconduct.

Respondent erroneously states, in her initial brief, that the Florida Standards For Lawyer Sanctions "require the referee and this court to consider mitigation when imposing discipline on an attorney for misconduct." (I.B. at p. 15) The Standards provide for both aggravating and mitigating factors. Section 9.1 states, "After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose." (emphasis added)

The referee clearly applied Section 9.22(f) in aggravation. This section provides for the following as an aggravating factor which may justify an increase in the degree of discipline to be imposed:

9.22(f) submission of false evidence, false statements, or the deceptive practices during the disciplinary process.

The referee stated, in his report, that respondent's "original response to The Florida Bar's Complaint included a false categorical denial of the essential allegations." (R.R. at p. 2) (emphasis in original). This aggravating factor would justify an increase in the sanction imposed.

Respondent argues that a rehabilitative suspension will require the filing of a petition for reinstatement and, therefore, effectively increase the term of suspension. This argument has been previously made to this Court and is without merit. Although the reinstatement process requires an investigation into respondent's fitness which will require additional time after the filing of the petition, this is not a logical reason to lessen the suspension if in fact the misconduct is sufficiently serious to warrant a rehabilitative suspension. Respondent should be required to undergo the reinstatement process not only to determine whether she has used or continues to use illegal controlled substances, or has continued psychological or emotional problems, but to insure

that she is fit to resume the practice of law. This Court has consistently imposed rehabilitative suspensions when the misconduct of the respondent is so serious as to call into question the attorney's present and future fitness to practice law.

Respondent argues that other cases involving substantially similar misconduct resulted in non-rehabilitative suspensions or public reprimands.

A review of all cases mentioned by respondent shows that each lacked the important aggravating factor found by the referee in this case: the fact that respondent made a significant and material false statement in responding to the inquiry by the Bar. By denying the accusations of drug use made by the complainant categorically, and accusing the complainant of making libelous statements, respondent tainted and subverted the very foundation of the disciplinary investigative process - the search for truth. Respondent's attempt to legitimize her actions by claiming that the rules now allow false responses to the Bar and her attempts to transfer blame for the false statement to her attorney for allegedly advising her to make the false statements shows her continuing refusal to acknowledge this improper conduct.

If this Court were to condone or tacitly approve respondent's conduct, the door would be opened for accused attorneys to file false denials of accusations of ethical misconduct which would run

counter to the goals of lawyer discipline and the disciplinary rules, including the recently amended 4-8.4(g) which makes it a substantive violation of the disciplinary rules to "fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct." Respondent was free to respond by asserting any available privilege or immunity or interpose any disability that prevents disclosure of certain matter, but she chose to respond by making a false and baseless categorical denial and, in addition, accused the complainant of making "patently false and libelous" allegations, thereby making more than a general denial of the facts contained therein. (TFB Ex. #3) As stated by the referee at the final hearing in this cause, "when it comes to saying things that are significant and untrue, no attorney can stand behind a defense of legal advice." In addition, no attorney should be permitted to assert a defense that the rules allow such a false statement.

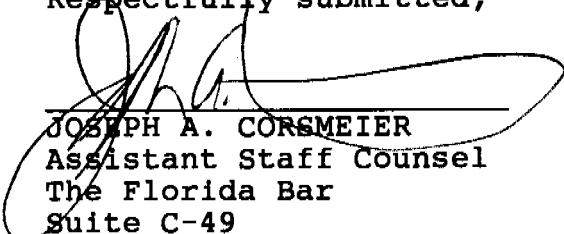
The referee properly considered the facts and aggravating and mitigating factors in this case and recommended a rehabilitative suspension to be followed by three (3) years of probation. The testimony at the final hearing included a recommendation by a psychotherapist, Marilyn Bailey, a clinical social worker, Patricia Ann Parker, and a psychiatrist specializing in addictive psychiatry, Dr. Michael Sheehan, that respondent undergo continuing

counseling and therapy for her emotional and psychological problems. The Florida Bar would not object to the imposition of an additional condition of continuing therapy for emotional and psychological problems within the terms of the probation imposed after the rehabilitative suspension is completed.

CONCLUSION

The referee properly considered the underlying misconduct, the aggravating and mitigating factors, and the Florida Standards For Lawyer Sanctions in recommending the imposition of a rehabilitative suspension from the practice of law to be followed by a three (3) year probationary period. The recommendation by the referee should be upheld.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief has been furnished to Taryn Xenia Temmer, Respondent, c/o Scott K. Tozian, Counsel for Respondent, 109 N. Brush Street, Suite 150, Tampa, FL 33602, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 by regular U.S. Mail this 10th day of September, 1993.



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