047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JOEL E. GRIGSBY,

Respondent.

Case No. 81,980
(TFB Case No. 93-30,466 (10A))

AMENDED ANSWER BRIEF

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RESPONDENT, PRO SE

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STATEMENT OF THE CASE AND FACTS

Respondent, JOEL E. GRIGSBY, accepts the Complainant's Statement of the Case and Statement of the Facts as contained in the Complainant's Initial Brief.

SUMMARY OF ARGUMENT

The proper disciplinary sanction for Respondent is that which has been recommended by the Referee: a public reprimand with mental-health probation and payment of costs. Complainant is correct that Respondent has a history of prior discipline, and that they involve similar omissions. Nevertheless, these factors do not warrant departure from the referee's recommendation because:

1) the nature of the offense itself is relatively minor,

2) the offense occurred during and was caused by a longstanding clinical depression,

3) the prior similar omissions occurred during and were also caused by the Respondent's depression, and

4) the fact of the depression coupled with the Respondent's having sought treatment is a proper mitigation.

ARGUMENT

ISSUE: THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS APPROPRIATE GIVEN THE FACTS OF THIS CASE

The Referee's recommendation of a public reprimand and three years probation with mental health counselling is the appropriate recommendation for discipline in the instant case. A referee's recommendation as to discipline comes to the Court with a presumption of correctness, and although subject to a broader review than a referee's findings of fact, will not be overturned absent something in the record sufficient to defeat that presumption. *The Florida Bar v. Roberts*, 626 So. 2d 659 (Fla. 1993)

Complainant is correct that repeated instances of similar misconduct can be considered as grounds for more serious punishment than isolated misconduct warrants. *The Fla. Bar v. Bern* 425 So.2d 526 (Fla.1982) A close reading of the *Bern* opinion reveals that the Court considers a lawyer's previous disciplinary history and increases the discipline *where appropriate. The Fla. Bar v. Bern, supra*, at 528, emphasis added. Thus, the existence of a prior disciplinary history does not automatically escalate the severity of a present sanction.

The first consideration for any sanction is the nature of the offense itself. Here, the offense is the failure to timely respond to an initial grievance, the substance of which was found to be without probable cause. The offense itself is of relatively minor

nature, and without more, would certainly not require a more severe discipline than the Referee's recommendation.

Respondent concedes that his history of prior misconduct entails similar activity. In fact, Respondent will point explicitly to the finding of the previous referee that both prior instances were of similar nature and that Respondent cited emotional distress as causal in both prior proceedings. Complainant's Appendix to Complainant's Initial Brief at page A 14. The instant Referee found that Respondent was "suffering from clinical depression which explains his conduct although does not excuse it." Report of Referee, page 2. Respondent's history of similar failures to respond to inquiries coincides with the period of time ensuing the onset of a series of life stresses incurred by Respondent. These events began with his father's murder in October, 1988, and included his law partnership dissolution in January, 1989, and divorce in March 1989. The uncontradicted evidence offered at the Referee's trial is that these stresses produced a clinical depression in Respondent which made it impossible for him to respond to additional external demands, including requests for information from the Complainant, and that his previous failures to respond are consistent with his observable condition prior to the Referee's trial.

One of the most significant cases for precedent in this matter is *The Florida Bar v. Dubbeld* 594 So.2d 735 (Fla.1992) In *Dubbeld*, the lawyer was before this court for his third disciplinary proceeding having been convicted of driving under the influence of alcohol

with accident, and leaving a patently offensive telephone message on the answering machine of a woman whom he thought had told his wife he was having an affair. *Id.* at 736. Dubbeld had received his first admonishment for a verbal altercation with a policeman following a traffic stop. His second sanction followed criminal convictions for spouse battery and disorderly intoxication. *Dubbeld*'s referee found that all three incidents were alcohol related, but recommended only a private admonishment, citing, *inter alia*, alcohol abuse and treatment as mitigation. This Court found that a public reprimand followed by alcohol-focused probation was appropriate for Dubbeld. In doing so, this Court recognized that alcohol abuse and seeking treatment for such affliction can be mitigating circumstances in attorney discipline. *Id.* at 737. Thus, *Dubbeld* sets forth the recognition by this Court and the Florida Bar that alcoholism is a disease or medical condition and can mitigate circumstances constituting appropriate discipline for lawyers whose misconduct is alcohol related and who have sought treatment. This principle is in line with one of the three primary purposes of disciplining attorneys: *i.e.*, that the discipline must be fair to the attorney by being sufficient to punish a breach of ethics and at the same time *encourage reformation and rehabilitation. The Fla. Bar v. Dubbeld, supra* at 736, citing *The Florida Bar v. Hartman* 519 So.2d 606 (Fla. 1988)

Complainant, The Florida Bar, has itself recognized that clinical depression is a disease or medical condition which is prevalent among lawyers, and has recently requested that Florida

Lawyers Assistance, Inc. create a depression intervention and rehabilitation program in addition to its alcohol program.

Respondent submits that clinical depression, by analogy with alcohol is a proper mitigating factor for attorney discipline when it is present and when treatment has been sought. Both Respondent's depression and treatment were established by the Referee's findings of fact. Report of Referee, page 2. Indeed, this Court has previously cited emotional distress as mitigation in *The Florida Bar v. Poplack* 599 So.2d 116 (Fla.1992)

The final case which is imperative for review in this matter is *The Florida Bar v. Vaughn* 608 So.2d 18 (Fla.1992) because it is most similar to the facts herein concerning failure to respond. In *Vaughn*, the lawyer was complained against for misrepresentation in a criminal matter. Vaughn failed to cooperate with the investigation in four ways. He failed to respond to the Bar's request to reply to the complaining party. He did not appear at the grievance committee hearing. He failed to tell the Bar he was in a criminal trial in Tampa during the grievance hearing. He failed to appear at the referee's trial, and only attended by telephone after the referee called him. *Id.* at 19. The referee found Vaughn not guilty of the substance of the complaint, but guilty of failure to cooperate and recommended 30 days suspension from practice with automatic reinstatement. Vaughn had already received a private reprimand for personal checking account violations, and a public reprimand for what the referee called personal behavior, but was actually directly contacting an adverse party without contacting

that party's lawyer. *Id.* at 19. Vaughn never replied to the Bar's initial requests, either in writing or verbally. This Court found that Vaughn failed to cooperate with the Bar prior to the filing of the formal complaint, and that he continued that course of conduct even after the formal complaint was filed. The Court also wrote that the *Vaughn* case was before the Court only because Vaughn failed to cooperate with the disciplinary process and to provide information he had in his possession. The Court reduced the discipline from the recommended 30 day suspension to a public reprimand because that was appropriate for Vaughn. *Id.* at 20,21.

Respondent's actions herein are less egregious than Vaughn's. Contrary to that lawyer, Respondent responded to requests for admission, appeared at the grievance hearing, appeared at the referee's trial, and is responding with the instant brief. Respondent's actions are due to depression, not due to Vaughn's conscious decision not to cooperate. Respondent's prior misconducts are admittedly similar, but are inactions and omissions explained by his longstanding depression as opposed to Vaughn's purposeful contact with a represented adverse party.

The facts in *Vaughn* mandate that the Referee's recommendation in the instant case are appropriate and should be adopted by this Court. Respondent's depression and treatment are established. Imposition of a more severe discipline than the referee's recommendation would only deter other depressed lawyers from seeking the help they need to overcome their problem. This Court should accept the Referee's recommendation and impose the sanctions of a public

reprimand followed by probation with appropriate mental health conditions as safeguards.

CONCLUSION

Based on the foregoing authority and arguments of law, Respondent prays this Court will accept the recommendations of the Referee, and impose the disciplinary sanctions on the Respondent of a public reprimand, probation, and payment of costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing amended answer brief have been furnished by priority mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy of the foregoing has been furnished by United States Mail to Carlos E. Torres, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801-1085 this 14th day of April, 1994.

/s/ Joel E. Grigsby
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