7/8

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No.: 86,975

vs.

TFB No.: 95-10, 469(13D)

KEITH F. ROBERTS,

Respondent.
_____/

ANSWER BRIEF

OF

RESPONDENT

Keith F. Roberts, Esquire
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FL. Bar No. 234958

TABLE OF CONTENTS

TABLE OF AUTHORITIES

THE STATEMENT OF THE CASE AND OF THE FACTS

The facts and events recited in the Statement of Facts contained in the Bar's Initial Brief are not disputed. These are, of course, the same facts presented to and relied upon by the Referee in reaching his conclusions and recommending appropriate discipline here.

SUMMARY OF THE ARGUMENT

Respondent has not been previously disciplined. There is nothing in the record here or in the records of the Bar to suggest that respondent has improperly handled any other case or otherwise failed to fulfill his professional responsibilities to his many other clients.

The injury to Mrs. Barbarino, the complainant here, that resulted from respondent's mistakes and lack of diligence is real. But there is no intimation of dishonesty by Respondent in the disposition of the estate funds at issue, or otherwise.

The Referee's recommended order and, surely, that of this Court, will require that Mrs. Barbarino be paid, as she should be. Respondent has never denied or challenged this responsibility.* And as the Referee explicitly considered (TR-1, at _), the continuation of Respondent's practice is the way to ensure such compensation.

The Bar's contention that a disciplinary suspension is the appropriate sanction here simply is not supported by relevant rulings of this Court. Those reported decisions, presented to and considered by the Referee at the hearing, instead fully support his conclusion that a public reprimand is appropriate.

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*Florida Bar Rule 3-5.1(i) permits restitution to be ordered "if the disciplinary order finds that the respondent received a clearly excessive, illegal, or prohibited fee or that the respondent has converted trust funds or property." The Bar has not alleged any such misconduct here, and upon the facts, could not plausibly do so. It therefore would appear that a restitution condition or order is not authorized in this case. However, at no point in these proceedings has Respondent sought to avoid his restitution obligation on this or any other basis, and he does not do so here.

ARGUMENT

A. Respondent's personal circumstances do not indicate an unfitness to practice law or need for rehabilitation.

Respondent's own acknowledgment of certain emotional and medical difficulties and of ongoing professional treatment, cited by the Bar as requiring an affirmative demonstration of basic fitness, falls far short of indicating that level of impaired capacity. The one case cited by the Bar on this score, The Florida Bar v. Goldin, 240 So.2d 300 (Fla. 1970), though lacking a full description of the relevant facts, plainly involved a lawyer with far more serious and comprehensive mental or emotional problems than appear on this record. The Court, moreover, was upholding (in material part) the discipline recommendation of the referee, who received in evidence a psychiatric report and presumably other evidence, and who was in the best position to assess this attorney's overall situation.

In the absence of any such record here, perhaps the best affirmative indication that Respondent is not similarly afflicted is the absence of any other disciplinary problems in his practice. Moreover, what the Referee, consistent with Standard 9.32(c) ("Mitigation") of the Florida Standards for Imposing Lawyer Discipline, considered in mitigation here, the Bar seeks not merely to discount but to urge as aggravation. As that Standard establishes, however, a "personal or emotional problem" is certainly not to be held against Respondent.

B. Not all of Respondent's cited conduct contributed to the injury here.

Respondent did not handle the estate here with diligence, and he made an inexcusable error in disbursing the estate's funds. It is as a consequence of these lapses, and in particular the latter, that Mrs. Barbarino has been damaged. The further matters cited by the Bar

concerning Mrs. Barbarino's failure to receive notice of certain hearings from Respondent or from the probate court (because her listed address was never updated) in no way compounded the prejudice to her or held any real prospect of doing so. Respondent attended those hearings and ultimately sought to finalize (albeit incorrectly) the estate. The Bar's "piling on" of these additional purported lapses should therefore be viewed as not germane.

Of course, there is no allegation (and no basis for an allegation) of any irregularity in the accounts of the estate.

C. The case authority involving disciplinary suspensions shows that only more egregious or repeated misconduct merits such a sanction.

Of the cases cited by the Bar as ordering suspensions, all involve more serious misconduct than here. In Goldin, supra, the lawyer was found guilty of "converting to his own use the trust funds of two clients. He subsequently issued worthless checks in repayment of the debts." Id. at 300. In The Florida Bar v. Theed, 246 So.2d 745 (Fla. 1971), the attorney, who was both executor and legal representative of the estate, not only ignored his clients and failed to account, but was found to have "withdrawn and misappropriated for his own personal use" the funds of the estate. Id. at 746. In The Florida Bar v. Reed, 249 So.2d 417 (Fla. 1971), the attorney, besides failing to appear at the grievance hearing, repeatedly failed to respond to client inquiries about, or to account for, estate funds, such that she was described as "grossly ineffectual in the management of legal affairs." Id. at 418.

The Florida Bar v. Shannon, 376 So.2d 858 (Fla. 1979), also cited in the Bar's brief in support of its position, well illustrates the kinds of misconduct, far more serious than that of Respondent here, that merit a suspension sanction. In Shannon, in a setting rife with

questionable entanglements and records, the attorney billed $7,000.00 to an estate worth less than $5,000.00, and could not substantiate numerous items in his accounting. The cumulative lapses led the referee, and ultimately the Court, to conclude not only that the lawyer's mishandling of the estate represented an "intentional" breach of professional duty, but to find "that respondent's figures in his final accounting are so inaccurate and so misleading as to suggest misrepresentation to the court..." Id. at 860. The referee here made no such findings, nor is such a conclusion concerning this Respondent justified by the record.

More recently, the Court has found suspension warranted when there has been prior disciplinary action. In The Florida Bar v. Daniel, 641 So.2d 1331 (Fla. 1994), the Court ordered a 91-day rehabilitative suspension upon finding that the attorney, who had failed to participate in the Bar proceedings and then challenged the legitimacy of those proceedings in this Court, had in the recent past received two 30-day suspensions.

And in The Florida Bar v. Countant, 569 So.2d 442 (Fla. 1990), it was recognized that "[t]he Court deals more harshly with cumulative misconduct than it does with isolated misconduct." Id. at 443 (citation omitted). In that case, for an offense that, the Court recognized, normally would have merited a lesser sanction (lack of diligence, lack of client communication, failure to expedite), a 30-day suspension was ordered because of previous disciplinary action. Id. at 443, n.5.

In all of these "suspension" cases the Court, it should be noted, followed the referees' recommendations (although in Theed, supra, the Court reduced the term of suspension). But most significantly, they involved far more serious conduct than here, or there was a prior disciplinary history, or both.

D. Consistent with the Standards governing lawyer discipline, the case authority involving reprimand shows that to be the appropriate sanction here.

The Florida Standards for Imposing Lawyer Discipline, including those most pertinent here - Standards 4.4 (lack of diligence) and 4.5 (lack of competence) - plainly distinguish between "knowing" or intentional conduct (including a "pattern" of misconduct), where suspension may be justified, and negligence, which calls for reprimand. Previous rulings by this Court wherein a public reprimand has been ordered respect this important distinction.

The Florida Bar v. Budzinski, 322 So.2d 511 (Fla. 1975) involved numerous instances of incompetence and client neglect, apparently due at least in part to the attorney's alcoholism. These included failure to prosecute an appeal, the loss of bankruptcy paperwork, filing incorrect pleadings, and failure to file necessary pleadings. The Court approved a consent judgment that provided for a public reprimand followed by probation.

In The Florida Bar v. Shannon, 398 So.2d 453 (Fla. 1981) (no connection to previously cited Shannon case), the attorney ignored a patent title defect in rendering a title opinion, and after acknowledging his error, failed to follow through as promised in bringing a quiet title action to rectify the problem. Considering these matters, this Court order a public reprimand, observing:

> "This is a case of neglect without any wrongful intent or motive. Respondent has no record of past professional misconduct."

Id. at 454.

Similarly, in The Florida Bar v. Friedman, 422 So.2d 317 (Fla. 1982), the Court approved a consent judgment calling for public reprimand where the attorney had made several errors reflecting lack of competence "in what appear[ed] to be a relatively routine real

estate transaction". Id. at 317.

The Court disagreed with the Bar's recommendation of a 60-day suspension in The Florida Bar v. Glick, 383 So.2d 642 (Fla. 1980). The attorney in that case had mishandled two different matters for two different clients. In one, the attorney improperly prosecuted a quiet title suit, closed the transaction without advising the client of the continuing defect, prepared an incomplete deed, and never refunded his fee for the quiet title suit. In the other, a civil suit was dismissed because of the attorney's inaction and no attempt was ever made to reopen it. The Court cited the absence of any dishonesty or fraud by the attorney and the lack of any prior disciplinary action in approving the referee's recommendation of a public reprimand followed by a one-year term of probation.

Again in a 1995 case, The Florida Bar v. Robinson, 654 So.2d 554 (Fla. 1995), where the reported misconduct by the attorney involved three (3) different cases, the referee and this Court rejected the Bar's proposal for harsher discipline (90-day suspension) and issued a public reprimand. The Court cited the absence of a prior disciplinary record, the attorney's full and free disclosure and cooperation during the disciplinary proceedings, and his good character and reputation.

Some of these "reprimand" cases appear to involve arguably more serious or frequent misconduct than Respondent's. Overall, though, it clearly is with these cases, and not those imposing suspension, that the situation here far more nearly compares.

CONCLUSION

The facts here reveal an attorney who was not properly diligent in handling a case, who then made an embarrassing error, and whose response thereafter reflects, more than anything, his continuing embarrassment. In continuing to urge suspension — indeed, a rehabilitative suspension — even against the Referee's considered decision to reject such a harsh sanction, the Bar seems to be driven more by its contempt for attorneys who err than by what appears genuinely necessary to protect the public and the profession.

This Respondent has never sought to deny his lapses, from the moment his error was pointed out. Throughout the disciplinary investigation and proceedings, he has cooperated with the Bar. Respondent is well aware that he will be required by this Court's judgment to repay in a short time frame the necessary restitution to Mrs. Barbarino.

There is no suggestion of fraud or dishonesty here, nor anything but (admittedly unacceptable) error and negligence. Though the Bar is in there matters entirely unconcerned with the totality of a lawyer's career and whatever of genuine merit be or she may have accomplished, it is surely significant that this is Respondent's only encounter with the disciplinary process.

These considerations, and the relevant precedents of this Court, make it clear that a reprimand, and not suspension, is warranted here. Respondent expects a period of probation to follow; and although the length thereof was not addressed before the Referee, Respondent would ask the Court to consider a term shorter than the three (3) years urged by the Bar and reflected in the Referee's recommendation, consistent with the length of probation term reflected in the referenced cases.

Respectfully submitted,

KEITH F. ROBERTS

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Hand Delivery to Joseph A. Corsmeier, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607, this 21st day of June, 1996.

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