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IN THE SUPREME COURT OF FLORIDA
500 S. Duval Street
Tallahassee, FL 32399

CLERK, SUPREME COURT
By _____

Chief Deputy Clerk

CASE NOS.: 87,415; 87,806; and
87,913

FLA BAR NOS.: 94-50,585 (17G);
95-51,621 (17G) and 96-50,376 (17G)

THE FLORIDA BAR

Complainant,

vs.

HOWARD ELLIOT HOROWITZ,

Respondent.

INITIAL BRIEF OF APPELLANT HOWARD ELLIOT HOROWITZ

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Respondent/Appellant, HOWARD ELLIOT HOROWITZ, certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Roger G. Stanway, Esq.
Attorney for Respondent/Appellant

2. Lorraine C. Hoffmann, Esq.
Attorney for Complainant/Appellee
(Florida Bar Ft. Lauderdale Florida)

3. Howard Elliot Horowitz
(Respondent/Appellant)

4. John A. Boggs, Esq.
(Florida Bar Tallahassee Florida)

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STATEMENT OF THE CASE

The **Florida** Bar filed their Complaints against the Respondent, Howard E. Horowitz, being Case Number 87,415 filed February 16, 1996; Case Number **87,806** filed **April 29**, 1996; and Case Number **87,913** filed May **6**, 1996. The Respondent **did** not file an Answer to any of the three Complaints filed by The Florida Bar and as a result Defaults were entered against Respondent in all three cases. In Case Number 87,415 **and** Case Number **87,806**, the Grievance Committee determined probable cause and the matters were referred to the Referee without Respondent's appearance before the Committee. In Case Number **87,913 Respondent** appeared before **the** Committee and waived probable cause and the matters therein were referred to the Referee.

The Florida Bar filed its Motion to Consolidate all three cases before the Referee for final hearing and the Motion was granted. Respondent was not represented by counsel either before the Grievance Committee or before the Referee. A hearing was held before the Referee solely on the issue of sanctions and **the** Referee determined that the Respondent should be disbarred. Subsequently, the Respondent timely filed his Notice of Appeal.

STATEMENT OF THE FACTS

The Florida Bar charged the Respondent with three Complaints. In the first case, (Case Number 87,415), Respondent was charged with a failure to file guardianship papers on behalf of a client. Respondent did not respond to the Complaint and the matter was referred by the Grievance Committee to a Referee.

In the second case, (Case Number **87,806**), Respondent failed to proceed with an Appeal filed on behalf of a client and the **Appeal** was dismissed. The Florida Bar also subpoenaed Respondent's trust account but Respondent allegedly only produced a portion of the records. Again, Respondent did not respond to the Complaint and the matter was referred by the Grievance Committee to a Referee.

In the third case, (Case Number **87,913**), Respondent failed to proceed with the foreclosure or extension of a client's lien and the lien expired. Respondent also was charged with a failure to provide **an** accounting of funds received in settlement of a client's cause and segregation of disputed funds. Respondent appeared before the Grievance Committee with reference to this cause, waiving probable cause and admitting the violations. Respondent indicated to the Chairman of the Committee that he was severely depressed and was undergoing therapy and treatment for his condition. The Committee referred the matter to the Referee upon conclusion of the hearing.

A hearing was held before the Referee on the sole issue of sanctions against Respondent as Respondent stipulated to a factual

basis to the Bar Complaints and Defaults had been entered by the Referee against Respondent. At the time of the hearing Respondent testified he was depressed during the periods that the incidents occurred as a result of a bankruptcy and malpractice claim. Further, Respondent indicated to the Referee that he was under the care of a physician for his depression and **was** receiving therapy. (Tr. Referee, pp. 18-21, attached as Exhibit "A").

The Referee filed its Report wherein the Referee recommended that Respondent be disbarred. In arriving at this conclusion the Referee specifically found at page 22 of the report:

"Addressing respondent's mental state as suggested by the Florida Standards, I find no evidence of any physical or mental disability which could have impaired his judgment when dealing with his clients or in responding to the bar's investigative inquiries...."

As a result of the Referee's Report the Respondent filed an Appeal. In addition, Respondent filed with this Court a Petition for Extension of Time to File his Brief. Up until this point, Respondent had **been** representing himself throughout these proceedings. The Florida Bar filed its Motion to Dismiss the Appeal because of Respondent's failure to file his brief with the Court. Respondent thereafter retained counsel herein who filed his appearance. A Notice of Filing Exhibit was filed in support of the Petition for Extension of Time which consisted of a report by Respondent's treating physician diagnosing major depression. This Court thereafter granted an extension until February 5, 1997 in which to serve Respondent's Initial Brief.

SUMMARY OF ARGUMENT

The report of the Referee is devoid of any factual or legal justification to determine that Respondent should be disbarred. The testimony presented by Respondent before the Grievance Committee and the Referee clearly indicated Respondent's mental disability as a result of major depression. The Referee and The Florida Bar chose to ignore this testimony. Established case law dictates that the Referee should have considered Respondent's mental state when determining sanctions and to ignore them is clearly erroneous and the order of disbarment must be reversed.

ISSUE I

**THE REFEREE'S FAILURE TO CONSIDER
THE RESPONDENT'S MENTAL STATE IS
CLEARLY ERRONEOUS AND AS A RESULT
THE REPORT LACKS EVIDENTIARY SUPPORT**

It is clear from the Referee's Report that the Referee did not consider any aspect of Respondent's mental state when the Referee reached his conclusion of disbarment. Respondent had testified both before the Grievance committee and before the Referee that he was under the care of a physician for treatment of major depression. This testimony alone should have placed the Referee on notice not to mention The Florida Bar, that there may be some cause to Respondent's actions which center on his ability to respond to his clients and these proceedings. The Referee's findings of fact are remiss in this regard as the Referee clearly states, "I find no evidence of any physical or mental disability. . . ." (Page 22 Report of Referee).

In The Florida Bar vs. Graham, 605 So.2d 53 (Fla. 1992) this Court held at p. 56:

"...Absence evidence casting doubt on a lawyer's culpability, such evidence of mental or substance-abuse problems, a lawyer is held fully responsible for any misconduct...."

In the case of The Florida Bar vs. Larkin, 420 So.2d 1080 (Fla. 1982), the Referee in observing Respondent found:

"...His physical appearance before this referee was such that I concluded that Larkin suffered such condition before he admitted it. His actions, his speech, his conduct and personal hearing all at the hearing were most respectfully, but they all

clearly demonstrated that his ability and faculties are impaired as a result of long abuse of alcohol. He **was** completely sober at the hearing, but a reading of his questions, comments and testimony at the hearing clearly demonstrate his loss of faculties. His conduct as evidenced by the facts in these three separate counts of the Complaint are [also] consistent with those of one who suffers from the abuse of **alcohol.**"

The Court went on to state at p. 1081:

"...It is clear from the facts of this case, as perceptively found by the Referee, that Mr. Larkin's professional misconduct **stems** totally from the effects of alcohol abuse."

In the case of The Florida Bar vs. Grigsby, 641 So.2d 1341 (Fla. 1994), the Court reviewed the report of the Referee that dealt with an attorney who suffered from clinical depression. The Referee had recommended a public reprimand **and** because of five prior instances of discipline the Bar petitioned for review seeking a ninety-day suspension. The Court recognized that the attorney's failure to respond in the proceeding was "likely caused by this mental disability", (p. 1314). The Court went on to approve the discipline as recommended by the Referee as appropriate.

Finally, in The Florida Bar vs. Dubbeld, 17 FLW 115 (Sup. Ct. 1992) the Court stated:

"There are three primary purposes in disciplining attorneys. The discipline must be: 1) fair to the public both by "protecting the public from unethical conduct and... not denying the public the services of a qualified **lawyer;**" 2) fair to

the attorney by "being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation;" and 3) "severe enough to defer others who might be prone or tempted to become involved in like violations."...."

It is **clear** from the above cited cases that Respondent's statements as to his mental condition to the Grievance Committee and Referee should have played a significant part in the Referee's determination of sanctions. It is also clear that the Referee failed in considering any evidence of Respondent's mental state when making his determination. At the very **least** he could have considered through observation, that something was clearly wrong when there is a pattern of failure to respond by an attorney up until this date who has had a relatively clear record. Also, it seems incumbent on the Bar to at least inquire as to Respondent's mental condition and his ability to properly represent himself where they **are** also clearly made aware by Respondent's testimony that he is suffering from major depression. (Tr. Referee, pp. 18-21, attached as Exhibit "A").

Finally, an attempt was made by Respondent's counsel to supplement the record to include the medial history of Respondent as it relates to his mental state before, during and after the alleged misconduct. Such evidence includes the reports of Respondent's treating physicians, hospitalizations and contact with Florida Lawyers Assistance. The Florida Bar was not agreeable to allow such supplement. This counsel is aware of the Court's warning in Hadden v. State, 616 **So.2d** 153 (Fla. App. 1 Dist 1993) and is therefore not submitting either an affidavit nor documents

indicated. However, it is submitted that this evidence if presented by Respondent at the time of the hearing before the Referee would have a substantial impact on the Referee's decision and ultimately on this Court's decision. As indicated Respondent being under severe depression failed to realize the impact such evidence would have in this proceedings.

ISSUE II

IN LIGHT OF THE FAILURE OF THE REFEREE TO CONSIDER THE MENTAL STATE OF RESPONDENT, THE SANCTION OF DISBARMENT IS NOT WARRANTED

In The Florida Bar vs Perri, 435 So.2d 827 (Fla. 1983) the Referee recommended a three year suspension for improper use and conversion of trust account funds. After The Florida Bar was made aware of Respondent's action the Respondent went to a clinical psychologist for evaluation and treatment. The doctor testified at the hearing before the Referee that Respondent had a compulsive personality disorder. The Court stated at p. 829:

"It is clear from the referee's findings that there are factors present in this case which warranted his conclusions that the proper discipline is a three-year suspension from the practice of law rather than **disbarment.**"

In The Florida Bar vs Schramm, 21 FLW 81 (1996) the Court determined that a ninety-one day suspension was appropriate for multiple ethical violations including misrepresentation in two cases and failure to act with diligence in a third. In The Florida Bar vs Dietrich, 469 So.2d 1377 (Fla. 1985) Respondent was suspended for two years where convicted of felonies after becoming

addicted to alcohol apparently due to marital problems. In The Florida Bar vs Shores, 500 So.2d 139 (Fla. 1986) the Respondent received a public reprimand and probation for a two year period for neglect of a legal matter and commission of misconduct constituting a felony or misdemeanor. In The _, 21 FLW 402 (1996) the Referee recommended a six month suspension for trust account accounting violation. In approving the Referee's recommendation the Court reviewed the Referee's consideration as follows:

"In considering his recommendation, the referee looked at Barbone's year of birth (1960), date admitted to the Bar (December 27, 1988), prior public reprimand with one year probation, and prior thirty-day suspension. In aggravation, this complaint involved multiple violations following two prior disciplinary actions, there was no supervised rehabilitation through an accounting firm until just before the final hearing, and the facts of this complaint occurred while **Barbone** was on probation for similar violations, In mitigation, the referee found that **Barbone** lacked a selfish or dishonest motive, recently retained an accounting firm to maintain records, and performs community service **work.**"

Finally, this Court has determined that:

"...misuse of client's funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment." The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991) p. 1383.

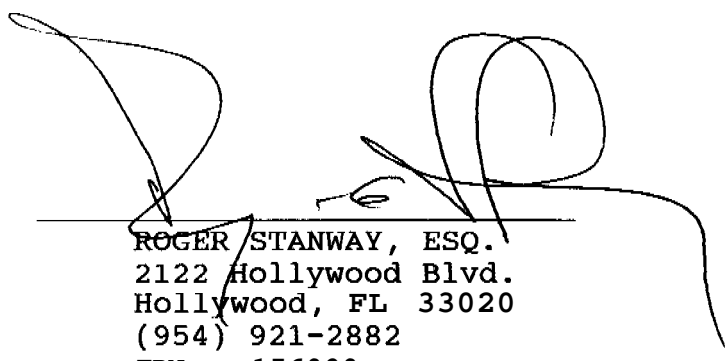
It is submitted that if the referee had taken into account Respondent's mental condition, that consistent with the above cases, Respondent would have received sanctions less than disbarment. Consistent with this Court's stated purpose of rehabilitation and the fact that Respondent was under a mental disability, the Respondent's disbarment is not warranted.

CONCLUSION

Insofar as the Referee erred in failing to consider the mental state of Respondent, the Respondent requests this Court to remand this cause to the Referee for further testimony and evidence relative to Respondent's mental state. Further, upon review of Respondent's mental state, the Referee issue its Report consistent with mitigating factors presented to him.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 5 day of February 1997 to Lorraine C. Hoffmann, Esq., The Florida Bar, Cypress Financial Center, Suite 835, 5900 North Andrews Avenue, Fort Lauderdale, FL 33309 and Howard E. Horowitz, 9620 Weathervane Manor, Plantation, FL 33324; and John A. Boggs, Esq., Florida Bar, Director of Lawyer Regulation, 650 Apalachee Parkway, Tallahassee, Florida 32399.



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