IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case
No. 90,566

v.

LYNN MOBLEY SUMMERS,

Respondent.
_____/

ANSWER BRIEF OF THE FLORIDA BAR

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INTRODUCTION

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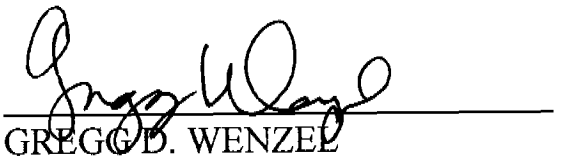

GREGG D. WENZEL

STATEMENT OF THE CASE AND FACTS

A number of representations made by the Respondent require clarification. First, the Respondent makes the vague statement that her disciplinary problem arose due to her "alleged activities in a single case" (brief, p. 3). The record, based upon her admissions, establishes that a single case was involved, but that Respondent's conduct constituted a pattern of total neglect.

The Respondent was an Assistant United States Attorney. In the case styled United States of America v. $52,630 in United States Currency, Case No. 90-0843- Civ the Respondent engaged in serious acts of nonfeasance of which Judge Ryskamp was personally cognizant.

Those acts, which are specified in the Referee's Report, follow:

a. Failure to submit a requested order containing findings of fact and conclusions of law.

b. Failure to comply with several orders of the Court including an order requiring a response to the claimants' Motions to Dismiss and for Summary Judgment.

c. Failure to respond to the Claimant's Motion for Entry of Default Judgment despite a court order to do so, resulting in dismissal of the case.

d. Failure to respond to a court order to pay attorney's fees and costs.

e. Failure to respond to a rule to show cause.

It is also clear from the foregoing, that Respondent's description of the case as simply a voluntary dismissal, is inaccurate. It is, likewise clear from the foregoing that Respondent's statement that the Government declined to appeal is not a statement favorable to the Respondent.

In addition, Respondent seeks to excuse some of her neglectful conduct by accusing the government of being dilatory in providing payment of attorney's fees. That claim is supported by no portion of the record. Respondent's representation that the parties finalized a settlement agreement on August 17, 1997 is also not supported by any portion of the record.

SUMMARY OF THE ARGUMENT

The Request for Admissions and other pleadings and documents were sent to the Respondent's last known address and record Bar address. The Bar received no response and the Requests were properly deemed admitted.

The Respondent's failure to respond to the Request for Admissions was not an isolated incident. It was part of pattern of failure to respond to virtually every communication from the Bar. The admissions established that the Respondent had totally neglected a case in which she was representing the U.S. Government. She had not carried out several specific acts despite direct orders from the United States District Judge to do so.

The Respondent alleges that a finalized consent agreement existed which preceded the final hearing. She is unable to sustain that argument based upon the existing record. In order to bolster the argument, Respondent has submitted an improper affidavit and attachment.

The record clearly establishes that there was no final consent agreement. To the contrary, the record demonstrates that the Respondent had failed to respond to efforts of the Bar to effectuate such an agreement. Therefore, there is no basis for remand.

Finally, several cases demonstrate that the Referee's recommendation of

disbarment was the correct discipline. The appropriate Florida Standard for Imposing Lawyer Sanctions also supports disbarment.

ARGUMENT

I. RESPONDENT HAS NOT ESTABLISHED THE EXISTENCE OF ANY ERROR ON THE PART OF THE REFEREE OR ANY BASIS FOR REMAND.

Rule 3-7.7 (c)(2) of the Rules of Professional Conduct provides that "The Report and record filed by the Referee shall constitute the record on review." The Respondent's argument clearly ignores the applicable rule governing the appropriate record. She has predicated her argument upon an affidavit which is not part of the record.

Obviously, a Petition for Review is not a license for initiating a trial by affidavit. With that in mind, it is apparent from the actual record that Respondent's argument cannot be sustained.

First, it is clear that the Referee was justified in entering an order based upon the unanswered Requests for Admissions. Respondent's conduct in respect to the proceedings as a whole established an overwhelming pattern of indifference. The communications ignored by the Respondent included two initial letters of inquiry, the Complaint, the Request for Admissions and the Notice of Final Hearing. Communications were sent to the Respondent's record Bar address and last known address, by both regular mail and certified mail, including the Request for Admissions. (ROR p.4).

This Court has held in identical circumstances that the Referee correctly deemed matters admitted. In The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996), this Court stated:

> [1] We first address Porter's claim that he was not properly served with notice of the proceedings. The Rules Regulating The Florida Bar specifically set forth the proper procedures for effecting notice. See R. Regulating Fla. Bar 3-7.11(b), (c). Rule 3-7.11(b) provides in relevant part:
>
> > Mailing of registered or certified papers or notices prescribed in these rules to the last mailing address of an attorney as shown by the official records in the office of the executive director of The Florida Bar shall be sufficient notice and service unless this court shall direct otherwise.
>
> Likewise, Rule 3-7.11(c) provides:
>
> > (c) Notice in Lieu of Process. Every member of The Florida Bar is within the jurisdiction of the Supreme Court of Florida and its agencies under these rules, and service of process is not required to obtain jurisdiction over respondents in disciplinary proceedings; but *due process requires the giving of reasonable notice and such shall be effective by the service of the complaint upon the respondent by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the respondent according to the records of The Florida Bar* or such later address as may be known to the person effecting the service.

Respondent suggests that a consent agreement existed between her and the Bar. The record directly contradicts her claim. At the final hearing on January 9, 1998 the Bar's counsel stated in regard to the Assistant Staff Counsel Elena

Evans' efforts to work out an agreement:

> The Bar did attempt to contact her. Elena had thought that they had reached a settlement by way of consent judgment.
>
> It was Ms. Evans' position that the Respondent had essentially lied to her, because on several occasions, the Respondent made several statements to Ms. Evans, if I may proffer to the Court, that a consent judgment was forthcoming, that it had been executed and that it had been mailed tot he Bar.
>
> We never received that, nor have we ever been able to contact her.
>
> This seems to be just part of her normal course of conduct. (T. 1/9/98, pps 4-5).

The only statement on the proper record makes it clear that Respondent was provided with a potential agreement which she could have signed and returned. There is no signed agreement, and obviously the Bar would not have proceeded if one did exist. Furthermore, efforts to obtain a response from the Respondent were fruitless.

No basis has been established for sending this case back to the Referee. If Respondent wished to obtain a hearing from the Referee regarding her current claims, which are outside the record, she could have moved to reopen the trial. The appellate courts have allowed broad discretion to reopen a trial even after a final decision has been entered. Silber v. C & R Industries, 526 So.2d 974 (Fla. 1st DCA 1988).

II. DISBARMENT IS THE PROPER DISCIPLINE.

Disbarment if the proper discipline for the Respondent. As this Court stated in The Florida Bar v. Friedman, 511 So.2d 986 (Fla. 1987) neglect of legal matters and other violations in abandonment of the clients warrants disbarment. As in this case Respondent Friedman failed to respond to the Bar's complaint and Request for Admissions.

Total nonfeasance is an appropriate basis for disbarment as this court held in The Florida Bar v. Smith, 512 So.2d 832 (Fla. 1987). In Smith the Respondent had failed to respond to the Bar's complaint. Similar facts appear in The Florida Bar v. Horowitz, 698 So.2d 78 (Fla. 1997), namely total neglect and lack of response.

Florida Standards for Imposing Lawyer Sanctions also support disbarment. Standard 4.41 provides that:

> Disbarment is appropriate when: a lawyer abandons the practice and causes serious or potentially serious injury to the client.

The government was clearly injured when its case was dismissed and it was obligated to pay attorney's fees and costs.

CONCLUSION

Based upon the foregoing, the Referee's Report should be approved and the Respondent should be disbarred.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFIED that the original and seven (7) copies of the foregoing Answer Brief of The Florida Bar was sent priority mail to **Sid J. White**, Clerk, Supreme Court of Florida, 500 So. Duval Street, Tallahassee, Florida 32399 and that a true and correct copy was sent certified mail (Z 447 108 596) return receipt requested, to **Jeffrey S. Weiner**, Attorney for Respondent, Two Datran Center, Suite 1910, 9130 South Dadeland Boulevard, Miami, Florida 33156 and via regular mail to **John Anthony Boggs**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399 this 15 day of October, 1998.

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