IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Supreme Court Case No. 90,566

THE FLORIDA BAR, :

Complainant, :

v. :

LYNN MOBLEY SUMMERS, :

Respondent. :

REPLY BRIEF OF RESPONDENT, LYNN MOBLEY SUMMERS

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ARGUMENT

I. THIS COURT SHOULD ENFORCE THE SETTLEMENT AGREEMENT

Respondent's Initial Brief cited various cases for the proposition that settlement agreements are highly favored in the law and should be enforced wherever possible. Respondent also cited cases establishing that oral settlement agreements are enforceable where the terms and conditions thereof are definite and ascertainable. The Florida Bar, in its Answer Brief, does not dispute or address any of this case law, nor does it raise any legal obstacles to the enforcement of the settlement agreement negotiated between the parties.

Instead, The Florida Bar takes the position that the oral settlement agreement, which was memorialized in a Consent Judgment drafted by The Florida Bar and submitted to the Respondent, was unenforceable simply because the Respondent failed to sign the agreement. (Answer Brief page 7.) Significantly, The Florida Bar does not argue that it never assented to the terms and conditions contained in the Consent Judgment which it drafted. Nor does The Florida Bar dispute that the Respondent announced her acceptance of the terms of the Consent Order at the status conference before the Referee and in conversations with The Bar. Rather, The Bar's argument asserts that the mere absence of a signature by the Respondent is alone

sufficient to defeat the Respondent's claims for relief based on this settlement agreement (whether the claims be by way of motion to enforce the settlement agreement or by way of a motion for relief from admissions, where the admissions arose because of the settlement agreement). Moreover, The Florida Bar asks this Court to close its eyes to the reasons why the Consent Judgment was unsigned, in determining the fate of this Respondent.

On the one hand, The Florida Bar protests that this Court should limit its consideration to only those matters which appear on the face of the extremely sparse record herein. (Answer Brief page 5.) However, on the other hand, to support its assertion that the record "directly contradicts" the Respondent's claim herein, The Florida Bar cites only to the double hearsay assertions of Bar counsel before the Referee (which ironically commence with a concession that Bar counsel "thought that they had reached a settlement by way of Consent Judgment"). Id. T. 4-5.

Furthermore, The Florida Bar misses the point when it argues that the Referee "was justified in entering an order based upon the unanswered requests for admissions". (Answer Brief p. 5.) The rules clearly contemplate that unanswered admissions can be deemed admitted; that is not in dispute. However, the underlying circumstances and reasons why admissions requests are not responded to are highly relevant and can form the basis of a motion for relief from admissions. Indeed, the

opportunity to pursue such relief from admissions is expressly authorized on the face of the Rule and the burden is upon the party resisting relief from admissions "to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits". Florida Rule of Civil Procedure 1.370(b). The Florida Bar has not even attempted to meet this burden.

The current issue is not whether the Referee could properly have deemed the matters admitted; the issue is whether, in light of all of the circumstances now known (which, in fairness, were not known to the Referee at the time), it is consistent with justice and fairness for admissions obtained through a technicality to substitute for an adjudication of the case on its evidentiary merits.

The Florida Bar attempts to sidestep this entire issue by asserting that the Respondent "ignored" these proceedings as part of "an overwhelming pattern of indifference". However, The Florida Bar's position in this regard is inherently inconsistent with the undisputed facts. While without question, the Respondent could have and should have been more responsive, she did personally appear before the Referee for the first scheduled hearing, and did communicate with Bar counsel and negotiated therewith the Consent Judgment prepared by The Florida Bar. Although the Respondent's conduct was by no means perfect, she did not "ignore" these proceedings and was plainly not "indifferent" thereto.

Membership in The Florida Bar is extremely important to this Respondent, and she thought she had settled this grievance matter by agreeing to The Bar's request for a 90 day suspension with an automatic reinstatement. There is simply no logic nor justice behind The Bar's current position that, merely as a consequence of the Respondent's inadvertent failure to sign the Consent Judgment at issue, the agreed upon 90 day suspension should now be escalated to disbarment, the most extreme sanction available.

II. DISBARMENT IS CLEARLY NOT THE APPROPRIATE DISCIPLINE

The Florida Bar devotes less than 1 page of its Answer Brief to an attempt to support the imposition upon the Respondent of the professional death penalty -- disbarment from the practice of law.

In her Report and Recommendation the Referee cited a number of cases as purportedly justifying the extreme sanction of disbarment herein. In our Initial Brief on behalf of the Respondent, we demonstrated that each of those cases were clearly distinguishable as they imposed this sanction for criminal acts, dishonesty, fraud, trust account violations or other gross examples of moral turpitude which are wholly absent here. (See Respondent's Initial Brief at page 16.)

Indeed, Respondent's Initial Brief also cited numerous cases and other authorities for the proposition that as "the extreme and ultimate penalty in disciplinary proceedings", disbarment should be reserved for "extreme violations involving moral turpitude, corruption, defalcations, theft, larceny or other serious or reprehensible offenses". In Re LaMotte, 341 So.2d 513 (Fla. 1977); see also Respondent's Initial Brief at pages 13-14.

The Florida Bar, in its Answer Brief, essentially ignores all of these distinctions and dispositive authorities and continues to argue, somewhat half-heartedly, that disbarment is the proper discipline. (Answer Brief at page 8.) However, the three cases which The Florida Bar now argues as supporting this discipline are completely distinguishable from the instant case.

The Florida Bar v. Friedman, 511 So.2d 986 (Fla. 1987) is characterized by The Florida Bar as a case involving "neglect of legal matters and *other violations* in abandonment of the clients". Id. (emphasis supplied). These "other violations" to which The Florida Bar gives short shrift in its Answer Brief were nevertheless deemed very significant by both the referee and this Court in Friedman. Specifically, Friedman involved not only "total abandonment" of the Respondent's law practice involving "wholesale neglect" of many clients' cases in pending litigation, but also involved various acts of "fraud, misrepresentation, breach of fiduciary responsibility, conversion of funds and trust account violations". Friedman 511 So.2d at 987. It was

the "conjunction" of all of these wrongful acts, including those involving dishonesty, criminal conduct and moral turpitude, which the referee and the Supreme Court, in Friedman, determined to warrant disbarment. Id. As amply demonstrated in the Respondent's Initial Brief herein, this case involves no accusation and no finding of dishonesty, criminal conduct, or moral turpitude on the part of this Respondent.

The Bar's second cited case authority, purportedly supporting disbarment, is The Florida Bar v. Smith, 512 So.2d 832 (Fla. 1987). This four paragraph opinion reveals very little about the factual background of the case. However, it does appear that Smith was charged with 23 counts of failing to perform services for clients after being retained, and was found to have abandoned his practice and engaged in "wholesale neglect of legal business entrusted by clients". Smith at 833. This plainly bears no resemblance to the instant case wherein there was no allegation or finding that the Respondent had abandoned the practice of law and there were certainly not 23 clients left unrepresented. The Florida Bar attempts to blur the important distinction between a lawyer who improperly engages in the wholesale abandonment of numerous clients' matters on the one hand, and, on the other hand, a lawyer who is accused of mishandling the post-trial proceedings in a single case which she had already tried. There was never an accusation or a finding that the Respondent in the instant case ever "abandoned" a single client.

The final case relied upon by The Florida Bar to support disbarment is The Florida Bar v. Horowitz, 697 So.2d 78 (Fla. 1977). The Bar portrays Horowitz as imposing disbarment as a result of Horowitz's "total neglect and lack of response". Answer Brief at page 8. However, once again, The Bar has closed its eyes to the important other factors which led this Court to conclude that disbarment was appropriate in Horowitz (factors which are totally absent in the instant case). For example, Horowitz arose out of three separate complaints filed by The Florida Bar against that lawyer, all consolidated before the referee for final hearing. The referee found (and Horowitz did not dispute) that Horowitz was guilty of violating, *inter alia*, Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 4-1.5(a) (a lawyer shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee); Rules 5-1.1(d), 5-1.2(b), and 5-1.2(c) (all involving trust account violations); Rule 3-4.3 (the commission by a lawyer of any act that is unlawful or contrary to honesty and justice), and Rule 4-1.15(b) (involving misappropriation or failure to account for funds or property in which a client or third person has an interest). Horowitz 697 So.2d at 82. These are precisely the type of violations involving moral turpitude which are conspicuously absent from the findings of the referee in the instant case. Moreover, in Horowitz, disbarment was also held to be justified in light of Horowitz's prior excessive disciplinary history which included all manner of lesser

discipline, reprimand, admonishment, and suspension. Horowitz 697 So.2d at 83. In the instant case, it is undisputed that this Respondent has no similar history to support the conclusion that lesser sanctions would have been ineffective.

Finally, The Florida Bar's concluding argument in favor of disbarment relies upon the Florida Standards for Imposing Lawyer Sanctions, Standard 4.41 which provides that:

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

Answer Brief at page 8. The Bar argues that "the government was clearly injured when its case was dismissed and it was obligated to pay attorneys' fees and costs". Id. However, in this regard, The Florida Bar is patently trying to stretch this Standard to cover circumstances which plainly do not fall within its scope. To begin with, as noted above, the actions of which this Respondent are accused do not include abandonment of the practice of law. There are no allegations of abandonment within The Florida Bar's complaint against this Respondent and the Referee's report makes no finding that the Respondent abandoned her practice. Indeed, the report of the Referee addresses only events in a single case, which occurred as early as 1991, almost 6 years prior to The Florida Bar's complaint.

Moreover, The Bar's argument that the client was injured when it became obligated to pay attorneys' fees and costs, is also not supported by the referee's

findings, and presupposes that the government's forfeiture claim was meritorious in the first instance (a supposition which was rejected by the only tribunal to ever directly consider that issue). The report of the Referee never cites Standard 4.41 of the Florida Standards for Imposing Lawyer Sanctions and contains no express finding that the actions of the Respondent caused any injury to her client. To the contrary, paragraph 6 of the Referee's Findings of Fact concludes that "the court entered an order awarding fees and costs to the claimants because the government failed to establish probable cause for the initial seizure".[1]

The issue of whether or not serious injury to the client resulted as a consequence of any alleged misconduct by this Respondent was never tried before the Referee, since no evidence or testimony was received by the Referee whatsoever, and she merely entered her report upon the allegations of the complaint being deemed admitted. Of course, there are no allegations in the complaint concerning serious injury resulting to the client. However, perhaps the best indications that the client did not consider itself to have suffered any serious injury arise from the fact that The Florida Bar's prosecution of this action occurred many years after the events in

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[1]It is crucial to note that all of the alleged misconduct on the part of this Respondent occurred after the conclusion of the trial before Judge Ryskamp. The judge's decision as to whether or not probable cause had been shown for the seizure at issue in that case would, of necessity, have been based upon the evidence and testimony submitted at that trial.

question, and were not the result of any complaint by the client. The Florida Bar does not dispute this. Moreover, there is no evidence that the client ever took any negative action against the Respondent as a consequence of the results in this case. As explained in her Initial Brief, had there been a trial before the referee on the issue of injury to the client, the Respondent would have explained the dynamics which led the government to conclude that an appeal of Judge Ryskamp's ultimate conclusion on the probable cause issue was not warranted. Simply stated, a lawyer should not be subject to disbarment in every case where a client's claim is rejected and attorneys' fees are awarded the prevailing party.

CONCLUSION

Given the undisputed fact that The Florida Bar assented to a proposed consent judgment which would have imposed upon the Respondent a ninety day suspension with automatic reinstatement, and the fact that the misconduct alleged by the Bar arose out of a single case, about which there was no client complaint, and with respect to which there were no allegations of illegal conduct, dishonesty, personal benefit to the Respondent or other indicia of moral turpitude, this Court should either impose upon the Respondent the discipline previously agreed to (i.e. a ninety day suspension without automatic reinstatement) or, in the alternative, remand this action for consideration of an application for relief for admissions or to enforce settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 30th day of October, 1998 to Gregg Wenzel, Esq., Assistant Staff Counsel, The Florida Bar, 444 Brickell Avenue, Suite M100, Miami, Florida 33131.

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