IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

TARYN XENIA TEMMER,

Respondent.
_____/

Case No. 93,886

T.F.B. No. 97-11,265(13E)

ANSWER BRIEF OF RESPONDENT

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FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

T.R.	=	Final hearing transcript of March 1, 1999.
R.R.	=	Report of Referee.
TFB Ex.	=	The Florida Bar exhibits.
R. Ex.	=	Respondent's exhibits.
I.B.	=	The Florida Bar's Initial Brief.

STATEMENT OF THE FACTS AND OF THE CASE

Supreme Court Case No. 93,886

The Respondent agrees with the Statement of the Case and Facts set forth in The Florida Bar's Initial Brief with the following additions and/or corrections:

Respondent presented substantial character evidence through attorneys and judges with whom Respondent has worked. The testimony of these witnesses who have observed the Respondent professionally indicates that the Respondent is competent to practice law; is a zealous advocate (T.R. pp. 31, 35, 75); is honest and reliable (T.R. pp. 33, 36); is admired by clients (T.R. 52, 70); is alert and prepared for contested matters and has harmed no clients as a result of the activity giving rise to this disciplinary action. (T.R. pp. 33, 52, 55, 59-60, 65-68, 74-75).

The Florida Bar was provided with information of the Respondent's arrest in April 1997, prior to the end of Respondent's term of probation. However, a probable cause finding was not returned until May 20, 1998. The Referee specifically found that although "Respondent was on disciplinary probation at the time of these violations, she was not found guilty of any criminal conduct in a criminal court" and that she "voluntarily submitted herself to Florida Lawyers Assistance, Inc. for evaluation" and was eventually diagnosed with either Cyclothymic Disorder or Bi-Polar Disease. (R.R. p. 2). Lithium was prescribed to

treat this disorder and Dr. James Adams testified that “the likelihood of a recurrence of the substance abuse...is greatly diminished, if she remains on her medications as prescribed.” (R.R. p. 2).

According to the Referee’s Report, the recommendation for discipline of Respondent was based on “personal history and prior disciplinary record of the Respondent.” (R.R. p. 4).

SUMMARY OF ARGUMENT

The Referee recommended that the Respondent receive a ninety (90) day suspension followed by probation for a period of three (3) years with Respondent continuing treatment with Florida Lawyers Assistance, Inc. The Respondent must further comply with the terms of Florida Lawyers Assistance, Inc. rehabilitation contract and pay a monthly monitoring fee. The recommendations are proper and warranted considering all the facts of this case, the Florida Standards for Imposing Lawyer Sanctions and the mitigating and aggravating facts of this case.

The Referee properly considered all facts of this case, as well as Respondent's prior history, and evaluated the mitigation of the Respondent's previously undiagnosed and unmedicated psychological condition in making his recommendation for discipline. Additionally, the Referee considered the Respondent's prior disciplinary history as an aggravating factor as well as considering the following mitigating factors as set forth in the Florida Standards for Imposing Lawyer Sanctions: Standard 9.32(c) personal or emotional problems; Standard 9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; Standard 9.32(h) physical or mental disability or impairment; Standard 9.32(j) interim rehabilitation; and 9.32 (l) remorse.

The Referee's recommendation of discipline of Respondent is supported by competent substantial evidence and the decisional law of this Court and should be adopted.

ARGUMENT

I. THE REFEREE PROPERLY RECOMMENDED A NINETY (90) DAY SUSPENSION FOLLOWED BY THREE (3) YEARS PROBATION AND CONTINUED TREATMENT WITH FLORIDA LAWYERS ASSISTANCE, INC. AND COMPLIANCE WITH FLORIDA LAWYERS ASSISTANCE REHABILITATION CONTRACT.

It is well established that Florida Bar disciplinary proceedings are remedial and not penal in nature. DeBock v. State of Florida, 512 So. 2d 164, 166 (Fla. 1987). Since disciplinary proceedings are "designed for the protection of the public and the integrity of the courts," it is recognized that "bar discipline exists to protect the public, and not to 'punish' the lawyer." DeBock at 166-167.

Further, the Florida Standards for Imposing Lawyer Sanctions (hereinafter Standards) states that the primary purpose for lawyer disciplinary proceedings is "to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly." Fla. Stds. Imposing Law. Sancs.1.1. Additionally, "The Standards constitute a model, setting forth a comprehensive system for determining sanctions, *permitting flexibility and creativity* in assigning sanctions in particular cases of lawyer misconduct." Fla. Stds. Imposing Law. Sancs. 1.3. (*emphasis added*). The

Standards “are designed to promote, among other things, consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.” Id.

The Florida Bar argues that the Referee's recommended discipline of a ninety (90) day suspension “will not serve to protect the public or the legal system” and is “not sufficient punishment” for the Respondent's ethical violations and, further, that it will not “deter Respondent or other attorneys from engaging in similar misconduct.” (I.B., p. 6). This argument is contrary to the substantial mitigating factors present in this case, and reveals The Florida Bar’s primary motivation is to punish Respondent.

The Florida Bar’s position is contrary to the principles set forth in DeBock v. State of Florida, 512 So. 2d 164 (Fla. 1987). First, a careful review of the transcript of the proceedings in this matter reveals that there is no evidence that any client has ever been harmed by the Respondent throughout her practice. To the contrary, the Respondent presented evidence of five attorneys and two judges who testified as to her competency as a lawyer.

Judge Vivian Maye testified that the Respondent appeared before her “maybe 20 times,” that her performance was “always...very well prepared, a zealous advocate for her clients” and that she “admired the fact that she appears to

care very deeply about her clients." (T.R. p. 31). Judge Maye further testified that she "never" questioned Respondent's sobriety. (T.R. p.32). Additionally, Judge Ralph Stoddard testified that he has known the Respondent for many years and has observed the Respondent before him on "at least half a dozen or more" occasions (T.R. p.73-74). Judge Stoddard characterized the Respondent's performance as a lawyer as "excellent" and stated that she is "both proficient and professional and she probably goes the extra mile...for her client. She's always impeccably honest with me." (T.R. p.74).

Furthermore, the five (5) attorneys who testified have practiced with her or were her adversaries. All of these attorneys observed her diligence and trustworthiness as an attorney who zealously advocated on behalf of her clients. All witnesses testified that they never questioned the Respondent's sobriety at any time in their observations of her. Attorney Alan Kerben, after knowing the Respondent for five (5) years, testified that she was "very capable, she's very professional, a strong advocate, but not overly aggressive" (T.R. p. 35). He further testified that her ethics were "above the board." Attorney Robert Fraser testified that the Respondent is "a very capable young lawyer...she seems to...care about her clients...they seem to like her. She's conscientious, and if she tells you she'll have something to you the next day, it's invariably to you the next day. So

her word is good." (T.R. p. 52). When asked if her sobriety was ever an issue the answer was a clear "no." (T.R. p. 52). This general opinion of the Respondent is consistent throughout the character testimony.

Second, the Referee carefully took into consideration the Respondent's prior history, as well as the sanctions imposed in the previous case. Although the Referee was reluctant to question the first judgment in 1994 against the Respondent, he did state, "when you look at the things that were going on in the '94 case. . . honestly I kind of wonder about why did she get 90 days? And, golly, no clients were hurt?" (T.R. p.115) Additionally, the Referee considered the Respondent's current diagnosis and condition and the fact that it was not properly diagnosed in the past as he stated that he did not "have the mind to criticize what was done before--but when you look at, you know, in a comparative way some of the other cases, it seems to have been a full measure of the punishment meted out and yet she didn't receive the benefit of an accurate diagnosis." (T.R. p. 115).[1] Yet, the Referee was reluctant to give anything less than the discipline afforded Respondent in 1994 as he stated, "[H]ow can we go from first time you get more

[1]See The Florida Bar v. Levine, 498 So. 2d 941 (Fla. 1986) (public reprimand ordered for a conviction of federal misdemeanor use of cocaine). See also, The Florida Bar v. Piggee, 490 So. 2d 1260 (Fla. 1986) (sixty (60) day suspension ordered for marijuana and cocaine conviction).

than you get for second time? That kind of rubs me the wrong way. I just have some problems with it." (T.R. p. 116)

Based upon the record, the Referee carefully considered the Standards, the case law on the subject, and the aggravating and mitigating facts of this case in reaching his recommendations. Accordingly, the Referee's recommendation should be upheld.

The Florida Bar cites to Standards 10.2 and 10.3 in support of its argument that the Respondent should be disciplined with a ninety-one (91) day suspension, rather than a ninety (90) day suspension as recommended by the Referee. However, The Florida Bar ignores the fact that Standards 10.2 and 10.3 specifically state that the presumptive ninety-one (91) day suspension does not apply if there are "aggravating or mitigating" circumstances or if rehabilitation has been proven.

The Referee found "the following aggravating factors as set forth in the Florida Standards for Imposing Lawyer Sanctions: Standard 9.2 and Standard 9.22(a) prior disciplinary offenses. (R.R. p.5). Further, the Referee specifically found the following mitigating factors as set forth in the Florida Standards for Imposing Lawyer Sanctions: Standard 9.3; Standard 9.32(c) personal or emotional problems; Standard 9.32(e) full and free disclosure to disciplinary board

or cooperative attitude toward proceedings; Standard 9.32(h) physical or mental disability or impairment; Standard 9.32(j) interim rehabilitation; and 9.32(l) remorse. (R.R. p.5). Implicit in the Referee's recommendation is that the mitigating factors far outweigh the aggravating factors, and therefore, the ninety-one (91) day presumption in the Standards has been overcome.

The Florida Bar also argues that the Respondent received discipline in her prior case in accordance with the recommendations of Standard 10.3. However, the testimony indicates that the Respondent had a medical condition that went undiagnosed until January 1999, when she was evaluated by Dr. Myers pursuant to the request of Florida Lawyers Assistance, Inc. In the Respondent's previous case, she was not required to sign a contract with Florida Lawyers Assistance, Inc., Florida Bar v. Temmer, 632 So. 2d 1359, 1360 (Fla. 1994). In fact, after her evaluation, Florida Lawyers Assistance, Inc. advised the Bar that there "does not appear to be sufficient evidence upon which to infer a substance abuse problem" and that they would not be further involved unless advised otherwise. Temmer at 1360. Thus, given the misdiagnosis, the subsequent lapse in judgment by Respondent was more understandable and mitigated.

The Florida Bar cites to Standard 9.22(a), entitled prior disciplinary offenses, to warrant its request for punitive action against the Respondent as a

sanction for her present disciplinary action. However, the Referee specifically included this factor in making its decision for discipline in this case. Accordingly, the Referee's recommendation for a ninety (90) day suspension has already considered this aggravating factor.

The Bar urges that the Respondent's previous experience as an assistant state attorney could be considered an aggravating factor. Respondent testified that she worked for the state attorney's office in 1988, immediately after graduation from law school. (T.R. p.76). This was long before the first incident of disciplinary action took place. Clearly, this fact is irrelevant to the immediate case and should not be considered as an aggravating factor.

The Florida Bar also argues that Standard 8.0 (prior discipline orders) applies to the immediate case and as a consequence, the Respondent's prior disciplinary record requires more than the ninety (90) day suspension previously ordered. Essentially, the Bar argues that a non-rehabilitative suspension must be followed by a rehabilitative one. Ordinarily, this argument might be persuasive, however, the Referee found that there were several mitigating factors present, most notably the misdiagnosed medical condition. Based on those mitigating factors, the

Referee ordered that the Respondent be disciplined with a ninety (90) day

suspension followed by three (3) years probation, continued treatment by Florida Lawyers Assistance, Inc., and compliance with the terms of the rehabilitation contract. The discipline recommended by the Referee is proper and appropriate based on the case law, the circumstances of this case and the Standards.

In The Florida Bar v. Liroff, 582 So. 2d 1178 (Fla. 1991), this court approved the Referee's recommended discipline and ordered a sixty (60) day suspension from the practice of law and required the attorney to enter an inpatient drug treatment facility approved by Florida Lawyers Assistance, Inc. In Liroff, the attorney was first disciplined on March 26, 1987, with a private reprimand for his addiction to an opiate cough syrup. As part of the discipline, the attorney was ordered to undergo treatment by Florida Lawyers Assistance, Inc. On August 31, 1989, the attorney was again disciplined for failure to fulfill the conditions of the substance abuse program. This time the attorney was merely placed on probation for two (2) years and thereafter until he could prove rehabilitation pursuant to Florida Lawyers Assistance, Inc. contract. When Liroff again failed to comply with the terms of his probation, he was suspended for a period of sixty (60) days. Liroff at 1180. Thus, after three strikes, Liroff received a shorter non-rehabilitative suspension than that of the Respondent for her first disciplinary action.

Moreover, there has been no evidence provided that the Respondent is now, or was at any time during her practice, impaired or that her present condition is one from which rehabilitation must be established. To the contrary, all the evidence presented substantiates the competency of the Respondent to practice law.

Nevertheless, the Bar argues that Respondent's discipline should be increased because she was on probation with the Bar when she was arrested for her current offense in December of 1996. Instead of pursuing the violation of probation, the Bar grievance committee took until May 20, 1998 to return a probable cause finding. The leisurely prosecution of this matter by the Bar belies its argument that severe punishment is warranted.

Moreover, the Bar's argument that cumulative misconduct compels a 91 day suspension is not supported by prior decisions of this Court. In The Florida Bar v. Pipkins, 708 So. 2d 953 (Fla. 1998), this Court approved the findings and recommendations of the Referee because they were supported by competent and substantial evidence. However, this Court rejected the Referee's disciplinary recommendation for a ninety-one (91) day suspension and proof of rehabilitation and instead found that a ninety (90) day suspension was appropriate. In Pipkins, the attorney was found to have committed several trust account violations while

serving a sixty (60) day suspension and eighteen (18) month probation for similar misconduct. Thus, even where the same misconduct was committed while the attorney was on disciplinary probation, this Court has found that a second non-rehabilitative suspension is proper.

Also, the Respondent voluntarily submitted to Florida Lawyers Assistance, Inc. for assistance prior to the disciplinary trial. The Respondent agreed to the conditions imposed and recommendations made by Florida Lawyers Assistance, Inc. as corroborated by Ms. Judith Rushlow's testimony. (T.R. p.38-46).

Finally, there has never been any allegation or concern for harm to Respondent's clients. To the contrary, all evidence indicates her devotion to her practice and care in representation of her clients. Further, there was no evidence provided by The Florida Bar that the Respondent continues to have an ongoing substance abuse problem. Thus, the Bar's request for a rehabilitative suspension is not warranted by the facts, but is fueled only by a desire to punish.

Thus, based upon the above-cited case law and testimony as cited herein, the Referee's recommendations should be approved. The Referee's recommendation is afforded a presumption of correctness. Only where the recommendation is clearly erroneous or not supported by the evidence may this Court reweigh the evidence and substitute its judgment for that of the Referee. The

Florida Bar v. Orta, 689 So. 2d 270, 272 (Fla. 1997).

CONCLUSION

The Referee's report and recommendation is supported by the facts, the case law and Florida Standards for Imposing Lawyer Sanctions. The disciplinary action recommended by the Referee is appropriate when all the evidence in this matter is reviewed including the Respondent's past disciplinary action. The Respondent's competency as a lawyer has never been an issue and her medical condition was only recently properly diagnosed. The Referee took all these facts into consideration when making his report and recommendations in this case. A ninety-one (91) day suspension sought by The Florida Bar is solely intended to punish the Respondent. There is no other legal or evidentiary justification to order a ninety-one (91) day suspension. Therefore, since the disciplinary process is remedial and not penal in nature and because there is competent and substantial evidence to support the Referee's recommendations, the recommendations should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of Respondent's Answer Brief has been furnished by regular U. S. Mail to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U. S. Mail to Monica Ann Frost, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, FL 33607; a true and correct copy by regular U. S. Mail to John Anthony Boggs, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this _____ day of June 1999.

CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this answer brief has been written in font size Times New Roman 14 pt.

Scott K. Tozian, Esquire
Attorney for Respondent