IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC96648
[TFB Case No. 1997-51,446(07C)]

DOROTHY V. MAIER,

Respondent.

_____/

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the Bar."

The transcript of the final hearing as to discipline only held on March 16, 2000, shall be referred to as "T," followed by the cited page number(s).

The Report of Referee dated April 3, 2000, will be referred to as "ROR," followed by the referenced page number(s).

The Bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

Respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

COMPLIANCE WITH RULE 9.210(a)(2)

The undersigned hereby certifies that the foregoing brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 14 point Times New Roman.

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STATEMENT OF THE CASE

On April 28, 1999, the Seventh Judicial Circuit Grievance Committee "C" found probable cause against the respondent in TFB Case No. 1997-51,446(07C). The Bar filed its formal Complaint against the respondent on September 30, 1999. The discipline case was assigned Supreme Court Case No. SC96648. The Honorable Peter M. Evans was appointed as referee on October 8, 1999. The respondent was served with the formal complaint, certified mail return receipt requested, at her record bar address. The mail was marked "Return to Sender Addressee Unknown" and returned to the Bar. The respondent failed to file the requisite answer to the complaint. The Bar filed its Motion for Default on October 29, 1999. The Order on The Florida Bar's Motion for Default was entered by the referee on November 9, 1999. On or about November 19,1999, the respondent filed a Motion to Set Aside and Vacate the Default. The hearing on the respondent's motion was held December 22, 1999, wherein the referee granted the motion and gave the respondent 20 days from the date of the hearing to respond to the Bar's complaint. The formal order granting the motion was entered on January 3, 2000. The respondent filed an Answer to the Complaint on January 11, 2000. The parties signed a Stipulation as to Facts and Rule Violations on March 16, 2000, which was provided to the referee. Accordingly, the final hearing as

to discipline only was conducted on March 16, 2000. Pursuant to the signed stipulation, the referee found the respondent violated the following Rules Regulating The Florida Bar: 4-1.3 for failing to act with reasonable diligence and promptness in representing a client; 4-1.4 for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation; and 4-8.4(g) for failing to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct. The referee issued the Report of Referee on April 3, 2000, recommending that the respondent be suspended from the practice of law of 91 days and thereafter until rehabilitation is proven and that respondent pay the Bar's costs totaling $1586.75. The referee also recommended that the respondent sign a rehabilitation contract with Florida Lawyer's Assistance, Inc., within 30 days of the entry of the Supreme Court of Florida's order, to include completion of an evaluation for substance abuse and mental health issues. The referee's recommended disicpline also included a period of three years probation following reinstatement wherein the respondent would submit to an evaluation by LOMAS (Law Office Management Assistance Services) as well as supervision by another member of The Florida Bar regarding the respondent's caseload. The Board of Governors of The Florida Bar

considered the referee's report at their June, 2000, meeting and voted not to appeal the referee's findings or recommendations. The respondent filed her Petition for Review on June 15, 2000. This brief is The Florida Bar's answer to the respondent's Initial Brief.

STATEMENT OF THE FACTS

The Bar adopts the referee's findings of fact as set forth in his report based on the Stipulation as to Facts and Rule Violations signed by the parties. The following facts are taken from the Report of Referee contained in the appendix herein and as otherwise noted.

On or about February 24, 1995, Yvonne Suter retained the respondent to pursue an application for alien labor certification through the Florida Department of Labor and Employment Security and ultimately obtain her visa to live and work in the United States. Ms. Suter paid the respondent $2,500.00 to represent her in the immigration matter.

On or about March 22, 1995, the respondent forwarded Ms. Suter's completed application to William G. Rous of the Florida Department of Labor and Employment Security (hereinafter referred to as "the department"). By letters dated March 29, 1995, and June 30, 1995, Mr. Rous requested additional information from the respondent regarding Ms. Suter's application. The respondent timely responded to Mr. Rous' requests with additional information. However, the respondent's replies were not copied to her client, Ms. Suter.

On August 30, 1995, Mr. Rous again corresponded with the respondent seeking additional information regarding Ms. Suter's application. A response was due by

October 14, 1995.

During this time, from February, 1995, through February, 1996, Ms. Suter repeatedly called the respondent's office seeking updates on the processing of her application. The respondent failed to adequately respond to Ms. Suter's repeated inquiries.

On or about February 6, 1996, Ms. Suter sent a letter to the respondent seeking information regarding her application. The respondent did not contact Ms. Suter until on or about March 11, 1996, after Ms. Suter advised she intended to obtain another attorney and retrieve her file from the respondent.

In or around June, 1996, after locating the respondent in Daytona Beach, Florida, and obtaining copies of documents from her file, Ms. Suter learned her application for alien labor certification had been canceled. By letter dated July 22, 1996, Ms. Suter demanded a refund from the respondent of the $2,500.00 retainer she had paid.

Subsequent to the aforementioned July, 1996, letter to the respondent, Ms. Suter filed a grievance against the respondent with The Florida Bar. Ms. Suter's grievance was closed on May 15, 1997.

In June, 1998, Ms. Suter again contacted The Florida Bar. Ms. Suter's grievance against the respondent was reopened as a result of new information she provided to The

Florida Bar.

Subsequent to the reopening of Ms. Suter's grievance against the respondent, the respondent failed to timely respond to inquiries by The Florida Bar into the matter. The respondent could not be located at her record bar address in Ft. Lauderdale, Florida, and mail sent to that location was on many occasions returned by the post office as unclaimed.

SUMMARY OF THE ARGUMENT

In the present case, the referee's findings of fact are not in dispute. The parties signed a Stipulation as to Facts and Rule Violations which was accepted by the referee and incorporated into the Report of Referee. Thus, it is undisputed that the respondent's conduct consituted a violation of the following Rules Regulating The Florida Bar: 4-1.3 for failing to act with reasonable diligence and promptness in representing a client; 4-1.4 for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation; and 4-8.4(g) for failing to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct.

The referee heard testimony and received evidence in support of aggravating and mitigating circumstances. The evidence included documentation regarding the respondent's extensive prior discipline history. The evidence also included the respondent's own testimony. Further, the referee was provided with case law supporting the recommendation of a 91 day suspension. Therefore, the referee's recommended discipline of a 91 day suspension is supported by case law, the Florida Standards for Imposing Lawyer Sanction, as well as the facts of the case.

ARGUMENT

POINT I
THE REFEREE'S RECOMMENDED DISCIPLINE OF NINETY ONE (91) DAYS SUSPENSION IS APPROPRIATE GIVEN THE CASE LAW AND FACTS.

A referee's findings of fact are presumed to be correct and will be upheld absent a clear showing that the findings are without any support in the record. The Florida Bar v. Summers, 728 So. 2d 739 (Fla. 1999). In the instant case the parties signed a Stipulation as to Facts and Rule Violations at the final hearing which was provided to the referee and made part of the record. Thus, the referee's findings of fact as to misconduct are not in dispute and supported by the record.

In order to successfully attack a referee's findings, the party seeking review must deonstrate that there is no evidence in the records to support the findings or that the records clearly contradicts the referee's conclusions. The Florida Bar v Carricarte, 733 So. 2d 975 (Fla. 1999). The referee's conclusions and recommendations as to discipline in the case at bar are also supported by the record. The record includes the transcript of the final hearing as to discipline only, documents as to the respondent's prior discipline history and exhibits regarding respondent's evidence of mitigation. At the final hearing, the referee was provided with documentation regarding the respondent's prior discipline

cases. The documents clearly established that the respondent has been disciplined three (3) times since 1994.

The respondent was disciplined for the first time in April, 1994. The respondent received an admonishment by letter from the chair of the Seventeenth Judicial Circuit Grievance Committee "C" for failing to competently and diligently handle a client's action to clear title to property and a probate matter. In addition, the respondent failed to adequately communicate with her client regarding the status of the case. The respondent was found to have violated the following Rules Regulating The Florida Bar: 3-4.2 violation of the Rules of Professional conduct is cause for discipline; 4-1.1 for failing to provide competent representation; 4-1.3 for failing to act with reasonable diligence and promptness in representing a client; 4-1.4 for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation; and 4-8.4(a) for violating the Rule of Professional Conduct.

In December, 1996, the respondent received another admonishment by letter from the chair of the local grievance committee and six (6) months probation. The respondent failed to diligently handle a client's dissolution of marriage matter after having been paid a legal fee to do so. She failed to file

necessary pleadings and the case proceeded to mediation without the benefit of requested discovery. The grievance committee found that the respondent's conduct was a violation of the following Rules Regulating The Florida Bar: 4-1.3 for failing to act with reasonable diligence and promptness in representing a client and 4-1.5 for collecting a clearly excessive fee.

The respondent was suspended for a period of thirty (30) days and placed on three (3) years probation by order of the Supreme Court of Florida in The Florida Bar v. Maier, 707 So. 2d 930 (Fla. 1998). The respondent was disciplined for misappropriation and shortages in her trust account in violation of the following Rules Regulating The Florida Bar: 4-1.15(a) for failing to hold in trust funds or property in connection with representation; 4-1.15(b) for failing to promptly deliver to the client of third person funds which they are entitled to receive; 5-1.1(a) for failure to maintain and utilize money entrusted for a specific for that purpose only; and 5-1.2(a) for failure to maintain certain minimum required trust account records. The respondent's trust account had numerous incidences of shortages. In addition, the respondent neglected to promptly deliver funds and/or make payments from her trust account to resolve client matters.

At the time the grievance committee found probable cause in the instant case, the respondent was on probation for the aforementioned misconduct. The Florida Bar v. Maier, 707 So. 2d 930 (Fla. 1998). The grievance committee

determined that the respondent was paid a legal fee to assist her client with an immigration matter involving a visa application and alien labor certification. The undisputed facts established that the respondent neglected the client's case and failed to adequately communicate with her client regarding case status. The respondent's neglect resulted in the client's inability to proceed further with the immigration matter at that time. In addition, the respondent failed to respond to the bar's inquiries in a timely manner. On more than one occasion, mail to the respondent's record bar address was returned as unclaimed/undeliverable.

The respondent has received two (2) admonishments and a 30 day suspension followed by three (3) years probation. It is evident that the respondent's past and present violations constitute cumulative misconduct. In fact, the respondent's conduct involving neglect has escalated from neglect of client matters to neglect of client trust funds. When considering the appropriate penalty in attorney discipline matters, this Court considers prior misconduct as releveant factors. The Florida Bar v. Adler, 589 So. 2d 899 (Fla. 1991).

In the respondent's prior discipline cases, like the instant matter, she was found guilty of neglect and inadequate communication with clients. An attorney's cumulative misconduct of a similar nature should warrant even more serious disciline than might disimilar conduct. The Florida Bar v. Rolle, 661 So. 2d 296 (Fla. 1995). Furthermore, under the Florida Standards for Imposing Lawyers

Sanctions, as promulgated by this Court and used by referees in determining the appropriate level of discipline to be recommended, a prior discipline history is considered an aggravating factor [Standard 9.22(a)]. The referee in the case at hand appropriately considered the respondent's prior violations along with the violations in the present case in recommending that the discipline to be imposed should be a 91 day suspension. (ROR 5, 6).

At the final hearing as to discipline only, in addition to documentation regarding the respondent's prior discipline history, the Bar also presented argument regarding other aggravating factors under The Florida Standards for Imposing Lawyers Sanctions as applicable to the case. The respondent's substantial experience in the practice of law and vulnerability of the victim as well as the pattern of misconduct and multiple offenses were all presented to the referee as aggravating factors. [Standards 9.22(i); 9.22(h); 9.22(c); and 9.22(d)]. Further, the referee was provided with citations to The Florida Standards for Imposing Lawyers Sanctions and case law by the Bar in support of a 91 day suspension. The Florida Standards for Imposing Lawyers Sanctions [4.0 Violatoins of Duites Owed Client; 4.42 Lack of Diligence; 6.0 Violatoins of Duites Owed the Legal System, Abuse of the Legal Process 6.2; and 7.0 Violations Other Duties Owed as a Professional, 7.2].

In The Florida Bar v. Flowers, 672 So. 2d 526 (Fla. 1996) the attorney's

neglect, lack of communicaton and failure to respond to the Bar's inquiries warranted a 91 day suspension from the practice of law. The respondent failed to properly handle a client's guardianship and permitted a situation to exist wherein another client's immingration matter was neglected. This Court held that the referee appropriately considered the attorney's prior discipline consisting of a private reprimand, public reprimand with probation, and a 10 day suspension. The public reprimand and suspension were for similar misconduct invoving trust account violations. The attorney further argued that the referee ingnored his evidence of mitigaton regarding his illness and the daeth of his wife. However, this Court found the referee's report and record reflected that the evidence of mitigation was properly considered.

As in Flowers, 672 So. 2d 526 (Fla. 1996), the respondent in the present case also received discipline for similar misconduct involving neglect and inadequate communication. In adddition, the respondent's undisputed misconduct which is the subject of these proceedings also involved neglect and inqdeuate communication as well as her failure to timely respond the the Bar's inquiries. Further, the respondent, like the attorney in Flowers, 672 So. 2d 526 (Fla. 1996), argued that the referee failed to consider her evidence of mitigation regarding her mental and emotional health problems. However, the Report of Referee clearly stated that the referee carefully considered the respondent's argument and case

law. (ROR p.4).

The attorney's conduct in The Florida Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997) warranted a 91 day suspension. The attorney was found guilty of five (5) counts involving neglect, lack of communicaton, failing to respond to the Bar's inquiries, and dishonest conduct involving an employee. The attorney previously had received two (2) public reprimands for similar conduct. This Court found that the referee considered the attorney's prior discipline as well her serious medical and emotional problems as aggravating and mitigating factors and recommended a 91 day suspension. Therefore, this Court found no basis to deviate from the referee's recommended discipline.

The respondent's prior discipline cases also involved similar offenses including neglect and indaequate communication. Moreover, the respondent was on three (3) years probation, after having been suspneded for thirty (30) days, at the time the grievance committee found probable cause regarding the current misconduct. The respondent's behavior over time has involved an escalating pattern of neglecting client matters, including neglect of her client trust accounts. While the respondent in the instant case was not charged with a multi-count complaint as in Nowacki, 697 So. 2d 828 (Fla. 1997), her prior disciplinary history is more serious in that it includes a thirty (30) day suspension followed by three (3) years probation. As in Nowacki, 697 So. 2d 828 (Fla. 1997), the respondent

provided evidence of emotional and mental health problems at the final hearing. The Report of Referee distinctly referenced that the respondent's argument as to mitigation and case law regarding discipline were duly considered by the referee. (ROR p. 4).

In Rolle, 661 So. 2d 296 (Fla. 1995), the Court approved the recommended discipline of a 91 day suspension noting that the attorney's prior discipline of a private reprimand had failed to deter further misconduct. The attorney was found guilty of two (2) counts of neglecting clients' cases and failing to respond to the clients' repeated requests for information. The attorney previously had received a private reprimand for nearly identical conduct. In addition, the attorney had another disciplinary case pending simulatneously before the Court.

Clearly the respondent in the instant case has a greater discipline history that the attorney in Rolle, 661 So. 2d 296 (Fla. 1995). The respondent's prior discipline history establishes a pattern of neglect. It is evident that the respondent's prior discipline has done little to deter continued neglect. Thus, as in Rolle, 661 So. 2d 296 (Fla. 1995), suspension from the practice of law for 91 days is warranted. This Court may consider prior discipine and increase the discipline to be imposed. Further, this Court in Rolle, 661 So. 2d 296 (Fla. 1995), reiterated the three (3) primary purposes of discipline: fairness to society; fairness to the attorney; and deterance of future behavior by other member of the bar.

The COurt hled that a one year suspension was appropriate discipline for an attorney's conduct in light of previous acts similar conduct. The Florida Bar v. Morrison, 669 So. 2d 1040 (Fla. 1996). The attorney neglected two (2) client matters causing harm to the clients. One client's case was dismissed with the statute of limitation having run while the other client lost compensation for injuries. In addition, the respondent failed to respond to inquiries from the Bar. In recommending a one year suspension, the referee considered the attorney's previous discipline of a public reprimand and one year probation for similar conduct.

As in Morrison, 669 So. 2d 1040 (Fla. 1996), the respondent's conduct caused client harm. The respondent's client was unable to proceed further with her visa application and alien labor certification. The respondent neglected the client's case, failed to respond to the client's repeated requests for information regarding case status and failed to respond to the Bar in a timely manner. Thus, based on the respondent's conduct and prior discipline, the referee appropriately recommended increased discipline.

In addition to the cases present by the Bar at the final hearing, The Florida Bar v. WIlliams, 753 So. 2d 1258 (Fla. 2000) also supports a period of suspension requiring proof of rehabilitation. In Williams, 753 So. 2d 1258 (Fla. 2000), the attorney was previously disicplined three (3) times in five (5) years for lack of

diligence, failure to adequatley communicate with clients and failure to cooperate with the Bar's investigation. He received an admonishment, public reprimand and a 20 day suspension which was followed by one year probation . The COurt concluded that the enhanced discipline was appriproariate in light of the past similar violations and in accord with case law.

In Flowers, 672 So. 2d 526 (Fla. 1996), the Court's holding indicated that the referee's report reflected that the referee considered previous discipline as well as aggravating and mitigating factors. The Report of Referee in the instant case distinctly reflects that the referee did the same. The record reflects that the referee was provided with case law by the respondent to support her argument for a deviation from a period of suspension. Further, the record reflects that the referee also heard testimony from three (3) witnesses, including the respondent on her own behalf, her current employer and a licensed clinical psychologist.

The respondent's current employer, Bruce Wagner testified regarding the work the respondent was doing for his firm. (T 41-48). However, Mr. Wagner testified that the respondent did not fully disclose to him the nature of her prior discipline. (T 46). He further testified that the misappropriation and shortages in the respondent's trust account, which resulted in her most recent discipline of a thirty (30) day suspension and three (3) years probation, caused him some concern. (T 46-47). In his testimony, Mr. Wagner indiciated that he has known

the respondent since 1978 but was unaware as to the nature and extent of her discipline history. (T 42, 46).

The respondent testified at length on her own behalf (T 48-92). While the resondent detailed the circumstances and emotional stressors she believed to have in part caused her discipline troubles, she failed to specifically clarify what efforts she has made to ensure the behavior would not be repaeted. In fact, the rrespondent indicated that her living and commuting situation would remain unchanged. (T 80, 81, 84, 85). The Bar submits that this is exactly the same situation which lead to the respondent's neglect of her client's immigration case and her failure to respond to her client's repeated requests for information. It would appear that the primary change described by the respondent was her mental health group counseling. The respondent entered group treatment in December, 1999. She testified that thus far, she has maintained regular attendance sine that time. Moreover, the respondent confirmed that she failed to disclose to Mr. Wagner, her current employer, the full nature and extent of her previous discipline. (T 87).

The referee also heard testimony from Dr. W. G. L. Ryan, a licensed clinical psychologist and addictionologist. (T 14-39). Dr. Ryan evaluated the respondent and diagnosed severe depression with post traumatic elements. (T 32). He further testified that in the short time the respondent had been participating in

group counseling, she was compliant with treatment. (T 28) Dr. Ryan also testified that consequences were a necessary component of treatment. (T 34). Despite Dr. Ryan's favorable prognosis, no specific testimony was provided to the referee that the respondent's emotional or mental health problems were directly responsible for her misconduct.

It is insufficient to merely argue that there is contradictory evidence when there is also competent, substnatial evidence to suupor tht referee's findings. The Florida Bar v. Schultz, 712 So. 2d 386,388 (Fla. 1998). An appeal is not a trial do novo and this Court is precluded from reweighing the evidence and substituting its judgement for that of the referee. The Florida Bar v. Cibula, 725 So. 2d 360 (Fla. 1998). This is because the referee is in the best position to judge credibility and therefore acts as this Court's fact finder. Carricarte, 733 So. 2d at 978. Further, in attorney discipline proceedings, this Court will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law. The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997).

The referee herein specifically stated that the respondent's argument and case law were carefully considered regarding the recommended discipline. (ROR 4). The record reflects that the respondent's arguments also included presentation and analysis of mitigating factors. Moreover, the report absolutely indicates that the referee took into consideration the respondent's argument in

that the referee specifically analyzed one of the primary cases argued by the respondent, The Florida Bar v. Grigsby, 641 So. 2d 1341 (Fla. 1994). The referee distinguished the facts, circumstances and rule violations from the instant case and found it to be different. (ROR 4). The additional cases argued by the respondent at the final hearing are also likewise distinguishable from the instant case. Thus, the referee's conclusions and recommendations as to discipline are wholly supported by the facts, the record, and existing case law.

CONCLUSION

The respondent's misconduct involving neglect of a client's matter, failing to respond to the client's repeated requests for information and failing to respond to the Bar's inquiries in a timely manner represent a pattern of escalating and cumulative misconduct. The referee properly considered as an aggravating factor the respondent's prior discipline history consisting of two (2) amdonishments for similar conduct and a thirty (30) day suspension followed by three (3) years probation for misappropriation and shortages in the respondent's trust account. Furthermore, the referee was provided with evidence and testimony regarding aggravating and mitigating factors. The referee's report clearly reflects that all of the above was carefully considered. Accordingly, the referee's recommended discipline is supported by case law, the facts of the case, the record and the Florida Standard for Imposing Lawyer Sanctions.

WHEREFORE, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact and recommendation as to guilt and enter an order of discipline against respondent of a 91 day suspension, a three (3)-year period of probation with the conditions set forth in the referee's report, and payment of the Bar's costs in prosecuting this case which currently total $1,586.75

Respectfully submitted,

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By: _____
PATRICIA ANN TORO SAVITZ

Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to J. David Bogewnschutz, counsel for the respondent, Bogenschutz & Dutko, 600 S. Andrews Avenue, Suite 500, Ft. Lauderdale, Florida 33301-2802; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this _____ day of August, 2000.

Respectfully submitted,

_____

Patricia Ann Toro Savitz
Bar Counsel

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DOROTHY V. MAIER,
Respondent.

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APPENDIX TO COMPLAINANT'S ANSWER BRIEF

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