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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RITA HORWITZ ALTMAN,

Respondent.

_____/

Supreme Court Case
No. SC18-724

The Florida Bar File
No. 2018-50,808(15C)OSC

INITIAL BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

Complainant, The Florida Bar, is seeking review of a Report of Referee recommending a Public Reprimand and 5 years of probation and other conditions.

Complainant will be referred to as The Florida Bar, or as The Bar. Rita Horwitz Altman, Respondent, will be referred to as Respondent, or as Ms. Altman throughout this brief.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to specific pleadings will be made by title. References to the transcript of the final hearing are by symbol TR, followed by the appropriate page number (e.g., TR 289).

References to Bar exhibits shall be by the symbol TFB Ex. followed by the appropriate exhibit number (e.g., TFB Ex. 10 or TFB Composite Ex. 11).

References to Respondent's exhibits shall be by the symbol R Ex. followed by the appropriate exhibit number (e.g., R Ex. 2).

STATEMENT OF THE CASE AND FACTS

On May 11, 2018, The Florida Bar filed a Petition for Contempt and Order to Show Cause (hereinafter referred to as "Petition") alleging that Respondent failed to timely respond to two separate inquiries from the Investigating Member of the Fifteenth Judicial Circuit Grievance Committee "C" (hereinafter referred to as "Investigating Member") assigned to investigate allegations that Respondent engaged in ineffective assistance of counsel in an immigration matter. The Petition set forth the following chronological events: On January 22, 2018,[1] the Investigating Member sent a letter (hereinafter referred to as the "January 22, 2018 letter") requesting documents from Respondent. Respondent received the letter by email and by certified mail but failed to respond. On March 7, 2018, the Investigating Member sent Respondent a second letter (hereinafter referred to as the "March 7, 2018 letter") reminding Respondent of her failure to respond to the January 22, 2018 letter and of her obligation to respond within 10 days pursuant to Rule Regulating The Florida Bar 4-8.4(g). The March 7, 2018 letter explicitly required a response by March 19, 2018. It too was received by email and certified mail, yet Respondent failed to respond.

[1] The January 22nd letter reflected the year 2017, which was an error. The actual date the letter was sent was January 22, 2018.

On March 23, 2018, the Bar requested that the grievance committee consider a Request for Issuance of Notice of Non-Compliance and Finding of Contempt (hereinafter referred to as the "the Bar's Request") to determine if Respondent had good cause to excuse her failure to respond and whether Respondent should be held in contempt. On April 10, 2018, Respondent filed a Response to The Florida Bar's Request for Issuance of Notice of Non-Compliance and Finding of Contempt (hereinafter referred to as the "Response to the Committee"). On April 18, 2018, the grievance committee determined that Respondent failed to show good cause for her failure to respond. The Petition further highlighted Respondent's extensive disciplinary history with respect to her failure to respond to clients, the Bar, grievance committees, subpoenas and this Court, dating back as early as 1998.

On May 29, 2018, Respondent filed Respondent's Response to The Florida Bar's Petition for Contempt and Order to Show Cause (hereinafter referred to as the "Response to the Supreme Court"), essentially mirroring the Response to the Committee (hereinafter collectively referred to as the "Responses"). In the Responses, Respondent stipulated that she received both letters, that she failed to respond timely and that her failure to respond to the March 7, 2018 letter was "irrational, not reasonable." As to the January 22, 2018 letter, Respondent advised that since it did not contain a due date, she did not get to it right away. On

February 4, 2018, Respondent's mother was hospitalized until February 12, 2018. Respondent further stated, "As the only child living in Florida, the care of her mother was, as always, all in Ms. Altman's hands." Respondent further indicated that she had since responded to the Investigating Member's questions and wrote a letter of apology to the Investigating Member, which were attached as exhibits to the Response to the Committee.

On June 6, 2018, the Bar filed its Reply to Order to Show Cause. In it, the Bar noted that on November 21, 2017, prior to the events that led to the Petition, the Investigating Member sent a letter requesting key documents in furtherance of his investigation. This letter was also ignored, prompting a second letter on January 3, 2018. The Bar further noted that, consistent with Respondent's prior discipline record, only when Respondent is faced with the threat of contempt and impending suspension does Respondent provide a response. Respondent responded on April 10, 2018, approximately 69 days late[2] and eight days before the grievance committee hearing.

The Honorable Stacy Ross was appointed as Referee on July 17, 2018. A final hearing was held on December 18, 2018.

[2] Although the Report of Referee states that the response would have been due on February 6, 2018, 10 days from January 22, 2018 is February 1, 2018 (RR 5).

Respondent testified that she was admitted to the Bar in 1992 and began to work for an immigration lawyer, left and opened her own office (TR 28, 106). Respondent only practices immigration law (TR 108). Currently, Respondent employs one part-time paralegal who has worked for her for 15 years, a part-time lawyer and a part-time legal assistant and has approximately 1,000 clients (TR 110, 124, 210). A typical week for Respondent involves seeing clients and appearing in immigration court around the country, one to five times a week (TR 112). Everything goes through Respondent, including telephone calls and the mail (TR 114).

Respondent testified that her mother was currently hospitalized and needs an aortic valve replacement for her heart (TR 98). Respondent speaks with her mother, who now suffers from dementia, once or twice daily, depending on her mother's mental state (TR 147-148). Respondent is her mother's primary and sole caretaker (TR 99). Respondent takes her mother to the hospital, unless the ambulance takes her, and visits her at the assisted living facility where she lives (TR 100). Respondent rarely receives help from her siblings to care for their mother (TR 101).

Respondent's first priorities are to her family. Respondent's son, age 42, has undergone three heart surgeries (TR 115, 116). Respondent was present for her

son's second surgery in October 2017 (TR 115). About six or seven years ago, the father of her children passed away after a battle with cancer (TR 115). Respondent's second priority is to her clients and her law practice because "business has to exist" so the workers get paid (TR 115). Respondent places herself at the bottom (TR 116).

The underlying grievance which gave rise to the contempt proceeding was filed on or about March 9, 2016 by Respondent's former client's immigration lawyer, Ilaria Cacopardo (hereinafter referred to as "Cacopardo") (TR 120, R Ex. 2, RR 2). Respondent was copied on a letter from the Bar dated March 17, 2016 initially closing the Bar matter (TR 124-125, R Ex. 1). Respondent felt vindicated that the Bar had made the correct decision and felt that the Bar understood that the client was well represented (TR 125-126).

Respondent was not surprised when Cacopardo filed a grievance because typically if someone loses in immigration court, according to the Respondent they file a Lozada complaint[3]. To do so, the hearing notice has to allege a Lozada violation which is ineffective assistance of counsel (TR 121-122, 124). The

[3] Respondent was referring to Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), which provides that in order to seek to overturn a deportation order based on ineffective assistance of counsel the motion must state whether a grievance was filed with the applicable disciplinary agency.

grievance advised that Cacopardo was moving forward to file a motion to reopen the underlying immigration case for ineffective assistance of counsel (R Ex. 2). Respondent testified that she knew from at least August 10, 2016 that there was an immigration appeal pending before the Immigration Board of Appeals (TR 171, R Ex. 4). Respondent did not believe that the underlying grievance had any merit (TR 123).

Almost two months after the case was initially closed, Respondent received the Bar's May 17, 2016 letter reopening the Bar file and requesting a response to the grievance (TR 126, R Ex. 2). Respondent was shocked, surprised and did not understand why the matter was reopened and being pursued (TR 126). Respondent is not aware if the Bar came into possession of new information or additional evidence when the case was reopened (TR 173-174). Respondent testified that a lesson that she learned from her four prior disciplinary cases was that she was required to respond, and she did not want to go down that path again because her practice is too big (TR 127). She understood that once someone filed a grievance against you, you are free to disclose what you know about the Complainant and there is no attorney-client privilege remaining (TR 128). On June 14, 2016, Respondent provided a response to the grievance (TR 128, R Ex. 3, RR 3). Respondent believed that she addressed all the issues in the June 14, 2016 letter to

assist the Bar (TR 129). Respondent received a copy of the Complainant's rebuttal to her June 14, 2016 response and did not respond to it (TR 129, R Ex. 4).

On September 12 and 13, 2016, there were communications between the Bar and Cacopardo regarding the status of the immigration appeal (RR 3, R Ex. 5, 6). Respondent was not copied on those communications (TR 130, R Ex. 5, 6). Respondent received two letters dated November 9, 2016, stating that the Bar matter was placed on monitor status until the underlying immigration appeal was decided before the Immigration Board (TR 130-131, 172, R Ex. 7, RR 3). Thereafter, Respondent was not notified of or copied on emails between the Bar's Investigator and Cacopardo (TR 131-134, R Ex. 8, 9, 10, 11, 12). Respondent is not aware of any rule that mandates that The Florida Bar copy her on communications to Cacopardo (TR 172).

After the November 9, 2016 letters placing the grievance on monitor status, on November 16, 2017, Respondent was notified that the matter was being assigned to the Investigating Member of the grievance committee for further investigation (TR 34, R Ex. 13, RR 4). Respondent believed that the Bar matter had "gone away" since she did not hear from the Bar for one year (TR 135). Respondent testified that in her prior disciplinary cases when she failed to respond, the matter was dealt with quickly (TR 135). She does not recall there being a one-

year gap (TR 135). Respondent did not consult with an attorney up to this point because she thought the case was extremely self-explanatory and that the case was closed (TR 135-136).

Approximately a week or more before November 21, 2017, Respondent flew to Boulder, Colorado, where her son was having emergency heart surgery (TR 136, RR 4). Respondent's son returned with her for Thanksgiving for a big family event at her house (TR 137, RR 4). On November 21, 2017, having been appointed on November 16, 2017, the Investigating Member sent a letter to Respondent requesting documents (R Ex. 13, TFB Ex. 1, RR 4). On or about November 22, 2017, Respondent signed for the November 21, 2017 letter (TR 137, RR 4). Respondent testified that she did not respond and had no excuse (TR 137, 141, RR 4). The Referee found that although no response due date was provided in the letter, rule 4-8.4(g) provides that a lawyer shall respond within 10 days of any follow-up inquiry by the grievance committee (RR 4). Respondent acknowledged that the rule required a response within 10 days (TR 29). Respondent admitted that she received a letter dated November 21, 2017 by certified mail, as indicated by her signature on the "green card" receipt and postmark stamping printed "22 Nov '17" by the United States Post Office (TR 33-34, TFB Composite Ex. 1, RR 4).

Upon receiving the November 21, 2017 letter, Respondent opened it, read it, and "put it in [her] list of things to be done" (TR 35, RR 4).

On January 3, 2018, the Investigating Member sent Respondent a courtesy follow-up letter, on official Florida Bar Grievance Committee letterhead, informing Respondent that she failed to respond to the November 21, 2017 letter, and pursuant to rule 4-8.4(g), gave Respondent until January 14, 2018 to respond (TFB Ex. 2, RR 4). Unlike the November 21, 2017 letter, the follow-up letter dated January 3, 2018 had a due date by which to respond (TR 141, RR 5). Respondent answered the January 3, 2018 letter, and not the November 21, 2017 letter, because she saw that it had a due date and it was clear to her that a response was required by January 14th (TR 141-142). Respondent responded on January 15th, the next business day (TR 40, 142, TFB Ex. 3, RR 4).

On January 22, 2018, the Investigating Member sent Respondent a letter, on official Florida Bar Grievance Committee letterhead, requesting additional information via email and certified mail (RR 5, TFB Ex. 4). Respondent admitted receiving a letter on January 22, 2018 by email as shown by the read receipt, and by certified mail on January 24, 2018 (TR 42-43, TFB Ex. 4, RR 5). Respondent acknowledged that the year on the letter was misdated as 2017, instead of 2018 (TR 42). Respondent testified that the January 22, 2018 letter did not contain a due

date and at the time she was not aware that she had 10 days to respond (TR 43, 142-143, TFB Ex. 4, RR 5). She reviewed the letter, reflected on the case's procedural history and became frightened, unable to understand why there were continued requests for more information from the Bar (TR 143). Even though there was no due date on the letter, Respondent knew she had to respond (TR 143).

Respondent testified that her mother, who was 92 years old and suffers from COPD, heart failure and pneumonia, was hospitalized in Palm Beach County from February 4, 2018 through February 12, 2018 (TR 57, 144-145, RR 5-6). For the eight days that she was hospitalized, Respondent visited her mother and continued to travel from Palm Beach to immigration court in Miami and other appointments in Broward and Palm Beach County (TR 145, RR 5-6). After the eight days, her mother was moved to a rehabilitation center in West Palm Beach, until March 3, 2018 (TR 146). Respondent testified that there was no one around to take care of her mother (TR 146).

During the period of February 4 through March 3, 2018, Respondent still attended hearings, met with clients, went to her office daily and does not remember canceling any hearings (TR 174, RR 6). After March 3, 2018, her mother may have gone to Respondent's house or possibly gone back to Brookdale, the assisted living facility (TR 146). Respondent and her mother employed aides to assist with her

mother's care and ensure that she could get around and that she took her medication (TR 146). Respondent's sister, in New York, also helped (TR 147).

Respondent did not respond to the January 22, 2018 letter within 10 days, or February 1, 2018, as required (TR 44). Upon receiving the January 22, 2018 letter by email, Respondent read it and does not recall what she did after she read the letter (TR 44). Upon receiving a hard copy of the letter on January 24, 2018 by certified mail, Respondent placed the letter in her "desk in [her] file of things to be done" (TR 44, RR 5). When asked if there was a reason that she failed to respond within 10 days to the January 22, 2018 letter, Respondent testified as follows:

> A. I did not respond timely to this letter. I believe that I had done—that I had responded to the Bar timely before the initial complaint letter based on Lozada matter. I believed that I had represented Miss Heron competently and that there was no merit to her complaint.
>
> I understood all of the Lozada rules which tell us that somebody wants to get their case that has been denied in the immigration courts back before the court, then the Lozada complaint must be filed which means that not only do they have to allege that there was ineffective assistance of counsel, but that the person making the complaint has to then file also with The Florida Bar a letter alleging this.
>
> I believe that I had sufficiently responded not only with my explanation, but also giving the Bar my file and offering the Bar any other evidence that I had, calendars or everything else, showing interactions with this client.

> When I got this letter, I was surprised to get it. I was shocked to get it.

(TR 44-45).

Respondent further explained that her mother became ill, she runs a very busy practice, she put her clients first and then her family, and the Bar letter was at "the bottom of the pile" (TR 46). Respondent conceded that her response was due by February 1, 2018 and that her mother did not fall ill until February 4, 2018 (TR 47-48).

When Respondent failed to respond to the January 22, 2018 letter, Respondent received a follow-up letter dated March 7, 2018, requiring a response by March 19, 2018, and informing Respondent that pursuant to rule 4-8.4(g), she had 10 days to respond (TR 48-49, TFB Ex. 5, RR 6). Respondent received the March 7, 2018 letter by email on the same day and by certified mail on March 12, 2018 (TR 51, TFB Ex. 5, RR 6). Respondent failed to respond (TR 49, RR 6). Upon receipt of the March 7, 2018 letter, Respondent opened it, read it, realized that she had not done the proper thing by not responding and placed it with the other letters in a pile of things "to do" (TR 49, 148, RR 6). She knew she had to respond but was having difficulty doing so (TR 148). She was worried because she had failed to respond in a prior disciplinary case in which she was suspended and,

since the Bar kept inquiring, she believed that there was something else happening (TR 149).

When asked by her counsel if she had a reason why she failed to timely respond, Respondent testified as follows:

> A. I wish that I could explain more about what the fear was and why I couldn't overcome that fear and get myself out of that and do what I knew had to be done for the Bar.
>
> Q. But when your son had the heart problem, you dropped everything and went to your son. Why did you do that?
>
> A. Because that's what I'm supposed to do and—Well, that's what I needed to do and wanted to do.
>
> Q. And when your mom got sick, you dropped everything, at least for a while, and took care of your mom. Why did you do that?
>
> A. Because I'm the responsible person and it's my mother and I must do these things and that's what I needed to do and wanted to do.

(TR 150).

Respondent also testified that she did not know why she failed to respond (TR 118). Respondent agreed that the March 7, 2018 letter would have been the second letter she received referencing rule 4-8.4(g), informing her that pursuant to the rule she had 10 days to respond to the Bar's inquiry (TR 48, TFB Ex. 6).

On March 23, 2018, not having received a response to the Investigating Member's inquiries, the Bar requested that the grievance committee consider

whether Respondent had good cause for failing to respond or whether Respondent should be held in contempt for her failure to respond to the Bar's inquiries (TR 51-53, TFB Ex. 6, RR 6). On March 23, 2018, Respondent received a letter indicating that on April 18, 2018 the grievance committee would be considering the Bar's Request and that Respondent could submit a written statement to the grievance committee explaining, refuting, or admitting the alleged misconduct (TR 54, TFB Ex. 7, RR 6). Respondent acknowledged that the letter did not state that if she responded to the Bar's inquiries at that point in time, that the Bar would withdraw the matter before the grievance committee (TR 55). Respondent hired counsel between March 23, 2018 and April 10, 2018 (TR 56).

On April 10, 2018, Respondent, through counsel, submitted her Response to the Committee (TR 55-56, TFB Ex. 8). Prior to submission, Respondent read and approved the Response to the Committee (TR 56, RR 7). In it, Respondent stated that she had no one to blame but herself for her failure to respond, that her failure to respond to the March 7, 2018 letter was irrational, not reasonable, but that she had a reasonable explanation for her failure to respond to the January 22, 2018 letter (TR 57, RR 7). Respondent explained that her mother fell ill and was hospitalized from February 4, 2018 through February 12, 2018 and was moved to a

rehabilitation facility in which she remained until March 3, 2018 (TR 57, TFB Ex. 8, RR 7).

Regarding Respondent's explanation concerning not responding to the January 22, 2018 letter, the Referee found, in part, as follows:

> 18. The undersigned Referee finds that Respondent's contention that she did not timely respond to the January 22, 2018 letter because there was no due date unacceptable. A lawyer practicing in the State of Florida is charged with notice and knowledge of the Rules and the standard of ethical and professional conduct prescribed by the Florida Supreme Court. In addition, each of the four cases in which Respondent had been disciplined have dealt with the Respondent's failure to respond timely to The Florida Bar. Respondent has clearly demonstrated a pattern of non-responsiveness to Bar inquiries. Based upon her history, Respondent knew or should have known of the requirements mandated by Rule Regulating The Florida Bar 4-8.4(g).
>
> 19. The undersigned Referee also finds that the Respondent's assertion that she did not timely respond to the January 22, 2018 letter because of her elderly mother being hospitalized inexcusable. Respondent testified that her mother fell ill on February 4, 2018 and remained hospitalized until February 12, 2018, yet she still continued to meet with clients, attend court hearings without having to cancel or reset. Moreover, Respondent did not attempt to secure an extension of time to respond.

(RR 8).

The Response to the Committee further states, "As the only child living in Florida, the care of her mother was, as always, all in Ms. Altman's hands" (TR 57, TFB Ex. 8, RR 7-8). Respondent testified that she has four other siblings from the

same mother and father, two of whom live in Florida (TR 58). Respondent admitted that one of the two siblings who lives in Florida resides locally in Broward County (TR 58). As to this statement, the Referee found, in part, as follows:

> During the Final Hearing, Respondent testified that she had four other siblings, and two, in fact, do reside in the State of Florida, one in Sarasota and another in Pompano Beach, Florida. As cited above, the Response to the Committee specifically states, "As the only child living in Florida …" The undersigned Referee finds that this misrepresentation was an attempt to minimize her culpability in failing to timely respond.

(RR 8-9).

The Response to the Committee further explained that the March 7, 2018 letter should have been answered immediately, that the letter terrified Respondent and reminded her that she had failed to respond to the January 22, 2018 letter (TR 59, TFB Ex. 8, RR 8). The Referee found that "Respondent claimed to be 'overcome with fear,' yet she acknowledged that the fear was not reasonable." (RR 9). "Regardless, Respondent still failed to respond to the subsequent March 7, 2018 letter which was received after her mother was out of the hospital and rehabilitation." (RR 9). Admittedly, both letters were placed together in the same pile of things "to do" (TR 59, RR 4, 6).

The grievance committee found that Respondent failed to show good cause for her failure to timely respond and requested that the Bar file the Petition with the Florida Supreme Court (TR 61, TFB Ex. 9, RR 9). The Bar filed its Petition on May 11, 2018. By order dated May 14, 2018, the Florida Supreme Court issued an order directing Respondent to show cause why she should not be held in contempt (TR 61, TFB Ex. 10).

On May 29, 2018, Respondent filed the Response to the Supreme Court (TR 62-63, TFB Ex. 11). In it, Respondent reiterated the same claims and contentions regarding her failure to respond to each inquiry as in the Response to Committee, including the lack of due date on the January 22, 2018 letter, that because of Respondent's busy schedule she did not get to it right away, and that her mother fell ill and was hospitalized from February 4, 2018 through February 12, 2018, and was then moved to a rehabilitation facility in which she remained until March 3, 2018 (TR 64-65, TFB Ex. 11). The Response to the Supreme Court stated that the March 7, 2018 letter terrified Respondent and it reminded her that she had failed to respond to the January 22, 2018 letter (TR 66, TFB Ex. 11). The Response to the Supreme Court also stated, "As the only child living in Florida, the care of her mother was, as always, all in Ms. Altman's hands" (TR 65, TFB Ex. 11).

Respondent admitted that she reviewed and approved the Response to the Supreme Court prior to her attorney filing it with the Florida Supreme Court (TR 65).

When Respondent reviewed the document stating that she was the **only** child living in Florida, it was not accurate, but it seemed accurate to Respondent (TR 101, 102). Respondent testified that she must have understood the statement as she is the only child in Florida who cares for her mother (TR 101).

Respondent testified that she had no valid excuse for her failures to respond except that she placed her clients first, she was worried about her mother while caring for her, and she was terrified of the Bar issues and could not understand the chronology of the Bar matter, from it being dismissed initially to the Bar asking more and more questions (TR 117). Respondent testified that she never said that she would not respond, that she intended to respond, but she did not get to it (TR 118).

Respondent pays for her son's tuition, living expenses and health insurance since he returned to school (TR 152). Respondent is financially responsible for her son, and her employees, and legally responsible for her clients (TR 152). Respondent testified that the Bar should have come first, she was wrong and takes full responsibility (TR 153).

When Respondent received the Bar's letter regarding the grievance committee considering her failure to respond, she contacted Dr. Weinstein of Florida Lawyers Assistance, Inc. (hereinafter referred to as "FLA") and then called the Bar (TR 155-156, RR 7). Not until Respondent received the grievance committee's letter, when she was faced with possible contempt, did she take action (TR 175). On April 3, 2018, Respondent spoke with Bar counsel and learned that any responses should be directed to the grievance committee (TR 157, RR 7). Respondent telephoned Dr. Weinstein for advice. Dr. Weinstein advised her to hire attorney David Rothman (TR 158, RR 7). Respondent contacted David Rothman the following day and began working with him to prepare all the documents (TR 159). Respondent reviewed the response to the grievance committee many times and ratified it (TR 159, RR 7). Respondent wrote a letter of apology to the Investigating Member and attached it to the Response to the Committee, stating, in pertinent part, "I timely responded to your first inquiry and provided those documents requested." (TR 160-161, TFB Ex. 8). On cross-examination by the Bar, Respondent admitted the first letter of inquiry was the November 21, 2017 letter and that she did not respond timely to the Investigating Member's first inquiry as stated in the apology letter (TR 176).

Respondent did not respond out of fear and procrastination, but she knew based on her prior experience what was ultimately going to happen (TR 163). Respondent did not believe that the Bar was being disrespectful by making their inquiries nor did she think of slowing down or preventing the investigation (TR 164). Respondent testified that the last eight months have been awful for her and it is all her fault that her witnesses had to be called to testify, that the Bar had to spend so much time repeatedly requesting things that she had and that the Referee had to hear this case (TR 164-165).

The Bar read portions of Respondent's deposition into the record, in which she made the following admissions:

- She did not respond to the November 21, 2017 letter because "I had some family issues that were pressing at the time and the letter didn't have a response date on it and I believe that my other responses were sufficient." (TR 178-180, TFB Ex. 16).
- When she received the November 21, 2017 letter, she did not know how much time she was allowed to respond and that she committed the very serious mistake of doing nothing to research the time allowed by the rules (TR 181-182, TFB Ex. 16).

- She failed to respond to the January 22, 2018 follow-up letter because “I had felt that I had responded to the two letters. I had given my file to Mr. Weiss." (TR 182, TFB Ex. 16).
- She did not respond to the March 7, 2018 letter because I had my mother in the hospital and in the rehab center. I put everything in the office first and, again, I just put this last." (TR 183, TFB Ex. 16).
- Based on her prior experiences in various disciplinary proceedings, Respondent knew the importance of responding to the Bar and what it could lead to by not responding (TR 185, TFB Ex. 16).
- Respondent described the alleged fear in her Response to the Supreme Court as follows:

  > I felt that I had responded and I felt that I had given the Bar at this point--I know late--but what they had asked for and then additional things just to cover the fact that here's the file and here's the emails--not emails--here's my computer files as opposed to paper files and everything like that. I just felt that I was very--that there was something was going on to--that maybe people wouldn't understand immigration law or how it works or why was there more questions and more questions.

(TR 183-184, TFB Ex. 16).

- When asked to further explain the fear, Respondent said, "The only fear, if you can really call it fear, I would have had would have been to try to

understand why the Bar was--kept asking for more when I felt that I had given them what I had." (TR 184, TFB Ex. 16).

Paul Auerbach, who has been an attorney since 1955, testified that he met Respondent at a North Palm Beach Bar Association meeting in 1991 or 1992, which he attended shortly after moving to Florida from New York (TR 187-188). Auerbach currently practices elder law, but formerly practiced criminal defense (TR 187). He was shocked by the size of Respondent's practice and the way she worked. She went to court in the morning from Palm Beach County to Miami and sat working with clients in her office the rest of the evening, until 5 or 6 o'clock (TR 189-190). Auerbach testified that with the amount of cases and the work volume that Respondent has, it is a miracle that she only made this mistake (TR 191-192). He testified Respondent is honest, diligent and respectful to the courts (TR 193-194, RR 10). Auerbach also testified, "With regard to the complaint that's before this Court, I find that unusual. It defies [Respondent's] personality to say that she didn't take care of something that she was supposed to." (TR 191, RR 10). With regard to Auerbach's testimony, the Referee found, "Based on the foregoing statement, the undersigned Referee questions how familiar the witness is with the Respondent's professional character in light of the fact she had been previously disciplined on four previous occasions for very similar conduct." (RR 10-11).

Myranne Feinstein, grew up with Respondent and has known her for 62 years, since she was eight years old. They were inseparable until Respondent got married (TR 195-196). Feinstein testified that Respondent is a great friend, compassionate, honest and reliable. Respondent's mother's healthcare has fallen to Respondent alone (TR 197, RR 11). Feinstein also has stepped in to help (TR 197). Respondent also cares for her son, who has health problems. When Respondent's mother fell ill, Feinstein took Respondent's mother to the hospital, had her admitted and took her home (TR 198). The siblings never called Feinstein to check on their mother (TR 198).

Patrick J. Dugan, Feinstein's domestic partner, met Respondent through Feinstein, 18 years ago (TR 201, RR 11). Dugan was a lieutenant commander in the New York Police Department (TR 202, RR 11). He finds Respondent to be warm, proud of her profession and her family (TR 202). He has observed Respondent with her family, and she is very caring, steady, loving and a compassionate person (TR 204, RR 11).

Shelley Sellinger, a board-certified psychiatrist who has known Respondent for about 32 years, testified that Respondent's former deceased husband and her husband were OB-GYN residents at Albany Medical Center together in the 80's (TR 206, RR 12). Sellinger believes Respondent to be a loving, caring and selfless

person (TR 208). Respondent takes care of everyone else, including her siblings, friends, or clients to her own detriment (TR 208, RR 12).

Pasqual Mendez, a 24-year-old student who lives with his mother and two siblings, testified that he has been employed as Respondent's legal assistant for five years (TR 210, RR 12). Mendez testified that he was born in Guatemala, he came to the United States when he was two years old, and he currently has DACA status (RR 12). Mendez testified that Respondent is very honest, caring, and responsible (TR 212). Respondent allows for a flexible work schedule, accommodating and encouraging Mendez' school attendance and curriculum (TR 213). In the years he has been working with Respondent, he has never seen Respondent be disrespectful, less than diligent with her cases, with her mother or with her son (TR 214). Respondent never expressed anger or lack of respect for the Bar. Respondent has made it possible for him to learn about the immigration process and to go to school, while paying his own tuition (TR 216). On cross-examination, Mendez admitted that he knew of Respondent's disciplinary history of failing to respond to the Bar and subpoenas, and that he did not think that it is respectful or responsible to fail to respond to the Bar (TR 217). Mendez testified that if Respondent were to get disbarred, he would have to find a new job (TR 218, RR 13). Mendez further testified that he agreed to testify to help his boss so that he could continue to work

for her and help aid her in continuing to help her immigrant clients, including himself (TR 218).

Dr. Scott Weinstein, the Clinical Director of FLA, testified that he manages the mental health and dual diagnosis components of the program (TR 224-225). Dr. Weinstein received a Bachelor of Science in psychology, a Master's of Science in psychology and a PhD in psychology (TR 227). Dr. Weinstein's employment at FLA began in 2004. Dr. Weinstein first met Respondent in late 2004, when Respondent was sent to FLA as a condition of probation in one of her disciplinary cases (TR 228, RR 9). Respondent attended weekly group sessions for almost a year (TR 230). Respondent was not good at taking care of herself which was the gist of the group therapy sessions (TR 233). Dr. Weinstein's insight from what he remembers of Respondent (when he treated her 13 years prior) is that she had the propensity to put everything else before herself (TR 235, RR 10). In dealing with Respondent for the one year, Dr. Weinstein opined that Respondent is an honest and sincere person, who accepted responsibility for what she did in the past (TR 235-236).

Since Respondent's last therapy session at FLA ended 12 years ago, Dr. Weinstein has not met with Respondent in person. He has only spoken with Respondent over the telephone two to four times, including once within the last

year when a client passed away and two times this past April (TR 230, 239-240). Dr. Weinstein has never been to Respondent's law office, met her staff, her family or her friends, other than in therapy (TR 241). All he knows of Respondent is what he has seen in the group therapy sessions over 12 years ago (TR 241).

When Respondent left therapy, Dr. Weinstein had no reason to believe that Respondent would fail to timely respond to the Bar (TR 242, RR 10). Following an evaluation of Respondent by Dr. Sealy in 2005 and after a cursory review of Dr. Sealy's written report, Dr. Weinstein initially opined that perhaps Respondent was just a little above having to answer to an authority (TR 243). He testified that his opinion changed during group therapy where the members support each other, and attorneys work at self-awareness (TR 244).

Dr. Weinstein was informed generally why the Bar is seeking contempt against Respondent, but he was not informed of the specifics such as the letters she failed to respond to or how many times she failed to respond, or when her mother became ill (TR 250). The Referee gave "little weight to [Dr. Weinstein's] testimony due to the approximately twelve year time gap." (RR 10).

In regard to her disciplinary history, Respondent testified, and the records indicate, as follows:

- By Supreme Court Order dated April 25, 2002, in SC01-1199, Respondent was publicly reprimanded and placed on probation for one year for failing to respond to the Bar multiple times and for failing to respond to her client for an extended period of time (TR 81-82, 85, TFB Ex. Composite 12).
- By Supreme Court Order dated April 14, 2005, in SC04-1659, Respondent was suspended for 30 days and placed on probation for one year for failing to file an appellate brief for a client, which prompted an order from the Board of Immigration Appeals ordering her client to voluntarily depart from the country (RR 29). Respondent failed to inform the client of such order (TR 86-88, TFB Composite Ex. 13, RR 29). As a result, the client was not allowed to voluntarily depart and was ordered removed (TFB Composite Ex. 13, RR 29). During the disciplinary proceedings, Respondent failed to respond to the Bar Complaint and subsequently failed to respond to the investigating member's inquiries on numerous occasions (TFB Composite Ex. 13).
- By Supreme Court Order dated November 10, 2005, in SC05-715, Respondent was suspended for 30 days, to be served concurrent with the 30-day suspension imposed in SC04-1659, and placed on probation for one year for failing to respond to two letters requesting a response to a grievance and

failing to appear and produce her client file pursuant to a valid subpoena duces tecum before the grievance committee (TR 89, TFB Composite Ex. 14, RR 29-30).

- By Supreme Court Order dated July 7, 2006, Respondent was suspended for failing to comply with two subpoenas. Respondent failed to comply with said subpoenas from May 31, 2006 to July 10, 2007, resulting in a suspension of over one year (TR 94-96, TFB Composite Ex. 15, RR 30). Respondent also failed to respond to the Florida Supreme Court's Order to Show Cause.

Respondent stipulated that in her prior disciplinary cases she failed to appear before grievance committees, respond to subpoenas and court orders, and that she received different punishments.

The Referee recommended that Respondent be held in contempt, publicly reprimanded and placed on probation for a period of five years, with the special condition that Respondent's counsel supervise her during her probation. (RR 26). The Referee found the following three aggravating factors: prior disciplinary offenses, substantial experience in the practice of law, and multiple offenses (RR 24). The Referee found the following five mitigating factors: Personal or emotional

problems, timely good faith effort to rectify consequences of misconduct, character and reputation, remorse, and remoteness of prior offenses (RR 24-25).

The Bar filed its Notice of Intent to Seek Review on March 15, 2019 challenging the disciplinary sanction.

SUMMARY OF ARGUMENT

Respondent failed to respond to three letters from The Florida Bar's Investigating Member, investigating allegations that Respondent engaged in ineffective assistance of counsel. The first letter of inquiry, dated November 21, 2017, went unanswered. Respondent responded to the second letter dated January 3, 2018. Respondent then failed to respond to two consecutive letters dated January 22, 2018 and March 7, 2018. Upon receipt of all the letters, knowing that she needed to respond, Respondent placed them in a "to do" pile. Not until Respondent was facing possible contempt and suspension did Respondent respond. Tellingly, the grievance committee was eight days away from considering Respondent's contemptuous conduct when Respondent responded. Further, in both her Response to the Committee and Response to the Supreme Court, Respondent exhibited a lack of candor.

The Referee found Respondent to be in contempt and recommended the imposition of a public reprimand and five years of probation with conditions that Respondent's counsel supervise her to ensure that she obtain an evaluation by FLA, participate in any recommended counseling and participate in a review by The Practice Resource Institute of The Florida Bar.

The Referee's recommendation has no reasonable basis in existing case law or Florida's Standards for Imposing Lawyer Sanctions. Based on Respondent's conduct in the instant case and her extensive disciplinary history involving similar misconduct, disbarment is the only appropriate sanction.

ARGUMENT

DISBARMENT IS THE ONLY APPROPRIATE DISCIPLINE FOR RESPONDENT'S HABITUAL FAILURE TO RESPOND TO THE BAR, GRIEVANCE COMMITTEES, CLIENTS, SUBPOENAS AND THE FLORIDA SUPREME COURT AND FOR HER MISREPRESENTATIONS REGARDING MITIGATING CIRCUMSTANCES

This Court's scope of review over disciplinary recommendations is broader than that of findings of fact because it is this Court's responsibility to order the appropriate discipline. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989). See also Art. V, §15, Fla. Const. "The Supreme Court shall have exclusive jurisdiction to regulate…the discipline of persons admitted to the practice of law." The Court usually will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Temmer, 753 So.2d 555 (Fla. 1999). The recommendation of a public reprimand and five years of probation with conditions has no reasonable basis in existing case law or in Florida's Standards for Imposing Lawyer Sanctions. Disbarment is the appropriate sanction.

This is the fifth disciplinary case in which Respondent has effectively thwarted a Bar investigation. From the inception of the grievance, on May 17, 2016, Respondent was notified that rule 4-8.4(g) required a response (RR 3, R Ex.

2). The January 3, 2018 and the March 7, 2018 letters also contained courtesy notifications regarding the timeframe allowed by rule 4-8.4(g)[4] (RR 6, TFB Ex. 2, 5). Despite these courtesy notifications and Respondent's extensive disciplinary history violating rule 4-8.4(g), Respondent maintained throughout these proceedings that she did not know the timeframe mandated by the rule. Incredibly, Respondent alleged that she failed to respond because two of the five letters did not contain a due date.

As found by the Referee, Respondent's excuses fall short and are belied by her four prior disciplinary cases in which she has been placed on probation three times, suspended twice, and held in contempt and suspended effectively for a year for failing to respond to the Bar (RR 8, TFB Ex. 8, 11, 12). Respondent further contended that her failure to respond to the January 22, 2018 letter was due to her mother's health and Respondent's busy law practice. The Referee found these reasons inexcusable and unacceptable, which only leaves Respondent's statement that she felt that she had "sufficiently responded" in her initial response, as the remaining reason for her failure to respond. It is incredible that Respondent, a

[4] Although the Referee found that it was the second time that Respondent had been notified of the timeframe allowed by the rule, the record exhibits reflect that the March 7, 2018 letter is the third letter with such notification.

lawyer who has been disciplined four times for thwarting disciplinary investigations, stated that she failed to respond to multiple inquiries in a fifth investigation because she felt that she had "sufficiently responded." These statements provide clarity and insight as to Respondent's state of mind.

The Referee found that "Respondent has clearly demonstrated a pattern of non-responsiveness to Bar inquiries. Based upon her history, Respondent knew or should have known of the requirements mandated by Rule Regulating The Florida Bar 4-8.4(g)." (RR 8). Standard 8.1 of Florida's Standards for Imposing Lawyer Sanctions states, "Disbarment is appropriate when a lawyer has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct."

In the instant case, Respondent engaged in the same exact misconduct as she did in all four of her prior disciplinary cases (RR 8, TFB Composite Ex. 12-15). Respondent has previously been suspended and placed on probation for the very same misconduct (TFB Composite Ex. 12-14). Further, this Court granted the Bar's Petition for Contempt and Order to Show Cause in 2006, suspending Respondent until she "certified compliance with the two separate subpoenas duces tecum" issued by the grievance committee (TFB Composite Ex. 15). It took Respondent over a year to do so. Undeterred by this year long suspension,

Respondent continues to intentionally thwart Bar investigations. The Florida Bar v. Russell-Love, 135 So.3d 1034 (Fla. 2014)(finding that in order to establish intent, it must only be shown that the conduct was deliberate or knowing.). Respondent admitted that she knew that she had to respond and the consequences of failing to respond. When she received the March 7, 2018 letter, she knew she had not responded to the January 22, 2018 letter, yet she placed it in the pile of things "to do" with the other letters that she failed to respond to (RR 6).

Respondent is 70 years old and has been thwarting Bar investigations since 1998, six years after being admitted to The Florida Bar. Respondent is not amenable to rehabilitation. Placing Respondent on probation in the past has not served to correct her non-responsiveness or deter her from future offenses of the same kind. Respondent's non-responsiveness in the case *sub judice* has created significant work for the Bar and multiple grievance committees. The Bar not only had to send multiple communications and expend time drafting documents before the grievance committee, it has expended an exorbitant amount of time litigating this matter. Sending Respondent back to FLA for the fourth time after obstructing

the Bar's investigation in a fifth matter, without any diagnosis or any apparent ailment[5], is not consistent with this Court's practices.

This Court has generously placed Respondent on probation three times. She has also been suspended twice and most recently for over one year. Undeterred, Respondent continues to obstruct the disciplinary process. This Court views cumulative misconduct more seriously than an isolated instance of misconduct, and cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct. The Florida Bar v. Walkden, 950 So.2d 407, 410 (Fla. 2007). The Referee acknowledged that "in more recent years the [Florida Supreme] Court has imposed even more severe discipline for unethical and unprofessional conduct than in the past." The Florida Bar v. Parrish, 241 So.3d 66, 80 (Fla. 2018) (RR 24).

In The Florida Bar v. Horowitz, 697 So.2d 78 (Fla. 1997), this Court found that even clinical depression did not sufficiently mitigate a pattern of neglecting clients and failing to respond to communications from the Bar. In recommending disbarment, the Referee in Horowitz wrote:

> In this case any discipline less than disbarment would not be sufficient to protect the public and would not have a deterrent effect against

[5] Notably, there was no testimony by any witness pertaining to any diagnosis that would require Respondent to obtain treatment or therapy.

> similar, future misconduct. It is imperative that a clear and unmistakable message be sent that callous disregard for clients, The Florida Bar, and the attorney disciplinary process are serious infractions which may not be committed with impunity.

Horowitz, 697 So.2d at 83.

In upholding the referee's recommendation of disbarment, the Florida Supreme Court stated as follows, "We specifically note that in a past disciplinary proceeding, Horowitz received an admonishment for failure to adequately communicate with his clients. He also was placed on probation and ordered to undergo LOMAS review." Id. at 84. This Court further noted "that Horowitz' pattern of wrongdoing and his prior disciplinary history require his disbarment." Id. at 84.

In The Florida Bar v. Walkden, 950 So.2d 407 (Fla. 2007), this Court disbarred Walkden after The Florida Bar filed a Petition for Contempt alleging that Walkden continued to practice law after the effective date of his suspension. Similar to the case *sub judice*, Walkden had already been held in contempt once before and suspended for one year. In its analysis, this Court reasoned:

> Disbarment is appropriate where, as here, there is a pattern of misconduct and a history of discipline. Additionally, cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct.
>
> * * *

> The Court has sanctioned Walkden three times previously, imposing increasingly heavier sanctions, progressing from a ninety-day suspension, to a ninety-one-day suspension (for violating the terms of his probation), to a one-year suspension. The next level of discipline is disbarment.

Walkden, 950 So.2d at 411; see also The Florida Bar v. Cox, 718 So.2d 788 (Fla. 1998)(holding that "Disbarment is appropriate where, as here, there is pattern of misconduct and history of discipline.").

In 2006, this Court granted the Bar's Petition for Contempt and suspended Respondent. The instant proceeding is the second time this Court has granted the Bar's Petition for Contempt for the same conduct.

In mitigation, the Referee found that Respondent's latest Bar matter concluded in 2007, or 11 years ago (RR 25). The sheer number of Respondent's prior disciplinary cases involving the same misconduct should extinguish any weight given to this mitigating factor. The Florida Bar v. Varner, 992 So.2d 224 (Fla. 2008)(finding that the Referee properly concluded that the remoteness of the prior disciplinary history did not mitigate attorney's misconduct because the facts of the most recent disciplinary case were very similar to that of the present case).

Tellingly, after receiving notice that her failure to respond would be considered by the grievance committee for a possible contempt finding, Respondent responded to the grievance committee. Only when Respondent was on

the edge of possible suspension did she take action. Respondent submitted the Response to the Committee, attaching to it her answers to the January 22, 2018 and March 7, 2018 inquiries.

In the Response to the Committee, Respondent misrepresented her family situation by stating that she was the **only** child living in Florida, when in fact Respondent has two sisters living in this state. By her own admission, Respondent reviewed, authorized and ratified the Response to the Committee prior to sending it to the grievance committee (TFB Ex. 16). Although the Referee did not make a finding regarding a misrepresentation to the Florida Supreme Court, the Response to the Supreme Court had that very same statement[6]. The Bar does not lack empathy regarding Respondent's family situation, however, Respondent must be forthright in her representations. "This Court does not view dishonesty as minor …. 'Basic, fundamental dishonesty … is a serious flaw, which cannot be tolerated.'" The Florida Bar v. Rousso, 117 So.3d 756 (Fla. 2013) (citing to The Florida Bar v. Rotstein, 835 So.2d 241, 246 (Fla. 2002)). The Referee found that "this misrepresentation was an attempt to minimize her culpability in failing to

[6] See The Florida Bar v. Tuerk, Case No. SC17-62 (Fla. July 20, 2017). This Court disbarred an attorney for misrepresenting to this Court that he did not receive notice of court proceedings.

timely respond." (RR 9). This misrepresentation is material because it was made in order to obtain leniency from the grievance committee and the Florida Supreme Court. Respondent portrayed her situation as "the only child living in Florida" to obtain such results and to justify her failure to respond. This misrepresentation found by the Referee serves to increase any sanction imposed.

In addition, although not addressed by the Referee in her Report, Respondent's apology letter to the Investigating Member also contains a blatantly false statement stating, "I timely responded to your first inquiry and provided those documents requested." (TR 160-161, TFB Ex. 8). Respondent admitted that she did not respond timely to the first inquiry, but only after questioning by the Bar (RR 9). Moreover, the letter of apology set forth this misrepresentation in an attempt to have the Bar's Request withdrawn (RR 7).

Given that this is Respondent's fifth disciplinary case in which she has engaged in conduct that intentionally thwarted a Bar investigation, and she has made misrepresentations during these proceedings, the only appropriate sanction is disbarment.

CONCLUSION

Based on the foregoing argument and citations of authority, The Florida Bar respectfully requests that this Court reject the Referee's disciplinary recommendation and disbar Respondent.

Linda Ivelisse Gonzalez, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this Initial Brief has been Efiled with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, with a copy provided via email to David Bill Rothman, Respondent's Counsel, Rothman & Associates, PA, 200 S. Biscayne Blvd., Suite 2770, Miami, FL 33131-5300, at dbr@rothmanlawyers.com and jtm@rothmanlawyers.com; using the Efiling Portal, and to Staff Counsel, The Florida Bar, via email at aquintel@floridabar.org, on this 28th day of March, 2019.

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Linda Ivelisse Gonzalez, Bar Counsel