IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RYAN F.C. MITCHELL,

Respondent.

_____/

Supreme Court Case No. SC23-0869

The Florida Bar File Nos.
2022-30,321 (09A)
2022-30,423 (09A)

REPLY BRIEF

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REPLY ARGUMENT

I. Aggravating and mitigating factors:

The bar argued that the referee erred in finding that payment of court ordered restitution was a mitigating factor under the plain language of Standard 3.4(a). Specifically, Standard 3.4 lists factors that "are not considered as either aggravating or mitigating." The first factor listed is "forced or compelled restitution." Mr. Mitchell argues that it should be a mitigating factor because he "expeditiously paid the restitution figure." (AB:28). There is no carve out in Standard 3.4(a) that states that compelled restitution becomes a mitigating factor if the respondent complies quickly.

The answer brief next asserts that the referee did not err in finding that Mr. Mitchell was cooperative in the disciplinary proceedings. This is a mitigating factor that is often argued, even when there is no required showing that a respondent's cooperation was "above and beyond the normal cooperation expected of every member of the Bar." *The Florida Bar v. Herman*, 8 So. 3d 1100, 1107 (Fla. 2009). Notably, Mr. Mitchell does not argue that his degree of cooperation went above and beyond normal cooperation. After denying that he violated any bar rules in his answer to the formal complaint, he waited until trial to stipulate that he would not be

contesting his criminal conduct, to which he had already pled no contest. Then he offered testimony challenging one of those pleas of no contest anyway; specifically, he claimed he did not throw his wife's phone in the pool, which was the basis for the criminal mischief charge. (See T1:72-73). The bar is not asserting that Mr. Mitchell engaged in bad faith obstruction of the disciplinary proceedings, which is an aggravating factor under Standard 3.2(b)(5). But he did not go above and beyond in his cooperation with the proceedings either.

In asserting otherwise, Mr. Mitchell argues that his April 4, 2023 letter to the bar, which labeled his wife as the aggressor and Mr. Mitchell as the victim who left the house to calm the situation, should not be held against him. (AB:28-29). Specifically, he falsely claims that the bar's argument regarding his level of cooperation "boils down to the notion that Mitchell . . . didn't sufficiently cooperate because he, through counsel, had refrained from filing patently damaging pleadings with the bar back during the time he was facing felony battery and felony criminal mischief charges." (AB:29). The bar's argument did not "boil down to" Mr. Mitchell's failure to immediately incriminate himself; it was based on argument that Mr. Mitchell's level of cooperation was not "above and beyond," as required for the mitigating factor to apply.

Contrary to the mischaracterization in the answer brief, the bar did not assert that Mr. Mitchell could only cooperate by immediately incriminating himself while criminal charges are pending. Mr. Mitchell's counsel appropriately requested that the bar exercise its discretion under Rule 3-4.4 and withhold prosecution of disciplinary proceedings pending the outcome of the disciplinary matter. (R.117). The bar is not asserting that this initial letter established Mr. Mitchell's lack of cooperation. Mr. Mitchell's counsel did not offer a version of events at that point in time.

Instead, *after* Mr. Mitchell pled no contest to two misdemeanors, he *then* offered his version of events, which diverted all focus to his wife's alleged actions and completely omitted disclosure of the multiple times Mr. Mitchell punched his wife in the face in anger—not in self-defense. (R.167). He was not facing felony battery and felony criminal mischief charges when he provided this accounting of events. He was also not merely providing the full context of events from his perspective, despite claims to the contrary throughout the answer brief. Though the answer brief repeatedly asserts that Mr. Mitchell was entitled to provide context for his no contest pleas, this was the so-called "context" regarding his actions that he provided in a letter to the grievance committee:

> When Mr. Mitchell awoke, he saw Mrs. Mitchell kneeling next to him, fully clothed, and holding an iPhone in his face with the

> camera light on. As Mr. Mitchell was lying there, hands beneath his pillow, Mrs. Mitchell started screaming, “Stop hitting me, stop hitting me!” while continuing to film Mr. Mitchell. Thereafter, they began arguing and it became physical. Mr. Mitchell left the house in order to calm the situation.

(R.167). Mr. Mitchell cannot in good faith assert that his letter was a full accounting of events, when his crimes are hidden behind the words “it became physical,” and even though he had a perfect recollection of every alleged action by his wife. Mr. Mitchell was not providing exemplary levels of cooperation with the bar’s investigation by offering this sporadic accounting of events.

The bar argued that the referee either erred in finding or afforded too much weight to the mitigating factor of remorse under Standard 3.3(b). The bar’s argument was predicated on the sheer amount of victim blaming and the heavily qualified, perfunctory nature of Mr. Mitchell’s testimony regarding his remorse for battering his wife. (IB:31-34). Even if the mitigating factor applies, the bar asserts that it should be afforded little weight. The answer brief concludes that the bar’s argument “misses the mark” because the referee found Mr. Mitchell’s expression of remorse to be credible. (AB:29). Mr. Mitchell also asserts that he was merely exercising his due process right in asserting that he fell into a trap, and that his wife somehow knew she could goad him into committing a violent crime against

her—even though he testified that he either never hit his wife before that night or he did not recall doing so. (AB:29; T1:86). The answer brief argues that Mr. Mitchell can provide context while also being remorseful for the injury caused. (AB:29-30). Notably, when arguing that Mr. Mitchell expressed remorse, his own counsel noted that "he's obviously working through some issues here." (T1:238). Mr. Mitchell heavily qualified his expressions of remorse, and the weight afforded this mitigating factor should be either none at all or minimal.

II. The referee's rejection of FLA, Inc.'s recommendation of a one-year contract:

Mr. Mitchell's use of alcohol is a significant problem when he wishes to use it as mitigation for his misconduct, but it is also a problem he fully resolved when arguing that he should not be subject to a one-year, FLA, Inc. contract. (AB:30-31). Mr. Mitchell sees no contradiction in this logic. Instead, he simply offers assurances that he will be able to self-moderate once his criminal probationary period is over. His drinking is always phrased in terms of being a past problem already resolved. His level of wine consumption was a contributing factor to the toxicity in his marriage. (AB:9). He drank excessively during the height of the pandemic. (AB:12). He beat his wife after a night of drinking on September 21, 2021, but he claims that immediately after, he "dramatically cut back his alcohol

consumption through self-moderation." (AB:12). But after he was placed on criminal probation, he was no longer self-moderating when abstaining from alcohol, because abstinence from alcohol was a condition of his probation. The answer brief fails to address Mr. Mitchell's unsuccessful effort to modify his probation so that he could keep drinking, after a mere two months of probation. (T1:162-63). When asked about this effort, Mr. Mitchell claimed that it "wasn't that important to [him]" and he "never craved" alcohol. (T1:163; T1:185). Mr. Mitchell has repeatedly claimed that he does not have a drinking problem and that any problem he may have had in the past has already been fully resolved. Now he argues that his court ordered sobriety at the time of the disciplinary proceeding demonstrates that he is able to self-moderate in the future. (AB:30). He also completely discounts the diagnosis that he has "alcohol use disorder" as a generic label used when a person has 3 or 4 drinks "coupled with some legal intervention." (AB:16).

The issue is not that Mr. Mitchell sometimes has three or four drinks in a night; the issue is his conduct after having multiple drinks, and his explanation that he was drinking too much during that period. The bar's recommendation that the sanction imposed on Mr. Mitchell include a mandatory FLA, Inc. contract was based on the recommendation of a

licensed evaluator with FLA, Inc. following a comprehensive psychiatric and substance abuse evaluation. Mr. Mitchell merely disputes the need for the FLA, Inc. contract. He asks this Court to accept his own assurances that multiple doctors told him that they did not recommend that he had a substance abuse problem and needed treatment. (AB:13). Dr. Pittington never testified that Mr. Mitchell would not benefit from such treatment, and the answer brief makes no assertion to the contrary. (See AB:15-16). The answer brief references Mr. Mitchell's therapist, Dr. Kevin Mertens, but Dr. Mertens did not testify in the proceeding. (AB:11). Instead, Mr. Mitchell relied on testimony from Kourtney Nash, a clinical evaluator who did not diagnose Mr. Mitchell with alcohol use disorder and did not conduct the substance abuse psychoeducation course referenced in her report. (See IB:39).

Mr. Mitchell claims that he has already been rehabilitated from a previously existing alcohol problem. No doctor who conducted a substance abuse evaluation offered testimony in the disciplinary proceeding establishing that a one-year FLA, Inc. contract is not necessary. An affidavit submitted by the clinical director of FLA, Inc. explained that Mr. Mitchell underwent a comprehensive psychiatric and substance abuse

evaluation on February 20, 2023, which resulted in the one-year contract recommendation. (R.228).

The referee lacked sufficient evidence to reject the recommendation, given the absence of a contrary opinion by another licensed evaluator or doctor who performed a substance abuse evaluation. An alternative requirement that Mr. Mitchell continue private therapy until the end of his criminal probation is meaningless given that Mr. Mitchell's probation will "end around June or July of 2024." (AB:26). The answer brief does not assert otherwise.

Given the circumstances of Mr. Mitchell's criminal conduct, the misconduct at issue is not appropriately redressed by a public reprimand without any further monitoring.

III. Case law:

The answer brief offers distinctions to case law cited in the bar's brief, arguing that these cases involved more severe misconduct and do not establish a 90-day suspension as the appropriate sanction. (AB:31-37). Notably, the answer brief only cites to one written opinion of this Court imposing a public reprimand. (AB:34 (citing *The Florida Bar v. Bartholf*, 775 So. 2d 957 (Fla. 2000)). The bar's initial brief noted that there is no description of the injuries inflicted on the victim of the respondent's battery,

and *Bartholf* was decided before this Court's recent decisions imposing stronger sanctions for lawyer misconduct. This is especially significant because more recently in *The Florida Bar v. Roberts II*, Case No. SC20-142, 2020 WL 2204804 (Fla. May 7, 2020) (unpublished disposition), this Court suspended a lawyer for 45 days even though there were no visible injuries or marks on the victim other than an old injury unrelated to the domestic violence. Although *Roberts* is an unpublished disposition, it is clear that domestic violence by a respondent warrants a suspension.

The only other authorities cited by Mr. Mitchell imposing a public reprimand are unpublished decisions accepting consent judgments. In *The Florida Bar v. Hoag*, Case No. SC21-1683, 2021 WL 6012710 (Fla. Dec. 16, 2021) (unpublished disposition), there is no description of the basis for the respondent's nolo contendere plea to misdemeanor domestic violence, *and* the respondent voluntarily entered into a three-year monitoring contract with FLA, Inc. In *The Florida Bar v. Moeller*, Case No. SC16-651, 2016 WL 4138256 (Fla. Aug. 4, 2016), there was no conclusive determination of guilt establishing that the respondent fired a gun at or near his wife, because the respondent's wife would not cooperate with law enforcement. Neither of these cases apply here, given the extent of Ms. Mitchell's injuries and Mr. Mitchell's admission that he punched his wife in the face several times.

In support of the bar's assertion that Mr. Mitchell should be suspended for 90 days, the bar argued *The Florida Bar v. Schreiber*, 631 So. 2d 1081 (Fla. 1994). Mr. Mitchell argues that this case is distinguishable because Mr. Shreiber did not cooperate in the disciplinary proceedings. (AB:32). Mr. Mitchell's level of cooperation in his disciplinary proceeding was not particularly noteworthy, as argued *supra*. The one aggravating factor is not the difference between a public reprimand for Mr. Mitchell and a 120-day suspension in *Schreiber*. Perhaps recognizing this fact, the answer brief then offers that Mr. Schreiber's misconduct "may have gone well beyond an isolated instance of an argument becoming physical." (AB:32). Mr. Schreiber pled no contest to a single charge. *Id*. at 1081. Mr. Mitchell cannot distinguish case law by speculating on additional facts not included in this Court's written opinion.

CONCLUSION

For the above stated reasons, The Florida Bar asks this Court to approve the referee's findings of guilt regarding Rules 3-4.3 and 4-8.4(b). The bar asks this Court to reject the referee's recommended sanction of a public reprimand and instead impose a 90-day suspension from the practice of law followed by a one-year probationary period to include a one-

year dual diagnosis contract with FLA, Inc. as the appropriate sanction in this case.

Respectfully submitted,

Mark Lugo Mason, Bar Counsel

CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 23rd day of April, 2024, and a true and correct copy of the foregoing has been furnished via e-service to Thomas Delvin Sommerville, Attorney for Respondent, 820 N Thornton Ave, Orlando, FL 32803-4003 at tom@sommervillelaw.com.

Mark Lugo Mason, Bar Counsel

CERTIFICATE OF TYPE SIZE & STYLE

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Mark Lugo Mason, Bar Counsel