IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	Supreme Court Case NO.: SC02-111

Complainant.

v.

JEANETTE ELIZABETH SMITH,

Respondent.

_______________________________/

RESPONDENT'S REPLY 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 Trial Transcript will be referred to as "TT" followed by the referenced page number(s) (TTat_____)

The Report of Referee dated October 9, 2002, will be referred to as "ROR" followed by the referenced page number(s) (ROR-A-____).

The Florida Bar's Answer Brief will be referred to as "AB" followed by the referenced page number(s). (AB at ___).

SUMMARY OF THE ARGUMENT

The Bar's answer brief provides no argument to support the Referee's findings that The Florida Bar v Moran, 273 So.2d 379 (Fla. 1973) and The Florida Bar v. Cramer, 643 So.2d 1069 (Fla. 1994) are not as egregious as the case at bar and therefore need not be considered. The Bar's answer brief refuses to distinguish these cases factually. By failing to consider Moran and Cramer, the Referee abused her discretion and failed to comply with the purpose and goal of the Florida Standards for Imposing Lawyer Sanctions.

The Bar's answer brief does not provide any credible explanation as to why the Referee's Report does not contain any specific findings as to intent and therefore the finding of guilt as to Rule 4-8.4(c) of the Rules regulating The Florida Bar cannot stand.

The Bar, it is answer brief, ignores the driving force behind Respondent's conduct, i.e. her physical and mental condition, and the compelling testimony regarding Respondent's character, good reputation and service to the downtrodden. A two year suspension would therefore be a harsh and indurate punishment, and self-defeating punishment.

RESPONSE AND REBUTTAL TO ARGUMENTS PRESENTED IN ANSWER BRIEF

The Bar contends in its answer brief that the four cases relied upon by the Referee in reaching her recommendation of a two year suspension (The Florida Bar v Farbstein, 570 So.2d 93 (Fla. 1990); The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1992); The Florida Bar v Kassier, 711 So.2d 515 (Fla. 1998); and The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986) were appropriate because these cases range in discipline between one year and three year suspensions and the Referee's "recommendation falls squarely in the middle of the range provided for in the existing case law". (AB at 13).

In response to Respondent's argument that the Referee improperly dismissed any consideration of the cases of The Florida Bar v Moran, 273 So.2d 379 (Fla. 1973) and The Florida Bar v. Cramer, 643 So.2d 1069 (Fla. 1994) by stating that, "they seemed much less egregious" (ROR at 13), the Bar provides no analysis and merely states that, "Even the most cursory review of those cases shows that to be the case". (AB at 13-14). There was however no review of these cases at all, let alone a cursory one.

The Bar seems to be parroting the Referee's faulty logic without any type of meaningful scrutiny of the cases presented. (ROR 13). This

reasoning is at odds with the purpose and goals of discipline. The purpose of lawyer discipline proceedings are to protect the public and administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession. Florida Standards for Imposing Lawyer Sanctions 1.1. The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions…The purpose of the Standards are to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanctions in individual cases; (2) consideration of appropriate weight of such factors in light of the stated goals of lawyer discipline; and (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions. Standard 1.3. The level of discipline applied by the Referee did not consider all the relevant factors, nor consider the appropriate weight for such factors.

The selection of a two year suspension as a sanction based on the fact the it "falls squarely in the middle of the range provided [in the case of Farbstein, Schiller, Kaisser and Tunsil]" (AB at 13), without considering the relevant factors, appropriate weight of the factors, and the consistency of the sanction, absolutely discards the use of the Standards in disciplinary

proceedings. This reasoning uses a mathematical formula of averages rather than adhering to the purpose and goals of attorney discipline as set forth in the Standards. Attorney discipline should not be advanced by taking a set of cases, without any meaningful analysis of their factual underpinnings, and averaging their sanctions to arrive at a sanction. This reasoning is unsound, intellectually dishonest and not in keeping with the Standards.

The Referee abused her discretion and by failing to consider or give any weight to the Cramer and Moran cases relied upon by Respondent. The statement that these cases are inapplicable to the instant case because the conduct was less "egregious" to Respondent's conduct flies in the face of what these cases stand for. This is a gratuitous statement because it neither recognizes nor distinguishes these cases. Like the Referee's Report, the Bar's answer brief also refuses to discuss the facts of these cases. It is however, the Court's ultimate responsibility to correct this error, analyze these cases, give them the weight they deserve and order the appropriate discipline. The Florida Bar v Niles, 644 So.2d 504, 506-07 (Fla. 1994).

Cramer was delinquent in payment of employee taxes amounting to $43,635.71, misappropriated $13,743.42 given to him to be deposited in his trust account, but he instead deposited the money in his operating account for office purposes, his office account showed numerous checks were

returned for insufficient funds and negative balances existed on approximately nine occasions, and he failed to maintain minimum compliance with the Rules Regulating The Florida Bar regarding trust accounts. Cramer at 1070. Certainly Cramer's misconduct was in fact more egregious than that of the Respondent in the case at Bar.

Cramer is more constructive for an analysis of the case at bar than Farbstein, Schiller, Kaisser and Tunsil since it specifically deals with the mitigating impact of a medical condition. This Court found that the most significant mitigating factor was "Cramer's heart condition and related medical problems which led to many of Cramer's problems in his law practice and affected his conduct". Cramer at 1070. Additionally, this Court agreed that "a ninety-day suspension best fits the circumstances of this case." Id. At 1070-71, *citing* The Florida Bar v Scott, 566 So.2d 765 (Fla. 1990).

Moran involved neglect by the attorney in the prosecution of cases and misrepresentation of one self to be a court-appointed counsel for a client does not warrant suspension from the practice of law, but warrants public reprimand and probation with adequate supervision in view of the evidence of rehabilitation. This court considered the fact that respondent was the

victim of certain personal and medical difficulties, which in the past impaired respondent's performance as an attorney. Id.

If the stated purpose of the Standards is to have any meaning in promoting consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions (Standard 1.3), then the Cramer and Moran cases must be considered, and the Referee's recommendation of a two year suspension can not stand, and must be substituted with a suspension of ninety days or less.

In the instant case, the amount of money involved is the $1,665.00 filing fee of the Munims, which was in fact returned to the Munims, and the $100.00 NSF check, which was unrelated to client funds and which was made good. When the equities are balanced with respect to client harm, this case certainly does not merit a two year suspension.

In response to Respondent's argument that the Referee's recommendation of guilt as to violation of Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation) can not stand because of the lack of the requisite finding of intent, the Bar draws it own conclusions from the record. Despite acknowledging the fact that the Referee found that "Respondent had not acted with nefarious intent and that her conduct was the result of extraordinary sloppiness and culpable

negligence" (AB at 18), the Bar takes an extraordinary leap of logic that because the Referee found a violation of Rule 4-8.4(c), we should imply the element of intent. (AB at 19).

The element of intent cannot be implied when it comes to Rule 4-8.4(c), it must be proven by clear and convincing evidence. The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992), The Florida Bar v. Cramer, 643 So.2d 1069 (Fla. 1994).

The Bar in its answer brief ignored the driving force behind Respondent's conduct, i.e. her physical and mental condition. The Bar, however acknowledged throughout the trial that Respondent was sick, that her illness was genuine and that the court ought to take it into consideration. TT 250. Perhaps, had Respondent's physical and mental condition not been an issue, the two year suspension might be understandable, but that is not this case. Respondent suffered from several medical problems beginning in the late summer and fall of 1999. Due to low blood pressure, dehydration, and exhaustion, she eventually collapsed and required emergency treatment consisting of IV fluids for several weeks at a time in March and in August 2000. She also required continued bed rest. Respondent became progressively weaker and disoriented and in December 2000 she suffered another medical crisis due to a pregnancy. After being taken to the

emergency room in extreme pain, the doctors determined the fetus she was carrying was dead, and probably had been for weeks. She was given medication to induce labor so as to avoid a surgical abortion, but she subsequently hemorrhaged and underwent an emergency procedure in January 2001. ROR at 6. Like in Moran, there is no doubt in the record that Respondent was the victim of certain personal and medical difficulties, which in the past impaired her performance as an attorney.

The Bar's attitude of ignoring Respondent's physical and mental condition in its answer brief sends the wrong message. It sends the message that it lacks compassion to assist its members who are struggling with physical and mental problems. There was some very compelling testimony at trial regarding Respondent's character and good reputation. Dean Hausler testified that she had never known Respondent "to be anything other than a very honest person, a forthright person, a person of integrity." TT219. She further stated that for one moment, Respondent's judgment was clouded by her illness, but that she, "has devoted all the years she has been an attorney to taking care of the indigent, the poor, the needy, the downtrodden." TT 220.

The question that has to be asked is whether the public interest is served by suspending a lawyer like this for two years. This is harsh and

indurate punishment, which this Court has recognized in the past could be self-defeating. Id.

CONCLUSION

Based upon the foregoing arguments and authority, the Referee's Report and Recommendation should be rejected by this Court and it would appear to be appropriate to impose a reprimand, or a short-term suspension of less than 90 days, and eliminate restitution or reduce it to $1,332.

Respectfully submitted,

____

RICHARD B. MARX
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven(7) copies of the foregoing have been sent via U.S. Mail to Thomas D. Hall, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy of the foregoing was sent via regular U.S. Mail to: Carlos Leon, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, this____day of July, 2003.

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COMPLIANCE WITH RULE 9.210(a)(2)

The undersigned hereby certifies that the foregoing Amended Initial Brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 14 point proportionately spaced Times New Roman font and hereby files a 3.5” computer diskette containing said reply brief, which has been scanned by Norton AntiVirus and found to be free of viruses.

____

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