IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellee, v. MARJORIE HOLLMAN SHOUREAS, Respondent-Appellant. _____/	Supreme Court Case Nos. SC03-1194 and SC03-1333 The Florida Bar File Nos. 2003-50,917(17J); 2003-50,993(17J); and 2003-51,418(17J)(OSC)

RESPONDENT'S ANSWER BRIEF

KEVIN P. TYNAN, #710822
RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

TABLE OF CONTENTS

PAGE(S)

TABLE OF CASES AND CITATIONS

CASES PAGE(S)

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar." Marjorie Hollman Shoureas, Appellant, will be referred to as "respondent." The symbol "RR" coupled with a case number will be used to designate the report of referee for that particular matter and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Lastly, the symbol "TFB" followed by a letter and number will designate the bar's trial exhibits.

STATEMENT OF CASE AND FACTS

On November 9, 2004, the Referee, the Honorable Edward A. Garrison, conducted a Final Hearing on the two cases that are now consolidated on appeal. While the Bar, in its Initial Brief, sets forth in general terms the facts of both such cases, the Bar's factual recitation is incomplete and will be supplemented herein.

In the first case, Supreme Court Case No. SC03-1194, the Respondent has been found guilty of neglecting two client's matters. The first client, Mr. Lavont Flanders, retained the Respondent in or about September of 1999 for representation in two civil litigation files. There came a point in time that the Respondent ceased working on all client matters, inclusive of Mr. Flander's cases, and failed to adequately communicate this fact to him. Similarly, the Respondent was hired by Magnolia Jager on or about April 6, 2001 concerning her claim for employment discrimination, paid an initial retainer of $100.00, but eventually was unable to communicate with the Respondent who had ceased functioning as an attorney. As to both the Flanders and Jager representations the Referee found the Respondent guilty of having violated R. Regulating Fla. Bar 4-1.1 [competence]; 4-1.3 [diligence]; 4-1.4 (a) & (b) [communication]; 4-1.5(a) [excessive fee] and 4-8.4(a). The Referee also found that the Respondent failed to respond to the Bar on either client complaint and therefore also found the Respondent guilty of having violated R. Regulating Fla. Bar 4-8.4(g).

After fully considering the Respondent's prior disciplinary history (all based upon cases resolved by this same Referee) and in particular this Court's opinion in The Florida Bar v. Shoureas, 29 Fla. L. Weekly S429 (Fla. 2004), decided to recommend the following disciplinary sanction:

1. A three year suspension from the practice of law to run concurrent and coterminous with the suspension in The Florida Bar v. Shoureas, 29 Fla. L. Weekly S429 (Fla. 2004);

2. Restitution to Ms. Jager in the amount of $100.00 payable within sixty (60) days from the Court's order on this case;

3. During the course of the suspension, the Respondent is to continue with her treatment and counseling with Dr. Ryan and Florida Lawyers Assistance, Inc. The appropriateness of any probationary terms regarding such treatment should be addressed in any reinstatement proceeding.

4. Payment of the Bar's costs in the amount of $3,338.60.[1] See SC03-1194 RR at 7.

---

[1] These costs appear to contain the full price of the trial transcript for both cases on this appeal. See Affidavit of Costs dated November 23, 2004. The Referee is recommending on the second case that both sides bear their own costs.

The Bar is appealing this sanction recommendation and once again asks this Court to disbar the Respondent. The Bar is also appealing the Referee's not guilty finding in Supreme Court Case No. SC03-1333. More precisely, the Bar takes issue with the Referee's finding that the Respondent did not willfully and intentionally violate this Court's prior suspension Orders because of the onset of serious depression. TT p.218, l. 11 - P.219, l.20. As the Bar points out in its statement of facts, the Respondent failed to promptly comply with all of the technical aspects of her prior suspension order, inclusive of failing to timely notify clients and opposing counsel of her suspension and the failure to remove her office sign. SC03-133 RR at 2-7. The great majority of these issues were admitted by the Respondent, inclusive of having meetings with three individuals, Diane Curtis, Michael Riggio and Renee Kamin, at her office after she was suspended. However, the Respondent testified she did not believe that any of those meetings were in the context of providing legal advice. Each of these matters will be addressed below in the Argument section of this Brief. While the Referee heard testimony from Mr. Riggio, Ms. Curtis and Ms. Kamin did not testify during the final hearing. The Referee did hear testimony from the Respondent, who explained each of these meetings and the reason for same and found her not guilty of having practiced law in violation of her previous suspension order relative to any of these three individuals.

The Florida Bar has appealed this not guilty finding and asks the Court to disbar the Respondent for the conduct that the Referee found not to be a willful and intentional violation of this Court's Order of Suspension.

It is the Respondent's position that the Referee's factual finding should be upheld without the need to discuss a disciplinary sanction on the contempt case. Further, the Respondent urges this Court to uphold the Referee's three year suspension recommendation on Supreme Court Case No. SC03-1194.

SUMMARY OF ARGUMENT

At one point in time in her life the Respondent was suffering from severe depression which manifested itself in a manner that caused her to cease effectively practicing law, inclusive of defending herself when clients started to complain to The Florida Bar about being unable to communicate with their lawyer. Regretfully, her mental illness resulted in clients cases being neglected. For this she is sorry and remorseful and has been suspended on two prior occasions for this neglect. Before the Court at this time is another two instances of neglect from what the Referee has described as "part an parcel of the same dark period"in the Respondents personal and professional life. Due to the mitigation that he has found in this case and with due consideration to this Courts ruling in the prior case concerning the Respondent, he has recommended a new three year suspension that will run concurrently with this Court's prior three year suspension.

While this is a very significant and harsh sanction, it is warranted in this case. What is not warranted is the Bar's request to disbar the Respondent by ignoring the substantial mitigation, the efforts at rehabilitation and this Court's most recent disciplinary case with this very same Respondent. The Referee's sanction recommendation complies with the precepts of lawyer sanction and should be upheld.

In the second case before the Court, the Bar seeks to overturn a Referee's finding that there was no wilful violation of a prior suspension order. The Bar has presented no evidence (or reasonable argument) to contradict the testimony presented by the Respondent concerning her mental health and her lack of actual knowledge of her suspension until after it had already been in effect. Accordingly, this not guilty finding should likewise be upheld.

ARGUMENT

I. THE REFEREE'S FINDING OF NO WILFUL VIOLATION OF A SUSPENSION ORDER AND HIS RECOMMENDATION OF A THREE YEAR SUSPENSION FOR NEGLECT OF TWO CLIENTS' MATTERS SHOULD BE UPHELD.

The Florida Bar did not secure the sanction they desired at trial and now appeal two distinct issues. The first appellate issue concerns a Referee's decision to find the Respondent not guilty of having wilfully violated an order that suspended her from the practice of law and the second is the Bar's claim that a three year suspension for neglecting two client's matters is too lenient a disciplinary sanction. The Bar is incorrect on both matters and the Referee's well reasoned analysis on both issues should be affirmed.

A. Supreme Court Case No. SC03-1333.

The Florida Bar asks this Court to overturn a Referee's finding that a Respondent be found not guilty of the charges leveled against her by the Bar. It is well settled that a referee's findings of fact and guilt are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support." The Florida Bar v. Canto, 668 So.2d 583 (Fla. 1996); The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). The Bar has failed to meet this appellate burden.

On February 20, 2003, this Court entered an order suspending the Respondent from the practice of law for ninety-one (91) days. SCO3-1333 RR at 2. Pursuant to R. Regulating Fla. Bar 3-5.1(g) and the Court Order, the Respondent was to cease practicing law no later than March 24, 2003; and was required to take other steps, inclusive of removing any indication of an active practice of law and notification of clients and opposing counsel of her suspension. Unfortunately, the Respondent was not aware of her suspension until on or about March 27, 2003, when opposing counsel in one particular matter advised her of that fact. TT p. 125, l.7-23. At that moment she ceased practicing law and telephonically informed the affected client of her suspension. TT p. 1.25, l.2-6. The remaining requirements of the suspension (written notice to clients, etc.) were not accomplished until the Respondent retained counsel concerning the Bar's prosecution and found out that there were other requirements that had to be met. TT p. 1.28, l. 9-16.

During the trial the Respondent explained the reason for her failure to discover her suspension in a timely manner was that she was not opening any of her mail. This included bills, correspondence from clients and others, inclusive of mail from The Florida Bar. TT 96-103. The most telling example of this practice (and the Respondent's depression) was the Respondent's answer to a question posed about

why she did not open the mail from The Florida Bar was that "if you don't open them, you don't have to deal with them." TT p. 1.22, l. 22-23.

Dr. William Ryan, a clinical psychologist, who not only treated the Respondent but is also a consultant with Florida Lawyers Assistance, Inc. (FLA), The Florida Bar's program for assisting impaired attorneys,[2] testified that the failure to look at one's mail is a common symptom for someone who is depressed.[3] TT p. 169, l. 2-16. Dr. Ryan's testimony on both of these points was uncontroverted. Dr. Ryan explained that the Respondent ". . . had an inability to transform her aggression into assertion. As a result, she was being somewhat passive/aggressive and withdrawing and phobic." TT 166, l. 23 - p. 167, l.1. It was therefore Dr. Ryan's opinion that the

---

[2] This program is normally considered a drug and alcohol rehabilitative program, but it also includes assistance for attorneys who have mental health concerns or impairments.

[3] One could also argue that her failure to respond to the Bar during the early stages in Case No. SC03-1194 and in her prior disciplinary matters is yet another indication of her depression. Further, her failure to defend herself or appear and present mitigation in prior disciplinary matters has resulted in the Court imposing a three year suspension in The Florida Bar v. Shoureas, 29 Fla. L. Weekly S429 (Fla. 2004) wherein the Court noted that her ". . . failure to contest the disciplinary charges before the referee and especially given her failure to present any mitigation or *explanation* for her actions . . ." warranted the maximum period of suspension (3 years).

Respondent was "markedly" depressed at the time that she began treatment with him.[4] A note should also be made of Judy Rushlow's testimony at the final hearing. Ms. Rushlow is employed by FLA as an Assistant Director and in that role she conducted an initial interview of the Respondent prior to her execution of a standard three year mental health contract with FLA. TT p. 105-107. It was Ms. Rushlow's uncontroverted testimony that not only was the initial presenting problem depression, but that this depression also included suicidal ideations prior to the commencement of treatment in July of 2003. TT p.106.

The Respondent testified extensively on her mental health, her failing marriage and economic woes all of which were ongoing at the time of her ninety one day suspension and her later imposed three year suspension. The Respondent's testimony, while questioned by the Bar, is not refuted by any other witness who testified in this case. Her testimony included what she described as a typical day post December of 2002 (the time frame wherein she should have been defending prior Bar actions and the time frame leading up to her 91 day suspension) which was that she:

> . . . would go into the office, maybe, sometimes nine o'clock, sometimes eleven o'clock. I would take the cushions - - I have two upholstered chairs in my office. I take the two cushions, put them on the floor and sleep on

[4] Also see Dr. Ryan's report which was introduced into evidence as Respondent's Exhibit One.

> the floor. I wouldn't answer any doors. I'd just - - then I'd leave and just go walk around the mall . . . or drive in the car. TT p.119, l. 13-23.

By February and March of 2003, her financial crisis deepened (failure to pay rent for her home and office and her husband not working) and her depression deepened but she tried to work on a few client matters. TT 120-123.

Upon discovery that she was suspended from the practice of law in late March of 2003, the Respondent continued to go to her office in an effort to avoid her husband, who being unemployed and dealing with his own mental health issues was at home. Her depression caused, at least in part, her failure to tell her husband or her son (who worked at her office) that she was suspended from the practice of law. TT p. 1.26-127. Upon discovery of her suspension she no longer went to court or practice law. TT p. 1.28. However, she took no further affirmative actions vis-a-vis her suspension because she "didn't know what to do" and quite frankly, her depression prevented her from rationally thinking like a lawyer to make sure there was nothing else she was required to do upon a suspension from the practice of law. TT p. 1.26, l. 12.

The Bar attempts to argue that the Respondent's presence in her office post her suspension was a clear indication of a violation of the suspension order. However, merely being at one's office (sleeping and avoiding any communication with anyone)

is not a violation of the suspension order. Certainly, the fact that office sign remained and that three people in an approximate fourth month period successfully located the Respondent at her office and had a conversation is problematic, but upon a closer examination of the issues is likewise not a violation of the suspension order. The referee carefully listened to the explanation of each of these three contacts and only heard testimony contradictory to the Respondent's explanation from Mr. Riggio. There being no contradictory evidence to support the Bar's claims on these other two issues (Curtis and Kamin) the Bar is unable to demonstrate that the Referee's findings on these two matters are "clearly erroneous and lacking in evidentiary support."

In the Riggio matter the Bar contends that payment by Riggio to the Respondent of $1,017.50 post her suspension evidences a violation of the suspension order. SC03-1333 RR 6. However, it was the Respondent's explanation that this was for work performed prior to the effective date of her suspension. SC03-1333 RR 7. Mr. Riggio admits to consulting with the Respondent in October of 2002 (TT p. 25) and a second time in December of 2002 (TT p. 26) but denied the claim that this money was for past services rather than for a retainer for a divorce proceeding. It was the Respondent's testimony that in October and December of 2002 that she consulted with Mr. Riggio concerning a divorce proceeding and that she prepared the appropriate pleadings to initiate a divorce and that the $1,017.50 was for services

rendered prior to her suspension. Apparently, the Referee decided to accept the Respondent's version of this matter, rather than Mr. Riggio's. With conflicting testimony between two witnesses, the Referee's analysis of the credibility of each witness should be relied upon absent a clear indication in the record that one witnesses testimony should be disregarded. In order to find in the Bar's favor in this point no deference must be given to the Referee's presumption of correctness in this regards.

It is the Bar's position that the admissions made by the Respondent regarding her failure to remove her office sign, her failure to notify clients, opposing counsel and the courts of her suspension ought to be sufficient evidence to secure a conviction for contempt of the Supreme Court's Order of suspension. The Referee after considering these admissions, the Respondent's explanations concerning her lack of actual notice of her suspension until late March 2003 and the uncontroverted testimony of her mental health at the time of all of the events in question, stated that he " . . . did not find any willful contempt of the Supreme Court's Order by Ms. Shoureas." TT p.218, l. 11-13. Accordingly, the Referee found the Respondent not guilty and he should be upheld on this point.

B. Supreme Court Case No. SC03-1194

The facts of Case No. SC03-1194 are uncontroverted by either party. Instead, the Bar takes issue with the Referee's sanction recommendation of a three year

suspension and his reliance upon this Court's prior decision to impose a three year suspension on the case wherein he recommended disbarment. The Referee's comments on this later point are persuasive. In entering his ruling the Referee stated:

> I find it very helpful the Supreme Court's decision to not impose the sanctions that I recommended last time. But also, I'm also considering very much the rehabilitative efforts that have been undertaken by Ms. Shoureas. TT p. 219, l. 10-15.

The Referee further opined that:

> My original comment still applies. This appears this is all part and parcel of the same dark period. And it should have been wrapped up in one. If it had been know, I'm sure it would have all been brought up at the same time. TT p. 220, l. 5-10.

Notwithstanding these comments by the Referee, the Bar asks this Court to do what it declined to do in the last case when faced with much more misconduct and a lawyer who did not participate until the appellate process. See The Florida Bar v. Shoureas, 29 Fla. L. Weekly S429 (Fla. 2004). In Shoureas, the Court conducted a detailed analysis of the existing case law and application of the Standards for Imposing Lawyer Sanctions to neglect cases such as the one found in this case and then found on the facts before the court at that time (neglect of two clients and a failure to respond to the Bar with no mitigation or explanation of the misconduct by the Respondent) that a

three year suspension was appropriate. In declining to disbar on the facts of that case, the Court reminded us that:

> Disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar. . . A removal from the bar should therefore never be decreed where any punishment less severe, such as reprimand, temporary suspension or fine would accomplish the end desired. Id., quoting Florida Bar v. Murrell, 74 So. 2d 221, 223 (Fla. 1954).

Regrettably, this Court must now examine another case involving Ms. Shoureas. While there are differences in this Shoureas case, they are helpful to the Respondent, as are the similarities between this action and the prior case. First the similarities. Both cases have neglect and failing to communicate with two distinct clients, as well as a failure to respond to the Bar during the disciplinary process. However, in the case presently before the Court the Respondent, while failing to respond to the Bar during the beginning stages of the case (thus warranting a violation of the rules), did appear and defend the matter before the referee, which defense included evidence of mitigation and a full explanation of her conduct that caused the Bar to file a complaint. Thus, what was lacking in the last case which may have mitigated the three year suspension, is now before the Court for resolution on this case.

Other than advance a cumulative discipline argument with a citation to The Florida Bar v. Bartlett, 509 So. 2d 287 (Fla. 1987), the Bar has presented no other argument, citation or reference to authority that would support its claim for disbarment on this neglect case. The Bar's reliance on Bartlett is misplaced. Once again, as it did in the last case, the Bar relies upon an uncontested case wherein the Respondent was defaulted and failed to file a brief in opposition to the referee's disbarment recommendation. Id., at 288. Yes, the respondent in Bartlett had two prior suspension just like there is in this case. Id., at 288-289. However, there is no finding that these suspensions were predicated upon misconduct that occurred during the same time frame and was mitigated by anything. In the case at hand, as the Referee so aptly noted, the Respondent's misconduct is "all part and parcel of the same dark period" in the Respondent's personal and professional life. TT p. 220.

The Referee after carefully considering the facts of this case, the facts of the last case and the Court's opinion thereon and the mitigation present in the case at hand[5], found that an appropriate sanction would be a three year suspension from the practice

[5] See Fla. Standards for Imposing Lawyer Sanctions, Standard 9.32 (c) [personal or emotional problems - a failing marriage and financial problems]; (f) [inexperience in the practice of law - admitted in March 2000]; (h) [physical or mental disability or impairment - her depression]; (j) [interim rehabilitation - voluntary contract with FLA and continued psychological treatment]; and (l) [remorse].

of law that would run concurrently and coterminous with the three year suspension previously ordered by this Court. Further, the Referee is recommending continued treatment and counseling for depression during the suspension period, as well as restitution of $100.00 to one client. The Bar has failed to explain how this recommendation is not authorized under the Florida Standards for Imposing Lawyer Sanctions or has a reasonable basis in existing case law. See for example The Florida Bar v. Forrester, 818 So. 2d 477 (Fla. 2002). On the contrary this new three year suspension is fully grounded in the Court's analysis found in The Florida Bar v. Shoureas, 29 Fla. L. Weekly S429 (Fla. 2004). Accordingly, this Court should uphold the Referee's well reasoned approach to sanction in this case.

CONCLUSION

The Florida Bar seeks to disbar the Respondent for neglecting two client's matters and for a contempt violation that the Referee refused to find. While the Respondent is remorseful and embarrassed by her conduct and realizes that a serious sanction needs to be imposed, she verily believes that once her recovery from depression is complete (as verified by a referee in any reinstatement proceeding) that she can be a trust worthy member of The Florida Bar. While her course of conduct has not been acceptable for a member of the Bar, her depression clouded her judgment and prevented her from being able to practice law effectively or to even defend herself

in prior disciplinary matters. It is the Respondent's position that the three year suspension recommended by the Referee meets all of the requirements of lawyer sanctions and that the Referee should be upheld on both cases before the Court.

WHEREFORE, the Respondent, Marjorie Hollman Shoureas, respectfully requests this Court to uphold the Referee's recommendations in both cases before the Court by and imposing a concurrent three year suspension from the practice of law, coupled with restitution to one client and continued psychological treatment during the period of suspension and payment of the Bar's costs on this particular proceeding and by affirming the not guilty finding on the second case and that each party should bear its own costs on this second proceeding.

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

By: _____
KEVIN P. TYNAN, ESQ.
TFB No. 710822

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished served via U.S. Mail on this 22nd day of February, 2005 to Adria Quintella, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by McAfee.

_____
KEVIN P. TYNAN