IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ELIZABETH AILEEN BROOME,

Respondent.
_______________________________/

Case No.: SC03-84, SC03-1205, SC03-1206, SC03-1931, SC04-448 and SC04-1375 (Consolidated)

TFB File No.: 2001-01,274(1A), 2003-00,301(1A), 2002-00,811(1A), 2003-00,493(1A), 2002-00,752(1A), 2001-01,091(1A), 2004-00,174(1A), 2004-00,357(1A) and 2004-00,410(1A) (Consolidated)

RESPONDENT'S ANSWER BRIEF

LOIS B. LEPP
Lois B. Lepp, P.A.
1127 N. Palafox St.
Pensacola, Florida 32501
(850) 435-1090
Florida Bar No.: 855634
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE FACTS 4

SUMMARY OF ARGUMENT 8

ARGUMENT 10

ISSUE I 10

THE REFEREE'S RECOMMENDATION OF PUBLIC REPRIMAND AND THREE YEARS' CONDITIONAL PROBATION IS SUPPORTED BY THE RECORD AND EXISTING CASE LAW

a. Public Reprimand and Three Years' Conditional Probation is Appropriate 10

i. Recommended Penalty Meets Purpose of Disciplinary Proceedings 10

ii. Recommended Penalty Has Basis In Existing Case Law 11

iii. Recommended Penalty Is Supported By Standards For Imposing Lawyer Sanctions 18

iv. Bar's Arguments Against Mitigating Factors Not Supported by the Record 20

b. Suspension for Any Period is Not Appropriate... 23

i. Referee Rejected Suspension As Inappropriate 23

ii. Case Law Supports Referee That Suspension Is Inappropriate 24

iii. Standards for Imposing Lawyer Sanctions Do Not Necessitate Suspension 24

iv. Bar's Cited Cases Not Applicable 26

ISSUE II 30
THE REFEREE'S RECOMMENDATION THAT RESTITUTION IS NOT APPROPRIATE IS SUPPORTED BY THE RECORD
a. Some Work Was Performed 30
b. No Evidence of Amount Which Is Clearly Excessive 31
c. Pending Civil Action Can Decide Issue 31

ISSUE III 34
THE REFEREE'S REJECTION OF ADDITIONAL AGGRAVATING FACTORS IS SUPPORTED BY THE RECORD

CONCLUSION.. 38

CERTIFICATE OF SERVICE.. 40

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN... 41

TABLE OF CITATIONS

Lloyd's Underwriter's at London v. Ruby, Inc.
801 So. 2d 138, 139 (Fla. 4th DCA 2001) 32

The Florida Bar v. Centurion, 801 So. 2d 858 (Fla. 2000)............................26, 27

The Florida Bar v. Cimbler, 840 So. 2d 955 (Fla. 2002), reh. den. 27, 28

The Florida Bar v. Della-Donna, 583 So. 2d 397 (Fla. 1989) 32

The Florida Bar v. Grigsby, 641 So. 2d 1341 (Fla. 1994) 12, 13, 14, 18, 24

The Florida Bar v. Horowitz, 697 So. 2d 78 (Fla. 1997) 22

The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997) 12

The Florida Bar v. Moran, 273 So. 2d 379 (Fla. 1973)................12, 14, 15, 16, 24

The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970) 10

The Florida Bar v. Rosetti, 379 So. 2d 362 (Fla. 1980)..................................16, 17

The Florida Bar v. Setien, 530 So. 2d 298 (Fla. 1988) 22

The Florida Bar v. Shoureas, 30 Fla. L. Weekly S697 (Fla. 2005)...................... 29

The Florida Bar v. Shoureas, 892 So. 2d 1002 (Fla. 2004) 29

The Florida Bar v. Springer, 873 So. 2d 317 (Fla. 2004) 29

Other Authorities Cited

Rules Regulating the Florida Bar

3-5.1(i) 31
4-1.1 4
4-1.2 4
4-1.3 .... 4, 5
4-1.4 4
4-1.4(a) 5
4-1.5 4
4-1.5(a) 5
4-3.2 5
4-8.4(g) 4, 35

Florida Standards for Imposing Lawyer's Sanctions

4.4 18
4.42 .... 18, 24, 28
4.42(a) 25
4.42(b) 18, 25
6.2 .... 18, 19
6.22 24
6.23 19
9.22(e) 34, 35, 38
9.22(i) 34, 38
9.22(j) 34, 36, 37, 38
9.32(a) 7
9.32(b) 7
9.32(c) 7, 22
9.32(h) 7, 22
9.32(j) 7, 22
9.32(k) 7

PRELIMINARY STATEMENT

Respondent will utilize the same references to the parties, the complaints, the transcripts, and the pleadings, as set forth by The Florida Bar.

Specifically, Complainant, The Florida Bar, will be referred to as "The Florida Bar" or the "Bar" throughout the Answer Brief.

Respondent, Elizabeth Aileen Broome, will be referred to as "Respondent."

References to SC Case No. SC03-84, TFB File No. 2001-01,274(1A) shall be designated as the "Samuel complaint."

References to SC Case No. SC03-1205, TFB File No. 2003-00,301(1A) shall be designated as the "First DCA complaint."

References to SC Case No. SC03-1206, TFB File No. 2002-00,811(1A) shall be designated as the "Brown complaint."

References to SC Case No. SC03-1931, TFB File No. 2003-00,493(1A) shall be designated as the "Sapp complaint."

References to SC Case No. SC03-1931, TFB File No. 2002-00,752(1A) shall be designated as the "Schmal complaint."

References to SC Case No. SC03-1931, TFB File No. 2001-01,091(1A) shall be designated as the "Phifer complaint."

References to SC Case No. SC04-448, TFB File No. 2004-00,174(1A) shall be designated as the "Smith complaint."

References to SC Case No. SC04-1375, TFB File No. 2004-00,357(1A) shall be designated as the “Spooner complaint.”

References to SC Case No. SC04-1375, TFB File No. 2004-00,410(1A) shall be designated as the “Mailloux complaint.”

References to the transcript for the summary judgment hearing on May 7, 2004, shall be designated “TSJ” with the appropriate page number, i.e., “TSJ-4.”

References to the transcript for the penalty hearing on November 19, 2004, on the first six complaints, shall be designated as “TPH1" with the appropriate page number, i.e., “TPH1-10.”

References to the transcripts for the final hearing on January 26, 2005 in the Smith complaint shall be designated as “TSmith” with the appropriate page number, i.e, “TSmith-10.”

References to the transcripts for the final hearing on February 3, 2005 in the Spooner complaint and Mailloux complaints shall be designated as “TSM” with the appropriate page number, i.e., “TSM-5.”

References to the transcript for the second penalty hearing on May 10, 2005, on all the Bar complaints, shall be designated as “TPH2" with the appropriate page number, i.e. “TPH2-15.”

References to the Rules Regulating The Florida Bar shall be designated as “Rules” with appropriate number, i.e. “Rule 4-1.3" or as “Rules.”

References to the Report of Referee dated June 29, 2005 shall be designated as "ROR" followed by the appropriate page number, i.e., "ROR-12."

References to The Florida Bar's exhibits shall be designated as "TFB Exhibit" followed by the appropriate number, i.e, "TFB Exhibit-12."

References to joint exhibits shall be designated as "JT Exhibit" followed by the appropriate number, i.e., "JT Exhibit-14."

References to Respondent's exhibits shall be designated as "R Exhibit" followed by the appropriate number, i.e., "R Exhibit-12."

References to Florida Lawyer's Assistance, Inc. shall be designated as "FLA."

References to the Florida Standards for Imposing Lawyer Sanctions shall be designed as such or as "Standards."

References to The Florida Bar's Initial Brief shall be designated as "TFB's Brief" followed by the appropriate page number, i.e. "TFB Brief-15."

References to all other pleadings and documents will be designated by their appropriate title in the record, i.e., Complaint, Motion for Summary Judgment, etc.

STATEMENT OF FACTS

Although The Florida Bar states it was not disputing the Referee's findings of facts, and that the statement of facts was from the Referee's findings (TFB Brief-6), The Florida Bar adds factual findings not made by the Referee in its statement of facts. TFB Brief-12-15.

Respondent adds the following:

In the Smith case, Mr. Smith's motion for a new trial was denied, even after Respondent testified on his behalf, because the court found Respondent did an excellent job for Mr. Smith. TPH1-32.

Respondent has made some payments on the judgment to Mr. Brown. TPH1-32.

Respondent performed some work for Mr. Sapp for the $6,700.00 fee she was paid. ROR-14. Mr. Sapp has sued Respondent in small claims court, which suit is still pending. TPH1-33; TPH2-8.

After a final hearing in the Smith complaint, Respondent was found not guilty of violating the substantive rules, 4-1.1 (competence); 4-1.2 (scope of representation); 4-1.3 (diligence); 4-1.4 (communication); and 4-1.5 (excessive fees). ROR-35. Respondent, in her Answer to the Complaint, admitted that she violated 4-8.4(g) in that she failed to respond to The Florida Bar. ROR-21.

After a final hearing in the Spooner complaint, Respondent was found not guilty of violating the substantive rules, 4-1.3 (diligence), 4-1.4(a) (communication with client), 4-1.5(a) (excessive fee) and 4-3.2 (expediting litigation). ROR-36. Respondent admitted in her Answer to the Complaint that she had failed to respond to The Florida Bar's inquiries in the Spooner matter.

After a final hearing in the Mailloux complaint, Respondent was found not guilty of violating Rule 4-1.3 (diligence), 4-1.5(a) (excessive fee) and 4-3.2 (expediting litigation). ROR-36. Respondent admitted that she failed to respond to The Florida Bar. R's Answers to Complaint in Spooner/Mailloux complaint.

Respondent suffers from the medical conditions of major depression and post-traumatic stress disorder. TPH1-9-11; 45, 49, 56; ROR-40-42. Respondent did not know her depression was not under control (TPH1-10) or that it was affecting her ability to practice law. TPH1-12, 17. Depression caused Respondent to avoid many of the tasks of practicing law. TPH1-57, 61. Respondent's actions and omissions herein, both substantive and in failing to respond to the Bar, were caused by her medical condition. ROR-41; TPH1-49-50. Respondent's first step in getting help was to hire counsel who referred her to a psychiatrist. TPH1-10. Respondent

voluntarily entered into a three year contract with FLA.[1] TPH1-17-18; ROR-41. Respondent has been "very compliant" with her psychiatrist's recommended treatment plan. ROR-41. During the course of the proceedings, Respondent's mental health condition had significantly improved. TPH1-59-62; TPH2-43; ROR-41, 43. Respondent is currently able to practice law. TPH1-57, 61; TPH2-43. Suspension of Respondent would be harmful to Respondent (TPH1-23-24, 52; TPH2-44; ROR-41-42) and would deprive the public of a good attorney. TPH1-24; TPH2-46.

Respondent experienced a number of physical illnesses and surgeries and injuries caused by two motor vehicle accidents during the relevant time period. TPH1-11-14; ROR-40-41. Respondent also experienced the severe illness of her father, her only surviving parent, during the relevant time period. TPH1-14-15; ROR-40-41.

Respondent did not act for financial gain. TPH1-21; ROR-42. Respondent did not intend to cause harm to her clients; because of her depression, she did not even know she was causing harm. TPH1-21. Respondent has experienced financial difficulties during the relevant time frame. ROR-40; TPH1-53.

[1]The Bar claims a delay in Respondent's following up with the psychiatrist's recommended treatment, but the record reflects any delay was due to the psychiatrist's schedule. TPH1-40. Similarly, the FLA contract was subject to the schedule of Judy Rushlow of FLA, of which the Bar was aware. TPH1-17, 67.

Respondent did not have the ability to pay any of the judgments or fees owed to her former clients. TPH1-20, 53; TPH2- 15. Respondent is remorseful. TPH1-50; ROR-42. Respondent has had no prior disciplinary actions in her 17 years of practicing law. TPH1-31; ROR-40.

The Referee found “substantial” mitigating factors of Standards 9.32(a) (absence of prior disciplinary record); 9.32(b) (absence of dishonest or selfish motive); 9.32(c) (personal or emotional problems); 9.32(h) (physical or mental disability or impairment); 9.32(j) (interim rehabilitation); and 9.32(k) (remorse), Fla. Stds. Imposing Law. Sanc. ROR-40-42.

SUMMARY OF ARGUMENT

The Referee's recommendation of a public reprimand by personal appearance before the Referee, with three years' probation with the conditions that she comply with her voluntary FLA contract, obtain an attorney monitor, obtain a Law Office Management Advisory Service (LOMAS) review, attend ethics school, and pay the costs of The Florida Bar is supported by the record, the Standards, and existing case law. Therefore, this Court should adopt the Referee's recommended penalty.

The Referee considered the Bar's request and properly declined to order suspension of Respondent, which recommendation is supported by existing case law. This Court should decline to order a suspension.

The Referee considered the Bar's request and properly declined to order restitution in the Sapp case where there is a pending civil suit by Mr. Sapp against Respondent regarding this issue, the finding of a clearly excessive fee was decided by default in favor of The Florida Bar, the evidence reflects some work was done by Respondent, and the Referee did not find what portion of the fees was clearly excessive.

The Referee considered and properly declined to find certain aggravating factors suggested by The Florida Bar. The record does not support such

aggravating factors.

The Referee’s findings of aggravating and mitigating factors and recommended penalty are appropriate and supported by the record and relevant case law, meet the purposes of discipline, and should be adopted by this Court.

ARGUMENT

ISSUE I

THE REFEREE'S RECOMMENDATION OF PUBLIC REPRIMAND AND THREE YEARS' CONDITIONAL PROBATION IS SUPPORTED BY THE RECORD AND EXISTING CASE LAW

a. Public Reprimand and Three Years' Conditional Probation is Appropriate

The Referee's recommended discipline of public reprimand before the Referee and three years of probation with conditions of compliance with her voluntary FLA contract, LOMAS review, an attorney monitor, attendance at ethics school, plus the taxation of $17,149.88 in costs is appropriate under the facts of this case and is supported by the existing case law and the Standards. This Court should adopt the Referee's recommendation as to discipline.

i. Recommended Penalty Meets Purposes of Disciplinary Proceedings

The purposes of attorney disciplinary proceedings have been well established by this Court. The punishment must be: 1) fair to the public, in protecting the public from an unethical attorney and in not denying the public access to a qualified attorney; 2) fair to the attorney, sufficient to punish a breach yet encourage rehabilitation; and 3) sufficient to discourage other attorneys from committing the same type of conduct. The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970).

The uncontroverted evidence in this case is that Respondent suffers from clinical depression, which is a bona fide medical condition. ROR-40. The Referee found that Respondent's medical condition was the cause of her failures with respect to her clients and her repeated failure to respond to The Florida Bar. ROR-41, 43; TPH1-49-50.

The Referee considered the duty to the public when he recommended that Respondent receive a public reprimand. The Referee stated, "The public is adequately protected from Respondent's possibility of relapse by the recommendations I have made herein." ROR-43. Further, the Referee considered that "Respondent's psychiatrist further testified that she [the psychiatrist] had considered the duty to the public in rendering this opinion [that suspension would be detrimental to Respondent]." ROR-42.

Because this was a medical condition that caused the misconduct, other attorneys can not possibly be encouraged to commit the same type of misconduct. By the same token, this recommended penalty is fair to Respondent, punishes her breach and yet encourages her continued rehabilitation. The Referee stated that his recommendation "meets the purposes of discipline." ROR-43.

ii. Recommended Penalty Has Basis In Existing Case Law

This Court has repeatedly held that it will uphold the recommendation of the

Referee, if same is based in existing case law. “[T]he referee in a Bar proceeding again occupies a favored vantage point for assessing key considerations– such as a respondent’s degree of culpability, and his or her cooperation, forthrightness, remorse and rehabilitation (or potential for rehabilitation). Accordingly, we will not second-guess a referee’s recommended discipline as long as that discipline has a reasonable basis in existing caselaw.” The Florida Bar v. Lecznar, 690 So. 2d 1284, 1288 (Fla. 1997). This Referee was aware of the three-fold purposes of discipline when he stated, “I am persuaded by the cases of The Florida Bar v. Grigsby, 641 So. 2d 1341 (Fla. 1994) and The Florida Bar v. Moran, 273 So. 2d 379 (Fla. 1973) that the recommended penalty meets the purposes of discipline.” ROR-43.

The existing case law, cited by the Referee, supports the Referee’s recommendations. In Grigsby, the attorney failed to respond to the Bar’s numerous requests for information about the case. “The referee found that Grigsby suffers from clinical depression for which he has voluntarily sought treatment, and although Grigsby’s illness explained his conduct, it did not excuse it. Thus, the referee recommends that Grigsby be found guilty of the misconduct charged.” Grigsby, 641 So. 2d at 1342. The referee recommended that Grigsby be publicly reprimanded, be placed on three years’ conditional probation, during which time

Grigsby must continue therapy and be supervised by an attorney who will monitor his case files, and that Grigsby pay the Bar's monitoring costs. Id.

Significantly, Grigsby had two prior disciplines including an admonishment for inadequate communication with a client and failure to respond to the Bar's inquiries and a 90 day suspension for lack of diligence and lack of communication with several clients. Because of Grigsby's disciplinary history- absent in the case at bar - the Bar petitioned for a only a 90 day suspension, plus three years' conditional probation. This Court rejected the Bar's position, despite the two prior disciplinary matters, and stated:

> As to the appropriate discipline, the Bar is correct that as a general rule a suspension is appropriate when an attorney is found guilty of misconduct that causes injury or potential injury to the legal system or to the profession and that misconduct is similar to that for which the attorney has been disciplined in the past. However, under the circumstances, we do not believe that a suspension is warranted. The referee's findings that Grigsby suffers from clinical depression for which he voluntarily sought professional help is not challenged. Since Grigsby's failure to respond to the Bar's requests was likely caused by this mental disability, we believe the recommended discipline is adequate.

Id at 1343 (citations omitted) (emphasis added).

In Respondent's case, the uncontroverted evidence is that Respondent suffers from clinical depression, that her failure to respond to the Bar and her clients was *actually* caused by her depression, that she voluntarily sought

treatment, that she has made remarkable improvement over the course of these proceedings, and that she is now capable of practicing law. ROR-41. Respondent does not have two prior disciplines for the same misconduct, as did Grigsby. The terms and conditions of the Referee's proposed conditional probation are similar to those in Grigbsy, if not more stringent, and are more than adequate to meet the purposes of discipline.

The Florida Bar v. Moran, 273 So. 2d 379 (Fla. 1973) also supports the Referee's recommended penalty. In Moran, the attorney was found "guilty of neglect in the prosecution of his cases" and made a misrepresentation to the court. Id at 379. The Moran referee recommended a public reprimand, three years' conditional probation with terms that include monitoring of his work by another attorney and quarterly reports by the attorney's physician that the attorney is continuing to make progress. This Court upheld that recommendation and found that suspension of the attorney while making significant efforts at rehabilitation would be harmful. The Court specifically addressed that the terms of the conditional probation adequately protected the public. Specifically, the Court stated:

> It appears from the record that respondent is the victim of certain personal and medical difficulties which in the past have impaired his performance as an attorney. However, the testimony of respondent's physician indicates that respondent is rapidly returning to good health and that his health and self-discipline increase with each passing

> month. It is the opinion of the physician that respondent is now capable of practicing law in a competent manner and that his fitness and capability will continue to improve with the passage of time. This opinion is borne out by evidence in the record disclosing that cases currently being handled by respondent are being diligently and effectively prosecuted. Thus, in our opinion it is unnecessary and might in fact be harmful to respondent's apparent rehabilitation to suspend respondent from the practice of law at this time. Conversely, our duty to the public and the legal profession makes it imperative that respondent be adequately supervised to insure his continued diligence in the future. We therefore find ourselves in general agreement with the recommendation of the Referee that respondent be publicly reprimanded and placed on probation for a three-year period.

Id at 379-380 (emphasis added).

The evidence in the case at bar is very similar to Moran. Respondent neglected her cases. Respondent has suffered from personal and medical difficulties which have impaired her performance as an attorney. ROR-40-43. Respondent's physician– a psychiatrist– has opined that Respondent has made significant progress and that Respondent is capable of practicing law. ROR-41; TPH2-43. Respondent testified that she is handling her cases more diligently (TPH2-13). Respondent's physician has opined that it would be detrimental to Respondent's continued recovery if Respondent were to be suspended at this time. ROR-41-42; TPH1-52; TPH2-44. The Referee, like the Moran referee, considered the duty to the public in making the recommendation of public reprimand and conditional probation. ROR-42-43. The Moran case serves as solid basis in

existing case law for this Court to adopt the recommendation of the Referee as to the recommended discipline.

The Bar admits that the findings of the referee in Moran are similar to those in Respondent's case, but the Bar makes an exception for the Moran case, because Mr. Moran had a "physical problem for which he had obtained successful medical treatment." TFB Brief-27. Depression is a legitimate medical condition. TPH1-49. It is not a condition that allows someone to just pull themselves up by the boot straps. TPH1-49. So if Respondent had a physical problem it would be better, according to the Bar, most likely because our society can more easily deal with a physical problem. If the Respondent had undiagnosed or untreated brain cancer that was affecting her ability to practice and she did not recognize that she had symptoms that were impacting her practice of law, then sought treatment and was returning to good health, the Bar would find this more acceptable. In fact, under a cancer scenario, the Bar would probably find excusable neglect. But, Moran does not say Mr. Moran had a physical illness. It says Mr. Moran had "medical difficulties" and that his "control and self-discipline" were increasing. Moran, 273 So. 2d at 379. Thus, the Bar's exception for Mr. Moran's medical difficulties is equally applicable to Respondent's medical difficulties. Like in Moran, Respondent has shown that she is currently capable of practicing. TPH1-19, 57, 61;

TPH2-5, 14, 43.

Although not cited by the Referee, The Florida Bar v. Rosetti, 379 So. 2d 362 (Fla. 1980) also supports this Referee's recommended discipline. Mr. Rosetti engaged in inexcusable neglect which continued over a period of time. The Rosetti referee found that "all the charges are based on inexcusable neglect, and totally absent is any evidence that this Respondent is guilty of anything other than his past demonstrated inability to cope with the rigors attendant to the practice of law. Such demonstrated incompetence can not be permitted to go unchecked." Id at 363. In Rosetti, there was no evidence of clinical depression, and there was prior discipline for the same type of misconduct, yet this Court found that the referee's recommendation of a public reprimand and three years' conditional probation with supervision, met the purposes of discipline.

In Rosetti, the referee stated, "Having heard and observed this witness, your [r]eferee is convinced of [r]espondent's sincerity and conviction that, given an opportunity, he can now function as a practicing lawyer. The improvement in his demeanor and appearance is no less than dramatic." Id at 363-64.

This Referee essentially made the same comment about this Respondent. Respondent "had made 'significant improvement', which this Referee witnessed in Respondent's appearance and demeanor. Respondent, herself, testified that she

had not been as healthy in 14 years." ROR-41.

Thus, sufficient case law exists which serves as a basis for the Referee's recommendations.

iii. Recommended Penalty Is Supported By Standards For Imposing Lawyer Sanctions

Additionally, the recommended discipline is supported by the applicable provisions of the Florida Standards for Imposing Lawyer Sanctions. Standard 4.4, Fla. Stds. Imposing Law. Sanc., provides that:

> *Absent* aggravating or *mitigating circumstances*, and upon the application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:
> . . .
> 4.42 Suspension is appropriate when:
> . . .
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Standard 4.4, Fla. Stds. Imposing Law. Sanc. (emphasis added).

Respondent argued to the Referee that Standard 4.42(b), Fla. Stds. Imposing Law. Sanc., was the correct Standard as a beginning point for determination of appropriate discipline, provided that aggravating and mitigating factors were considered. TPH1-89. When the significant mitigators are considered, suspension is no longer appropriate under this Standard. See, Grisgby, 641 So. 2d at 1343 (suspension generally appropriate under Standards, especially where prior

discipline, but mitigating factor reduced to public reprimand and probation).

Standard 6.2, Fla. Stds. Imposing Law. Sanc., provides as follows:

> *Absent* aggravating or *mitigating circumstances*, and upon the application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:
>
> . . .
>
> 6.23 Public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

Standard 6.2, Fla. Stds. Imposing Law. Sanc. (emphasis added).

The evidence establishes unequivocally that Respondent was negligent in her failure to respond to the DCA's orders and in failing to move her clients' cases along. This negligence was caused by her clinical depression. She did not intentionally fail to act. She did not intentionally cause any harm to her clients. TPH1-51.

The Referee's recommended discipline of a public reprimand before the Referee and three years' conditional probation with the requirement of continued compliance with her FLA contract, a LOMAS review, an attorney monitor, attendance at ethics school, and payment of the Bar's costs is supported by the existing case law and by the Florida Standards for Imposing Lawyer Sanctions, and

meets the purposes of discipline as set forth by this Court. Because the Referee's recommended discipline is supported by existing case law, the recommendation should be upheld.

iv. Bar's Arguments Against Mitigating Factors Not Supported by the Record

The Bar is asking this Court to penalize Respondent for having an untreated medical condition which she did not realize was as severe as it had become by the time she finally sought therapy. True enough that Respondent did not know that her depression had become so bad until after the numerous bar complaints were filed. TPH1-25; 51-52. Respondent repeatedly testified to the analogy of her unknowing decline in function to that of placing a frog in water that is slowly heated versus in a pot of boiling water. TPH1-11; TPH2-12. The Bar argues that Respondent did not seek treatment until after disciplinary proceedings had begun. Surely, if she could have, she would have. TPH1-49. The very nature of depression is the inability to do certain things. TPH1-49-50. The Bar wants to penalize Respondent because she was unable to take the first step until she was facing summary judgment. But she finally took the first step in the days prior to the summary judgment hearing when she hired counsel, who made the referral to a psychiatrist. TPH1-10. In Respondent's very first action in these bar proceedings, her counsel's motion for continuance filed on or about May 6, 2004, Respondent

argued that she suffered from depression as the cause of her non-response. R's Motion for Continuance. Thereafter, Respondent sought voluntary psychiatric treatment and voluntarily entered into a contract with FLA. Respondent has been "very compliant" with the treatment recommendations of her psychiatrist. ROR-41. Respondent testified that she was thankful for these proceedings because it caused her to realize how sick she was. ROR-42; TPH1-25; TPH2-8.

Respondent was still somewhat functional but she did not realize that her disease had progressed to the point that it had become life threatening. TPH1-19. The Florida Bar's position appears to be that if Respondent had been completely non-functional instead of the low level of functioning that she was doing (TPH1-19), then the Bar might be more understanding. Thankfully, Respondent was meeting the minimum requirements for some of her clients. Respondent suggests that if she had been totally non-functional, the Bar would be seeking disbarment. It was Respondent's psychiatrist who testified that Respondent's failure to respond to the Bar and failures with respect to her clients was caused by her depression. TPH1-49. The Bar did not put on any testimony to contradict the testimony of the psychiatrist that Respondent suffered from clinical depression and that her actions and omissions were caused by her medical condition.

To now argue that Respondent's mental health condition did not affect her

practice because she was able to be somewhat functional and that competent and substantial evidence of depression is only an 'excuse' is contrary to all of the evidence.[2] To now suggest, as the Bar does in its Initial Brief, that Respondent's "claim that 'severe mental depression' is the 'cause' of her misconduct is contradicted by the oral and documentary evidence presented by the Respondent" (TFB Brief-30) and that the Referee's findings of mitigating factors under Standards 9.32(c), 9.32(h) and 9.32(j) is inconsistent with other findings (TFB Brief-27) is challenging the findings by the Referee that such depression was the cause of her misconduct. ROR-41-43. The Bar has not raised this issue on appeal and it should not be considered by this Court. Respondent has shown that her depression impaired her ability to practice law. The Referee's finding in this regard is well supported by the testimony of Respondent's psychiatrist and should be upheld by this Court.

Respondent has never asked this Court to dismiss the charges against her because her misconduct was caused by her mental illness. She has asked this Court

[2]The Florida Bar's citations to The Florida Bar v. Horowitz, 697 So. 2d 78 (Fla. 1997) and The Florida Bar v. Setien, 530 So. 2d 298 (Fla. 1988) that evidence of depression does not excuse misconduct are misplaced here. In both cases, the attorneys argued that depression or alcohol and drug dependency were involved. No testimony other than that of the respondent attorney was presented on the subject and in both cases, the referees had declined to consider the matters as mitigation.

to consider such causation as a significant mitigating factor which indicates that suspension is both harmful to her, not necessary in order to protect the public and not required under the existing case law and relevant Standards, as the Referee found. ROR-41-43.

b. Suspension for Any Period is Not Appropriate

At both final disciplinary hearings, The Florida Bar argued that Respondent should be suspended for one year, with other terms and conditions (TPH1-88 and TPH2-54). None of the cases cited by the Bar supported such a recommendation then or now.

i. Referee Rejected Suspension As Inappropriate

The Referee in his Report of Referee stated:

> I have considered the Bar's request that Respondent be suspended for a period of one year (or even any rehabilitative suspension) with additional terms and conditions. Notwithstanding that transgressions took place over an extended period of time with several clients, when weighed against the substantial mitigating factor of clinical depression as the cause of the behaviors, from which Respondent has made tremendous progress, I reject the request to recommend any term of suspension. The public is adequately protected from Respondent's possibility of relapse by the recommendations I have made herein.

ROR-43.

Thus, the Referee considered the Bar's argument for *any* term of suspension and rejected same as being inappropriate. The evidence in the record supports the

Referee's recommendation that suspension is inappropriate. Respondent's psychiatrist testified that suspension would be detrimental to Respondent's continued recovery. TPH1-52; TPH2-44. The psychiatrist also testified that she had considered the duty to the public when rendering an opinion that Respondent was fit to practice law. TPH2-46. The Referee considered the duty to the public, the aggravating and mitigating factors, and the purposes of discipline and found that suspension was not appropriate. ROR-42-43.

ii. Case Law Supports Referee Recommendation That Suspension Is Inappropriate

Further, the case law supports that suspension is not appropriate in this case.

In Grigsby, 641 So. 2d at 134, this Court stated, ". . . under the circumstances (clinical depression) we do not believe that a suspension is warranted." In Moran, 273 So. 2d at 380, this Court stated, ". . . it is unnecessary and might in fact be harmful to respondent's apparent rehabilitation to suspend respondent from the practice of law at this time."

iii. Standards for Imposing Lawyer Sanctions Do Not Necessitate Suspension

The Standards for Imposing Lawyer Sanctions do not require a suspension, as stated by the Bar. TFB Brief-19. The Standards clearly state at the outset of each one that the Standard is applicable "absent aggression or mitigating factors."

The Florida Bar argued the applicability of Standards 4.42 (suspension for knowingly failing to perform diligently) and 6.22 (suspension for intentionally failing to obey Court orders) at the final hearing before the Referee. TPH1-66. Standard 4.42(a), Fla. Stds. Imposing Law. Sanc., is inapplicable to Respondent's case because there is no evidence that she <u>knowingly</u> failed to perform services for a client and caused injury or potential injury. The record reflects that Respondent did not know that her illness was affecting her practice of law. TPH1-12, 17. Respondent agreed that 4.42(b), Fla. Stds. Imposing Law. Sanc., would be applicable if it were not for the "substantial mitigating factor of clinical depression as the cause of behavior." TPH1-59; ROR-43.

Similarly, Respondent did not <u>knowingly</u> violate with court orders or interfere with court proceedings. Her actions were negligent for the reasons stated.

The evidence is that Respondent did not knowingly cause any injury to her clients. TPH1-21, 51. The evidence is that Respondent's medical condition interfered with her ability to represent her clients. TPH1-49.

There was no testimony taken regarding any injury to the clients. The Florida Bar argues injury to clients based upon the summary judgment findings. The Florida Bar's argument that Mr. Samuel was incarcerated because Respondent failed to explain discovery to him (TFB Brief-19) is not supported by the citation

to record. "If the Respondent took the depositions, the defendant, Mr. Samuel might have considered the State's plea offer of probation more seriously." ROR-6 (emphasis added). Further, the record reveals that although Respondent supported Mr. Samuel's motion for new trial, the motion was denied because the trial court found that Respondent did an excellent job for Mr. Samuel. TPH1-22-23. Therefore, Mr. Samuel did not suffer any injury. Mr. Brown's case only dealt with Respondent's lack of payment of a civil debt. There are no findings relative to Respondent's initial representation of Mr. Brown; therefore, there can be no injury to her client in this matter. In the DCA complaint, the client was allowed a belated appeal. ROR-8. In Phifer, there is no evidence that the client's post-conviction relief would have been granted. Respondent is not arguing that there was no injury or potential injury to her clients. However, she is arguing that the injury is not as egregious as the Bar portrays it.

iv. Bar's Cited Cases Not Applicable

The Florida Bar cites to only two cases in which a one year suspension was imposed, neither of which are applicable. Reliance on The Florida Bar v. Centurion, 801 So. 2d 858 (Fla. 2000) is misplaced under the facts of Respondent's case. In Centurion, the attorney received a one year suspension as a result of numerous cases of misrepresentation to clients, lack of diligence and

communication, failure to respond to the Bar, and allowing clients cases to be dismissed due to missed court appearances, among other misconduct which the Court stated constituted an "intolerable breach of trust." Id at 862-63. There was no evidence whatsoever in the Centurion case that the attorney suffered from any type of medical, personal or emotional problems, much less that his misconduct was caused by the medical condition of clinical depression. In fact, this Court declined the Centurion referee's recommendation for a mental health evaluation because "the facts of the case were not such that Centurion would be aware that his mental health was in question." Id at 863. Moreover, it appeared that Mr. Centurion was not remorseful and was less than candid with the referee, as the referee noted that "Centurion suggestion that [the client] should have known that she still had a viable cause of action based on a contract theory because of her profession as a paralegal was 'outright offensive.'" Id at 861. There were no significant mitigating factors present in Centurion that would reduce the presumptive penalty of suspension. Id at 863.

The Florida Bar v. Cimbler, 840 So. 2d 955 (Fla. 2002), reh. den., is also significantly distinguishable from the facts at bar. Mr. Cimbler was also given a one year suspension for his neglect of client matters, failure to communicate with clients, improper use of trust funds, failure to notify clients of required appearances

which resulted in significant judgments and orders being entered against the clients and failure to attend court appearances, among other things. Mr. Cimbler was under an FLA contract and was under the care of a psychiatrist for recurrent and severe depression, *all during the time the offenses took place.* Cimbler also made deliberate efforts to make himself unavailable. Id at 957-58. The referee considered Standard 4.42(b) that the evidence established *negligent* handling of client matters. Id at 958. This Court rejected the referee's recommended 90 day suspension because Mr. Cimbler had significant prior discipline on the very same issues that were present here ("the serious and cumulative nature of Cimbler's misconduct, especially in light of his prior suspension, requires more severe discipline than recommended.") Id at 960-61. In 1994, Mr. Cimbler had received a 90 day suspension and three years probation based on similar findings of emotional problems and mental health impairments. It was during the period of probation that Mr. Cimbler continued to commit multiple acts of neglect at issue in the case and failed to be rehabilitated. Id at 960.

Although Respondent's cases involve several clients over several years, the evidence establishes that Respondent has no prior disciplinary history for the same or any other type of misconduct, her psychiatrist indicates she has made significant improvement which the Referee witnessed, that she is capable of practicing law,

and that she is doing well in her representation of clients. Respondent was not under the care of a psychiatrist or under her voluntary FLA contract at the time the offenses were committed. Instead, the evidence establishes she was sinking in deep depression, characteristically unaware of the impact that her depression was having on her practice of law.

The findings in The Florida Bar v. Shoureas, 30 Fla. L. Weekly S697 (Fla. 2005) (Shoureas II) are inapplicable in this case. Primarily, in Shoureas, in ordering a three year suspension, due to depression, the Court considered that the attorney had received three disciplines in the five years since her admission to the Bar, including a prior 91 day suspension and a three year suspension, which she was currently serving. See, The Florida Bar v. Shoureas, 892 So. 2d 1002 (Fla. 2004) (Shoureas I).

The Bar is not seeking a three year suspension in this case nor is it seeking disbarment, thus, Respondent believes that the Bar's arguments regarding cases such as Shoureas I, Shoureas II, and The Florida Bar v. Springer, 873 So. 2d 317 (Fla. 2004), are inapplicable because they do not support the Bar's requested discipline. The Bar has not cited to any similar cases which support its argument for a one year suspension. Thus, Respondent requests that this Court deny the Bar's request that she be suspended.

ISSUE II

THE REFEREE'S RECOMMENDATION THAT RESTITUTION IS NOT APPROPRIATE IS SUPPORTED BY THE RECORD

The Referee considered the Bar's request for restitution in the Sapp case, but declined to order same. The Referee stated,

> This Referee declines to order restitution in Case No. SC03-1931 (TFB File No. 2003-00,493(1A) (Sapp), as requested by The Florida Bar, because Mr. Sapp has pending civil litigation against Respondent relative to recovery of Respondent's attorney's fees which was stayed pending the outcome of this matter. Respondent and Mr. Sapp may thoroughly litigate the merits of his claim in the civil matter.

ROR-46.

a. Some Work Was Performed

The Sapp case was one of the many in this matter that were the result of summary judgment, as a result of Respondent's failure to respond to the formal complaint. The Referee's factual findings, based solely upon the Complaint filed by the Bar, indicated that Respondent did *some* work for Mr. Sapp. Respondent filed a motion for a bond hearing, and when she could not appear due to a medical emergency, she sent another attorney on her behalf. ROR-14.

However, The Florida Bar cited the finding that Respondent's fee was clearly excessive "because no legal work worth that amount of money was completed. . . ." TFB Brief-31; ROR-15. The facts, as found, indicate that

Respondent did some legal for Mr. Sapp, including the filing of a motion for bond, setting same for hearing, and because of an emergency medical procedure, having another attorney appear for her at the bond hearing. ROR-14. This finding by the Referee that some work was performed is contrary to the Bar's argument that "Respondent performed no legal services for the client." TFB Brief-32.

b. No Evidence of Amount Which Is Clearly Excessive

Rule 3-5.1(i), Rules, states in pertinent part:

> . . . the respondent <u>may</u> be ordered or agree to pay restitution to a complainant or other person if the disciplinary order finds that the respondent has received a clearly excessive, illegal, or prohibited fee or that the respondent has converted trust funds or property. In such instances the amount of restitution shall be specifically set forth in the disciplinary order or agreement and <u>shall not exceed the amount by which a fee is clearly excessive</u> . . . .

Rule 3-5.1(i) (emphasis added).

A referee is not required to recommend restitution. The language of the rule is permissive, not mandatory. Further, the amount of the restitution can only be that amount which is clearly excessive. Being that there is no such finding by the Referee as to the amount that was clearly excessive, this Court can not determine what amount was clearly excessive based upon this record.

c. Pending Civil Action Can Decide Issue

The Referee considered that it was more appropriate for the issue to be

litigated on the merits of how much Respondent earned, rather than relying on a default finding (by summary judgment) of a clearly excessive fee in a bar disciplinary proceeding. ROR-46. Florida public policy favors decisions on the merits. Lloyd's Underwriter's at London v. Ruby, Inc. 801 So. 2d 138, 139 (Fla. 4th DCA 2001).

Attorney disciplinary proceedings should not be used to pursue civil actions on behalf of a private citizen. The Florida Bar v. Della-Donna, 583 So. 2d 397 (Fla. 1989). This Court does not serve as a collections agency for former clients of bar members. Disciplinary proceedings "are not intended as forums for litigating claims between attorneys and third parties." Id at 312. The Florida Bar's argument that "it would be unfair to [Mr. Sapp] to be required to enforce a civil judgment against Respondent who may be judgment proof" (TFB Brief-36) appears to argue just that. In Della-Donna, the Court noted that "we can not and should not turn restitution as a condition of practicing our profession into a judgment for a third party. Della-Donna, 583 So. 2d at 312.

That this Court can order restitution of that portion of Mr. Sapp's fee which is excessive as a condition of Respondent's right to practice law does not mean that it should do so under the facts. The Florida Bar had not cited to one case in arguing this issue. It would be unfair to Respondent for Mr. Sapp to receive his

entire fee when Respondent performed some legal work for him and where the finding of a clearly excessive fee was by default (summary judgment) caused by Respondent's medical condition of depression. The evidence is that Mr. Sapp brought his civil action against Respondent, which was then held in abeyance pending the outcome of this case. TPH2-8. Respondent and Mr. Sapp can fully litigate the merits and amount of the fee in the civil action. ROR-46. The Referee's recommendation against restitution should be upheld by this Court.

ISSUE III

THE REFEREE'S REJECTION OF ADDITIONAL AGGRAVATING FACTORS IS SUPPORTED BY THE RECORD

The Referee's finding that only two aggravating factors– pattern of misconduct and multiple offenses– are applicable in this case (ROR-42) should be upheld.

The Bar argues Standard 9.22(e) (bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency); 9.22(i) (experience in the practice of law); and 9.22(j) (indifference to making restitution), Fla. Stds. Imposing Law. Sanc., are applicable to this case. TFB Brief-34. The Florida Bar made this same argument to the Referee. TPH1-84. The Referee declined to find that these aggravating factors were applicable to Respondent's case. "I have considered the Bar's arguments on other aggravating factors; however, I find that those do not apply here." ROR- 42-43. The Referee's finding that these provisions are inapplicable is supported by the record and should be upheld.

As to the Standard 9.22(e), because Respondent's actions and omissions are caused by a medical condition, Respondent's experience in the practice of law is irrelevant. It is not as if Respondent, by her experience in the practice, could control her illness. Therefore, the Referee's finding that this aggravating factor is

inapplicable should be upheld.

Standard 9.22(e) (bad faith obstruction of disciplinary proceeding) is equally inapplicable. The Bar's argument on this issue highlights the fundamental lack of understanding of the condition of depression. Respondent has already been found guilty of the substantive charge of failing to respond to the Bar. Now the Bar wants to aggravate that violation by alleging that the violation is also an aggravating factor. It would be improper to aggravate the violation of 4-8.4(g), Rules, by finding bad faith obstruction arising out of the very same set of facts which led to the substantive violation. Additionally, there is no support in the record that Respondent acted in bad faith. To the contrary, Respondent's inability to act in responding to the Bar was not intentional. TPH1-19, 21. That The Florida Bar had to use its own investigative resources to investigate and prosecute its own disciplinary complaints (TFB Brief-35) does not constitute a bad faith *obstruction*. There is absolutely no evidence that Respondent asked anyone to hide information or court records, or asked anyone to not speak with Bar investigators.[3]

Respondent is not required to maintain files of her former clients, a point which the Bar should know. Therefore, that Respondent "failed to provide any client case files to support her testimony" (TFB Brief-35), does not give rise to a

---

[3]The Referee recommended that the Bar's investigative costs be taxed against Respondent, a point which Respondent has not challenged.

bad faith obstruction. Moreover, the testimony was that Respondent did not have the clients' files. TSmith-17; TSM-64. There is no evidence that Respondent had the files, but refused to provide them to the Bar for inspection.

There is no evidence that Respondent acted in bad faith or that she *intentionally* failed to comply. The evidence is that Respondent's conduct, at most, was negligent due to her illness. Thus, the Referee's refusal to find this aggravating factor is supported by the record and should be upheld.

The record supports the Referee's finding that Standard 9.22(j) (indifference to restitution) is inapplicable to this case. Respondent testified she has had a continuing inability to pay or refund monies to her former clients. TPH1-20; TPH2-15; TSM-58. There is ample evidence in the record that Respondent has had significant financial difficulties which has exacerbated her depression. ROR-40-41; TPH1-20, 53; TPH2-15.

In the Sapp case, there has been no finding that Mr. Sapp is owed any money. TPH1-33. Although, the Bar argued for a recommendation of restitution, the Referee declined to order same because of a pending civil case between Mr. Sapp and Respondent. As to the allegation that Mr. Spooner is owed money, this is contrary to the finding of the Referee that Respondent did <u>not</u> charge a clearly excessive fee. ROR-36. Respondent testified that she did more than $10,000.00

worth of work. TSM-45. As such, no restitution is owed Mr. Sapp or Mr. Spooner; therefore, it would be inappropriate to find that Respondent had been indifferent in making restitution. Respondent has made some payments on the judgment due to Mr. Brown. TPH1-32. Respondent's inability to pay monies due to financial difficulties does not constitute indifference. The Referee properly found Standard 9.22(j) inapplicable. Such finding, being supported by the record, should be upheld.

The Referee's finding that these three Standards are inapplicable is supported by the record and should be adopted by this Court.

CONCLUSION

The Referee specifically addressed in his Report of Referee each point raised by the Bar on appeal. The Referee specifically declined to impose any period of suspension, explaining his rationale, finding that the public was adequately protected, and citing his reliance on existing case law in making his decision. This Court has repeatedly said that it will uphold the recommendation of a referee if based in existing case law.

The Referee properly and specifically declined to order restitution regarding Mr. Sapp's case, finding that it was more appropriate for Mr. Sapp and Respondent to litigate Mr. Sapp's claim on the merits, rather than rely on a default finding. There is no finding in the record of the amount of the fee which was clearly excessive. This Court should reject the Bar's request for an order of restitution.

The Referee properly found Standards 9.22 (e), (i), and (j), Fla. Stds. Imposing Law. Sanc., inapplicable to Respondent's case. The record supports that these Standards are inapplicable and this finding should be upheld by this Court.

Respondent urges this Court to uphold the Referee's recommendation of public reprimand and three years' conditional probation, as the proposed discipline is supported by existing case law and Standards and adequately meets the three purposes of disciplinary proceedings.

Respectfully submitted,

____

LOIS B. LEPP
Lois B. Lepp, P.A.
1127 N. Palafox St.
Pensacola, Florida 32501
(850) 435-1090
Florida Bar No.: 855634
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief regarding Supreme Court Case Nos. SC03-84, SC03-1205, SC03-1206, SC03-1931, SC04-448, SC04-1375, has been furnished by regular U.S. mail to Olivia Paiva Klein, Bar Counsel, at her record Bar address of 651 E. Jefferson St., Tallahassee, FL 32399-2300; and to John Anthony Boggs, Staff Counsel, at his record Bar address of 651 E. Jefferson St., Tallahassee, FL 32399-2300 on this ______ day of November, 2005.

____
LOIS B. LEPP
Attorney for Respondent

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

Undersigned counsel does hereby certify that the Respondent's Answer Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the Answer Brief has been filed by e-mail in accordance with the Court's Order of September 13, 2004 (AO SC04-84). Undersigned counsel does hereby further certify that the electronically filed version of this Answer Brief has been scanned and found to be free of viruses, by ZoneAlarm Security Suite.

____
LOIS B. LEPP
Attorney for Respondent