IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case Nos. SC03-84, SC03-1205, SC03-1206, SC03-1931, SC04-448, SC04-1375 (Consolidated)

v.

TFB File Nos. 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), 2004-00,410(1A), (Consolidated)

ELIZABETH AILEEN BROOME,

Respondent.
_______________________________/

THE FLORIDA BAR'S REPLY BRIEF

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PRELIMINARY STATEMENT

References in The Florida Bar's Reply Brief will be the same as in the Initial Brief, except for the following additions:

The Florida Bar's Initial Brief shall be designated as "Initial Brief" followed by the appropriate page numbers, i.e., "Initial Brief at p. 15."

Respondent's Answer Brief shall be designated as "Answer Brief" followed by the appropriate page numbers, i.e., "Answer Brief at p. 15."

STATEMENT OF THE FACTS

The Florida Bar would clarify that the facts set forth in the Initial Brief at pp. 12-18 pertaining to the Smith, Spooner, and Mailloux complaints are based on both the findings of fact by the referee and other materials referenced in the evidentiary record. Further, the mitigating factors found by the referee also include Standards 9.32(b) (absence of dishonest or selfish motive), and 9.32(l) (remorse). See ROR-42.

SUMMARY OF ARGUMENT

Standard 4.42 does not require that the misconduct be intentional or negligent in order to impose a suspension. The introductory language to the Standard also acknowledges a weighing of the aggravating and mitigating factors under the facts and circumstances of each disciplinary case. In these nine disciplinary actions, there were multiple rule violations demonstrating a pattern of neglect that caused injury or potential injury to a client. When weighed against Respondent's mitigating evidence, mental impairment offers a rationale for her misconduct, and consideration of a lesser discipline of a one-year suspension, but the mitigating evidence does not support a public reprimand as a disciplinary sanction.

While there may not be a case on point to support a one-year suspension when there is evidence of mental depression, a review of the case law on neglect of client supports The Florida Bar's disciplinary recommendation of a one-year suspension under the facts of these nine cases. Further, this rehabilitative suspension serves the purposes of a disciplinary sanction.

Restitution should be granted in this case because there was a specific finding of a "clearly excessive fee" that is one of the limited requirements under Rule 3-5.1(i). The Sapp complaint was not based on a dispute over a legal fee. Mr. Sapp paid Respondent's fee in full before the representation began. It was only after Respondent failed to

communicate with him for over 5 months, waived his speedy trial rights, and failed to diligently pursue his case, that Mr. Sapp wanted his fees refunded. Using the rationale in the referee's report, any time a fee was found to be clearly excessive, as long as a civil action could be brought, no restitution would be granted under Rule 3-5.1(i). Even if an attorney was found to violate Rule 4-1.5(a)(1), if a civil action and judgment could be sought, then no restitution would be granted to the prevailing complainant. This result would weaken the efficacy of a Rule 4-1.5(a)(1) violation, and the attorney could receive a windfall by keeping the clearly excessive fees.

ARGUMENT

ISSUE I

THE FLORIDA LAWYER STANDARDS AND RELEVANT CASE LAW SUPPPORT A ONE-YEAR SUSPENSION

Standard 4.42 states that suspension is an appropriate discipline when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Respondent claims that she did not "intentionally fail to act" and did not "intentionally cause any harm to her clients." See Answer Brief at p. 19. Standard 4.42 does not state that the misconduct needs to be intentional or negligent. Whether Respondent intended her misconduct or not, whether negligently done or not, it did result in injury to her clients. See Initial Brief at p. 19-20. Despite her alleged medical problems, she knew what she was doing, and continued to engage in the misconduct over a long period of time.

The introductory language to this Standard necessitates a weighing of the aggravating and mitigating factors in order to determine what level of discipline is appropriate. Although at the time Respondent engaged in the misconduct, she may have a medical condition that offers a rationale for Respondent's behavior, it does not excuse the multiplicity of rule violations and the pattern of misconduct over many years. See The Florida Bar v. Shankman, 908 So.2d 379 (Fla. 2005) (Despite the referee's finding of

numerous mitigating factors, including no prior disciplinary history, the Court held "… based on the amount and type of misconduct which occurred, we find that this was not a momentary lapse of judgment, but a pattern of dishonest and unethical conduct that occurred consistently for at least three months and involved multiple clients and other parties...cumulative misconduct must be treated more severely than isolated misconduct." Id. at 386).

Respondent's actions did result in injury to the clients. In the Samuel complaint, the referee found, and Respondent admitted, that "she had failed to sit down and discuss the case with her client reviewing his options and the evidence against him before trial so that he could make an informed decision as to whether to take a plea or go to trial." See ROR-6. Since Respondent failed to take any depositions on behalf of Mr. Samuel, a reasonable inference would be that the "evidence against him" consisted at least in part of the discovery provided by the State that is customarily requested by an attorney at the beginning of a criminal case.

Respondent contends that a public reprimand should be imposed because there are no cases on point that support a one-year suspension in which mental depression was a mitigating factor. Respondent's cases, however, can be analogized to the recent case of The Florida Bar v. Shoureas, 2005 WL 2509271 (Fla.) ("Shoureas II") where the court imposed a three-year suspension on an attorney who presented almost identical evidence

of mental depression as a mitigating factor for two cases of client neglect. Although in Shoureas II the attorney had a prior disciplinary history, Respondent has evidenced a pattern of misconduct that far exceeds the three prior cases of neglect brought against Shoureas. In addition, if Respondent's nine cases had been considered on an individual basis as they occurred rather than consolidated by the referee, the recommended disciplinary sanction would have escalated far beyond a public reprimand. See The Florida Bar v. Springer, 873 So.2d 317, 325 (Fla. 2004).

The one-year suspension is an appropriate discipline under the relevant case law and serves the three-pronged purposes of a disciplinary sanction. See The Florida Bar v. Brake, 767 So.2d 1163, 1169 (Fla. 2000). In a review of Shoureas II and other cases with multiple counts of client neglect, The Florida Bar considered Respondent's mental depression, her lack of prior disciplinary history, and the nature of the multiple violations in the present nine cases. In weighing the facts and circumstances of all nine disciplinary cases, however, and considering the applicable mitigating and aggravating factors, The Florida Bar contends that a one-year suspension is the appropriate level of discipline for Respondent's misconduct.

ISSUE II

RESTITUTION IS APPROPRIATE WHEN IT HAS BEEN DETERMINED THAT RESPONDENT RECEIVED A CLEARLY EXCESSIVE FEE

One of the purposes of imposing a disciplinary sanction is to protect the public from unethical conduct by members of The Florida Bar. See The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). In order to avoid a disciplinary proceeding being used as a substitute for a civil action or a malpractice proceeding, however, Rule 3-5.1(i) limits restitution to only those cases in which there has been a finding of a clearly excessive fee or conversion of client trust funds. See The Florida Bar v. Smith, 866 So.2d 41, 49 (Fla. 2004). In the Sapp complaint, the referee made a specific finding of a "clearly excessive fee" and found a violation of Rule 4-1.5(a)(1). See ROR-15, 35. Restitution is therefore clearly warranted under the Rules and the findings in the Sapp complaint.

It was only after Respondent neglected his criminal case, failed to communicate with him for five months, and waived his speedy trial rights without his consent, that Mr. Sapp terminated Respondent's legal representation and demanded a refund of his legal fees. Mr. Sapp paid Respondent's $6,700 total fee in full at the outset of his criminal case and did not dispute it as excessive. The Sapp complaint was not a fee dispute between the parties. It was a demand for repayment of his legal fees because Respondent failed to provide the legal services for which she was retained. To allow the public perception that

an attorney can charge a fee for legal services that are not rendered, and not be required to refund a clearly excessive fee, defeats the purposes of a disciplinary action against the attorney for violation of Rule 4-1.5(a)(1) to the detriment of the client, and provides a windfall to Respondent. See The Florida Bar v. Kavanaugh, 2005 WL 2233547 (Fla.), September 15, 2005, 30 Fla. L. Weekly S630 ("…lawyers who charge excessive fees are guilty of serious ethical breaches that diminish public confidence in the legal profession." 2005 WL 2233547 at *4).

CONCLUSION

For the reasons stated in The Florida Bar's Initial Brief and this Reply Brief, The Florida Bar would respectfully request that the Court reject the referee's disciplinary recommendation of a public reprimand, and impose a one-year suspension, grant restitution of $6,700 to Ricky Sapp to be paid before reinstatement, and find that the referee should have found additional aggravating factors based on the face of the record and the referee's findings of fact.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief regarding Supreme Court Case Nos. SC03-84, SC03-1205, SC03-1206, SC03-1931, SC04-448, SC04-1375 has been mailed by regular U.S. Mail to Lois B. Lepp, Respondent's Counsel, at her record Bar address of 1127 North Palafox Street, Pensacola, Florida 32501, on this 9th day of December, 2005.

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Olivia Paiva Klein, Bar Counsel

Copy provided to:
John Anthony Boggs, Staff Counsel

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

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

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Olivia Paiva Klein, Bar Counsel