IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STEVEN RAY BROWNSTEIN,

Respondent.
_____/

Supreme Court Case
No. SC04-2460

The Florida Bar File
No. 2004-71,265(11L)

The Florida Bar's Reply Brief

VIVIAN MARIA REYES
Bar Counsel
Florida Bar No. 004235
The Florida Bar
444 Brickell Ave., Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN ANTHONY BOGGS
Staff Counsel
Florida Bar No. 253847
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399
(850) 561-5839

JOHN F. HARKNESS, JR.
Executive Director
Florida Bar No. 123390
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399
(850) 561-5839

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DISBARMENT IS THE APPROPRIATE SANCTION FOR RESPONDENT'S MISCONDUCT.

This Court has made abundantly clear on numerous occasions that disbarment is the presumed appropriate sanction for misappropriation absent evidence of mitigation which outweighs substantially the seriousness of the violations and aggravating factors.[1] Most recently, this court reiterated that view in The Florida Bar v. Broome, 31 Fla. L. Weekly S347 (Fla. 2006), wherein this court stated that but not for the substantial mitigating evidence in the case, the sanction might have been disbarment. A careful analysis of the Broome case reflects this court's intolerance of serious misconduct and lends support to the Bar's position that disbarment is the appropriate sanction in the instant case.

The Broome case involved thirty-three separate rule violations of eighteen different rules with the misconduct spanning a period of almost seven years. Eight different clients were affected. Primarily the allegations involved or stemmed from neglect and failure to communicate, although other rule violations were present as well. There was no misappropriation and only one rule violation involving conduct involving dishonesty, fraud, deceit, or misrepresentation was found. The referee found several mitigating factors including: no prior

[1] See The Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996); The Florida Bar v. Weinstein, 635 So. 2d 21 (Fla. 1994); The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991); The Florida Bar v. Schiller, 537 So. 2d 992 (Fla. 1989).

disciplinary history, personal or emotional problems, physical or mental disability or impairment, interim rehabilitation, absence of dishonest or selfish motive, and remorse. Specifically, the referee found that the respondent suffered from clinical depression which caused her to engage in the misconduct found. The referee's findings of two aggravating factors: pattern of misconduct and multiple offenses, was not disturbed. While the Bar argued that the referee erred in not finding additional aggravating factors, the court concluded that there was competent substantial evidence in the record to support both a finding that the factors applied and that they did not. Accordingly, the referee's findings in this regard were not disturbed. The court did, however, reverse the referee on discipline, imposing a one year suspension with special conditions (the sanction sought by the Bar) rather than the public reprimand recommendation by its referee.

In distinguishing Broome from much earlier cases in which lesser discipline was imposed for ethical violations committed by lawyers suffering from clinical depression, this court cited to the differences in the number of rule violations involved, the rules violated, the clients affected, and the years of misconduct involved. Most importantly, this court noted its movement in recent years towards stronger sanctions for attorney misconduct, a sentiment pronounced in The Florida Bar v. Rotstein, 835 So. 2d 241, 246 (Fla. 2003).

While the number of rule violations present in the instant case are not as many as those found in Broome, the seriousness of the rule violations found in the instant case are compelling. They include both misappropriation [Rule 5-1.1(a) of the Rules Regulating Trust Accounts] and conduct involving dishonesty, deceit, fraud or misrepresentation [Rule 4-8.4(c) of the Rules of Professional Conduct]. When coupled with the aggravating facts disregarded by the referee including respondent's failure to pay his income tax for years (T. 229, 252, 264), failure to pay his secretary's withholding tax for years (T. 229-230, 250-251), failure to provide The Florida Bar with subpoenaed trust records, and his other instances of misappropriation, it is apparent that respondent's misconduct is far more egregious than that in Broome. As this court succinctly pointed out in the Broome case, not all rule violations are equal and the violation of some rules will result in greater sanctions than the violation of others. Clearly, the rule violations found in the instant case are amongst the most serious violations a lawyer can commit. When coupled with the aggravators ignored by the referee, respondent cannot overcome the presumption of disbarment.

Nonetheless, in support of the referee's recommendation of a three year suspension, the respondent points to Dr. Eustace's testimony concerning respondent's depression, describing it as unrebutted and clearly establishing respondent's illness. (Respondent's Answer Brief, p. 22). Respondent further

points to The Florida Bar v. Clement, 662 So. 2d 690 (Fla. 1995), for the proposition that unrebutted testimony cannot be arbitrarily ignored. However, as evidenced by her report, the referee did not ignore Dr. Eustace's testimony, nor is the Bar suggesting it be ignored. Rather, it is the Bar's position that the evidence of respondent's psychological problems was insufficient to overcome the presumption of disbarment, particularly given the Bar's arguments regarding the aggravators ignored by the referee.

Despite Dr. Eustance's testimony of depression, the evidence showed that respondent handled a complex legal matter with great results during this period (T. 183-185), that he knew right from wrong when engaging in his misconduct (T. 84), and that he functioned well socially (T. 245). Moreover, rather than the neglect and related misconduct found in Broome, respondent's misconduct involves trust, both trust funds and entrustment. Not only did respondent misappropriate client funds on more than one occasion (T. 189-190, 192, 267-271), but he also engaged in illegal and dishonest conduct by failing to file and pay his income taxes or remit his secretary's taxes which he withheld from her. If that wasn't enough, he issued non-sufficient fund checks to cover his theft (T. 187) and lied to his secretary about the taxes he withheld and failed to remit (T. 230-231, 250-251). To this day, respondent has not rectified either his or his secretary's tax issues (T. 251). Respondent's misconduct is simply not of the nature found in Broome.

Given the foregoing, The Florida Bar maintains that disbarment is the appropriate sanction for respondent's misconduct.

CONCLUSION

The Florida Bar respectfully requests this Honorable Court reject the Referee's recommended discipline and disbar Respondent.

Respectfully submitted,

VIVIAN MARIA REYES
Bar Counsel
TFB No. 004235
The Florida Bar
444 Brickell Avenue
Suite M-100
Miami, Florida 33l3l
Tel: (305) 377-4445

JOHN ANTHONY BOGGS
Staff Counsel
TFB No. 253847
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
Tel: (850) 56l-5600

JOHN F. HARKNESS, JR.
Executive Director
TFB No. 123390
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
Tel: (850) 56l-5600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Reply Brief was forwarded via priority mail to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Richard Baron, Attorney for Respondent, 501 N.E. First Avenue, Suite 201, Miami, Florida 33132-1960, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this _____ day of June, 2006.

_____
VIVIAN MARIA REYES
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that the Initial Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

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VIVIAN MARIA REYES
Bar Counsel