IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SHELLY GOLDMAN MAURICE,

Respondent.

_____/

Supreme Court Case No. SC04-700

The Florida Bar File No. 2002-51,684(15B)

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Throughout this Answer Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR ___ (indicating the referenced page number). The Florida Bar will be referred to as "the bar." Shelly Goldman Maurice will be referred to as "respondent." The Appendix will be designated as A___ (indicating the referenced Appendix number).

STATEMENT OF THE CASE AND FACTS

On November 17, 1998, the respondent prepared a quit claim deed for Ms. Helen Spelker. The quit claim deed conveyed a condominium to Gerard and William Spelker (Ms. Spelker's son and grandson, hereinafter, "the heirs"), while giving Helen Spelker a life estate in the property (A, 1). On August 5, 1999, respondent drafted a will for Ms. Spelker. (A, 2).

Despite having already conveyed the condominium to the heirs, respondent placed a provision in this 1999 will that required the heirs to first offer the sale of the condominium to Mr. Arthur Oliveri, a caretaker of Ms. Spelker. Respondent knew or should have known that any provision made for the condominium in the August 1999 will would have no legal force or effect. Helen Spelker died on April 2, 2001. Respondent was named personal representative in the 1999 will of Helen Spelker.

Despite a bulk of the decedent's estate being exempt or transferred upon her death, respondent opened a probate estate on May 19, 2001. (A, 3). No estate proceedings were needed. The heirs retained the respondent based on her legal advice and representations that probate estate proceedings were necessary. Respondent failed to competently or properly explain to the heirs that an estate was not necessary. Furthermore, the respondent advised the heirs that an estate needed to be opened up and a trust set up for William Spelker, a minor, to facilitate the

sale of the condominium. All proceeds from the sale of the condominium would go into this trust. Respondent was named the trustee of this trust in the 1999 will drafted by her.

In June 2001, the heirs wrote to respondent to request a copy of the November 1998 quit claim deed to the condominium, and sought answers to questions about the pending estate proceedings. The heirs wanted to utilize this information to consult with their New York attorney. Respondent never provided a copy of the quit claim deed to the heirs nor provided answers to their questions about the probate estate. In addition, the respondent improperly tried to force their heirs to sell the condominium to Arthur Oliveri.

In May 2001, the respondent opened an unnecessary probate estate. The respondent created an impermissible conflict of interest with the heirs by opening this needless probate estate for the purpose of generating legal fees for herself; and by seeking to promote the interests of the caretaker, Arthur Oliveri, over the heirs. The respondent assisted Arthur Oliveri, the caretaker, in preparing and filing a claim against the estate because respondent wanted additional monetary compensation beyond the amount provided by Helen Spelker prior to her death. The heirs filed a bar complaint in May 2002. After the filing of this bar complaint, the condominium was finally sold in June 2002. By placing this property in

probate, the sale of the condominium was delayed for over a year. This delay was directly attributable to the ethical misconduct of the respondent.

The referee assigned to handle this disciplinary case was The Honorable Mel Grossman, a circuit court judge within the probate division of The Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent chose to represent herself *pro se* throughout the pendency of the disciplinary case. A final hearing was held on August 11, 2004. The referee provided the respondent with an opportunity to present any and all evidence and testimony on her behalf during this final hearing. On September 13, 2004, The Florida Bar provided the respondent with an opportunity to object to the findings and contents of the proposed final report of referee. (A, 4). The respondent failed to object to the contents of the bar's proposed report of referee, and she failed to file a proposed report on her own behalf. On October 28, 2004, The Honorable Mel Grossman filed his final report of referee with this Court. The referee recommended that respondent be found guilty of violating R. Regulating Fla. Bar 4-1.1 [A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.]; Rule 4-1.3 [A lawyer shall act with reasonable diligence and promptness in representing a client.]; 4-1.4(a)(b) [(a) A lawyer shall keep a client reasonable informed about the status of a matter and promptly comply with reasonable

requests for information. (b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.]; 4-1.7(b) [A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client, or to a third person or by the lawyer's own interests unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation.]; 4-3.2 [A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.]; and 4-8.4(a) [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another] (RR , 3).[1]

Specifically, the referee made the following findings of fact:

I. FINDINGS OF FACT:

After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

[1] While reviewing the respondent's initial brief, bar counsel discovered that respondent's statement of case had proffered that she was found guilty by the referee for violating R. Regulating Fla. Bar 4-8.4(c) and Rule 4-8.4(d) . The report of referee specifically reflects that the referee did not find respondent guilty of violating either of the above-mentioned rules.

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary of Case.

1. In October 1998, Respondent met Helen Spelker, who hired Respondent to prepare a will, a power of attorney and a healthcare designation.

2. Respondent also prepared a quit claim deed in November, 1998.

3. Respondent sought to have Ms. Spelker retain the ability to sell or otherwise dispose of the property, but quit claimed her property reserving only a life estate.

4. The quit claim deed was duly recorded in the public record and the son and grandson became vested remainderman.

5. In August 1999, Respondent drafted a second will for Ms. Spelker. In the will, a key provision required the heirs to offer to sell the condominium to Arthur Oliveri, the descendant's [sic] caretaker for not less than $38000.

6. Respondent believed Ms. Spelker could control disposition of the property through her estate although she retained only a life estate as a result of the quit claim deed.

7. Helen Spelker died on or about April 2001.

8. The bulk of the decedent's estate was exempt or transferred upon her death, therefore, no formal estate proceedings were needed.

9. Despite the fact that no proceedings were necessary, Respondent opened an estate.

10. Respondent was hired by the heirs to probate the estate and handle the proper disposition of the property. She failed to explain to the heirs that an estate was not necessary. She explained an estate needed to be opened and a trust set up for William Spelker so that any proceeds from the sale of the condominium could be placed in trust.

11. Respondent had drafted the will in such a manner that the trust provided for in Helen Spelker's will appointed Respondent as the trustee.

12. When questioned by Pamela Spelker, the grandson's mother, Respondent did not advise Pamela Spelker or her attorney

that the condominium was transferred in November 1998, nor did she provide a copy of the deed she had prepared.

13. Respondent's conduct of opening an estate when none was needed placed her in conflict with the heirs of the estate who sought her counsel after Helen Spelker passed.

14. Her judgment regarding the necessity of an estate was clouded by her expressed concern for Helen Spelker's caretakers. (RR 1-3).

In recommending the appropriate disciplinary measures to be applied against the respondent the referee noted:

> In today's society, the majority of Florida's population no longer lives in small communities, but, rather, in ever growing metropolitan areas. Attorneys are more involved in the lives of individuals than at any other time in our history and, typically, their clients only know that they have been approved to practice by The Supreme Court of Florida. These clients are consumers of legal services and expect assurances that they deal with counsel who are licensed to practice, they are dealing with someone who is competent and whose only interest is in their client and any other persons to whom is owed a fiduciary duty. They are entitled to expect that ant it is the responsibility of the judicial branch to insure the professionalism and competency of all attorneys. The public has the right to rely upon the courts to maintain these high standard [sic]. (RR 3-4).

The referee, in determining that the respondent's conduct was sufficiently egregious to warrant a two year suspension, considered two aggravating factors. These were the vulnerability of the victim, and respondent's substantial experience

in the practice of law. (RR, 4). The referee also considered the respondent's lack of a prior disciplinary record as the lone mitigating factor in this case. (RR, 5).

SUMMARY OF THE ARGUMENT

The Bar provided the referee with a copy of the publicly recorded November 1998 quit claim deed conveying the condominium of Helen Spelker to the heirs. Upon the death of Ms. Spelker, the condominium automatically vested in the heirs as remaindermen with the right of survivorship. Furthermore, the referee was provided with a copy of the August 5, 1999 will of Ms. Spelker that required that the previously conveyed condominium pass through a probate estate. Both legal documents were prepared by the respondent. The respondent was named personal representative in Helen Spelker's will. The referee also considered the testimony of the respondent prior to entering his findings of fact and conclusions of guilt in this case. The referee, as a probate division judge, was uniquely qualified to consider all the facts and legal issues surrounding the bar's complaint.

This Court has held a bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently deter other attorneys from similar misconduct. Furthermore, the discipline must have a reasonable basis in existing case law or The Florida Standards for Imposing Lawyer Sanctions. The recommendation by the referee in the case adheres to the purpose of lawyer discipline because it is fair to society, it is fair to respondent, and would deter other attorneys from engaging in similar conduct. Moreover, existing case law supports and allows the referee's

recommendation for disciplinary measures to be applied against the respondent. The single mitigating factor found by the referee does not overcome the aggravating factors that justify the referee's recommendation that a rehabilitative suspension is warranted in this case. Given this respondent's misconduct, the aggravating factors found by the referee, the discipline given in similar cases, and The Florida Standards for Imposing Lawyer Sanctions, the referee in this case appropriately recommended a two year rehabilitative suspension along with the requirement that the respondent complete specific continuing legal education programs and pays the bar's cost in prosecuting this proceeding.

ARGUMENT

I. THE REFEREE PROPERLY FOUND RESPONDENT GUILTY OF VIOLATING THE FOLLOWING ETHICAL RULES: 4-1.1 (COMPETENCE), 4-1.3 (DILIGENCE), 4-1.4(A)(B) (INFORMING CLIENT OF STATUS OF REPRESENTATION), 4-1.7(B) (CONFLICT OF INTEREST-DUTY TO AVOID LIMITATION OF INDEPENDENT PROFESSIONAL JUDGMENT), 4-3.2 (EXPEDITING LITIGATION), and 4-8.4(A) (A LAWYER SHALL NOT VIOLATE RULES OF PROFESSIONAL CONDUCT).

The respondent presented the argument at page 10 of her initial brief that the referee's findings of ethical rule violations were not substantiated by clear and convincing evidence. A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. *The Florida Bar v. Forrester*, 656 So.2d 1273 (Fla. 1995), quoting *The Florida Bar v. Marable*, 645 So.2d 438 (Fla. 1994). Because the referee is in the better position to evaluate the demeanor and credibility of the witnesses, the referee's findings of fact should be upheld if they are supported by competent, substantial evidence. *The Florida Bar v. Forrester*, 656 So.2d 1273 (Fla. 1995), quoting *The Florida Bar v. Marable*, 645 So.2d 438 (Fla. 1994). On review, this Court neither reweighs the evidence in the record nor substitutes its judgment for that of the referee so long as there is competent, substantial evidence in the record to support the referee's findings. *Id*. The party contending the referee's findings of fact and conclusions as to guilt are erroneous

carries the burden of demonstrating that there is no record evidence to support those findings or that the evidence in the record clearly contradicts the conclusions. *The Florida Bar v. Feinberg*, 760 So.2d 933 (Fla. 2000), quoting *The Florida Bar v. Sweeney*, 730 So.2d 1269, 1271 (Fla. 1998).

Cloaked with the presumption of correctness, the respondent has the burden of showing that either no evidence was found on the record to support the findings of fact or that the evidence in the record clearly contradicts the referee's conclusions of guilt. First, respondent improperly attacks the referee's findings of fact and conclusions of guilt related to ethical misconduct involving "dishonesty, misrepresentation, deceit or fraud." (emphasis added). Although initially charged with Rules Regulating The Florida Bar 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation …] in the bar's complaint, The Report of Referee (RR, 3) never found respondent guilty of violating 4-8.4(c). Therefore, the respondent's argument in attacking a finding of guilt for a rule violation not found within the final report of referee is meritless; and does not rebut the factual findings of the referee nor contradict the conclusions of guilt found by the referee for the remaining rules violations.

Given the findings of facts and conclusions of guilt found by the referee after a final hearing, the respondent has failed to present compelling proof that the referee's findings of fact or conclusions were clearly erroneous. The referee was

in the best position to consider the demeanor and credibility of the respondent's testimony and to evaluate the weight of the evidence introduced at the final hearing. Despite respondent's self-serving assertions that she violated no ethical rules, the referee entered findings of fact based on the respondent's testimony, pleadings, and evidence presented during the final hearing. (RR, 1). These findings of fact and conclusions of guilt were supported by clear and convincing evidence, and substantiated violations of Rules Regulating The Florida Bar 4-1.1, 4-1.3, 4-1.4(a) and (b), 4-1.7(b), 4-3.2 and 4-8.4(a) by the respondent. The respondent specifically failed to demonstrate how the referee's findings of fact were based on no evidence. Also, the respondent did not provide specific evidence from the record that clearly contradicts the referee's conclusions of guilt. The mere fact that the referee did not accept her testimony as credible does not obviate or disprove the referee's findings of fact or conclusions of guilt. Therefore, the findings of fact and conclusions of guilt made by the referee in this case were supported by clear and convincing evidence and should be adopted by this Court.

II. THE REFEREE PROPERLY RECOMMENDED A TWO YEAR SUSPENSION FOR RESPONDENT'S ETHICAL MISCONDUCT AND THE REFEREE'S RECOMMENDATION IS SUPPORTED BY THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND EXISTING CASE LAW.

While a referee's findings of fact should be upheld unless clearly erroneous, this Court is not bound by the referee's recommendations in determining the appropriate level of discipline. *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986); *The Florida Bar v. Rue*, 643 So.2d 1080 (Fla. 1994). Furthermore, this Court has stated that the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997); *The Florida Bar v. Wilson*, 643 So.2d 1063 (Fla. 1994). In *The Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970), this Court held three purposes must be held in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter other attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *The Florida Bar v. Sweeney*, 730 So.2d

1269 (Fla. 1998); *The Florida Bar v. Lecznar*, 690 So.2d 1284 (Fla. 1997). This Court will not second–guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law. *The Florida Bar v. Laing*, 695 So.2d 299, 304 (Fla. 1997) .

In addition, The Florida Standards for Imposing Lawyer Sanctions provides a reasonable basis for the referee's recommendation of a rehabilitative suspension for the respondent. The Florida Standards for Imposing Lawyer Sanctions 4.3 deals with the proper sanction for an attorney's failure to avoid conflicts of interest. Here, respondent opened up an unnecessary probate estate; failed to inform the heirs that their condominium had already been previously transferred to them back in November 1998; furthermore, the referee specifically found that the independent judgment of the respondent was clouded by her expressed concern for Helen Spelker's caretakers over the heirs as her clients. Moreover, Standard 4.32 suggests suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. The delay attributable to the respondent's misconduct injured the heirs by needlessly delaying their ability to sell the condominium. The condominium should have been available for sale immediately upon the death of Ms. Spelker on April 2, 2001, absent the conflicts of interest

created by the respondent. Thus, a rehabilitative suspension is an appropriate sanction given the respondent's ethical misconduct.

The Florida Standards for Imposing Sanctions 4.4 deals with the proper sanction for an attorney's lack of diligence in representing a client. Sanction 4.42 provides that suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. Again, by placing the condominium in an unnecessary probate estate, while favoring the caretaker's attempts to purchase the property, the respondent caused a needless delay in the heirs receiving the proceeds from the sale of their condominium for over a year from the date of the death of Helen Spelker. This injury to the heirs due to the respondent's lack of diligence was sufficient to provide a reasonable basis for the referee's recommendation of a rehabilitative suspension.

Florida Standards for Imposing Sanctions 4.5 deals with the proper sanction for an attorney's lack of competence in representing a client. Sanction 4.2 provides that suspension is appropriate when a lawyer engages in an area of practice in which the lawyer lacks competence, and causes injury or potential injury to a client. The respondent drafted a quit claim deed that fully conveyed Helen Spelker's condominium to the heirs upon her death. Respondent then prepared a will after the quit claim deed, requiring placement of this condominium in a probate estate upon the death of Helen Spelker. After Helen Spelker's death,

respondent opened an unnecessary probate estate where the bulk of the decedent's estate was exempt or transferred automatically upon her death. This misconduct reflected the vast incompetence exhibited by the respondent. The injury to the heirs included a lengthy delay in their ability to sell the condominium due to the respondent's incompetence. This injury provided a reasonable basis for the referee's recommendation of a rehabilitative suspension for the respondent.

Florida Standards for Imposing Sanctions 7.0 deals with the proper sanction for an attorney's violations involving duties owed as a professional. Sanction 7.2 provides that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of the duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Again, the injury resulting from the respondent's incompetence would likewise support a recommendation for rehabilitative suspension under the Florida Standards for Imposing Sanctions 7.0.

When considering the discipline delineated in The Florida Standards for Imposing Lawyer Sanctions, any applicable mitigating or aggravating factor must be considered. A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. *The Florida Bar v. Forrester*, 656 So.2d 1273 (Fla. 1995), quoting *The Florida Bar v. Marable*, 645 So.2d 438 (Fla. 1994). This standard applies in reviewing a referee's finding of mitigation and

aggravation. *The Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003). Again, because the referee is in the better position to evaluate the demeanor and credibility of the witnesses, *The Florida Bar v. Sweeney*, 730 So.2d 1269, 1271 (Fla. 1998).

The referee in the instant case found in mitigation the absence of a prior disciplinary record. In aggravation, the referee found vulnerability of the victim and respondent's substantial experience in the practice of law. The mitigating factor in this case did not outweigh the aggravating factors found by the referee in recommending the discipline for the respondent. Respondent asserts in her brief that she established the following mitigating factors for this Court's consideration:

1. Absence of prior disciplinary record;

2. Respondent is a self starter who put herself through law school and started her own firm;

3. The complainants did not lose money nor pay a fee to respondent;

4. Respondent has completed all required CLE courses since the filing of the Final Report of Referee;

5. Respondent is Chairperson of South County Bar Association's Real Estate Committee; and

6. Respondent never intentionally violated any ethical rules.

The Florida Standards for Imposing Lawyer Sanctions 9.3 enumerates factors which may be considered and found in mitigation. The referee found specifically the absence of a prior disciplinary record as the only mitigating factor in the respondent's case. Respondent's 5 additional proffered mitigating factors found in her initial brief have no reasonable basis or correlation with any of the enumerated mitigating factors in Florida Standards for Imposing Lawyer Sanctions 9.32. Furthermore, while still pending at the referee level, the respondent failed to object to, or contest the language of, the proposed report of referee from the bar, and failed to submit a proposed final report on her own behalf prior to the referee filing his final report with this Court.

Therefore, the Court should rely on the referee's recommendations for discipline and adopt his recommendation for a rehabilitative suspension based on the referee's unique position to evaluate the credibility of the respondent's testimony at the final hearing. The referee properly weighed the testimony and evidence presented to him at the final hearing. Therefore, this Court should adopt the referee's recommendation for a rehabilitative suspension of the respondent.

This Court has ruled and upheld the recommendation of rehabilitative suspensions were appropriate in cases involving similar ethical misconduct. In *The Florida Bar v. Cimbler*, 840 So.2d, 955 (Fla. 2002), this Court held Respondent's conduct in neglecting client matters and failing to communicate with clients

warranted a one year suspension. This Court also held that a one year suspension was warranted when an attorney violates rules of professional conduct involving competence, diligence, and failure to communicate with clients. *The Florida Bar v. Jordan*, 705 So.2d 1387 (Fla. 1998). Finally, in *The Florida Bar v. Theed*, 246 So.2d 745 (Fla. 1971), this Court imposed a one year suspension for ethical misconduct encompassing an attorney's improper handling of a probate estate, and for the attorney's failure to properly account for assets of the probate estate.

Again, this Court should adopt the referee's recommendations for discipline. A two year rehabilitative suspension is the appropriate discipline and warranted given the egregious ethical misconduct of the respondent. The referee's recommendation has a reasonable basis in existing case law and The Florida Standards Imposing Lawyer Sanctions.

CONCLUSION

This Court should approve the findings of fact and conclusions of guilt within the referee's report in this case and adopt the referee's recommendation of discipline. This recommendation of a two year rehabilitative suspension, along with the successful completion of continuing legal education programs and payment of the bar's costs, is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of The Florida Bar's Answer Brief has been furnished via regular U.S. mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; true and correct copies have been furnished by regular U.S. mail to Shelly Goldman Maurice, respondent, 11076 S. Military Trail, Boynton Beach, Florida 33436-7217, and to Staff Counsel, The Florida Bar 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this _____ day of _____, 2006.

_____

ALAN ANTHONY PASCAL

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

Undersigned counsel hereby certifies The Florida Bar's Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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ALAN ANTHONY PASCAL

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APPENDIX