IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	SC Case No. SC06-1629
Complainant,	TFB Nos. 2006-31,155(05A) 2006-31,398(05A) 2006-31,434(05A) 2006-31,530(05A) 2006-31,735(05A) 2006-32,079(05A) 2006-32,108(05A)
v.	
KRISTINE VALENTINE-MILLER,	
Respondent,	

_____/

RESPONDENT=S CORRECTED ANSWER BRIEF

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JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction over this matter pursuant to Rules 3-1.2, 3-3.1, and 3-7.7, Rules Regulating The Florida Bar. The Court will not disturb a Referee's

recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Temmer, 753 So.2d 555, 558 (Fla. 1999). The Court will not reweigh the evidence and disturb a Referee's findings of fact when supported by competent evidence in the record below. The Florida Bar v. Rose, 823 So.2d 727 (Fla. 2002). Similarly, a Referee's findings as to mitigation carry a presumption of correctness and will not be disturbed unless clearly erroneous or without support in the record. The Florida Bar v. Arcia, 848 So. 296 (Fla. 2003).

SYMBOLS AND REFERENCES

The Florida Bar will be referred to as The Florida Bar or "the Bar." The transcript of the final hearing before the Referee will be cited as (T.). The Report of Referee dated November 22, 2006 will be referred to as "ROR" followed by the referenced page number of the Bar's Appendix to it Initial Brief (the Respondent is not providing any additional transcript or appendix). The Bar's Initial Brief will be referred to as "IB" followed by the referenced page number.

STATEMENT OF THE CASE

The Respondent does not dispute the version of the case set forth in the Bar's Statement of the Case. The Respondent reminds the Court, however, that as to the statement that the Board of Governors voted to seek an appeal (IB-2), the Board of

Governors was acting on the recommendation and representations of bar counsel. The Board's recommendation is little more than an authorization of a request by bar counsel, and the Board's decision to seek an appeal carries little weight in and of itself.

STATEMENT OF THE FACTS

The Respondent was a sole practitioner in Ocala, Florida, primarily engaged in personal injury practice. Due to a serious of personal and medical problems, it became apparent to the Respondent that she was not properly handling her practice. In the fall of 2005, Respondent began working for the Office of the Public Defender in Marion County, Florida, where she had worked as a young attorney.

The Respondent had several remaining civil cases in various stages of resolution at the time she began working for the Public Defender. It was disputed to what extent the Respondent could have and should have reasonably relied on a non-lawyer staff person for these matters, but it is not disputed that the Respondent gave the staff person inadequate supervision, and that despite the efforts of this staff person to serve as a conduit between Respondent and her clients, Respondent failed to communicate with clients, even when the staff person attempted to relay information. At the final hearing, the Respondent conceded that it was her responsibility to properly supervise staff, to review her trust account records, and to communicate with clients.

The Florida Bar began receiving complaints about the Respondent failing to communicate with clients in January, 2006. The first complaint, by a client named

Phillip Ardizzone, also alleged that he had endorsed a settlement check to Respondent, but that the Respondent had failed to provide him with his settlement proceeds. The Florida Bar commenced an investigation, and other complaints were file. The Florida Bar subpoenaed Respondent *duces tecum* for a deposition, and requested that she provide at that time files and bank account records. Respondent appeared for the deposition on March 7, 2006, but only provided disorganized and incomplete files and records. Respondent declined to answer questions, and indicated that she wished to get an attorney.

The Florida Bar subpoenaed records directly from Respondent's bank. Based on those records, and the partial files produced by Respondent, the Bar's auditor determined that although Respondent's trust account had a positive balance of over $50,000.00, even factoring that balance in, and Respondent's entitlement to fees, there was a shortage in the account which could range from $30,000.00 to over $50,000.00. Without more complete records, the auditor could not provide a more accurate estimate.

As a result of these shortages, The Florida Bar filed a Petition for Emergency Suspension, which was ordered by The Supreme Court of Florida on June 19, 2006. The Florida Bar filed its Complaint in this matter on August 15, 2006. The Amended Complaint was filed on or about October 3, 2006, as a result of testimony Respondent gave in her deposition on September 27, 2006.

Respondent did not dispute that she neglected her practice to the point of a complete collapse, that several client's cases were neglected, that she failed to properly manage her trust accounts, that shortages resulted from her taking draws beyond fees which she had earned, and that multiple rule violations resulted from her acts and omissions.

Respondent did not dispute the allegations against her, but rather maintained that due to the personal and medical problems which she suffered, the mitigating factors are such that suspension is the appropriate discipline. At material times, Respondent suffered through the unexpected death of her mother, subsequent infighting between siblings, a diagnosis of malignant melanoma and a belief for several weeks that her condition was terminal. She developed a severe alcohol and prescription drug dependence. Respondent ultimately checked into a residential drug and alcohol treatment facility in June, 2006, believing that she would stay for thirty days. She was not released until she had completed a ninety day stay. Upon her release, she was thrust into the current litigation, giving her deposition within ten days of her release, and having her final hearing approximately thirty days from her release.

SUMMARY OF ARGUMENT

The Respondent suffered a series of severe setbacks, including theft of funds by an employee, the unexpected death of her mother, and her own bout with melanoma, all

while being a mother to two young twins. During this time, the Respondent suffered from depression and became addicted to alcohol and prescription pain medication. She ceased properly supervising her practice and neglected cases. She drew excessive funds from her trust account, although she was never overdrawn. The Respondent was in severe denial and did not initially comply with The Florida Bar's requests for information. Ultimately, The Florida Bar properly secured an emergency suspension order against the Respondent.

The Respondent entered a treatment program and was released in approximately three months. She began taking responsibility for her actions and what she had done. She elected not to oppose the allegations of The Florida Bar, but only to present evidence in mitigation, seeking to avoid disbarment. During the trial on discipline, the Respondent testified truthfully and accepted responsibility for her actions, demonstrating tremendous remorse. She expressed her commitment to continue with the recommended treatment, and to pay restitution when possible. She understands that the presumed discipline for her actions is disbarment.

The Referee received proposed reports and written arguments from bar counsel and defense counsel. After considering the evidence and the case law, the Referee recommended that the Respondent receive a three year suspension with additional conditions. The Respondent had requested a two year suspension, but she accepted the three year suspension and elected not to petition for review.

It is the position of the Respondent that the Referee's findings as to mitigation are supported by the record, and that the discipline imposed upon her has support in case law and the Standards for Imposing Lawyer Sanctions. The recommendation of a three year suspension, along with other conditions, should be upheld by this Court, as disbarment would be too severe a sanction under the totality of the circumstances.

ARGUMENT

ISSUE I

THE REFEREE DID NOT ERR IN HIS FINDINGS AS TO MITGATING FACTORS; THERE IS COMPETENT SUBSTANTIAL RECORD EVIDENCE TO SUPPORT THE FINDINGS.

This Court has consistently held that it will not reweigh the evidence and disturb a Referee's findings of fact when supported by competent evidence in the record below. The Florida Bar v. Rose, 823 So.2d 727 (Fla. 2002). Similarly, a Referee's findings as to mitigation carry a presumption of correctness and will not be disturbed unless clearly erroneous or without support in the record. The Florida Bar v. Arcia, 848 So. 296 (Fla. 2003).

In Arcia, a former associate of a law firm had started his own firm in violation of an employment contract with the law firm. The law firm sued, and the Bar later brought disciplinary proceedings for Arcia's dishonesty, including taking the law firm's monies as well as possibly client monies. The matter resulted in a contested disciplinary proceeding. The Referee ultimately found rule violations, and made findings as to aggravating and mitigating circumstances. On appeal, Arcia challenged the Referee's findings as to aggravation and mitigation. The court held that the Referee's findings as to aggravation and mitigation carry the same presumption of correctness as do the Referee's findings of fact. Arcia, 848 So. 2d at 298. This Court has also held that it is not enough for a party to point to contradictory evidence in the record—if the record contains competent

substantial evidence to support the Referee's findings, the findings should not be disturbed. The Florida Bar v. Broome, 932 So.2d 1036 (Fla. 2006); The Florida Bar v. Barrett, 896 So. 2d 1269, 1275 (Fla. 2005).

In the present matter, the record contains support for the Referee's mitigation findings, even if the Bar contends that there is conflicting evidence in the record. The record demonstrates the following mitigation: absence of a dishonest or selfish motive [9.32(b)] (T-75-77, T-122-124); personal or emotional problems [9.32(c)] (T-81-82, T-111, T-115, T-134, T-139); inexperience in the practice of law, at least as to civil law and operating a practice [9.32(f)] (T-56); physical or mental impairment [9.32(h)] (T-71, T-82, T-84, T-139); interim rehabilitation, though the Respondent does not contend that she is rehabilitated completely [9.32(j)] (T-72, T-79, T85-87, T-112, T-139); and remorse, a factor that the Referee was clearly in the best position to assess [9.32(l)] (T-61, T-84, T-140). It is not disputed that Respondent has no prior disciplinary record. [9.32(a)] Therefore, under this Court's prior decisions, the Referee's findings as to mitigation should not be disturbed.

The Bar contends that the Referee erred in failing to find as an aggravating factor 9.22(e), Respondent's obstruction of the disciplinary process (IB-15). Yet Standard 9.22(e) specifies bad faith, intentional obstruction. That was not the case below. The Referee properly found that any obstruction was due to the issues from which the Respondent was suffering, and was not an attempt to deceive. These findings have

support in the overall testimony as to Respondent's mental condition, and thus these findings should not be disturbed.

ISSUE II

THE REFEREE'S FINDING AS TO RESTITUTION HAS LITTLE BEARING ON THE ULTIMATE RECOMMENDATION, AND IT SHOULD NOT BE CONSIDERED ERROR.

The Referee, as a parenthetical, noted that the Respondent would, based on the Respondent's testimony, receive a significant distribution from her mother's estate. The Bar takes issue with this statement in the Report of Referee, challenging the sufficiency of the evidence, as well as the statement that from these funds the Respondent could make restitution in the future. (ROR-8)

The Referee was in the best position to determine the credibility of Respondent's testimony. Despite the Bar's assertion otherwise, the Respondent testified honestly during the final hearing, and her testimony was sufficiently sound and solid evidence upon which the Referee could make such a finding – a review of the Respondent's testimony reveals that she simply did not testify in self-serving fashion at the final hearing.

The Respondent concedes that if the possibility of future restitution was stated as a significant basis for the recommendation, there would remain the uncertainty as to how this could be enforced. The Respondent maintains that herein lies one difference between a recommendation of suspension versus disbarment. As this honorable Court knows,

disbarment is the most extreme sanction. A disbarred attorney has little chance to return to practice. Therefore, a disbarred attorney has little motivation to make clients whole.

In contrast, an attorney who receives a long term suspension (and as the Court also knows, three years is the maximum term of suspension) must still petition for reinstatement and demonstrate rehabilitation, which would include payment of restitution. It is well settled that settled that a Florida Bar disciplinary proceeding must serve three purposes: the sanction must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar conduct. The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970).

In the present case the Referee was faced with a Respondent whose life had fallen apart. She has the support of good friends and family – her husband is the Chief Assistant Public Defender in the Fifth Circuit in Ocala. She has begun her rehabilitative treatment and follow-up in earnest. It is only fair to the Respondent to allow her the opportunity to complete full-fledged rehabilitation not only as to her addictions, but as to all aspects of her life. The fact that she may have the opportunity to pay restitution is another motivating factor, one that means she actually stands a chance of becoming an attorney again, something that effectively disappears with disbarment. The Referee did not list restitution as a mitigating factor. (ROR-14) Yet the Referee's notation of the potential for restitution was appropriate in the overall scheme of the recommendation, and in any case, it was not error sufficient to justify rejection of the recommendation of a

three year suspension.

ISSUE III

DISBARMENT IS TOO HARSH A SANCTION UNDER THE FACTS OF THIS CASE. THE REFEREE'S RECOMMENDATION IS NOT ERRONEOUS, IT HAS SUPPORT IN CASE LAW AND THE STANDARDS FOR IMPOSING LAWYER SANCTIONS, AND IT SHOULD BE APPROVED BY THE COURT.

It is important to consider that this appeal is about a difference in characterization of the Respondent's conduct. The Bar has, for lack of a more formal term, "pumped up" its accusations against the Respondent in order to portray her as a thief without regard for the interests of her clients. The Respondent and her witnesses testified otherwise, that the Respondent was fundamentally honest, but an individual who had lost control of her life and her practice during a period of extreme personal crisis. The Referee, after hearing the testimony, and observing the demeanor of the Respondent, determined that the Respondent's use of client funds was not a premeditated act as the Bar suggests. The Bar, over and over, talks of Respondent's "theft" of client funds as an intentional act. Under the law, it is clear that an attorney's extreme neglect can rise to the level of dishonesty. The Florida Bar v. Riggs, 944 So.2d 167 (Fla. 2006); The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988). Because of this, the Respondent ultimately admitted taking client funds, and the Rule 4-8.4(c) violation. Yet it cannot be not disputed that at the times material, Respondent suffered from severe personal, medical and psychological issues.

It is further important to remember that the Respondent did not overdraw her trust account. The Bar's auditor testified that at the time of the emergency suspension, the Respondent still had over $50,000.00 in her trust account. (T-35-36) In light of the Respondent's deep depression and alcoholism, and the poor manner in which her records were kept, it is credible that she never knew that she had so significantly drawn upon unearned monies; the Respondent, with her records in disarray, did not know whether the remaining funds reflected payment of liabilities such as medical providers.

The Bar states that "Respondent admitted that she took money out of her trust account knowing that she was converting client funds to her own use" citing to pages 77 and 99 of the final hearing transcript. (IB-4) This is not an accurate characterization of the Respondent's testimony. On those pages, Respondent concedes that she understood that "could have" had a shortage in her trust account (T-77) and that she was "getting worried" that she was "getting close" to getting into client funds. (T-99) The Bar's characterization of the Respondent's level of knowledge and intent is not supported by the testimony. The Respondent's witness Dodie Cantler, who had periodically been a legal assistant for the Respondent, testified that she didn't believe that the Respondent was reviewing her books and supervising the work of her other employee. (T-123) Ms. Cantler, who knows the Respondent personally, went on to testify about the Respondent "there's no way she took money intentionally and knew about it. There's no way." (T-124)

In light of the fact that Respondent still had a trust account balance of approximately $50,000.00, and in light of her mental condition at the time, the Bar's characterization of the Respondent's conduct as a theft is simply too harsh. The Respondent's testimony was credible, and based on the condition of her books and records, the record supports that this was not a knowing misappropriation, certainly not to the extent discovered by the Bar's audit. This Court has consistently held that it will not disturb a Referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Temmer, 753 So.2d 555, 558 (Fla. 1999).

In the present matter, the Referee cited to numerous similar cases which support less than a disbarment. (ROR 17). The Referee simply did not find, after hearing the evidence, that the Respondent was acting out of dishonesty, either in the handling of her trust account, or in her dealings with the Bar. For example, the Bar has repeatedly taken issue with the undersigned's letter to the Bar, in which the undersigned stated that he believed that the rule violations would be minor and the trust account problems would be minimal. The Bar continues to wave this letter about as evidence of dishonesty and deceit, surely in part to embarrass the undersigned counsel. But through the testimony at the final hearing, it became clear that this letter was written at a time when the Respondent was in severe denial of her problems. In fact, the Respondent admitted that she had consumed alcohol on the date of her office conference with the undersigned. (T-

70-71) The Referee simply did not find that there was a dishonest motive afoot. (ROR-17)

Accordingly, the Referee properly found that the mitigation was sufficient for Respondent to avoid the severe sanction of disbarment, and the Referee relied upon cases which were similar to the present matter, and which provided appropriate support for his recommendation. Among other cases, the Referee relied upon The Florida Bar v. Whigham, 525 So.2d 873 (Fla. 1988) and The Florida Bar v. Broome, 932 So.2d 1036 (Fla. 2006). The Respondent submits that these cases alone provide sufficient support for the Referee's recommendations. The Respondent also submits that The Florida Bar v. Wolf, 930 So.2d 574 (Fla. 2006) supports the recommendation of suspension. The Referee also found that Standard 4.12 supports suspension rather than disbarment. Clearly, the Referee's recommendation has sound support in case law and it should not be disturbed.

The undersigned also urges the Court to consider the level of diligence on the part of the Referee in preparing the Report and Recommendation. The discipline imposed on an attorney must be severe enough to deter others from similar conduct. That standard is met in this case. But there is no requirement that the Referee check any semblance of humanity and compassion at the courtroom door. The Respondent is, by the testimony of her family and friends, a truly good person who broke under the pressures that life and work threw at her. She does not deserve the extreme

sanction of disbarment.

CONCLUSION

There clearly is competent record evidence to support the Referee's findings as to mitigation, and these findings should not be disturbed. As to restitution, the Report of Referee does not reflect that the possibility of future restitution was given significant weight by the Referee, and there is more than enough other mitigation to support the Referee's recommendations as to discipline.

Certainly the Respondent would have to make restitution to be reinstated to membership in good standing with the Bar, so this issue is self curing – if the Respondent does not make restitution, she is not going to practice law again. Also, the issue of costs (which the Respondent would also be required to pay) remains outstanding, and remand on this issue is appropriate. Lastly, there are many cases that support suspension rather than disbarment under circumstances similar to the present case. The Referee's recommended discipline was neither clearly erroneous nor without support in case law or the Standards for Imposing Lawyer Sanctions.

WHEREFORE the Respondent respectfully requests that this Court: a) uphold the findings and recommendations of the Report of Referee, and order a three year suspension of the Respondent with the conditions set forth in the Report; and b) remand this matter to the Referee for the determination of costs to be assessed against the Respondent.

Respectfully Submitted,

BARRY RIGBY, ESQUIRE
Florida Bar No. 613770

CERTIFICATE OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this **____th day of March, 2007**, to **JAN WICHROWSKI**, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804; **KENNETH LAWRENCE MARVIN,** The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; **JOHN F. HARKNESS, JR.**, The Florida Bar 651 E. Jefferson Street, Tallahassee, Florida 32399-2300.

I FURTHER CERTIFY that this Brief complies with the requirements of the Florida Rules of Appellate Procedure, in that the Font is Times New Roman, 14 Point, and that the electronic version has been scanned by Symantec anti-virus and has been found to be free of viruses.

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