IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

KRISTINE W. VALENTINE-MILLER,

Respondent.
_____/

Case No. SC06-1629
[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)]

THE FLORIDA BAR'S REPLY BRIEF

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TABLE OF CONTENTS

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on October 20, 2006, shall be referred to as "T" followed by the cited page number(s). (T-____)

The Report of Referee dated November 22, 2006 will be referred to as "ROR" followed by the referenced page number(s). (ROR-____)

The bar's composite exhibit will be referred to as (No. ____ in bar's exhibit 1). The respondent's exhibit will be referred to as respondent's exhibit 1.

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF FACTS

Respondent's Answer Brief fails to provide a single citation to the record in the Statement of the Facts as required pursuant to the Fl. R. App. P. 9.210(b) and (c). The Bar's Initial Brief provides a complete statement of the case and of the facts with the required and appropriate references to the record.

In respondent's Statement of the Case, editorial comments are made as to the motive, intent and appropriate weight which this Court should give to the vote of the Board of Governors of The Florida Bar to appeal the suspension recommended in this case and seek disbarment. Respondent's comments are improper and wholly without any basis in the facts, rules, or record in this case and should be disregarded. This appeal is in full and proper accordance with a proper vote by the Board of Governors and the Rules Regulating The Florida Bar as adopted by this Court.

ARGUMENT

ISSUE I

DISBARMENT IS THE APPROPRIATE DISCIPLINE IN THIS CASE INVOLVING CONVERSION OF CLIENT FUNDS, ABANDONMENT AND HARM TO THE PUBLIC.

The Florida Bar is not seeking to overturn the referee's findings of facts in this case. Rather, review is sought as to the mitigating and aggravating factors considered by the referee in making a recommendation that respondent receive a three year suspension rather than disbarment in this case. Respondent admitted each and every fact and rule

violation charged in the Bar's Amended Complaint and therefore the facts are not at issue to be contested by either the Bar or respondent. In The Florida Bar v. Lancaster, 448 So. 2d 1019, 1022 (Fla. 1984), this Court held that the bar's failure to present evidence on an issue to which the parties had stipulated precluded the attorney from challenging the accuracy of the finding. The bar recognizes that this Court gives the findings of fact great weight in bar disciplinary cases. However, not as much weight is given to recommendations as to discipline.

The Florida Constitution, art. V, § 15 mandates this Court with significant responsibility for attorney discipline. This Court has defined three goals of discipline: the discipline must be fair to the public by protecting the public from unethical attorneys while not depriving them of a qualified lawyer, the discipline must be fair to respondent by providing sufficient punishment as well as encouraging reformation and rehabilitation, and finally, discipline must be severe enough to deter others who might engage in similar misconduct, The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983), The Florida Bar v. Barrett, 897 So. 2d 1269 (Fla. 2005).

These three goals are useful to keep in mind in reviewing Respondent's Answer Brief and determining the appropriate discipline in this case. The case at hand involves respondent's admission to violating no less than 23 different rules of ethics in regard to so many different clients that it was not possible to delineate each one. Conversion of client funds and abandonment of the law practice summarize the egregious conduct which

resulted in this expedited referee hearing process subsequent to respondent's emergency suspension. In addition, respondent failed to cooperate in the investigation and misrepresented facts to The Florida Bar.

Respondent's Answer Brief addresses the issue of the misrepresentation to the grievance committee and while not denying that it took place, states in essence that it was not an intentional misrepresentation because respondent was in a state of "denial" about her actions. To put the issue into context, the Grievance Committee was faced with a number of serious complaints alleging respondent had abandoned her personal injury practice and absconded with client funds owed to clients and medical providers. The respondent failed to provide the bar with the mandatory responses during the initial investigation or to provide the trust account records and client files required by subpoena. The cases were sent to the Grievance Committee as required for additional investigation. At that time, respondent provided a letter, her sole written response to the bar, and stated that the bar could be assured that only minor violations were present and no client harm or intentional misappropriation was present. Respondent suggests that this court should disregard the fact that she failed to respond to the bar and then lied to the grievance committee.

The reason this misrepresentation is not important, respondent argues, is that respondent's actions were caused by her "denial" of the situation. The bar reminds this court that respondent failed to present expert testimony or evidence as to her medical or emotional situation in this case. If the court disregards a blatant misrepresentation which impeded the bar's investigation, particularly without expert testimony as to the lawyer's mental state, this will send a message to the public and the bar that attorneys may misrepresent facts to the bar and then mitigate their discipline simply by claiming that they were in "denial" of the situation. This would not serve the purposes of attorney discipline. This Court, in The Florida Bar v. Horowitz, 697 So.2d 78 (Fla. 1997), held that Mr. Horowitz's extreme misconduct of totally neglecting his clients and violating various ethical requirements, including not responding to the bar, was insufficiently mitigated by his undocumented depression claim. The Court found disbarment was warranted.

Misrepresentations to the bar demonstrate a violation of the basic mandate for truth and integrity and warrant serious discipline. The Florida Bar v. Rotstein, 835 So. 2d 241 (Fla. 2002). See also, The Florida Bar v. Morrison, 496 So. 2d 820 (Fla. 1986) (where the attorney received a 10-day suspension for one isolated instance of neglect along with misrepresentations to the grievance committee); The Florida Bar v. Neely, 372 So. 2d 89 (Fla. 1979) (where attorney received a 90-day suspension for engaging in a conflict situation with a client and then lying under oath about it in bar proceedings).

It is also noted that respondent made further misrepresentations to the bar. As charged in the bar's amended complaint at paragraph 23, respondent misrepresented to the bar in her dues statements for fiscal years 2003-2004 and 2004-2005 that her trust account was in compliance with the Rules Regulating The Florida Bar, No. 20 in bar exhibit 1. The respondent admitted this fact in Respondent's Answer to Amended Complaint. In The Florida Bar v. Borja, 609 So.2d 21 (Fla. 1992), Borja was found guilty of violating rule 4-8.4(c) for misrepresenting his compliance with the trust accounting rules despite noting on the dues statement "exceptions for Florida Bar audit/comments."

The vulnerability of respondent's clients is an important factor in this case. Respondent's clients testified as to their prejudice in not receiving their funds entrusted to respondent or their files which would have enabled them to secure new counsel. The referee specifically acknowledged this. ROR-14.

While respondent suggests that fairness, humanity and compassion should be used in determining the appropriate discipline, the bar suggests that the true victims in this case, respondent's clients and the public, are the ones most deserving of justice in this instance. Absolutely no evidence was presented of any restitution, firm plans for restitution, or of any attempt to apologize or make the clients whole for respondent's conversion of between $31,000 and $51,000 of client funds. There is no precedent, nor

should there be any, to support respondent's argument that if respondent was suspended rather than disbarred, there would be a better chance of client repayment in the future.

While respondent draws on sympathy in describing her problems at the time of the misconduct, another picture also exists from testimony at the final hearing. Respondent abandoned and neglected numerous clients who entrusted her with their personal injury cases which included, their original documents, and their funds.

Respondent's clients followed her into solo practice when she left Charlie Tucker, P.A., a larger personal injury firm and took their cases with her, T-10-11, 118. She was terminated at the larger firm because of her poor work product, T-57. She then went into solo practice where she drank so heavily and displayed such poor work habits that the firm with which she shared space, Alavi, Bird, & Pozzuto, P.A., asked her to leave, ROR-5, 8. The members of the firm knew of her drinking problem, were friends with her husband and were uncomfortable with her situation, T-56.

Next, respondent moved to share space with another solo practitioner. The solo practitioner shared his secretary with respondent. Respondent, a mother of toddler age twins, drank alcohol and used prescription pain killers so heavily that she increasingly avoided her responsibilities including avoiding her office and clients, ROR-9. She relied upon a secretary to take care of her office and the secretary was able to activate an ATM card and steal over $20,000 from respondent's trust account. Respondent noticed this

within a couple of months and went to the bank and was successful in having the employee criminally prosecuted and the funds replaced by the bank, T-83-84.

Respondent's mother died in this time period and respondent was entrusted with significant funds from her estate as Personal Representative. Respondent withdrew funds from the estate, belonging to her siblings as well as to herself, without authorization, ROR-7-8, 13, No. 20 in bar's exhibit 1.

At the height of respondent's problems, her husband, a manager in the local public defender's office, hired her on as an Assistant Public Defender because respondent thought that environment might be helpful for her in light of her addictions, T-64. Respondent's husband claims that he had no idea how bad her problems were at the time she was hired, T-136-137. Respondent has admitted neglecting all of her clients, including her clients from the public defender's office, to the point of incompetency, T-62-63, 65-66.

Respondent checked herself into a rehabilitation facility the same month that the Petition for Emergency Suspension was filed. The standard and planned 30-day stay at the facility was increased to 90 days without explanation. No expert testimony was provided as reassurance that respondent's problems had been addressed. The referee in his recommendations suggested that further treatment and evaluations be sought as to a dual diagnosis including possible mental problems, ROR-18. Respondent's release from

the facility was so recent to the final hearing that no record existed as to her ability to function outside the facility. No testimony from Florida Lawyers Assistance was provided. No restitution or attempt to make the clients whole has been made.

Respondent completely failed to cooperate with the bar's investigation, lied to the grievance committee, blamed her secretary and others for her problems (ROR-10), and acknowledged only when pressed that she was remorseful and responsible for her own problems, T-64. Furthermore, it appears that the referee was apparently so concerned about respondent's unaddressed mental health problems that he recommended a specific evaluation and treatment for the mental health issues not yet treated, ROR-18.

Disbarment is the presumed discipline for conversion of client funds. See**,** The Florida Bar v. Gross, 896 So. 2d 742 (Fla. 2005); The Florida Bar v. Spear, 887 So. 2d 1242 (Fla. 2004); The Florida Bar v. Travis, 765 So. 2d 689 (Fla. 2000); and The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991).

Conversion is defined as failure to deliver trust funds on demand, The Florida Bar v. Hardman, 516 So. 2d 262, 263 (Fla. 1987). The Bar wants to make it perfectly clear that respondent has converted no less than between $31,000 to $51,000 of client funds to her own use. This was the reason for the emergency suspension in this case and this was the reason it was charged in the bar's Amended Complaint, and this was the reason the referee made this finding of a shortage (ROR-5-6) and a finding that respondent withdrew

money in excess of what she was entitled from her trust account, ROR 10. The fact that the trust account still had some funds left in it when the emergency suspension went into place does not mean that the trust account was not overdrawn. As clearly stated in the audit report, even if one takes into account the funds still in the trust account, there is absolutely a client loss of between $31,000 to $51,000, No. 16 in bar's exhibit 1. This fact is uncontroverted.

The referee acknowledged this fact when it was recommended that respondent be compelled to make restitution prior to reinstatement in the bar, ROR-18. The referee's assumption that respondent would do so with future funds to be realized from her mother's pending probate matter, was however, inappropriate and without support in the record, and resulted in the referee's overly lenient recommendation as to discipline.

Respondent asserts that the referee's reliance on The Florida Bar v. Whigham, 525 So. 2d 1036 (Fla. 1998), is appropriate. However, that nine-year-old case involved an attorney's failure to provide probationary trust account reconciliations and a resulting audit which indicated a two year period of trust account technical deficiencies including a temporary shortage. Not a single client complained or was neglected and no abandonment or lack of cooperation were present. Nevertheless, Mr. Whigham received a three year suspension, the same discipline which the referee suggests is appropriate for the far more egregious conduct of respondent at hand.

The referee's reliance upon The Florida Bar v. Broome, 932 So. 2d 1036 (Fla. 2006), is also appropriate, argues respondent. However, the Broome case involved multiple instances of neglect and one single count of misrepresentation to the grievance committee. The misrepresentation involved respondent's assurance to the committee that she would take steps to pay a judgment, a debt owed to a past client. Trust monies were not an issue in the Broome case whatsoever. Nevertheless, Broome received a one-year suspension and the court stated that the case easily could have risen to disbarment but for the mitigating factors presented.

Respondent relies upon The Florida Bar v. Wolf, 930 So. 2d 574 (Fla. 2006), to support suspension rather than disbarment in the case at hand. However, the Wolf case involved trust account misconduct with no allegations whatsoever of abandonment or client neglect. Moreover, Mr. Wolf cooperated with the bar's investigation, voluntarily participated in the bar's trust accounting workshop, took affirmative steps to improve his office management, and there was significant delay in the prosecution of the case. Most importantly, the referee specifically found that no clients suffered monetary loss. Unfortunately, the case at hand is far more serious involving client neglect and abandonment as well as client harm caused by respondent's use of client funds and resulting failure to repay or make them whole.

Clearly, The Florida Bar v. Hardman, 516 So. 2d 262 (Fla. 1987), is more

appropriate precedent. In Hardman, client abandonment, chemical dependency, and trust account misappropriation were all present. The Court found that respondent had abandoned his law practice due to chemical dependency in addition to the conversion. Like respondent at hand, Mr. Hardman presented evidence of rehabilitation subsequent to the misconduct. The court nevertheless found disbarment was appropriate in this 1987 case. It is noted that discipline has become more strict in recent years, The Florida Bar v. Rotstein, 835 So. 2d 241 (Fla. 2002).

Respondent's incompetence is also at issue. Respondent was found to have problems in handling her cases as far back as 2004 when she was let go by the first personal injury firm she worked for. Her incompetence admittedly harmed untold numerous clients in her personal injury practice and those assigned to her as an assistant public defender, T-65-66. Incompetence and lack of diligence resulted in disbarment in The Florida Bar v. Springer, 873 So. 2d 317 (Fla. 2004), where Springer engaged in six instances of misconduct which included deceit in lying about the work done for his clients. While cooperation and remorse were present, disbarment was nevertheless appropriate.

ISSUE II

IT IS APPROPRIATE TO AWARD THE BAR ITS COSTS ABSENT ANY OBJECTION BY THE RESPONDENT.

The bar is entitled to costs upon prevailing in a bar discipline proceeding, R.

Regulating Fla. Bar 3-7.6. The referee was provided with the Bar's First Affidavit of Costs on November 13, 2006. No objection was filed. On November 27, 2006, the referee filed his report, stating, "It appears that Respondent may wish to be heard on the issue of costs. For that reason, costs will be addressed by supplemental recommendation." ROR-18. To date, however, the record is devoid of any objections to the Bar's First Affidavit of Costs. Although respondent's Answer Brief suggests that remand is appropriate, there is no basis for remand and further delay in imposing discipline.

The bar prevailed on each and every rule charged. Absent objection, it is appropriate for this Court to award costs to the bar, the prevailing party herein. "Where the choice is between imposing costs on a bar member who has misbehaved and imposing them on the rest of the members who have not misbehaved, it is only fair to tax the costs against the misbehaving member." The Florida Bar v. Kassier, 730 So.2d 1273 (Fla. 1998); The Florida Bar v. Miele, 605 So.2d 866 (Fla. 1992).

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the record in this case, the referee's findings of guilt, and the recommendation of a three-year suspension *nunc pro tunc* to June 19, 2006, the date of her emergency suspension, and thereafter until she can prove rehabilitation for her substance abuse and until she has

made all her former clients whole, followed by probation for three years conditioned on her not opening or maintaining a trust account until she has successfully completed The Florida Bar's Trust Accounting Workshop and LOMAS or a similar course in office management and recordkeeping procedures and instead impose a sanction of disbarment and payment of The Florida Bar's costs, now totaling $11,207.95.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Brief have been sent by regular mail to and e-filed with the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to Barry William Rigby, Counsel for Respondent, whose record bar address is 924 North Magnolia Avenue, Suite 319, Orlando, Florida 32803-3850; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this _____ day of April, 2007.

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

Undersigned counsel does hereby certify that the Reply 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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