IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner/Appellant,

v.

ANN BITTERMAN,

Respondent/Appellee.

_____/

Supreme Court Case
No. SC07-1071

The Florida Bar File
No. 2007-70,509(11G-OSC)

THE FLORIDA BAR'S INITIAL BRIEF ON APPEAL

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CONSTITUTIONAL PROVISIONS:

OTHER AUTHORITIES:

Florida Standards for Imposing Lawyer Sanctions:

Rules Regulating The Florida Bar:

SYMBOLS AND REFERENCES

For the purpose of this brief, Ann Bitterman may be referred to as "Respondent". The Florida Bar may be referred to as "The Florida Bar" or the "Bar". The referee may be referred to as the "Referee". Additionally, the Rules Regulating the Florida Bar may be referred to as the "Rules" and the Florida Standards for Imposing Lawyer Sanctions may be referred to as the "Standards".

References to the Report of Referee will be by the symbol "ROR" followed by the corresponding page number(s). References to the transcript of the final hearing held on December 3rd, 2008 will be by the symbol "TR" followed by the corresponding page number(s).

References to The Florida Bar's exhibits will be by TFB, followed by the exhibit number. References to Respondent's exhibits will be by R, followed by the exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

On September 23, 2004, Respondent was suspended from the practice of law for ninety-one (91) days and placed on probation for three years in The Florida Bar v. Ann Bitterman, Supreme Court Case No. SC03-1370. (ROR at 2.) Pursuant to Rule 3-5.1(e) of the Rules, a suspension of more than ninety (90) days requires proof of rehabilitation by the Respondent. As yet, Respondent has not petitioned for reinstatement as provided in Rule 3-7.10 of the Rules and remains suspended from the practice of law. (ROR at 2.) Respondent, therefore, is precluded from engaging in the practice of law, or holding herself out as a member in good standing of The Florida Bar. (ROR at 3.)

On May 20, 2006, Respondent went to the Miami Dade County Women's Detention Center to visit a personal friend named Zadis Fernandez who was incarcerated there at that time. (ROR at 3; TR at 44.) Respondent's name appears on the Detention Center's visitor's log for May 20, 2006, with her occupation listed as "attorney". (TR at 45-46; TFB Ex. 6.) At the jail, Respondent identified herself as an attorney, there to visit Ms. Fernandez, and presented her Florida Bar Card as identification. (ROR at 3; TR at 100.) The visitor's log lists Respondent's "pass number" as "I.D.," indicating that she showed her Bar Card as her attorney identification. (TR at 51; TFB Ex. 6.) Detention Center procedures require an attorney to be admitted only by showing the Florida Bar Identification Card. (TR

at 46.) By showing her Bar Card, Respondent gained immediate access to Ms. Fernandez in a private room, in accordance with the privileges reserved for attorneys visiting clients or witnesses in jail. (ROR at 3; TR at 100-101.) Respondent testified that she showed her Bar Card because she did not want to wait to see Ms. Fernandez and she wanted "contact" because Ms. Fernandez was her friend. (TR at 101.)

Additionally, when Ms. Fernandez initially was arrested the police seized her automobile and impounded it at Diaz Towing, 760 NW 21st St., Miami, FL. (ROR at 3; TR at 45.) At this time the title to the car was in Ms. Fernandez's name, although some time beforehand Respondent had purchased the car for her. (TR at 105.) When Respondent visited Ms. Fernandez at the Detention Center, she brought with her a lease agreement that she had prepared for the vehicle, which she wanted Ms. Fernandez to sign. (ROR at 3; TR at 44, 119; TFB Ex. 10.) Ms. Fernandez, however, refused to sign the lease agreement. (ROR at 3; TR at 45.) Respondent testified that Ms. Fernandez was hysterical and distraught at the notion that Respondent would take the car from her. (TR at 114-115, 117.)

Despite Ms. Fernandez' refusal to sign the lease, Respondent immediately went to Diaz Towing, with the express purpose of retrieving Ms. Fernandez' car. (ROR at 3; TR at 108.) In order to retrieve the car, Respondent represented to Diaz Towing that she was Ms. Fernandez' attorney, and again showed her Florida

Bar Card along with her Driver's License to verify her claim. (ROR at 3; TR at 45, 113, 124; TFB Ex. 7.) Thereupon, Diaz Towing released the car to Respondent. (ROR at 3; TR at 116.)

Pursuant to its investigation of this matter, the Bar's staff investigator, Mr. Art Gill, interviewed officials at Diaz Towing. Diaz Towing confirmed that they released the vehicle to Respondent because they believed her to be Ms. Fernandez' attorney. (TR at 56.) Diaz Towing further stated that they would not have released the vehicle to Respondent had she not told them she was Ms. Fernandez' attorney. (TR at 57.)

Upon retrieving the automobile from Diaz Towing, against the express wishes of the vehicle owner, Respondent exercised a power of attorney to re-title the vehicle in her own name. (ROR at 4; TR at 114, 117.) Respondent obtained the power of attorney from Ms. Fernandez two weeks prior to her arrest, but did not use it to retrieve the vehicle from Diaz Towing. (TR at 116, 124, 142.) Ms. Fernandez was later required to file a Replevin action against Respondent in order to re-gain possession of the automobile. (ROR at 4; TR at 115, 117.)[1]

[1] Additionally, a complaint was filed with the Bar by Ms. Modesta Diaz in November 2006 alleging that Respondent agreed to represent Ms. Diaz in a divorce and immigration matter in exchange for Ms. Diaz' payment for work to be performed at her home. (ROR at 4; TR at 19, 21.) Further, Respondent and Ms. Claudia Bran, another friend of Respondent's, exchanged email conversations regarding potential legal issues on April 29, 2005. (TR at 67.) The Referee found Respondent not guilty of the offenses, and therefore they are not discussed in this

On June 8, 2007, the Bar filed a Petition for Contempt and Order to Show Cause with this Court. By order of the Court dated June 12, 2007, Respondent was commanded to show cause on or before June 27, 2007, why she should not be held in contempt of Court for practicing law in violation of this Court's order issued in Florida Bar v. Bitterman, 885 So.2d 388 (Fla. 2004). By another order of this Court dated November 29, 2007, the Chief Judge of the Eleventh Judicial Circuit was directed to appoint a Referee to preside over these proceedings. On December 13, 2007, the Honorable Edward Newman was appointed Referee.

The final hearing in this cause occurred on December 3, 2008. The Referee heard testimony from Art Gill on behalf of the Florida Bar, and from Respondent in her own behalf. The Referee rendered his oral ruling on the same date. The Report of Referee was entered on December 8, 2008, and the Florida Bar filed a Petition for Review on February 6, 2009.

The Referee found Respondent in contempt of this Court's order of suspension dated September 23, 2004, for her actions in holding herself out as a lawyer in good standing, and proffering her Florida Bar Card to the local jail and officials at Diaz Towing, in order to gain entry, access, and possession of the vehicle, in accordance with a lawyer's privilege. (ROR at 4; TR at 132-133, 135, 146.)

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brief. (ROR at 4-5.)

With respect to aggravation, the Referee found that Respondent had prior disciplinary offenses; that she had a dishonest or selfish motive; that there was a pattern of misconduct; that there was a refusal to acknowledge wrongful nature of conduct; and that there was vulnerability of the victims. (ROR at 8.) Respondent's prior disciplinary history is extensive, and includes: a thirty (30) day suspension with three years probation in 1996, Supreme Court Case No. SC87244; an admonishment for minor misconduct by the Eleventh Circuit Grievance Committee "G" in 1997; a ninety (90) day suspension and three years probation in 1999, Supreme Court Case No. SC94471; a public reprimand in 2001, Supreme Court Case No. SC00-2286; a ninety-one (91) day suspension and three years probation on September 23, 2004, Supreme Court Case No. SC03-1370; a ninety-one (91) day suspension and three years probation in 2007 effective nunc pro tunc September 23, 2004, Supreme Court Case No. SC06-1592; and a six month suspension in 2008 for contempt of this Court's 2004 order of suspension, Supreme Court Case No. SC06-957. (ROR at 7; TFB Ex. 9.)

In mitigation, the Referee found that Respondent has personal or emotional problems, a physical or mental disability or impairment, and interim rehabilitation. (ROR at 8.) It should be noted, however, that although not set forth in the Report of Referee, the Referee states on the record that he believes that Respondent still has some affectations from her medical condition and that he has a responsibility

as a referee to point that out to the Bar, and that the Bar has a licensing obligation to protect the public. (TR at 126.) The Referee additionally considered the personal relationship between Respondent and Ms. Fernandez as a mitigating factor, as well as Respondent's assertions that she was attempting to prevent harm to Ms. Fernandez when she retrieved the car from the towing/impound lot. (ROR at 8.) However, again it should be noted that while not included in the Report of Referee, the Referee states on the record that Respondent has an almost "masochistic love" for her clients in that she will hurt herself in order to help them, and that this is a cause for concern. (TR at 128.)

The Florida Bar urged the Referee to recommend to this Court that Respondent be disbarred for her contemptuous misconduct. The Referee denied the request of the Florida Bar, and initially recommended that Respondent receive a ninety-one (91) day rehabilitative suspension with three years probation. A condition of the probation was that Respondent's attorney become a supervisor for Respondent should she successfully petition to be reinstated. (TR at 149.) However, upon the renewed pleas of Respondent, and without further explanation, the Referee changed his recommended discipline to a thirty (30) day non-rehabilitative suspension with the same three year probationary period and conditions of probation. (ROR at 6-7; TR at 159.)

The Florida Bar filed its Petition for Review on February 6, 2009. The Bar

sought and secured an extension of time for the filing of its Initial Brief on Appeal. The Florida Bar's Initial Brief on Appeal follows.

SUMMARY OF THE ARGUMENT

The Referee's recommendation of a thirty day non-rehabilitation suspension in this matter is contrary to existing case law. Relevant case law establishes that disbarment is the appropriate discipline for Respondent, where she deliberately and intentionally held herself out as an attorney in good standing in order to commit a fraud, and where she has previously been found in contempt of court for violations of suspension and has an extensive disciplinary history.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF A NON- REHABILITATIVE SUSPENSION DOES NOT COMPORT WITH EXISTING CASELAW.

The Referee's recommendation of a thirty day non-rehabilitation suspension in this matter has no reasonable basis in existing case law, and should be rejected by this Court. The appropriate sanction for Respondent, where she held herself out as an attorney in good standing in order to gain the privileges of an attorney, and further to facilitate a fraudulent transaction, coupled with her extensive prior disciplinary history, is disbarment.

"The Supreme Court shall have exclusive jurisdiction to regulate…the discipline of persons admitted [to the practice of law]." Art. V, §15, Fla. Const. Therefore, "unlike the referee's findings of fact and conclusions as to guilt, the determination of the appropriate discipline is peculiarly in the province of this Court's authority." The Florida Bar v. O'Connor, 945 So.2d 1113, 1120 (Fla. 2006). As ultimately it is this Court's responsibility to order the appropriate punishment, this Court enjoys broad latitude in reviewing a referee's recommendation. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989). The Court usually will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Temmer, 753 So.2d

555 (Fla. 1999). Here, the recommended discipline has no reasonable basis in existing case law, and the Referee's recommendation should be rejected.

"A suspended attorney, although still a member of The Florida Bar, is without the privilege of practicing or holding himself out to the public and others as able to practice." The Florida Bar v. Breed, 368 So.2d 356, 357 (Fla. 1979). In the instant case, the thirty day non-rehabilitation suspension recommended by the Referee is not commensurate with Respondent's blatant misconduct. The Referee found by clear and convincing evidence that Respondent held herself out as an attorney in good standing at the county jail when she identified herself as an attorney who was there to visit with an inmate, Ms. Zadis Fernandez, and presented her Florida Bar identification card for the specific purpose of gaining speedy access to her friend, and so that she could meet with her in a private room, in accordance with the privileges of an attorney. More egregiously, following Ms. Fernandez's outright refusal to grant her any ownership interest in Fernandez's vehicle, Respondent then proceeded to Diaz Towing, where the vehicle had been impounded, and again held herself out as an attorney in good standing and again presented her Florida Bar identification card in order to fraudulently take possession of the vehicle that Ms. Fernandez had denied her. Respondent completed the fraudulent transaction by exercising a power of attorney to re-title the vehicle in her own name. Such glaring misconduct is at odds with the thirty

day non-rehabilitation suspension recommended by the Referee. Respondent should be disbarred by this Court.

Moreover, separate and distinct from the egregious nature of the misconduct at issue, this Court must reject the Referee's non-rehabilitation suspension recommendation because Respondent was already suspended from the practice of law at the time she engaged in this misconduct. This Court has previously held that when a suspended attorney violates this Court's order of suspension and is held in contempt for said misconduct, at least a rehabilitative suspension will be imposed on the offending attorney for that misconduct, standing alone. See The Florida Bar v. Brigman, 322 So.2d 556 (Fla. 1975), and The Florida Bar v. Forrester, 916 So.2d 647 (Fla. 2005).

Therefore, consistent with this Court's prior jurisprudence, the minimum discipline that could be considered is a rehabilitative suspension. However, this Court must also consider Respondent's extensive prior disciplinary history, that she has been found in contempt of this Court's order on at least one prior occasion, as well as the reprehensible nature of the misconduct at issue in the present case. Taking all of these factors into consideration, it is clear that disbarment is the only appropriate sanction in this matter.

Furthermore, the purpose of contempt proceedings brought against an attorney for violation of an existing disciplinary order, separate and distinct from

the purposes behind lawyer discipline generally, is to punish the offending attorney and to vindicate the authority of the Supreme Court to discipline Florida attorneys. The Florida Bar v. Forrester, 916 So.2d 647, 651 (Fla. 2005). In the instant contempt proceeding, the Referee's recommended thirty day non-rehabilitative suspension does not serve these purposes, especially in light of the fact that this is the second occasion upon which Respondent has been found in contempt of this Court's 2004 order of suspension. This Court has found that disbarment is the appropriate sanction under these circumstances. See The Florida Bar v. Gussow, 520 So.2d 580 (Fla. 1988) (Disbarment, rather than a rehabilitative suspension, is the appropriate sanction for a lawyer who is found in contempt of this Court's order); see also The Florida Bar v. Jones, 571 So.2d 426 (Fla. 1990) and The Florida Bar v. Bauman, 558 So.2d 994 (Fla. 1990).

Finally, in determining the appropriate discipline, this Court considers a respondent's prior misconduct and cumulative misconduct, and punishes cumulative misconduct more severely than isolated instances of misconduct. Disbarment is appropriate where there is a pattern of misconduct and a history of discipline. The Florida Bar v. Walkden, 950 So.2d 407, 410 (Fla. 2007), quoting The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000). In Walkden, an attorney was suspended for ninety (90) days in 2002. Respondent violated the terms of this suspension, and agreed to be further suspended for ninety-one (91) days in lieu of

the Bar bringing a formal contempt proceeding. When respondent violated the terms of this second suspension, he was found in contempt by this court and suspended for one year. Walkden failed to notify anyone of this suspension and further held himself out as an attorney in good standing, in violation of the terms of the suspension. Walkden was again found in contempt and, noting the cumulative misconduct, this Court ordered him to be disbarred. The disciplinary sanctions against Walkden became progressively harsher with each subsequent finding of misconduct.

Likewise, Respondent in the instant case should also be disbarred. Like Walkden, Respondent has been found in contempt of this Court's order of suspension on two occasions. Like Walkden, Respondent was found in contempt for holding herself out as an attorney in good standing. Respondent's disciplinary history exceeds that of the respondent in Walkden. Respondent has been disciplined on seven separate occasions over twelve years. Her suspensions, of which there have been five, have become progressively more severe; beginning with a thirty (30) day suspension in 1996, progressing to a ninety (90) day suspension in 1999, to two ninety-one (91) day suspensions in 2004 and 2007, and finally to a six month suspension in 2008 after being found in contempt of this Court's 2004 order of suspension. Therefore, following the precedent set forth in Walkden, Respondent's sanction in the instant case should reflect her lengthy

disciplinary history and cumulative misconduct. Respondent should be disbarred. See also, The Florida Bar v. Forrester, 916 So.2d 647 (Fla. 2005) (In light of respondent's extensive prior disciplinary history, which ranged from a public reprimand to a ninety day suspension, disbarment was the appropriate sanction for finding of contempt of Court's order of suspension); The Florida Bar v. Greene, 589 So.2d 281 (Fla. 1991) (Court held that disbarment was proper sanction for attorney where further suspension after finding of contempt of suspension order would be fruitless because of respondent's history of disciplinary violations); and The Florida Bar v. Bauman, 558 So.2d 994 (Fla. 1990) ("We can think of no person less likely to be rehabilitated than someone like respondent, who willfully, deliberately, and continuously, refuses to abide by an order of this Court.").

In the instant case, Respondent has been found in contempt of court for holding herself out as an attorney in good standing in violation of this court's order, along with numerous aggravating factors. Specifically, the Referee found the following aggravating factors to be present: 9.22(a) (prior disciplinary offenses), 9.22(b) (dishonest or selfish motive), 9.22(c) (a pattern of misconduct), 9.22(g) (refusal to acknowledge wrongful nature of conduct), and 9.22(h) (vulnerability of victims). However, the Referee's recommended discipline does not reflect either the egregious nature of the misconduct at issue, or the numerous factors found in aggravation of the offense. These factors clearly outweigh any

mitigation present in the case. The Referee's recommended discipline has no reasonable basis in existing case law. Disbarment is the appropriate discipline for Respondent.

CONCLUSION

In consideration of this Court's broad discretion as to discipline and based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court reject the Referee's recommended discipline of thirty days and impose instead disbarment.

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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.

_____

JENNIFER R. FALCONE MOORE
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief were sent via U.S. Priority Mail to the Honorable Thomas D. Hall, Clerk, Supreme Court Building, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and a true and correct copy was mailed to Roy D. Wasson, Attorney for Respondent, 28 West Flagler Street, Suite 600, Miami, Florida 33130; and to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399; on this ___ day of _____, 2009.

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