

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 REPLY BRIEF ON APPEAL

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SYMBOLS AND REFERENCES

For the purposes of the Reply 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 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 symbol “TR” followed by the corresponding page number(s).

References to the Initial Brief of The Florida Bar will be set forth as “TFB’s Brief” followed by the corresponding page number(s). References to the Initial Response Brief of Respondent will be set forth as “R’s Answer Brief” followed by the corresponding page number(s).

ARGUMENT

THE REFEREE’S RECOMMENDATION OF A NON-REHABILITATIVE SUSPENSION DOES NOT COMPORT WITH EITHER THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS OR EXISTING CASE LAW. RESPONDENT SHOULD BE DISBARRED.

Respondent argues that disbarment is not appropriate pursuant to Section 8.1 of the Florida Standards for Imposing Lawyer Sanctions because her conduct caused no harm and because the conduct was not similar to a prior violation. Respondent further asserts that the aggravating factors found by the Referee do not warrant elevation to disbarment. Contrary to Respondent’s assertions and consistent with Florida law, Respondent’s conduct meets the criteria of Section 8.1(a) and (b), and therefore disbarment is the presumptively proper discipline. Additionally, the aggravating factors found by the Referee support disbarment in the present case.

In this case, the Referee found that Respondent’s actions of holding herself out as an attorney in good standing in order to obtain a benefit or privilege of a lawyer violated this Court’s prior Order of Suspension. Therefore, the appropriate Standard to apply is Section 8.0, entitled “Prior Discipline Orders.” Without considering aggravating or mitigating factors, Standard 8.1 states that disbarment is appropriate when a lawyer either (a) intentionally violates the terms of a prior

disciplinary order and such a violation causes injury to a client, the public, the legal system, or the profession; or (b) has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct. In this case, Respondent's conduct has violated both sections of Standard 8.1, and disbarment is appropriate.

Respondent asserts that she has committed no more than a technical violation and that she caused no harm, and therefore Section 8.1(a) is not applicable. Contrary to Respondent's assertions, she has caused harm to members of the public, the legal system and the profession.

The harm to Ms. Zadis Fernandez, a particularly vulnerable member of the public, is clear. Ms. Fernandez lawfully owned a vehicle, titled in her name. (TR at 104-105). Ms. Fernandez made it abundantly clear that she did not want Respondent to take possession or any ownership interest in that vehicle. (ROR at 3; TR at 45). Respondent testified that Ms. Fernandez became hysterical at the very idea that Respondent might take the car away from her. (TR at 110, 114-115, 117). While Ms. Fernandez was incarcerated and helpless to prevent Respondent's actions, Respondent went to Diaz Towing where the vehicle had been impounded, presented her Florida Bar identification, indicated she was there on behalf of Ms. Fernandez, and retrieved the vehicle. (ROR at 3; TR at 56-57, 108, 117).

Respondent's assertions of altruistic motives, and claims that she was only acting in Ms. Fernandez's best interests to avoid impound fees and to properly insure the vehicle, are belied by her subsequent actions. After her wrongful retrieval of the vehicle without the rightful owner's permission, Respondent initiated action to re-title the vehicle in her own name. (TR at 117). Upon Ms. Fernandez's release from custody, she attempted to retrieve her vehicle from Respondent, and when that was unsuccessful, she was forced to file a replevin action in order to regain rightful possession of her own car. (TR at 117, R's Answer Brief at 5).

Clearly, Ms. Fernandez, herself, was harmed. The legal system was also harmed by the waste of judicial resources expended on the otherwise unnecessary litigation. Respondent's attempts to minimize this harm to Ms. Fernandez and the legal system by highlighting the Referee's opinion that her misconduct did not occur within an attorney-client relationship are without merit. This Court has repeatedly held that attorneys will be held professionally accountable for misconduct even when it occurs outside the attorney-client relationship. *The Florida Bar v. Barley*, 777 So.2d 941, 946 (Fla. 2000), *The Florida Bar v. Della-Donna*, 583 So. 2d 307 (Fla. 1989); *The Florida Bar v. Hefty*, 213 So. 2d 422 (Fla. 1968).

Further, Respondent's intentional action of showing her Florida Bar identification in order to gain immediate access to a prisoner in a private room, caused harm to the profession. (ROR at 3; TR at 51, 100-101). Respondent testified that the "jig was up," when she was caught by jail officials in a private room when she clearly was not there as the prisoner's attorney. (TR at 102, 124-125). Respondent's fraudulent action at the jail and "ends justifies the means" approach to such situations shines a negative light on attorneys in general and undermines confidence in the profession by those with whom she came into contact.

The legal system was further harmed by Respondent's very action of intentionally violating this Court's order. Any time that an attorney violates an order of the court, the legal system is harmed.

Standard 8.1 addresses two situations in which an attorney should be disbarred for violation of a prior disciplinary order. As described above, disbarment is appropriate pursuant to Section 8.1(a) because Respondent's contemptuous conduct caused harm to the public, the legal system and the profession. In the present case, disbarment is also appropriate pursuant to Standard 8.1(b), which states that disbarment is appropriate when an attorney has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct.

Respondent argues that she has not been disciplined for similar prior acts of misconduct, and therefore disbarment is not appropriate. The Florida Bar disagrees. Respondent's continual refusal to abide by this Court's Order of Suspension has resulted in a six month suspension in case SC06-957, and now in the instant recommendation of suspension by the Referee in the case *sub judice*. Respondent was found to be in contempt of this Court's September 2004 Order of Suspension in both cases. Holding herself out as an attorney in good standing while she was suspended is simply another means by which Respondent has been found in contempt of this Court's order. Therefore, the instant case constitutes similar misconduct and falls within the purview of Standard 8.1 (b). Respondent should be disbarred.

The Standards demonstrate that disbarment is the appropriate sanction in this case. The aggravating factors found by the Referee outweigh any mitigation present and further support the disbarment of Respondent. The Florida Bar adopts and reiterates the arguments made in its Initial Brief on Appeal, especially as to the prior history of Respondent and her cumulative misconduct.

Respondent's contention that this Court can not consider Respondent's prior disciplinary record as an aggravating factor is without merit. The Standards clearly anticipate the application of section 8.1(b) where circumstances warrant it, to then be followed by the Court's review of any additional prior history as an aggravating

factor. Standards 8.1(b) and 9.22(a) are not mutually exclusive.

Respondent's attempt in her Answer Brief to dismiss her prior history as insignificant and irrelevant, is disingenuous at best. Her disciplinary history includes:

* Respondent was suspended for a period of 30 days pursuant to a court order dated June 13, 1996, as a result of neglect and taping telephone conversations without the other parties' consent;

* Respondent was admonished pursuant to a report of minor misconduct dated March 7, 1997, as a result of incompetence and violating advertising rules;

* Respondent was suspended for a period of 90 days pursuant to a court order dated December 9, 1999, as a result of inadequate communication, incompetence and neglect;

* Respondent was publicly reprimanded pursuant to a court order dated July 5, 2001, as a result of a conflict of interest;

* Respondent was suspended for a period of 91 days pursuant to a court order dated September 23, 2004, as a result of her inappropriate behavior in dealing with an unrepresented person and conduct involving dishonesty;

* Respondent was suspended for a period of 91 days, effective *nunc pro tunc* September 23, 2004, pursuant to a court order dated January 18, 2007, as a result of incompetence and lack of diligence;

* Respondent was found in contempt and suspended for a period of six months pursuant to a court order dated May 22, 2008, as a result of her failure to submit quarterly reports from her treating doctor demonstrating compliance with treatment and medications, in violation of the probationary terms set forth in the

Supreme Court's order dated September 23, 2004 in *Supreme Court Case No. SC03-1370*.¹

A quick review of her prior disciplinary record makes sufficiently clear the reasons why Respondent would urge this Court not to consider her prior disciplinary history as an aggravating factor in the instant case, and thus argue such a limited interpretation of the Standards. Her prior offenses were, and should be, appropriately treated as an aggravating factor in this case.

Respondent's argument that her "dishonest or selfish" motive aggravator is outweighed by the Referee's attempts to rationalize her conduct, by indicating she was motivated by a need to maintain control over Ms. Fernandez and that she was attempting to prevent harm, is without merit. Respondent clearly acted both selfishly and dishonestly. She was deliberately dishonest in leading jail officials and Diaz Towing officials to believe that she was a member in good standing of the Florida Bar. She created this deceptive illusion for the purpose of obtaining her own selfish goals. She admitted showing her Florida Bar identification at the jail

¹ In her Answer Brief, Respondent attached an excerpt of the transcript from these proceedings. Neither the excerpt, nor the full transcript, were filed in that case, and were not part of the Record for that case. Respondent's sole purpose in attaching the excerpt to her Brief was to make the absurd implication that Bar Counsel was so unethical that she inserted a six month suspension into the Report of Referee on her own, without same being the recommendation of the Referee, and that the Referee was so incompetent that he did not notice same when he signed the Report of Referee. This blatant attempt to mislead and distract this Court further evidences Respondent's misconduct, and her complete disregard for this Court, the Rules of Procedure, and the Rules Regulating the Florida Bar.

because she did not want to wait to see Ms. Fernandez, as she would have been required to do as a member of the general public. (TR at 101). Further, she clearly wanted to obtain possession of Ms. Fernandez's car, over Ms. Fernandez's strenuous objections. Her true motivations regarding that vehicle are amply demonstrated by her subsequent conduct of re-titling the vehicle in her name and refusing to return it to its rightful owner upon Fernandez's release from custody. The dishonest or selfish motive is a proper aggravating factor in this case.

Respondent argues that her refusal to acknowledge the wrongful nature of her conduct should not be considered as an aggravating factor because she was only doing what she thought was right in a moral sense. Respondent's argument is disingenuous and without merit. As demonstrated *supra*, Respondent's assertions that she was merely trying to help or protect Ms. Fernandez are clearly belied by her subsequent actions of re-titling the vehicle in her own name and refusing to return it, requiring Ms. Fernandez to file suit against her. Respondent therefore could not have an objective and rational belief that her actions were morally correct. This aggravator was, and should be, properly considered in imposing discipline in this case.

Respondent argues that Ms. Fernandez should not be considered as a "vulnerable victim," for the purposes of the final aggravating factor found by the Referee. Respondent's argument is without merit. The fact that Ms. Fernandez

was a victim of Respondent's misconduct is amply demonstrated in the record. Respondent took her car without her permission, and against her express wishes, Respondent then had the vehicle re-titled in her own name, and refused to return it to Ms. Fernandez upon her release from custody. Ms. Fernandez was forced to take legal action to obtain the return of her vehicle. Further, Ms. Fernandez's particular vulnerability is clear from the fact that she was unable to do anything to prevent Respondent's misconduct because she was incarcerated.

In light of the Referee's findings, the applicable Standards, Respondent's extensive prior disciplinary history spanning over a decade, and the aggravating factors present in this case, the Florida Bar maintains that disbarment is the appropriate sanction for Respondent. The Referee's recommended discipline does not adequately reflect either the egregious nature of the misconduct at issue, or the numerous factors found in aggravation of the offense. The Referee's recommendation is not consistent with existing case law, and should not be accepted by this Court. The Florida Bar respectfully urges this Court to disbar 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 Reply 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 June, 2009.

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