Electronically Filed 08/01/2013 03:57:08 PM ET

RECEIVED, 8/1/2013 15:58:34, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ANA I. GARDINER,

Respondent.

_____/

Supreme Court Case
No. SC11-2311

The Florida Bar File
No. 2010-71,157 (11G)

REPLY BRIEF OF THE FLORIDA BAR

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THE REFEREE'S RECOMMENDED SANCTION OF A ONE YEAR SUSPENSION HAS NO REASONABLE BASIS IN EXISTING CASE LAW, NOR THE STANDARDS FOR IMPOSING LAWYER DISCIPLINE, AND THEREFORE SHOULD NOT BE ACCEPTED BY THIS COURT. THE APPROPRIATE SANCTION IN THIS MATTER IS DISBARMENT.

In her Answer Brief, Respondent continued her pattern of utilizing obfuscating and misleading statements in order to avoid responsibility for her misconduct, and demonstrated conclusively why disbarment is required in the instant case.

For instance, in her Statement of the Case and Facts, Respondent asserts that the Florida Bar did not accurately portray the facts. However, as has been her pattern throughout these proceedings, it is Respondent who has been less than truthful in her portrayal of events. At page 1, paragraph 3 of her Answer Brief, Respondent states that there is nothing on the cited transcript page, page 513, to support the Florida Bar's assertion that Respondent dissuaded Scheinberg from taking any action regarding the Timpano's encounter.

Contrary to Respondent's assertion, the record transcript cite clearly demonstrates that Respondent did in fact dissuade ASA Scheinberg from taking any action regarding their encounter at Timpano's. In the Final Hearing, on cross

examination, Respondent testified regarding the conversation in question and stated,

> Q. He told you during that conversation that Sheila Alu, a law student, had raised this issue of it's improper for you and the prosecutor to be together during the pendency of a trial?
>
> A. He told me—part of the things he told me, he told me that.
>
> Q. And you guys actually had a discussion about that, how he was upset about it, you told him, don't worry about it, she drinks a lot, it's no big deal, there is nothing for us to worry about?
>
> A. *Right*.

TR 513 (emphasis added). Moreover, Respondent has previously testified regarding this conversation, where she calmed Sheinberg's fears that Shiela Alu would report their misconduct. In her April 30, 2009 deposition, Respondent stated:

> A. That after that Sheila said something to the effect of so you complained to Mike Satz about something, like that, but you're having dinner with a judge in a case that - - something to that effect, and he said said something to the effect, well, if you think I've done something improper then refer me to the Bar.
>
> Q. Okay. So he explained all of this to you?
>
> A. Right.
>
> Q. And then what?

> A. Then I went ahead and explained everything that I knew about Sheila.
>
> . . .
>
> Q. Did he still seem to be upset about it when you were talking to him?
>
> A. Yeah. Oh yeah.

TFB Ex. 7, pgs 48-49.

Similarly, at page 2, paragraph 4 of the Answer Brief, Respondent states that the Bar misrepresented the evidence that indicated Respondent and Scheinberg were close friends who helped each other through the most traumatic events of their lives. Respondent stated:

> . . . The Florida Bar's suggestion that Respondent 'shut people out' except those who were 'most close to her, including ASA Scheinberg' is belied by the very transcripts and exhibits referred to- that is, that Scheinberg was not a 'close friend,' but 'a friend' . . .

Answer Brief, pg 2. This statement by Respondent in the Answer Brief is directly contradicted by the Referee's findings, and the overwhelming weight of the Record evidence, and in particular by her own testimony throughout the underlying proceedings and in the disciplinary case. For instance, in her deposition Respondent stated,

> When I came back from my dad's death I had also lost my grandmother, who basically raised me, that January 17th.

> She was my dad's mom. . . . And it's just been a really difficult time for me, and *I came back and I shut down, and I wasn't communicating with anybody, but for people that was close to me. I communicated with Howard.*

TFB Ex. 7, pgs 59-60 (emphasis added). Further, in her testimony before the Grievance Committee, Respondent stated,

> . . . he would call every night to see how I was doing, and that's how the communication started. It wasn't anything planned and it wasn't anything that I turned to him to become anything because I have never been attached to anyone, not even my sister, to talk about my life.
>
> Q. And I get that.
>
> But he called, whether it was you or him calling, he called and you began to rely on him and you by your own testimony here today discussed these very tragic, significant moments in your life with him.
>
> A. I did.
>
> Q. And became close to him.
>
> A. I did.
>
> Q. And you don't define that as a significant relationship?
>
> A. I didn't say that I didn't define it as a significant relationship. . . . Was he very important in my emotional stage in the conversations that I had with him, did it help me, yes, yes.

TFB Ex. 16, pgs 75-76. Moreover, in the Final Hearing, Respondent testified:

> Q. You will agree with me that you had an emotional, significantly emotional relationship with Mr. Scheinberg, a significant emotional relationship with Mr. Scheinberg?
>
> A. A close emotional relationship developed, I think those words are correct words, by phone.

TR 517. Respondent's current attempt in her Answer Brief, to continue to portray her relationship with ASA Scheinberg as inconsequential, or that of merely friends, but not close friends, is directly and repeatedly negated by Respondent's own testimony, and by the evidence of the overwhelming number of text and phone communications shared between them throughout the death penalty trial and up through at least the time of the JQC investigation. That she should continue to misrepresent her true relationship with Scheinberg before this Honorable Court conclusively demonstrates that she has not taken responsibility for her conduct and that disbarment is the appropriate sanction in this matter.

Further, in the Answer Brief, Respondent argues that this Court should give great weight to the evidence of Respondent's severe depression in mitigation of the appropriate sanction. A great portion of Respondent's Answer Brief is devoted to the testimony of Dr. Michael Brannon and his observations. However, in presenting this argument, Respondent neglected to mention that Dr. Brannon never diagnosed Respondent with depression. Dr. Brannon only saw Respondent twice in

six months, and never in a professional capacity. TR 192-193, 198-199. In fact, Dr. Brannon plainly stated that to make an actual diagnosis for depression, one must apply several criteria from the Diagnostic and Statistical Manual for Mental Disorders, Fourth Edition (DSM IV), and those symptoms "have to have some longevity to [them]." TR 194. Dr. Brannon's testified, in pertinent part:

> Q. Isn't it true that somebody could display symptoms of severe depression on any given day but not actually be severely depressed? In other words, are there not — okay, sorry.
>
> A. Yes is the answer to your question. Because it requires a length of time, a period of time, to display those symptoms so you could have a reaction to a traumatic event which could last for a short period of time as opposed to extended period of time.
>
> Q. Because of the length of time in between when you saw her the first time and second time, you can't indicate whether there were two short term depressions or whether this was a long sustained depression?
>
> A. Well, no. I don't have the clinical data to say that. . . .

TR 193. Indeed, when asked if he was making a diagnosis of clinical or severe depression, he answered "no one has asked me to do an evaluation or assess her in that way so I'm not doing it from a professional standpoint." TR 193.

Additionally, in reference to her treatment for depression, Respondent asserts, "The Bar's suggestion that respondent go[t] no help until 2009 is belied by

the testimony of Dr. Brannon. Answer Brief, pg 45 (emphasis in the original). Such statement by Respondent in her Answer Brief is yet another example of her tendency to state technically true facts, but through omission of pertinent details, create misleading and false statements. While Respondent did indeed seek help or treatment for a prior depression, that treatment predated, and was concluded prior to, any events giving rise to the current litigation. That treatment was not relevant to the present facts, nor to the argument the Bar was advancing in its Brief. It is undisputed that Respondent did not seek any treatment for the depression she states she was experiencing at the time of the relevant events, until 2009. Indeed, Respondent herself acknowledges this fact. TR 437, 470.

Further, the actual words used by Respondent in her Answer Brief to this Court, that "The Bar's suggestion that Respondent go[t] no help until 2009 is belied by the testimony of Dr. Brannon," were similarly misleading. Dr. Brannon stated that he did not follow up with Respondent to determine if she had sought psychological help at any time during or after the Loureiro trial. TR 198-199.

Further, even if this Court leaves aside the fact that Respondent was never diagnosed with depression, and that she did not seek treatment for any such condition until after her misconduct came to light, disbarment is still the appropriate sanction for Respondent. This Court has consistently imposed the sanction of

disbarment despite evidence of depression and emotional problems of the Respondent. *See i.e.*, *The Florida Bar v. Brownstein*, 953 So.2d 502, 512 (Fla. 2007); *The Florida Bar v. Horowitz*, 697 So.2d 78 (Fla. 1997).

Finally, Respondent's Answer Brief provides further evidence of her refusal to accept responsibility for her actions. Respondent's Answer Brief states that the Loureiro I trial was vacated solely due to the unilateral decision of the State Attorney. Answer Brief, pg 37. However, The Respondent herself has previously admitted "[t]he reason why he got a new trial was because of my actions." TFB Ex. 16, pg 49.

Indeed, the record is replete with Respondent's inability to grasp the severity of her misconduct, and to accept responsibility for her actions. She continues to argue that there was no real basis for the granting of a new trial, and even attack's the State's decision to provide one. However, this Honorable Court has repeatedly stated that, in a death penalty case, the appearance of impropriety "is as much a violation of due process as actual bias would be." *Scull v. State*, 569 So.2d 1251, 1252 (Fla. 1990). This is because "life is at stake and . . . the . . . sentencing decision is so important." *Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983). Respondent's refusal to acknowledge that her actions, standing alone, violated defendant Loureiro's constitutionally protected due process rights, and entitled him

to a new trial before a fair and neutral arbiter, are conclusive proof of her failure to accept responsibility for her misconduct. Disbarment is the appropriate sanction for Respondent.

Moreover, Respondent's reliance on *The Florida Bar v. Lipman*, 497 So.2d 1165 (Fla. 1986) for the proposition that her refusal to acknowledge the wrongful nature of her conduct cannot be considered as an aggravating factor, is without merit. While *Lipman* did address this issue, it has been distinguished by *The Florida Bar v. Germain*, 957 So.2d 613 (Fla. 2007) and is no longer prevailing authority. *Germain* states that when the refusal to acknowledge the misconduct is not based upon factual issues, but rather legal issues, the aggravating factor does indeed apply. *Id*. The Court states that

> . . . Germain has stipulated to most of the facts. He does not dispute that he engaged in the conduct. He nevertheless continues to assert that his actions did not constitute unethical conduct. These are legal issues. With a minimum of legal research, Germain could have discovered that his conduct did constitute unethical conduct and either curtailed his activities or avoided them altogether. *Where the issue rests on a legal question, the aggravating factor of failing to acknowledge the wrongfulness of the conduct clearly applies.* Accordingly, we approve the referee's findings concerning aggravating and mitigating factors.

Id. at 622 (emphasis added). Respondent does not dispute that she engaged in the underlying conduct with ASA Scheinberg. Therefore, in accordance with this Court's holding in *Germain*, her refusal to acknowledge the wrongfulness of her conduct is not based upon factual issues, but rather legal issues, and this aggravating factor is properly applicable.

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 recommendation that Respondent be suspended for one year and that instead, this Court impose the sanction of disbarment.

Jennifer R. Falcone Moore, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399, using the E-Filing Portal; and that a copy has been furnished by United States Mail to J. David Bogenschutz, Attorney for Respondent, 600 South Andrews Avenue, Suite 500, Ft. Lauderdale, Florida 33301 (and emailed at jdblaw0515@aol.com), and by U.S. Mail to Jack A. Goldberger, Attorney for Respondent, 250 Australian Avenue South, Suite 1400, West Palm Beach, Florida 33401 (and emailed at jgoldberger@agwpa.com); and emailed to Kenneth L. Marvin, Staff Counsel, The Florida Bar, at his designated E-Mail address of kmarvin@flabar.org on this 1st day of August, 2013.

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Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been E-filed with The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, using the E-Filing Portal. 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.

Jennifer R. Falcone Moore, Bar Counsel