IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,)

Complainant,)

v.)

THOMAS W. HEADLEY,)

Respondent.)

Supreme Court
Case No. 65, 580

On Petition for Review of
the Referee's Report in a
Disciplinary Proceeding.

MAIN BRIEF OF COMPLAINANT SUPPORTING PETITION FOR REVIEW

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INTRODUCTION

In this brief, The Florida Bar will be referred to as either "The Florida Bar", "the Bar", or "Complainant", Thomas W. Headley will be referred to as the "Respondent" or "Mr. Headley" and The Florida Bar Special Committee on Alcohol Abuse will be referred to as the "Special Committee".

Abbreviations utilized in this brief are as follows:

"T" refers to the Transcript of Proceedings dated December 21, 1984

"R.R. refers to the Report of Referee

"COMPL. EX." refers to Complainant's Exhibit attached to the Transcript of Proceedings dated December 21, 1984

STATEMENT OF THE CASE

The Florida Bar seeks review of a referee's report recommending that Respondent be placed on probation for his misconduct in practicing law while under suspension for nonpayment of dues.

The Referee found that on October 1, 1980 Respondent was suspended from the practice of law for nonpayment of dues, that Respondent received notification from The Florida Bar as to his suspension and dues delinquency during 1980, 1981, 1982 and 1983 and that he "neglected" to file a petition for reinstatement until October 28, 1983 (R.R. 1). The Referee's report indicates that the "gravamen of the Bar's Complaint is that Respondent continued to practice law in 1980, 1981, 1982 and 1983 after having been duly suspended for nonpayment of Bar dues" (R.R. 1).

Respondent appeared at the hearing before the Referee and admitted the charges (R.R. 2). The Referee found that Respondent's actions violated Disciplinary Rule 3-101(B) of the Code of Professional Responsibility and article II, Section 2 and article VIII, Section 2 of the Integration Rule of The Florida Bar (R.R. 2).

The Referee's report reflects that consideration was given to Respondent's argument as to mitigation, specifically

Respondent's alcoholism (R.R. 2,3). In recommending discipline the Referee attempts to design a term of "probation" under the supervision of the Special Committee, incorporating "provisional reinstatment", which he feels will enhance Respondent's chances for successful rehabilitation (R.R. 4,5).

The Florida Bar contests the Referee's consideration of Respondent's alcoholism as a mitigating factor; the Referee's recommendation of probation as an appropriate disciplinary sanction as well as the specific terms of probation recommended by the Referee; and the Referee's failure to recommend that Respondent demonstrate proof of rehabilitation through reinstatement proceedings. Accordingly Complainant urges that the Supreme Court accept the Referee's findings as to guilt and reject the Referee's recommended discipline as inappropriate in this case. The Florida Bar suggests that suspension for three months and one day with proof of rehabilitation and payment of costs is an appropriate disciplinary sanction.

STATEMENT OF FACTS

The complaint filed by The Florida Bar alleges that Respondent was suspended from the practice of law for nonpayment of dues in October 1980 and did not petition for reinstatement until October 1983. During the aforementioned period, Respondent received annual notification of his dues delinquency from The Florida Bar. In addition, in February 1983 Respondent was notified by letter from the Miami Office of The Florida Bar that he was delinquent in his dues and should not practice law. On March 29 and June 1, 1983 Respondent was contacted by a Bar staff investigator to confirm that he had received actual notice of his delinquent status. Despite receiving the notification referred to above, Respondent continued to practice law while under suspension for nonpayment of dues and did not petition for reinstatement until October 1983, three years after his suspension.

Respondent failed to file an answer to the Complaint or respond to the Request for Admissions. As a result, the matters were deemed admitted (Tr. 6). The Referee found Respondent guilty of practicing law while under suspension for nonpayment of dues in violation of Disciplinary Rule

3-101(B) of the Code of Professional Responsibility and article II, Section 2 and article VIII, Section 2 of the Integration Rule of The Florida Bar (R.R. 2).

Respondent appeared at final hearing to acknowledge his misconduct and present evidence of alcoholism as a mitigating factor.

The Florida Bar recommended to the Referee that a suspension for three months and one day and proof of rehabilitation was an appropriate disciplinary sanction (R.R. 2). Respondent's position was that the discipline recommended by The Florida Bar is "unwarranted" (Tr. 16).

In his report, the Referee acknowledged that the discipline recommended by The Florida Bar was not "unduly harsh" but was not, in his opinion best suited in this case because the Special Committee of The Florida Bar on Alcohol Abuse would not be utilized and therefore Respondent would not have the benefit of the Committee's assistance during his rehabilitation (R.R. 3,4). The Referee rejected the Bar's disciplinary recommendation in favor of probation with "provisional reinstatement" as detailed below:

> 1. Respondent will be placed on probation for a period of not less than six months, nor less than twelve months, under the supervision and guidance of The Florida Bar Special Committee on Alcohol Abuse,

Administrative Law Judge Michael E. Hanrahan, Chairman. Confidentiality in this matter having been waived, the Referee has taken the liberty of discussing the possibility of having the committee supervise Respondent's rehabilitation with the committee Chairman, Administrative Law Judge Michael E. Hanrahan, who advised that the committee would be willing to so serve and with approval of The Supreme Court, Judge Hanrahan would assign attorneys George Tulin, Raymond P. O'Keefe and Richard A. Moore to supervise and monitor Respondent's rehabilitation.

2. Upon payment of arreared Bar dues for 1984-1985 and a favorable written report from the Special Committee recommending reinstatement made to The Supreme Court, Respondent would be provisionally reinstated to practice law under the direct supervision and daily monitoring by the Special Committee. Thereafter, upon any report of the Special Committee made to The Supreme Court that Respondent's progress or rehabilitation has become unsatisfactory and that there exists in their opinion a potential for harm to the public, Respondent may be suspended from provisional practice of law by The Supreme Court and Respondent would be suspended for a period of three months and one day and thereafter, Respondent shall show proof of rehabilitation prior to said suspension being lifted.

a. Upon the filing of such an adverse report with the Supreme Court, the Respondent will be entitled to file a response contesting same and shall have the right to be heard on same prior to action upon said adverse Committee report by The Supreme Court.

b. After six months the Committee shall render a written recommendation to The Supreme Court as to whether Respondent's probation should continue and shall set forth the grounds for the basis of said belief.

3. The Special Committee shall advise The Supreme Court on a monthly basis of Respondent's progress.

4. Respondent shall continue his participation in Alcoholics Anonymous during the period of his probation and Respondent will not consume any alcoholic beverages.

5. Respondent will not violate The Integration Rules or Code of Professional Responsibility.

6. Costs of this proceeding of $1,275.30 shall be taxed against Respondent and shall be paid to The Florida Bar within one year of the termination (successful or otherwise) of Respondent's probation. Said costs shall accrue interest at the rate of 12% per annum.

(R.R. 4-5)

SUMMARY OF ARGUMENT

Respondent's misconduct of practicing law while under suspension for nonpayment of dues occurred during 1980, 1981, 1982 and 1983. At final hearing, Respondent testified that he first sought treatment for alcoholism in August 1984. Other than Respondent's testimony, there was no corroborating evidence that Respondent was an alcoholic prior to 1984 and during the period of misconduct. Further, there was no evidence that Respondent's alcoholism caused the misconduct. It is The Florida Bar's position that evidence suggesting that alcoholism may have existed at the same time as the misconduct is insufficient to establish a causal relationship between alcoholism and the misconduct so as to justify the Referee's consideration of alcoholism as a mitigating factor.

Assuming, arguendo, that Respondent's alcoholism should have properly been considered by the Referee as a mitigating

factor, the evidence presented, including Respondent's own testimony, clearly establishes that Respondent is currently unfit to practice law. Based upon such evidence, proof of rehabilitation should be required through reinstatement proceedings. Probation should not be considered a substitute for formal reinstatement proceedings and should only be utilized to further ensure a respondent's continued compliance with certain behavior after it is established that the respondent is currently fit to resume the practice of law.

Moreover, the terms of probation recommended by the Referee are inappropriate and not in accordance with the Integration Rule of The Florida Bar in that: (1) the specific terms are unclear; (2) the determination of fitness to practice law is transferred by the Referee to an entity not authorized by either the Supreme Court or Integration Rule of The Florida Bar to consider such matters; (3) the provision for reinstatement upon payment of the arrearage in Bar dues does not require either prior petition to and approval by the Board of Governors pursuant to article VIII, Section 2 of the Integration Rule of The Florida Bar or proof of payment of any outstanding costs of disciplinary proceedings; (4) the recommendation for provisional

reinstatement is not a Bar membership status which is recognized by the Integration Rule of The Florida Bar.

Based upon the facts of this case, The Florida Bar recommends that Respondent be suspended for three months and one day, show proof of rehabilitation pursuant to Integration Rule 11.11, and pay costs of the disciplinary proceedings.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH A CAUSAL RELATIONSHIP BETWEEN RESPONDENT'S ALCOHOLISM AND THE MISCONDUCT SO AS TO JUSTIFY CONSIDERATION OF ALCOHOLISM AS A MITIGATING FACTOR.

Respondent has been found guilty of practicing law in 1980, 1981, 1982 and 1983 while under suspension for nonpayment of dues (R.R. 1,2). Respondent testified that the first time he sought treatment for alcoholism was August 15, 1985 when he attended his first meeting of Alcoholics Anonymous (Tr. 20). Further, other than Respondent's testimony, there was no corroborating testimony or other evidence presented to establish the existence of alcoholism during the period 1980 through 1983. In fact, Respondent's testimony concerning the adverse effects of his drinking and

"character defects" not characterized by Respondent as alcohol-related involved the year 1984.

> [MR. HEADLEY]: . . . .
> Now, I was not a daily drinker, and I, to this point, had been spared the under-bridge type of drinking. I wasn't totally downed out, but I would say to Your Honor that I have no automobile. I just purchased a 1973 Plymouth Duster automobile. I had no home. This is going back approximately six, eight months ago. I had no office. I was not practicing law except on a sporadic basis a few cases that I continued to hold onto, where I tried to complete those.
>
> . . . .
>
> I had an office up until approximately March or April 1984, at which time I was asked to leave the office I was in and my belief today being because of certain character defects or parts of my personality that were emerging in this office.

(Tr. 25, emphasis added)

> [REFEREE]: Do you think you're to a point now where you can represent people, take their money, represent them as an attorney and function fully as their attorney in a case, say, a criminal case?
>
> [MR. HEADLEY]: No, I don't.
>
> [REFEREE]: What would stop you from doing it if you still have your license?
>
> [MR. HEADLEY]: Nothing. I would say to you, Judge, that, in all due respect, that I don't know that that enters into the discipline for my nonpayment of dues. . . .

(Tr.32-33, emphasis added)

In The Florida Bar v. Blalock, 325 So.2d 401 (1976) this court held that:

> We . . . appreciate . . . [Respondent's] . . . effort to control the root cause of his problems. Our duty is to weigh these personal factors as they affect Blalock, and in doing so also discharge our impersonal responsibilities to protect the public and to generate confidence in the integrity of the legal profession.

Id. at 404.

While Respondent has testified concerning his efforts to rehabilitate himself and deal with his current alcohol problem through involvement with Alcoholics Anonymous (Tr. 32), it is clear that Respondent is not currently fit to practice law. Accordingly, reinstatement proceedings pursuant to Integration Rule 11.11 should be required wherein Respondent's fitness to resume the practice of law shall be determined by a referee who shall submit his findings to the Supreme Court for appropriate review. Respondent's later testimony confirms that he received the dues notices, was asked about payments and simply neglected to pay them.

> [MR. HEADLEY]: [N]otices would arrive [at Respondent's office] and they would be opened and I would be asked about the Bar matter and the Bar dues and I would just go on about my business and say I was taking care of it. . . .
>
> . . . It falls on no one else other than me, and as I think back when I did those, I would mean to pay them, and tend to pay them, but they always just got pushed in the corner of the desk and I went on to other

things, and I don't know that I even thought that I wasn't hurting people, that it was a victimless type of situation.

(Tr. 27,28, emphasis added)

Moreover, in Respondent's Petition for Reinstatement following his suspension for nonpayment of dues filed with the Board of Governors in 1983, (COMPL. EX.3), Respondent does not mention alcoholism as a factor in failing to pay his Bar dues.[1/]

In State ex rel. v. Hogsten, 127 So.2d 668 (Fla. 1961), this Court held that alcoholism or illness is not relevant for consideration as mitigating circumstances when it occurs after the wrongful conduct. In the instant case, the evidence which supports a finding that Respondent's alcoholism existed as of August 1984 when he joined Alcoholics Anonymous, does not necessarily establish the existence of alcoholism in 1980 through 1983, the period in which the misconduct occurred.

[1/] Respondent's position in 1983, as reflected in his Petition for Reinstatement, was that his "delinquency resulted from a belief that his employer had undertaken to pay his Florida Bar dues". In his testimony before the Referee, Respondent disavowed his 1983 position claiming that his explanation to the Board of Governors was a "misrepresentation" which was also apparently caused by his alcoholism (Tr. 35-36).

Assuming, arguendo, that the evidence supports a finding that Respondent was an alcoholic during 1980 through 1983, there was no evidence that Respondent's alcoholism caused either his failure to pay Bar dues or his decision to continue to practice law so as to justify consideration of alcoholism as a mitigating factor. The mere fact that a potentially mitigating condition existed at the time the misconduct occurred does not establish a causal relationship between the mitigating condition and the unethical conduct.

It is significant that Respondent did not testify that alcoholism caused his failure to pay his Bar dues.

> [MS. ETKIN]: Mr. Headley, is it your position but for your alcoholic problem you would have paid your dues as required?
>
> [MR. HEADLEY]: I really don't know. I honestly can't tell you.
> I believe, and I would like to make it real clear, Ms. Etkin, that I don't offer this as an excuse and I don't want to use it as a crutch to explain away what I've done. I offer it as some explanation for what has happened. I accept full responsibility for what I did.
>
> [MS. ETKIN]: Mr. Headley, did your alcoholism cause you not to pay your Bar dues for the years 1980, 1981, 1982 and 1983 and 1984?
>
> [MR. HEADLEY]: I really don't know that. I can answer that nothing drove me to not pay other than the

> disease, and I don't know. I don't want to use it as a convenient crutch to fall on at this time and say I did it because I'm am alcoholic. I don't know the answer to that.
>
> I wonder. I have given deep thought many, many times why did I do this. What is the reason I did it. Where is the explanation, and I honestly have not been able to explain it to myself.
>
> Ms. Etkin, I can't tell you if I was not an alcoholic I would have paid it. I think most sane people would. I think if I would have been a sane individual and not suffering from a disease, I would have. I think so.

(Tr. 21-22, emphasis added).

In his report, the Referee acknowledges Respondent's inability to give a definite reason for his failure to pay Bar dues (R.R. 2). The Referee apparently based his decision to consider alcoholism as a mitigating factor upon an improper assumption that if Respondent was not an alcoholic he would have paid his dues.

> [REFEREE]: . . . I am firmly convinced that you had to be, like you say, an alcoholic or you wouldn't allow this to happen.

(Tr. 44)

The Referee's position appears to be that only an alcoholic would fail to pay Bar dues and would practice law while suspended for nonpayment of dues. However, alcoholism is not the only explanation for professional misconduct.[2/]

[2/] Although Respondent's testimony clearly does not support a finding that alcoholism caused his failure to pay Bar dues, in his finding of causation, the Referee refers to the testimony of Ray O'Keefe, an attorney who is a member of Alcoholics Anonymous and is active in programs dealing with alcoholism (R.R. 3). Mr. O'Keefe testified that he . . fn. cont'd . .

It is the position of The Florida Bar that alcoholism should mitigate discipline only when it is clearly established that the condition existed at the time of the misconduct and was causally related to the misconduct. In the instant case, the evidence does not support a conclusion that Respondent was an alcoholic during the period 1980, 1981, 1982 and 1983 and that his alcoholism caused his failure to pay his Bar dues and to practice law while under suspension for nonpayment of dues.

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first met Respondent in August 1984 and is acquainted with him through Alcoholics Anonymous (Tr. 42). The Florida Bar objected to Mr. O'Keefe's testimony for the purposes of establishing causation because he had no personal knowledge of Respondent's alcoholism prior to August 1984 and, therefore, could not confirm that Respondent was an alcoholic during that period of time or that Respondent's alcoholism caused his failure to pay Bar dues (Tr. 43).

II. WHERE THE EVIDENCE CLEARLY ESTABLISHES RESPONDENT'S PRESENT INABILITY TO PRACTICE LAW DUE TO ALCOHOLISM OR ANY MENTAL OR PHYSICAL CONDITION, PROOF OF REHABILITATION SHOULD BE REQUIRED THROUGH REINSTATEMENT PROCEEDINGS BEFORE RESPONDENT IS PERMITTED TO RESUME THE PRACTICE OF LAW.

This Court has held that an attorney's incompetency reflects on his fitness to practice law. The Florida Bar v. Levenson, 252 So.2d 794 (Fla. 1971). Accordingly, an attorney who is suspended because of incompetency has the right to apply for reinstatement upon showing that the mental disability no longer exists. Id. An attorney suffering from a neurotic condition has not been permitted to resume the practice of law merely based upon the passage of time and without a showing that he was mentally and tempermentally competent to resume the practice of law. The Florida Bar v. Goldin, 240 So.2d 300 (Fla. 1970).

In cases specifically involving alcoholism, this Court has held that "a practicing attorney who is an alcoholic can be a substantial danger to the public and the judicial system as a whole". The Florida Bar v. Larkin, 420 So.2d 1080, 1081 (Fla. 1982). In Larkin an attorney whose professional misconduct stemmed totally from alcoholism was ordered

suspended for ninety days with proof of rehabilitation required. In requiring rehabilitation, this Court stated:

> 'By his own admission, Respondent suffers from abuse of alcohol and such condition has existed or some length of time.'
> . . . [R]einstatement [should] be conditioned upon proof that he receive professional treatment for alcohol abuse which results in his having full control of the problem, that he no longer prevents a risk to the public as a practicing atorney, that he is fit and able to practice law.

Id. at 1081

The only disciplinary cases involving an alcoholic or incompetent attorney where rehabilitation has not been required are those in which rehabilitation subsequent to the misconduct was established before the Referee. The Florida Bar v. Moran, 273 So.2d 379 (Fla. 1973); The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984); The Florida Bar v. Rosetti, 379 So.2d 362 (Fla. 1980).

In the instant case, Respondent's unfitness to resume the practice of law due to alcoholism or emotional instability is clearly established in the record and recognized by the Referee (R.R. 2,3).

> [MR. HEADLEY]: . . . .
> August 14th, the day before I went to my first meeting of Alcoholics Anonymous, I had a gun in my mouth and I was crying because I couldn't kill myself. I had a shaggy beard. I had long hair. I looked as bad as I felt. I was yellow in complexion. I never went outside, never into the sunlight, never

> talked to anybody, rejected everybody, all my family, all my friends. I had nobody that I had any confidence or faith or trust or belief in at the very end and certainly not myself. I hated myself the most, but I was a total wreck prior to my going to Alcoholics Anonymous, and I believe and hope that I've had some turn around from that day because I didn't long to live, and I don't know if you think that's an overstatement, and I'm not looking for sympathy here, but I genuinely believe that I was one step from the grave or an institution, an institution meaning a mental institution, because I was become disillusional in my mind.
>
> It was getting to the point where I didn't even need to drink a lot to change my perception to what was happening to me. . . .

(Tr. 29-30).

III. THE TERMS OF PROBATION RECOMMENDED BY THE REFEREE ARE AMBIGUOUS AS WELL AS CONTRARY TO THE INTEGRATION RULE OF THE FLORIDA BAR

In Section 1 of his disciplinary recommendation the Referee sets forth a period of probation of "not less than six months, nor less than twelve months" which is, on its face, inconsistent (R.R. 4). Further, it is unclear as to whether Respondent is permitted to practice law during the probationary period. If not, there is a question concerning the purpose of assigning Special Committee attorneys to "supervise and monitor" Respondent's rehabilitation.

In Section 2 the Referee orders the provisional reinstatement of Respondent based upon Respondent's payment of "arreared Bar dues" for 1984-1985. In doing so, the Referee overlooks the provisions of article VIII, Section 2,

Integration Rule of The Florida Bar which requires an attorney who has been suspended for nonpayment of dues to be reinstated upon petition to and approval by the Board of Governors and payment of all fees and charges owing, including a $50.00 reinstatement fee (emphasis added). Further, article VIII, Section 6, Integration Rule of The Florida Bar specifically provides that dues tendered shall not be accepted from any member who is delinquent in the payment of costs imposed against him in a disciplinary proceeding. Delinquency is defined as costs not paid within 30 days after the disciplinary decision becomes final, unless time for payment is extended by the Board of Governors. The Referee, however, orders the payment of costs within one year of termination of probation (R.R. 5) which conflicts with the aforementioned Integration Rule and has the effect of extending the time for payment of costs without the approval of the Board of Governors.[3/]

In addition, the Referee's recommended discipline provides for the "provisional reinstatement" of Respondent under the

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3/ See also article XI, Rule 11.11(3) of the Integration Rule of The Florida Bar which precludes a referee's consideration of a petition for reinstatement until costs of all disciplinary proceedings have been paid.

direct supervision and daily monitoring of the Special Committee. However the Integration Rule of The Florida Bar does not recognize provisional reinstatement as a Bar membership status. Florida Bar members who are entitled to practice law must be members in good standing. Fla. Bar Integr. Rule, art. II, Sec. 2. Attorneys who have been placed on the inactive list, suspended, disbarred, or permitted to resign are ineligible to practice law until reinstated or readmitted. Fla. Bar Integr. Rule, art XI, Rule 11.10(8). Accordingly, the Referee's recommendation for "provisional reinstatement" is contrary to the membership provisions of the Integration Rule of the Florida Bar.

The Referee provides for Respondent's suspension from the "provisional practice of law" based upon the filing of a report of the Special Committee that Respondent's progress or rehabilitation has become unsatisfactory. Accordingly, the effect of the Referee's proposal is to vest the Special Committee with the role of determining fitness to practice law. This proposal, however, is in direct conflict with article XI, Rules 11.11(3) and 11.11(5) of the Integration Rule of The Florida Bar which establishes formal reinstatement procedures and vests the authority to determine

fitness to practice law in a referee designated by the Supreme Court.

Furthermore, the Referee permits Respondent the right to contest the adverse Special Committee report and to be heard on same. However, the recommendation is unclear as to whom such adverse report is referred for hearing and what the nature of these further proceedings would be.

Finally, it is unclear what, if any, distinction the Referee intends by his use of the term "provisional reinstatement" instead of probation as provided by article XI, Rule 11.10(1), Integration Rule of The Florida Bar and whether "provisional reinstatement" continues indefinitely, lapses, or may be otherwise terminated so as to accord Respondent full membership status. While The Florida Bar does not object to the utilization of the Special Committee or any agency for purposes of probation, assuming the terms of probation are in accordance with Rule 11.10(1) of the Integration Rule of The Florida Bar, the Bar does, however, object to probation which involves "provisional reinstatement" and suggests that probation is appropriate only after rehabilitation has been proven and a respondent is found fit to be fully reinstated as a member of The Florida Bar.

IV. CONSIDERING THE CIRCUMSTANCES IN THIS CASE, SUSPENSION FOR A PERIOD OF THREE MONTHS AND ONE DAY WITH PROOF OF REHABILITATION AND PAYMENT OF COSTS IS AN APPROPRIATE DISCIPLINARY SANCTION.

In considering The Florida Bar's recommendation for a suspension for three months and one day, the Referee acknowledges that the discipline is not unduly harsh, but is not, in his opinion, best suited in this case (R.R. 3, emphasis added). Instead, the referee recommends probation with provisional reinstatement, the terms of which The Florida Bar maintains is not in accordance with the Integration Rule of The Florida Bar, as discussed in Argument III.

Further, it is the position of The Florida Bar that probation in lieu of discipline, as recommended by the Referee, is inappropriate in this case. In The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970), this Court sets forth the three elements considered in evaluating a disciplinary sanction.

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Probation in lieu of discipline meets none of the criteria set forth in Pahules. First, it permits an attorney who has testified as to his unfitness to practice law to continue to practice without first establishing proof of rehabilitation through reinstatement proceedings. Probation does not cure unfitness and the public is certainly not protected by permitting a clearly unfit attorney to handle legal matters.

Assuming evidence was presented to support a finding that Respondent is rehabilitated and currently fit to practice law, probation might be appropriate as an additional measure to ensure Respondent's continued compliance with a particular course of conduct (i.e., abstention from alcoholic beverages, continued participation in Alcoholics Anonymous). The Floria Bar v. Moran, 273 So.2d 379 (Fla. 1973).

Secondly, the recommended discipline does not sufficiently punish Respondent for a breach of ethics. This Court has consistenly held that an attorney who

practices law while under suspension for nonpayment of dues is subject to disciplinary sanctions. The Florida Bar v. Bratton, 413 So.2d 754 (Fla. 1982); The Florida Bar v. Hawkins, 450 So.2d 483 (Fla. 1984); The Florida Bar v. Davidson, 433 So.2d 966 (Fla. 1983). In none of these cases was a respondent given probation as the only disciplinary sanction.

Even in The Florida Bar v. Pryor, 350 So.2d 83 (Fla. 1977) which involves Supreme Court approval of a consent judgment for Respondent's appearance in court under the influence of alcohol and while under suspension nonpayment of dues, the Respondent received a public reprimand and three years probation.[4/]

The Referee's objection to The Florida Bar's recommendation concerning discipline is based upon a

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4/ Pryor, however, may be distinguished from the instant case in that the instant case involves practicing law for three years while under suspension for nonpayment of dues, together with clear evidence of current alcohol and emotional problems.

misapprehension that by requiring proof of rehabilitation through formal reinstatement proceedings, Respondent would not have the benefit of the Special Committee's assistance during his rehabilitation (R.R. 4).

> Under the proposal by the Bar understanding practicing attorneys would not be involved in the rehabilitation process and instead, the Bar would have the limited role of determining whether or not rehabilitation has occurred after the fact.

Id.

The Referee's position, however, is without merit in that under the Bar's proposal Respondent is not precluded from seeking rehabilitative assistance from the Special Committee, Alcoholics Anonymous or any other association. The only restriction placed upon Respondent is that he would not be entitled to resume the practice of law until after he has proven rehabilitation pursuant to the reinstatement proceedings set forth in article XI, Rule 11.11, Integration Rule of the Florida Bar. Under the Bar's proposal, Respondent may continue his rehabilitative efforts and in any reinstatement proceeding introduce evidence from the Special Committee or any other source to establish current fitness to practice law.

The Referee's recommended discipline is apparently designed to encourage Respondent's rehabilitation by

essentially "overlooking" his breach of ethics and avoiding the imposition of any meaningful discipline. This position, however, neither encourages rehabilitation nor promotes respect for the regulations of the profession. It is The Florida Bar's position that by consistently ignoring notification as to his dues delinquency and continuing to practice law while under suspension for a period of three years, Respondent displayed a willful disregard for his professional obligation to ensure that he was a member in good standing at all times when he engaged in the practice of law. Such willful disregard may be characterized as "contempt" for the regulations of the profession.

This court has dealt severely with attorneys who manifest contemptuous conduct by practicing law in violation of a Supreme Court order of suspension order. The Florida Bar v. Hartnett, 398 So.2d 1352 (Fla. 1981); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978); The Florida Bar v. Breed, 368 So.2d 356 (Fla. 1979).

The element of willful disregard, together with the period of time Respondent engaged in the misconduct, should be considered aggravating factors. Unless such unethical conduct results in discipline, it will not deter other

attorneys who might be tempted to ignore their professional obligations and will, therefore, fail to satisfy the element of deterrence established in Pahules.

Considering the aggravating factors involved in this case, Respondent's current unfitness to practice law, and the purposes of discipline as set forth in Pahules, The Florida Bar urges this Court to reject the Referee's recommended discipline and order Respondent suspended from the practice of law for three months and one day, show proof of rehabilitation and pay costs of the proceedings within thirty days of entry of the final order of discipline, unless time for payment is extended by the Board of Governors.

CONCLUSION

In determining discipline, the Referee considered evidence of Respondent's alcoholism as a mitigating factor. The record supports a finding that Respondent is currently an alcoholic but does not, however, support a finding that Respondent's alcoholism existed during the period of misconduct and that alcoholism caused Respondent to practice law while not a member in good standing. Without evidence which clearly establishes both elements, the Referee should not have considered alcoholism as a mitigating factor.

Evidence of Respondent's current alcoholism is, however, relevant to the question of Respondent's current fitness to practice law. Where the record clearly establishes that Respondent is currently unfit to practice law, proof of rehabilitation should be required through reinstatement proceedings.

The Referee's recommendation for probation is inappropriate in principle as well as design. First, the terms set forth by the Referee are not in accordance with the Integration Rule of The Florida Bar. Secondly, probation as the only disciplinary sanction is an inappropriate response to a breach of ethics. The three year period of time in which Respondent ignored his professional obligation to ensure he was a member in good standing should be considered an aggravating factor so as to justify discipline which is severe enough to impress upon Respondent, and other attorneys, that such conduct will not be tolerated.

Accordingly, the Florida Bar recommends that Respondent be suspended for a period of three months and a day, show proof of rehabilitation and pay the costs of the disciplinary proceeding within thirty days of entry of the Supreme Court's

final order of discipline, unless time for payment is extended by the Board of Governors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the Main Brief of Complainant Supporting Petition for Review was mailed to Sid White Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, FL 32301 and that a true and correct copy was mailed to Thomas W. Headley, by certified mail (#P-737-110-114), return receipt requested, at 10592 N.W 7th Terrace, Miami, FL 33172, this 30 day of March, 1985.

Patricia S. Etkin

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