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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STEVEN L. SOMMERS,

Respondent.
_____/

Case No. 67,890
67,926
68,641

COMPLAINANT'S ANSWER BRIEF AND BRIEF IN SUPPORT OF CROSS PETITION FOR REVIEW

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STATEMENT OF THE CASE

The Florida Bar will accept the statement of the case set out in respondent's initial Brief with the following additions:

The referee in this case has recommended certain discipline separately in each of the three cases which are a part of this Cross Petition for Review.

In Case No. 67,890, the referee recommended that the respondent be privately reprimanded by the Board of Governors and that he be placed on probation for a period of six months with certain requirements to be accomplished during the probationary period. In each of the two remaining cases, Case No. 67,926 and Case No. 68, 641, the referee recommended suspension from the practice of law for a period of six months and thereafter until he shall prove his rehabilitation. She further recommended that the respondent comply with the Aftercare Chemical Abuse Program of Brookwood (Hospital) and avail himself of the services of The Florida Bar's Charles Hagan, Jr.'s program "during the terms of his suspension." (Emphasis supplied)

The referee was silent as to whether the recommended term of suspension from the practice of law in Case No. 67,926, was to be concurrent with, or consecutive to, the suspension recommended in Case No. 68,641.

It is the position of the Board of Governors that the discipline in these cases should extend to suspension from the practice of law for a period of one year and subject to probation for a period of three years.

STATEMENT OF THE FACTS

The Florida Bar will accept respondent's Statement of the Facts as set forth in his initial Brief.

SUMMARY OF ARGUMENT

This Court is confronted with the issue of deciding an appropriate discipline in this case in which a young attorney has been found guilty by a referee of eleven counts contained in three formal Complaints. During the course of the referee hearing the respondent admitted that he was guilty of multiple violations of the Disciplinary Rules, and that as a result of his neglect of his clients' legal problems, no fewer than four had suffered significant prejudice to their legal rights. At least three of the four clients have had their suits barred by the statute of limitations and thus have been denied their day in Court.

It is abundantly clear that the policy of this Court is that where alcoholism and, presumably, drug addiction, is the underlying cause of professional misconduct, and where the attorney is willing to cooperate and seek appropriate rehabilitation, this Court will take those circumstances into account in determining the proper discipline.

This is as it should be. However, this does not mean that use of appropriately stern attorney discipline as a deterrent should be overlooked.

The fact that an attorney is ill does not relieve him of responsibility for the conduct of his clients' affairs. Illness, short of insanity, should not convert attorney committed offenses which would otherwise make appropriate a long term suspension, into an offense worthy only of a short suspension not requiring proof of rehabilitation.

A specific purpose to be achieved by requiring proof of rehabilitation is that in cases, such as the one at bar, where the path of recuperation from the addiction has been brief, this Court and The Florida Bar can have realistic assurances that the attorney is, in fact, able to continue his upward trek. This would be accomplished at a point before other clients' interests may be endangered. It would make known to the public that this Court and The Florida Bar, do indeed, feel a responsibility to assure that the public is fully protected from attorney misconduct. See The Florida Bar v. Larkin, 420 So.2d 1080, 1081 (Fla. 1982).

Therefore, while it is entirely appropriate that alcoholism and drug addiction, together with recuperation and cooperation from the afflicted attorney can, and should, be considered by this Court in approving discipline, this principle does not require substantial reduction of an otherwise appropriate discipline.

ARGUMENT

A DISCIPLINE EXTENDING TO ONE YEAR'S SUSPENSION WITH PROOF OF REHABILITATION, AND PROBATION INCLUDING MANDATORY SUBSTANCE REHABILITATION COUNSELING FOR THREE YEARS, IS A MORE APPROPRIATE DISCIPLINE IN THESE THREE CASES THAN IS THE SIX MONTHS SUSPENSION, PRIVATE REPRIMAND, AND PROBATION RECOMMENDED BY THE REFEREE OR THE FORTY FIVE DAYS SUSPENSION WITH AUTOMATIC REINSTATEMENT AND THREE YEARS PROBATION ADVOCATED BY COUNSEL FOR RESPONDENT.

The three formal Complaints contained in these cases were tried by the referee on May 9, 1986, at a consolidated hearing of all three of the formal Complaints. Respondent admitted most of the facts contained in the several complaints. It is of more than passing interest, however, to note that these three formal Complaints comprise twelve counts, each of which contain a separate complaint by an individual client of this respondent. They include multi-violations of numerous rules of not only neglect, but of failing to seek the lawful objectives of his client, engaging in conduct reflecting adversely on his fitness to practice law, and failing to carry out contracts of employment.

The point to be decided in this case, the appropriate quantum of discipline to be approved, clearly raises the issue of

what consequence respondent's voluntary chemical dependence should have on that discipline.

The respondent admits that four of the eleven clients whose complaints constitute eleven of the twelve counts embraced by these three formal Complaints were in fact prejudiced by his lack of action on their behalf. At least three of these clients were, in fact, seriously prejudiced in that in each of the three cases the statute of limitations has run and they have been denied their day in court. It is worthy of note that the remaining clients whose cases were not barred, or whose causes of action have survived in spite of respondent's neglect, have experienced significant delays in establishing their rights, even though their causes of action may still exist. Some of these cases involve substantial employment rights.

While it may be true that taken separately and individually, the respective counts in these three Complaints may justify a lesser discipline, taken together, they represent a very serious breach of ethics. Ever since this Court decided the case of The Florida Bar v. Brigman, 307 So.2d 161 (Fla. 1975) it has approved the principle that several cases tried together, as they were in this case, can be used to justify a more serious discipline. The

Court has more recently reaffirmed the same principle in The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981).

In The Florida Bar v. Bowles, 460 So.2d 366 (Fla. 1984) this Court approved a discipline extending to suspension for eight months and restitution of certain funds to several clients in a case in which the referee had recommended findings of guilt of four counts. Any one of the four counts, separately and by itself, was not so egregious as to require suspension. Taken together, however, this Court felt that it was appropriate to award a suspension for eight months. Chemical dependence was not a factor in Bowles.

Respondent cites with approval the decision of this Court in a recent case, The Florida Bar v. Garcia, 485 So.2d 1254 (Fla. 1986) as precedent for awarding a public reprimand and supervised probation in a case involving only four counts of otherwise relatively minor offenses. In a strong dissent in that case, relating to the matter of discipline, Justice Ehrlich, writing for himself and Justice Shaw stated in part:

> The majority is apparently of the view that the discipline for multiple infractions of the Integration and Disciplinary Rules merit less discipline than the sum of the total since it concludes that a public reprimand and two year's probation are the appropriate dis-

> cipline. Considering both cases, I view the public reprimand to be nothing more than a token discipline and inappropriate here.
>
> The proper discipline, in my opinion, is a suspension for thirty days followed by a supervised probation for two years. Anything less than this will not get respondent's attention. This will give Mr. Garcia a period of time to take stock in his career and his professional life and to make the necessary changes, if he wants to remain a practicing attorney. This will serve the public purpose of imposing this discipline.

Respondent includes in his argument reference to a Florida Bar News article which he included as Exhibit A in his Appendix. Inasmuch as this article pertains to a corporation which the Board of Governors of The Florida Bar has formed for the purpose of assisting lawyers to get treatment for drinking and drug problems before the problems get the lawyers into professional misconduct trouble with the Bar, the information is irrelevant to this case. Because it has been injected into respondent's Argument, it should be noted in passing that there is nothing stated in the philosophy of the Board of Governors in that article that suggests, recommends, or mandates that an attorney who has violated the Code of Professional Responsibility and who has been brought before the bar of justice on that account, should receive less discipline than an attorney who has violated the same Disciplinary Rules but whose conduct is not the result of either drug or alcohol impairment. In fact, this Court in The Florida Bar v.

Larkin 447 So.2d 1340, 1341 (Fla. 1984), in addressing the subject of alcoholism, and ethical violations by an attorney, stated in part:

> Equally important purposes, however, are a deterrence to other members of the Bar and the creation and protection of a favorable image of the profession. The latter will not occur unless the profession imposes visible and effective disciplinary measures when serious violations occur.... Alcoholism explains the violations, it does not justify them. (Emphasis supplied)

The respondent cites with approval the philosophy which he perceives to be contained in The Florida Bar v. Headley, 475 So.2d 1213 (Fla. 1985), The Florida Bar v. Long, 486 So.2d 591 (Fla. 1986), and The Florida Bar v. Ehrlich, 485 So.2d 417 (Fla. 1986), all of which are recent cases in this Court involving lawyer misconduct which was brought about by dependence on alcohol or other chemical substances. In Headley, the attorney's offense was practicing law while suspended for nonpayment of dues. This Court specifically recognized that one of the most mitigatory circumstances in this case was the fact that "...there have been no instances of bad conduct as a practicing attorney." He was not even cited for contempt of court and his actions had not adversely affected the rights or interests of any client. Therefore, the discipline approved by this Court was appropriate

for the offense of practicing law while suspended for nonpayment of dues without reference to alcoholism.

Long contains a conditional guilty plea for consent judgment, and no reference is made to the reasons for accepting such a conditional guilty plea. The Court order references alcohol abuse and provides for termination of probation if a finding of probable cause is made concerning alcohol abuse. The case was not appealed.

Ehrlich also contains a consent judgment for unconditional guilty plea and appears to be a case in which only three clients were involved. The charges were less egregious than those in the case at bar. This case was not appealed.

The Florida Bar is not contending, as it did in Headley, that this Court should not consider drug abuse as a mitigating circumstance. The Bar does, however, suggest the relevance of the words quoted from Larkin, supra, "Alcoholism explains the violations, it does not justify them" (At page 1341).

A very recent case in which alcoholism or other chemical addiction is not a factor is The Florida Bar v. Bergman, Case No.

67,735 (Fla. 1986). Here, Mr. Bergman was found guilty of violating Disciplinary Rules 6-101(A)(2) and 6-101(A)(3). There is no discussion of complicating factors or prior discipline and this Court approved a discipline of suspension for six months and requiring proof of rehabilitation and restitution to a client of $7500.00 prior to reinstatement.

To approve a discipline extending only to a public reprimand or a token suspension, not requiring proof of rehabilitation, in a case of a respondent who is the victim of alcoholism or chemical addiction, while, in a similar case, meting out a substantially greater penalty to a respondent who is not addicted is not appropriate. The damage to clients would be the same. The public would find it difficult to believe that it is being fully protected by The Florida Bar when the drug addicted or alcoholic attorney who allowed the statute of limitations to expire on his case receives a substantially less severe discipline than does the non-addicted attorney.

In a case such as this, where a respondent's hospitalization for drug addiction began as recently as January 18, 1986, and terminated on February 26, 1986 (T. 49,53) this Court must be very cautious in executing its "... responsibility to assure that

the public is fully protected from attorney misconduct" (The Florida Bar v. Larkin, 420 So.2d 1080, at 1081 (Fla. 1982)). To approve a period of suspension which would require proof of rehabilitation would not be unduly harsh and would erect one additional safeguard against a premature return to the practice of law by this respondent.

The Florida Bar wholeheartedly endorses the teaching of this Court in Larkin, supra:

> In those cases where alcoholism is the underlying cause of professional misconduct and the individual attorney is willing to cooperate in seeking alcoholism rehabilitation, we should take these circumstances into account in determining the appropriate discipline. (P-1081) (Emphasis supplied)

In accepting this premise, however, the Bar does not perceive it to require that an attorney who is suffering from drug addiction, is entitled to substantially less discipline for the same offense for which an attorney not suffering from an alcohol or drug dependency would receive.

Respondent's chemical dependency was of such a nature and was of such a duration that the cases of eleven clients were neglected even though they retained the respondent in good faith.

Three of those eleven clients suffered irreparable damage at the hands of this respondent.

The Florida Bar suggests that, considering all the circumstances and all of the mitigation presented, a discipline is required which would require that the respondent be suspended from the practice of law for a period of time which would require, at the very least, proof of rehabilitation so that another referee, at a later time, can review the recuperative progress of the respondent to assure this Court and the legal profession that this attorney would be able to resume the practice of law without endangering his clients' rights. If this suggestion is given life, then a suspension must be ordered which will extend to a minimum of three months and one day with proof of rehabilitation. The Bar strongly urges, however, that an appropriate discipline would be suspension for a period of not less than one year, proof of rehabilitation, and probation for a minimum of three years under the supervision of The Florida Bar's Special Committee on Alcohol Abuse. This will give the respondent time, in the dissenting words of Justice Ehrlich in Garcia, supra, to "take stock of his career and his professional life and to make the necessary changes if he wants to remain a practicing attorney. This will serve the public purpose for imposing [a] discipline" in this case.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's reports and approve their findings of fact, recommendations of guilt and find that the discipline recommended should extend to suspension from the practice of law for one year with proof of rehabilitation, three years probation in The Florida Bar's Special Committee on Alcohol and Drug Abuse and payment of costs currently totalling $1460.85.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Answer Brief and Brief in Support of Cross Petition has been furnished by Federal Express to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing has been furnished by ordinary U.S. mail to John A. Weiss, Attorney for Respondent, at Post Office Box 1167, Tallahassee, Florida, 32302; and a copy of the foregoing has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahasee, Florida, 32301, this 26th day of September, 1986.

JOHN B. ROOT, JR.
Bar Counsel