IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 69,646
[TFB Case No. 87-27,365 (18A)]

v.

MARVIN S. DAVIS,

Respondent.
______________________________/

ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, Florida 32301
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, Florida 32301
(904) 222-5286

and

DAVID G. McGUNEGLE
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(305) 425-5424

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
TABLE OF OTHER AUTHORITIES	iii
SYMBOLS AND REFERENCES	iv
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2-5
SUMMARY OF ARGUMENT	6-7
ARGUMENT	
POINT I	8-11
WHETHER RESPONDENT'S ATTACK ON THE REFEREE'S FINDINGS OF FACT IS WELL FOUNDED IF THEY ARE NOT CLEARLY ERRONEOUS AND IF THEY ARE SUPPORTED BY THE EVIDENCE.	
POINT II	12-16
WHETHER A PUBLIC REPRIMAND WITH A TWO YEAR PERIOD OF PROBATION IS THE APPROPRIATE DISCIPLINE IN THIS CASE.	
CONCLUSION	17
CERTIFICATE OF SERVICE	18
APPENDIX	19

TABLE OF AUTHORITIES

	PAGE
The Florida Bar v. Hirsch 359 So.2d 856 (Fla. 1978)	8,9
The Florida Bar v. Hoffer 383 So.2d 639 (Fla. 1980)	9,10
The Florida Bar v. Larkin 420 So.2d 1080 (Fla. 1982)	14
The Florida Bar v. Larkin 447 So.2d 1340 (Fla. 1984)	12
The Florida Bar v. Lord 433 So.2d 983 (Fla. 1983)	6,12,14
The Florida Bar v. Pryor 350 So.2d 83 (Fla. 1977)	15
The Florida Bar v. Rayman 238 So.2d 594 (Fla. 1970)	8
The Florida Bar v. Rose 187 So.2d 329 (Fla. 1966)	9,10
The Florida Bar v. Seidel 510 S.2d 871 (Fla. 1987)	15
The Florida Bar v. Stalnaker 485 So.2d 815 (Fla. 1986)	6,10
The Florida Bar v. Wagner 212 So.2d 770 (Fla. 1968)	9

TABLE OF OTHER AUTHORITIES

	PAGE
Integration Rule of The Florida Bar, Article XI, Rule:	
11.06(9)(a)(1)	6,8
Rules of Discipline of the Rules Regulating the Florida Bar:	
3-7.5(k)(1)(1)	6,8
Disciplinary Rules of the Code of Professional Responsibility:	
1-102(A)(5)	1,13
1-102(A)(6)	1,13

SYMBOLS AND REFERENCES

In this Brief, the complainant, The Florida Bar, will be referred to as the Bar.

TI	For the first volume of the transcript of the referee hearing on April 24, 1987.
TII	For the second volume of the referee hearing on April 24, 1987.
TIII	For the third volume of the referee hearing on April 30, 1987.
R.	For the referee's report.
B.Ex -	For the Bar Exhibits.

STATEMENT OF THE CASE

The Florida Bar accepts the respondent's statement of the case.

After the hearings on April 24 and 30, 1987, the referee made his findings and recommendation of guilt of violations of the following disciplinary rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(5) for conduct prejudicial to the administration of justice; and 1-102(A)(6) for misconduct reflecting adversely on his fitness to practice law. The Board of Governors of The Florida Bar reviewed the referee's report at their meeting which ended on September 5, 1987. The Board voted to approve the report.

The respondent filed a petition for review on September 21, 1987, and thereafter, on October 21, 1987, filed a motion for extension of time to file a brief, which was granted. The respondent's brief in support of the petition for review was filed on November 22, 1987.

STATEMENT OF THE FACTS

The Florida Bar is unable to accept Respondent's Statement of Facts which is insufficient on several points and therefore submits the following statement of facts:

At approximately 10:30 A.M. on June 4, 1986, the Respondent and his assistant appeared in then - Circuit Judge Dominick J. Salfi's office and demanded to see him about a matter relative to a juvenile case. (TI p. 44) Only shortly before the respondent had encountered the assistant state attorney assigned to the case and was informed by him a capias had been issued for his client's arrest. There was some confusion regarding a special pretrial hearing which the respondent had apparently not been notified of and had missed. After learning of this, he became belligerent toward the assistant state attorney and went to Judge Salfi's chambers to take the matter up with him. (TI p. 171; TIII p. 25-26)

Upon entering Judge Salfi's chambers, the respondent's assistant demanded the respondent be permitted to speak with the judge, who was in a meeting in chambers, at once. (R. p. 2) When the trial clerk informed them this would not be possible, the respondent became agitated, verbally abusive, and somewhat

loud. (TI p. 46) Judge Salfi's judicial assistant and members of his staff who came in contact with the respondent testified at the final hearing on April 24, 1987, they smelled the odor of alcohol on the respondent's breath. (TI pp. 46,67,68,84-85) The assistant and the bailiff also stated his words were slurred. (TI pp. 67,84)

The respondent was then told by the judge's bailiff to go to Judge Salfi's courtroom to resolve the matter. (TIII p. 27)

At approximately 11:00 A.M. the respondent appeared before Judge Salfi in open court. (R. p. 2) The judge had been informed by his staff of the respondent's behavior. (TI p. 133) He asked the respondent if he had been drinking that morning. According to Judge Salfi's testimony, the respondent replied that he had but it was for an unspecified medical condition. (TI pp. 102,104) He requested the respondent submit to a Breathalizer test that day and return the results to him by that afternoon. (TI p. 104) The respondent was escorted from the courtroom by a Seminole County sheriff's deputy. He later proceeded to go with his assistant to a separate location where two Breathalizer tests were administered. (TIII pp. 29-30) The first was administered at 12:21 P.M. with a reading of .110% and the second at 12:22 P.M. with a reading of .098%. (R. p. 2; TI p. 158) At that time respondent was unsteady on his feet and smelled heavily of alcohol. (R. p. 2; TI pp. 157,167)

The respondent also appeared before Circuit Judge Kenneth M. Leffler early that afternoon representing an adult defendant in a criminal case. When Judge Leffler inquired as to the results of the test, the respondent falsely replied he had passed or was under the legal limit. (R. p. 3; TI p. 142; B.Ex - 2 pp. 2-3) He denied drinking any alcoholic beverages that day and insisted he had only taken a small dose of cough medicine early that morning. (B.Ex - 2 p. 3) At the time of this appearance he was still somewhat unsteady and perhaps slightly disoriented. (R. p. 3)

The respondent had previously appeared in open court before Judge Salfi for a Pre-Trial hearing on May 22, 1986. (TI p. 129) At that time Judge Salfi continued the case as he felt the respondent was not doing what he should have been doing and was allegedly under the influence of alcohol, although the judge did not smell any odor. The judge did indicate it was unusual in juvenile cases to have a second pretrial where the attorney had appeared. (R. p. 2; TI pp. 130-131)

On June 4, 1986, after the above described incidents, Judge Salfi suggested the respondent voluntarily submit himself to Florida Lawyers Assistance, Inc. for evaluation and possible treatment for alcohol abuse. (B.Ex - 1 p. 6) The respondent was later interviewed by Charles Hagan, but refused to submit to the recommended 96 hour in-depth evaluation. The respondent stated

he was concerned he might reveal certain secrets learned when he worked for a governmental agency. (TI p. 34)

Although the respondent maintains he had not drunk any alcoholic beverages the morning of June 4, 1986, many of the Bar's witnesses testified at the final hearing they had detected the odor of alcohol on his breath that day and several also testified he appeared to be intoxicated due to his speech and behavior. (TI pp. 46,67,84,157,172; TII pp. 223,235) Moreover, the Breathalizer test, indicated his blood alcohol level was above the statutory limit for driving a vehicle with an unlawful blood alcohol level some one and a half hours after he had appeared before Judge Salfi.

SUMMARY OF ARGUMENT

The referee's findings of fact are supported by the clear and convincing weight of the evidence. The recommendations of guilt flow from these findings and his recommendation of a public reprimand, two year period of probation conditioned upon the respondent's submission to evaluation and possible treatment for alcohol abuse, and payment of costs is the appropriate measure of discipline under the criteria set forth in The Florida Bar v. Lord, 433 So.2d 983,986 (Fla. 1983). A referee's findings of fact enjoy the same presumption of correctness as a civil trier of fact pursuant to The Florida Bar Integration Rule, Article XI, Rule 11.06(9)(a)(1) for cases prior to January 1, 1987, and Rule 3-7.5(k)(1)(1) of the Rules of Discipline for cases after that date. The referee serves as the court's finder of fact and properly resolves the conflicts in the evidence. It is well settled a referee's findings of fact will be upheld unless they are without support in the record or are clearly erroneous. The Florida Bar v. Stalnaker, 485 So.2d 815, 816 (Fla. 1986).

Respondent disagrees with the referee's findings and is attempting to rewrite them. This is inappropriate under the rules and settled case law. The referee heard the witnesses,

judged their demeanor and credibility, and reviewed all of the evidence available to him. That evidence clearly and convincingly supports his findings of fact which should be upheld.

The referee's recommendations as to guilt and discipline should also be adopted. That no client complained or was prejudiced was merely a fortunate circumstance. A public reprimand and a two year period of probation during which time the respondent must submit himself for evaluation and possible treatment for substance abuse is fair to the respondent and provides a necessary protection to the public and respondent's current and future clients.

ARGUMENT

Point I

WHETHER RESPONDENT'S ATTACK ON THE REFEREE'S FINDINGS OF FACT IS WELL FOUNDED IF THEY ARE NOT CLEARLY ERRONEOUS AND IF THEY ARE SUPPORTED BY THE EVIDENCE.

Respondent cannot attack the referee's findings on review if they are not clearly erroneous and are supported by the evidence.

The evidentiary standard in attorney discipline cases has long been a clear and convincing one. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). Further, it is well settled that a referee's findings of fact will be upheld unless they are clearly erroneous or without support in the evidence. The Florida Bar Integration Rule, Article XI, Rule 11.06(9)(a)(1) and new Rule 3-7.5(k)(1)(1) of the Rules of Discipline clearly state that a referee's findings shall have the same presumption of correctness as the judgment of the trier of fact in a civil proceedings. In The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978), the court addressed its role in reviewing a referee's report and findings of fact where conflicting testimony had been presented at the evidentiary hearing. The court upheld the referee's findings of fact, noting that such a determination was

the referee's responsibility and would not be overturned unless it was clearly erroneous or without supporting evidence:

> It is our responsibility to review the determination of guilt made by the Referees upon the facts of record, and if the charges be true to impose an appropriate penalty for violation of the Code of Professional Responsibility. Fact finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). We have carefully reviewed the evidence and find that the reports of both Referees are supported by competent and substantial evidence which clearly and convincingly show that Hirsch has violated the Code of Professional Conduct in the respects charged. At page 857.

In The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980), the court held similarly where there was conflicting evidence and the respondent challenged the referee's findings of fact as not being supported by clear and convincing evidence. The court stated:

> Our responsibility in a disciplinary proceeding is to review the referee's report and if his recommendation of guilt is supported by the record, to impose an appropriate penalty. The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). The referee, as our fact finder, properly resolves conflicts in the evidence. See The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966). We have reviewed the record and the report of the referee, and we find that the referee's findings of fact and recommendations of guilt are supported by clear and convincing evidence. At page 642.

The court's role in these cases was more recently enunciated in The Florida Bar v. Stalnaker, 485 So.2d 815, (Fla. 1986). The court reiterated its position that a referee's findings of fact are presumed to be correct and will be upheld unless it can be shown they are clearly erroneous or lacking in evidentiary support. Because there was conflicting testimony, the court went on to state:

> The evidence presented before the referee boils down to a credibility contest between Stalnaker and Jones. The referee listened to and observed both of them, and, as our fact finder, resolved the conflicts in the evidence. See The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980). Our review of the record discloses support for the referee's findings, and, therefore, we will not disturb them. At page 816.

The respondent further contends the referee "rubber stamped" the proceedings by failing to consider some of the testimony. A review of the three volume transcript fails to support this contention. In fact, the referee actively participated in the proceedings and often asked his own questions of witnesses. See TI pp. 128-136 for one such example.

Rose, supra, noted that the referee is in the best position to consider and weigh the conflicting evidence. As a finder of fact the referee is charged with weighing the credibility of witnesses when there is conflicting testimony or evidence. This

is the task of a judge or referee in any contested matter. The Bar submits the referee appropriately weighed the credibility of the witnesses in this case. It is simply inappropriate for the respondent to attempt to rewrite the referee's findings of fact which are based on competent and clearly convincing evidence, absent a showing that his findings are clearly erroneous or without the support in the record. Based on the massive evidence in this record, the Bar submits the respondent's argument simply must fail.

In order to successfully challenge a referee's findings of fact, the respondent faces a heavy burden indeed. He must prove that the referee's findings of fact were without support in the record. Given the overwhelming weight of the evidence readily apparent in the record, the Bar submits his task is impossible and the court should approve the referee's findings and conclusions in all respects.

Argument

Point II

WHETHER A PUBLIC REPRIMAND WITH A TWO YEAR PERIOD OF PROBATION IS THE APPROPRIATE DISCIPLINE IN THIS CASE.

A public reprimand with a two year period of probation is the appropriate discipline in this case.

In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), the court addressed the goals of discipline noting:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: 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. At page 986.

In The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984) the court noted another important purpose of discipline, that of protecting the favorable image of the legal profession by imposing visible and effective discipline when serious violations occur.

The Bar agrees with the respondent that no clients were injured by or complained of his behavior. It is fortunate that no actual prejudice or injury occurred that would have aggravated this case. However, his conduct was prejudicial to the administration of justice and reflected adversely upon his fitness to practice law as recommended by the referee. In fact, a pretrial hearing on May 22, 1986, was continued by Judge Salfi because the respondent allegedly was intoxicated and unable to properly represent his client. (TI pp. 130-131). Further, the respondent's conduct in the public places of the courthouse was unprofessional. An assistant state attorney testified the respondent was verbally abusive toward him and spoke in a loud tone of voice. (TI p. 171) His conduct in Judge Salfi's outer office was clearly wrong. He was verbally abusive toward the Judge's staff, agitated, and loud. His conduct on June 4, 1986, was clearly in violation of Disciplinary Rules 1-102(A)(5) for conduct prejudicial to the administration of justice and 1-102(A)(6) for misconduct adversely reflecting on his fitness to practice law. How can a judge permit business to be conducted either in his office, chambers or courtroom when one of the advocates appears to be under the influence? Such behavior is improper, unprofessional, and simply unacceptable.

The referee recommended the respondent, who has no prior disciplinary record, receive a public reprimand and be placed on

probation for a period of two years. The terms of probation recommended the respondent immediately undergo an evaluation and possible treatment for alcohol abuse. Although the recommended discipline is only a recommendation and not a finding, it should be given considerable deference by the court. The referee had a duty to protect the public from a possibly impaired attorney by making this recommendation. In The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982) where an attorney was suspended for 91 days for misconduct arising from his alcoholism, the court stated:

> [A] practicing attorney who is an alcoholic can be a substantial danger to the public and the judicial system as a whole . . . . If alcoholism is dealt with properly, not only will an attorney's clients and the public be protected, but the attorney may be able to be restored as a fully contributing member of the legal profession. This court has responsibility to assure that the public is fully protected from attorney misconduct. At page 1081.

The referee's recommendation appropriately serves the three purposes of discipline enunciated in Lord, supra. For the first purpose, a public reprimand and probation is appropriate under the current rules since it will advise the public and it is not unduly harsh. Secondly, this discipline must be fair to the respondent. The Bar submits it is. It puts him on notice that such conduct is clearly inappropriate and will not be tolerated. The Bar does not seek to suspend the respondent, but rather to

encourage rehabilitation by correcting the apparent underlying problem. Lastly, members of the Bar need to be clearly advised such misconduct will not be tolerated. By appearing in court on any business with a client in an intoxicated or impaired condition, an attorney puts his or her client's rights in unjustifiable jeopardy.

Other cases involving similar misconduct indicate that the recommended discipline is appropriate albeit they were settled by conditional pleas for consent judgments and are thus only illustrative. In The Florida Bar v. Pryor, 350 So.2d 83 (Fla. 1977) an attorney's conditional guilty plea was accepted and he receive a public reprimand and three year's probation for appearing in open court while intoxicated. The attorney was also under suspension at the time for failing to pay his Bar dues.

More recently, in The Florida Bar v. Seidel, 510 So.2d 871 (Fla. 1987), an attorney received a public reprimand and a three-year period of probation for misconduct associated with his abuse of alcohol. Although the case appears to be a somewhat more aggravated case than the present one, it was based upon the attorney's alcohol abuse which led to the personal charges. The attorney was required to contact Florida Lawyers Assistance, Inc. for treatment. The court further ruled he would not be permitted

to practice law until that organization certified his disease was under control.

Finally, it should be noted that pursuant to the current rules it would appear that the referee's recommendation of a public reprimand was the least severe form of discipline he could recommend. Therefore, the respondent's argument that the proposed discipline is unduly harsh is without merit.

CONCLUSION

Wherefore, the Board of Governors of The Florida Bar respectfully prays this Honorable Court will review and approve in an appropriate opinion order, the referee's findings of fact, recommendation of guilt and the recommended discipline of a public reprimand as well as a two year probationary period requiring immediate evaluation, and, if appropriate, treatment for alcohol abuse; and further order the respondent pay costs in these proceedings currently totalling $2,442.39.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, Florida 32301
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, Florida 32301
(904) 222-5286

DAVID G. McGUNEGLE
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(305) 425-5424

BY: [signature]
DAVID G. MCGUNEGLE
Bar Counsel

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Answer Brief and accompanying Appendix has been furnished by U.S. Mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing has been furnished by certified mail, return receipt requested No. P781683405 to respondent, Marvin S. Davis, Post Office Box 2015, Sanford, Florida, 32772; and a copy has been furnished by Ordinary U.S. Mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, this 11th day of December, 1987.

DAVID G. MCGUNEGLE
Bar Counsel