SUPREME COURT OF FLORIDA

CASE NO: 70,460

FILED
SID J. WHITE
MAY 17 1988
CLERK, SUPREME COURT
By
Deputy Clerk

THE FLORIDA BAR,

Petitioner,

-vs-

BENNY SETIEN,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Benny A. Setien, was admitted to The Florida Bar during May, 1983.(R.35) From 1974 through 1981 Benny Setien served with distinction as a police officer for the Dade County Public Safety Department.(R.32) While employed full time in that capacity Mr. Setien attended and graduated from college and subsequently obtained his law degree as he supported his family.(R.33-34)

Upon admission to The Bar, Mr. Setien opened his own practice at 2121 Ponce De Leon Boulevard in Coral Gables, Florida.(R.35) He stayed at this office until March 1984, when he entered into a partnership with Jay Santiago and moved to facilities located at 780 Le Juene Road in Miami, Florida.(R.38) His share of the cost of the new location was in excess of three times the cost of his earlier office.(R.38)

This increased financial strain began to cause pressures which damaged his family life. These problems were greatly exacerbated by a nine (9) week trial in the State of New York from May to July, 1984. The reward for his efforts was that the client in that case paid less than one third of the fees and costs that were incurred. The period away from his wife and family created a further strain on their relationship.

It was during this approximate period that Benny Setien began using cocaine and abusing alcohol in a fruitless effort to escape from the depression created by business and family problems.(R.42) In December, 1984, Benny's uncle and closest relative after his father's death in 1977, suddenly passed away.(R.41)

During 1985, Benny exhibited the classic symptoms of a drug abuser and became less and less responsible and dependable. Bills were not being paid timely and finances were being sloppily handled.(R.139)

By 1986, Benny Setien's wife left him and filed for divorce. Setien moved to new offices in January, 1986, but by March of that year the landlord changed the locks on his office without notice for submitting a dishonored check for the March rent payment.(R.46) Substantial sums were forfeited by Mr. Setien to the landlord at that time.

Benny Setien's practice struggled beyond that date through July, 1986, when he was suspended by The Bar for failure to pay dues.(R.91) Mr. Setien has not practiced law since that time.(Id.) Mr. Setien was temporarily suspended from the practice of law January 26, 1987, after a probable cause hearing on the charges before this Court.

Benny Setien discontinued all drug use during January, 1987. He entered a drug rehabilitation program administered by Florida Lawyers Assistance, Inc., in August, 1987, and has met all the obligations of and satisfactorily progressed through that program.(R.161) His inability to practice law has created tremendous financial difficulties on Benny and his new wife who had their first child in February, 1988.(R.71, 76)

Benny Setien has exhibited a sincere desire to correct his drug dependency problem which led to all of his Bar related difficulties and exhibited a sincere humility and remorse which the referee below made a special point to note.(R.247)

On February 5, 1988, a hearing was held before the honorable Judge George Shahood as referee for these proceedings. Numerous objections were noted by counsel for Setien to the form of the

proceedings and to the introduction of alleged misconduct not charged in the complaint submitted for the referee's determination of the appropriate punishment.(R6,124, 125, 132, 133)

At those proceedings the referee found Setien guilty of all nine charges in the Complaint including five relating to the neglect of legal matters, three relating to the transfer of worthless checks and one alleging the abandonment of the practice of law. Subsequent thereto, on February 26, 1988, the referee issued a recommendation that respondent be disbarred. This petition for review of findings of guilt and the recommendation of the referee was taken March 30, 1988.

STATEMENT REGARDING JURISDICTION

Attorney, Benny A. Setien petitions for review of the report of the referee filed in this disciplinary action brought by The Florida Bar. Review is sought under Rule 3-7.6 of the Rules Regulating The Florida Bar. The Supreme Court's jurisdiction of the proceeding is based on Article V, Section 15 of The Florida Constitution.

STATEMENT OF THE ISSUES

I. WHETHER THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF COUNTS II - IX OF THE COMPLAINT WHERE EVIDENCE FAILED TO SHOW THAT RESPONDENT: (A) ABANDONED HIS PRACTICE RATHER THAN MERELY FAILED TO MAINTAIN CONTACT WITH SELECTED CLIENTS; (B) ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION AND CONDUCT ADVERSELY REFELECTING ON FITNESS TO PRACTICE LAW RATHER THAN SUBMITTED CHECKS LATER DISHONORED DUE TO OVERSIGHT OR ERROR: AND (C) NEGLECTED LEGAL MATTERS RATHER THAN MERELY FAILED TO MAINTAIN CONSTANT CONTACT WITH SELECTED CLIENTS.

II. WHETHER THE REFEREE BELOW ERRED IN FAILING TO EXCLUDE EVIDENCE OF ALLEGED MISCONDUCT NOT CHARGED WHERE THE ONLY ISSUE WAS THE APPROPRIATE PUNISHMENT.

III. WHETHER THE REFEREE ERRED IN FAILING TO MAKE ANY FINDINGS IN MITIGATION DESPITE SUBSTANTIAL, CREDIBLE AND UNCONTRODICTED TESTIMONY AND EVIDENCE AT THE EVIDENTIARY HEARING:

(1) THAT RESPONDENT HAD NO PRIOR DISCIPLINARY RECORD;
(2) HAD NO DISHONEST OR SELFISH MOTIVE;
(3) HAD PERSONAL AND EMOTIONAL PROBLEMS;
(4) MADE TIMELY GOOD FAITH EFFORT TO MAKE RESTITUTION ON THE WORTHLESS CHECKS WHERE APPROPRIATE;
(5) GAVE FULL AND FREE DISCLOSURE TO THE BAR AND WAS COOPERATIVE TOWARD PROCEEDINGS;
(6) WAS INEXPERIENCED IN THE PRACTICE OF LAW;
(7) HAD A DISTINGUISHED RECORD AS A POLICE OFFICER PRIOR TO ENTERING THE PRACTICE OF LAW;
(8) WAS MENTALLY IMPAIRED DUE TO COCAINE ADDICTION;
(9) WAS SUBJECTED TO UNREASONABLE DELAY IN PROCEEDINGS AND WAS SUBSTANTIALLY PREJUDICED THEREBY;
(10) HAS ENGAGED IN SUBSTANTIAL INTERIM REHABILITATION;
(11) HAS BEEN SUSPENDED FROM THE PRACTICE OF LAW SINCE JULY 1986;
(12) HAS CLEARLY EXHIBITED REMORSE;
(13) IS NOW IN A POSITION OF PERSONAL HARDSHIP.

IV. WHETHER THE REFEREE BELOW ERRED IN IMPOSING DISBARMENT EVEN ASSUMING ARGUENDO THAT THE RESPONDENT WAS GUILTY OF FIVE COUNTS OF NEGLECT OF LEGAL MATTERS, THREE COUNTS OF ISSUING WORTHLESS CHECKS AND ONE COUNT OF ABANDONMENT OF THE PRACTICE OF LAW WHERE NO CLIENT WAS SUBSTANTIALLY PREJUDICED AND NO COUNT INDICATED MISUSE OF CLIENT FUNDS OR INTENT TO DEFRAUD IN LIGHT OF THE FOURTEEN MITIGATING FACTORS PROVEN AT THE EVIDENTIARY HEARING BELOW.

ARGUMENT

I.

THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF COUNTS II - IX OF THE COMPLAINT WHERE THE EVIDENCE FAILED TO SHOW THAT RESPONDENT: (A) ABANDONED HIS PRACTICE RATHER THAN MERELY FAILED TO MAINTAIN CONTACT WITH SELECTED CLIENTS; (B) ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION AND CONDUCT ADVERSELY REFLECTING ON FITNESS TO PRACTICE LAW RATHER THAN SUBMITTED CHECKS LATER DISHONORED DUE TO OVESIGHT OR ERROR; AND (C) NEGLECTED LEGAL MATTERS RATHER THAN MERELY FAILED TO MAINTAIN CONSTANT CONTACT WITH SELECTED CLIENTS.

Respondent stipulated to those violations alleged in Count I of the Complaint but only agreed with counsel for The Bar on facts both favorable and unfavorable for Counts II - IX. The Bar relied upon the Factual Stipulation exclusively at the time of the final hearing. That evidence was not sufficient under Florida law and no violations should have been found.

A. ALLEGED ABANDONMENT OF PRACTICE

(COUNT IX)

The Factual Stipulation, Count IX, indicates that Respondent was locked out of his office by his landlord without prior notice. (See also Factual Stipulation, Count VIII). Almost six weeks went by before Respondent was able to obtain files that were maintained in that office. It was admitted that those individuals who were still active clients of those referred to in the first five counts were not advised of the move. It was never conceded that Respondent abandoned his practice. It was not shown that Respondent had no other clients than those referred to in the Factual Stipulation. In fact, subsequent

evidence that was admitted during the discipline phase showed that not to be the case. (R.71, 91, 231)

In discipline matters, evidence presented by The Florida Bar must be clear and convincing before the Supreme Court may find that the Code of Conduct has been breached. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978)). The referee is merely the finder of fact and his purpose is to resolve conflicts in evidence. The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980). Where there is no dispute as to the facts, as here, there is no presumption of correctness that the Supreme Court must accord the decision of the referee. Id.

Abandonment of the practice means leaving all clients files unattended. See The Florida Bar v. Merritt, 394 So.2d 1018 (Fla. 1981) Clearly that was not shown with the evidence presented to the referee. Therefore, the finding of the violation as to Count IX must be overturned.

B. ALLEGED CHECK RELATED VIOLATIONS

(COUNTS VI, VII, AND VIII)

The legal position with respect to these alleged violations is identical to that argued above. Factually, the issue is what was the intent of the Respondent at the times when the four dishonored checks were issued and subsequent thereto. The Factual Stipulation and the testimony reveal that there was no improper intent.

The checks were written on three separate occasions. First was to the Clerk of the Court, Dade County. This check was for filing fees and was very quickly redeemed after notice. No lawyer practicing before in the Dade County court for well over a year after the incident was resolved would have intentionally defrauded that Court's Clerk regarding a small fee. In this, as in the other two instances,

the Respondent assumed an understanding he had with his bank to cover shortfalls would have made each payee whole. (R.70)

In the second instance payment was also tendered well before the final hearing, though Respondent concedes that the delay was too long and was caused by his precarious financial circumstances.

The final two checks were issued to a landlord who gave no notice of dishonor, changed the locks on the office and has no debt due from Respondent. While these circumstances indicate poor bookkeeping, they do not warrant findings of guilt on the offenses of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and conduct adversely reflecting on fitness to practice law. The referees' finding of guilt was error and this Court should hold that no violation occurred.

C. ALLEGED NEGLECT OF LEGAL MATTERS

(COUNTS II - V)

Counts II - V involve the handling of four groups of clients: Teodoro Carrasco ("Carrasco"); Anthony Garofolo ("Garofolo"); Fernando Figarolo ("Figarolo"); and Roberto and Esther Morejon ("Morejon"). None of the above clients were harmed in any way by Respondent's actions other than delay in return of property (a note) or in the return of phone calls. No statute of limitation was missed. No defaults were entered. No claims forefeited.

In each of the above situations Respondent could have avoided any difficulties by merely calling his clients more regularly to apprise them of the status of the case and his whereabouts. Unfortunately, Respondent was a busy trial lawyer under severe emotional, financial and physical problems. He has recognized his errors. But the actions did not constitute neglect of legal matters.

In one instance the client, Carrasco, lost contact with Respondent and retained new counsel without contacting Respondent. When the client was asked if he wanted the small file that was with Respondent, he answered that it was not necessary. Respondent never sought any fees or costs for his representation.

In another instance, the Respondent sent a letter to the debtor of a friend regarding money owed pursuant to a promissory note. No reply was ever received from the debtor. Contact was lost between the client, Figarola, and Respondent. Unfortunately, the original promissory note was not returned which caused an inconvenience to the client until its return approximately two years after the letter was originally sent. Again the client was charged nothing and was not prejudiced although he was delayed.

In Morejon, the Respondent did substantial work but the client changed attorneys numerous times and eventually took the case from Respondent permanently. Many calls were not returned but the legal matter itself was in no way neglected.

Finally, in Garofolo, Respondent again took substantial actions on behalf of the client. At no time was the legal matter neglected, but the client was not kept apprised of the status of the matter. In neither Morejon nor Garofolo did Respondent receive any fee or reimbursement for costs.

In each of the above cases the Respondent failed to maintain good client relations which prejudiced him because he lost the clients to other attorneys without receiving anything for his labors. The clients were not ultimately prejudiced. The violations asserted by The Bar and found by the referee did not occur.

II.

THE REFEREE BELOW ERRED IN FAILING TO EXCLUDE EVIDENCE OF ALLEGED MISCONDUCT NOT CHARGED WHERE THE ONLY ISSUE WAS THE APPROPRIATE PUNISHMENT

At the evidentiary hearing counsel for Benny Setien submitted a Motion in Limine to exclude all evidence of alleged misconduct not charged once the referee had made his determination on guilt. The referee denied the motion and subsequently admitted and considered evidence of misconduct not charged in determining punishment.(T.10) This ruling was error and substantially prejudiced Benny Setien.

In support of the Motion in Limine counsel submitted _The Florida Bar v. Hosner_, 12 FLW 527 (Fla. Oct. 15, 1987). _Hosner_ involved disciplinary proceedings against a lawyer charged with commingling attorney funds with those of a client and failing to keep periodic trust account reconciliations. The referee found Hosner guilty of those charges and recommended suspension from the practice of law for ninety days and probabtion for three years. The respondent did not contest the finding of guilt but argued instead that the disciplinary measures recommended by the referee were inappropriate.

The Bar attempted to sustain the harsh penalty for the technical violations by asserting that there was great potential harm to clients and suggesting that respondent may have been guilty of disbursing funds from his trust account before the corresponding deposits constituted collected funds in the account.

This Court was unequivocal in its rejection of The Florida Bar's position:

> The referee's report contains no finding of such a violation nor did the Bar's complaint accuse respondent o any such misconduct. Misconduct not charged may not provide the basis for punishment.

Id. (emphasis added.)

In the case at bar, the referee made no finding of any of the alleged violations which The Bar submitted through the testimony of witness Jack Truesdale or through additional bank account records. These alleged violations were not a part of The Bar's complaint. They were therefore irrelevant but, in light of the disbarment recommended, they apparently improperly influenced the referee.

The Bar did submit a case more than than six years older to the referee during argument on the Motion in Limine. The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981). In Stillman, the attorney being disciplined had misappropriated client funds and been convicted of grand larceny. While recommending disbarment the referee made findings not relating to matters charged in the Complaint including a forgery conviction against the respondent. This Court in that case stated:

> [e]vidence of unethical conduct, not squarely within the scope of the Bar's accusations, is admissible, and such unethical conduct, if established by clear and convincing evidence, should be reported because it is relevant to the question of the respondent's fitness to practice law and thus relevant to discipline to be imposed.

Id. at 1307.

In both Hosner and Stillman respondents were found to have violated rules of discipline as set forth in charges in Bar Complaints. In both instances the respondents challenged the quantum

of discipline and the Bar sought to justify the discipline through allegations of other misconduct. To the extent that the holdings diverge, Hosner is the more just decision.

At bar, Benny Setien had no opportunity to prepare for many of the allegations leveled against him because no notice was given by the Complaint. Due Process separates civilizations from barbarism. One of the chief roles of lawyers in society is to give meaning and life to Due Process. Can it be that of all members of our society only lawyers need not be accorded Due Process when reviewed by other lawyers?

It is interesting to note that the referee refused to validate any of the incredible testimony with findings though the discipline recommended indicates at least a subconscious influence. The evidence should never been considered. The referee, therefore, erred in admitting such evidence.

III.

THE REFEREE ERRED IN FAILING TO MAKE ANY FINDINGS IN MITIGATION DESPITE SUBSTANTIAL, CREDIBLE AND UNCONTROVERTED EVIDENCE ESTABLISHING NUMEROUS MITIGATING FACTORS

The Florida Standards for Imposing Lawyer Sanctions, Rule 9.31, defines mitigation or mitigating circumstances as any considerations or factors that may justify a reduction in the degree of legal discipline to be imposed. Rule 9.32 lists the factors that may be considered in mitigation.

(a) ABSENCE OF A PRIOR DISCIPLINARY RECORD:

Mr. Setien has an unblemished record that speaks for itself.(R.73)

(b) ABSENCE OF A DISHONEST OR SELFISH MOTIVE:

The actions that led to this disciplinary hearing were the involuntary and nonmalicious results of distorted thinking caused by his disease, drug addiction. Determinants of Substance Abuse; Galizio and Miasto 1985 Plenum Press New York.(R. 143)

(c) PERSONAL OR EMOTIONAL PROBLEMS:

The loss of his closet relative Edilberto Setien; the divorce from his wife; the foreclosure on his marital home; an addiction to drugs and alcohol all occurred during the period covered by the Complaint.(R.41)

(d) TIMELY GOOD FAITH EFFORT TO MAKE RESTITUTION OR TO RECTIFY CONSEQUENCES OF MISCONDUCT:

Timely payment of the undisputed dishonored checks was made. (See Factual Stipulation)

(e) FULL AND FREE DISCLOSURE TO DISCIPLINARY BOARD OR COOPERATIVE ATTITUDE TOWARD PROCEEDINGS:

Mr. Setien has supplied all items requested by The Bar and has fully cooperated in any and all ways necessary.

(f) INEXPERIENCE IN THE PRACTICE OF LAW:

Benny started practicing in February of 1983 and his physical and mental problems began in 1984.(R. 35, 41) Benny was eventually suspended in early 1986.

It's evident that Benny being a sole practicioner with little experience was a major factor in his problems.

(g) CHARACTER OR REPUTATION:

From May 1974 to July 1981 Benny was a police officer with the Dade County Public Safety Department.(R.32) He was an exempliary officer with an unblemished disciplinary record and he also received numerous commendations for distinguished service. The Florida Bar v. Weil, 12 FLW 456, Sept. 13, 1987. (Employment as a public servant may be considered in mitigation.)

(h) PHYSICAL OR MENTAL DISABILITY OR IMPAIRMENT:

Cocaine is a mentally addictive drug. Over long periods of use it produces abnormal thinking. Exagerated by the abuse of alcohol, Benny's thinking was far from rational. (R.143) Cocaine; Lise Anglin, 1985, Alcoholism & Drug Addiction Research Foundation, Toronto.

(i) UNREASONABLE DELAY IN DISCIPLINARY PROCEEDING, PROVIDED THAT THE RESPONDENT DID NOT SUBSTANTIALLY CONTRIBUTE TO THE DELAY AND PROVIDED FURTHER THAT THE RESPONDENT HAS DEMONSTRATED SPECIFIC PREJUDICE RESULTING FROM THAT DELAY:

This case has taken over a year from the time of his temporary suspension to trial. During this time Respondent has been unable to work as an attorney and as a result his

financial condition has dramatically deteriorated.(R.76)

(j) INTERIM REHABILITATION:

Benny has completed the first major stage of treatment for drug and alcohol addiction in the Florida Lawyers addiction program.(R.145) He has also been going AA/NA meetings on a regular basis as well as having constaint exposure to Florida Lawyers assistance attorney support group.

(k) IMPOSITION OF OTHER PENALTIES OR SANCTIONS:

Benny Setien, prior police officer for seven years, struggled to become a practicing attorney but has now lost everything; his marital home, his wife, and his practice.(R.43, 60) He has been alienated from his friends due to a disease, addiction to alcohol and cocaine. He was sick but he has now sought the cure. Benny's life since his addiction has already imposed severe sanctions from which there are no appeal.

(l) REMORSE:

Benny went through a number of years in total denial and only became able to acknowledge to himself that he had an addiction problem after his world totally collapsed around him. Now that his thinking is clear Benny is truly remorseful for those acts that lead to these disciplinary charges.(R.233,247) Benny has cooperated with the board in every way and he is eager to put this matter behind him. Though the pain of these cruel lessons stands as a constant reminder.

(m) RESPONDENT IS NOW IN A POSITION OF PERSONAL HARDSHIP: In January 1987, Benny remarried a very supportive wife, she gave birth to their first child in February of 1988. Benny wants the chance to start over and support his wife and new baby.(R.71) The potential for rehabilitation exists, he just needs a opportunity.

Each of the above mitigating factors was established at the final hearing. The referee made no mention of these factors in his Findings of Fact. Obviously, none of these were considered by the referee when he determined the appropriate discipline to be disbarment.

IV.

THE REFEREE ERRED IN IMPOSING DISBARMENT WHERE NO VIOLATION OF LAW WAS CHARGED, NO CLIENT WAS PREJUDICED BY RESPONDENT'S ACTIONS, AND THERE WAS NO MISUSE OF CLIENT FUNDS IN LIGHT OF THE NUMEROUS MITIGATING FACTORS PROVEN BELOW

Unlike our criminal justice system, the Florida system of attorney discipline has no clear guidelines by which to measure the appropriateness of the sanction meted out to an offender. Laudably, the Board of Governors has attempted to clarify the murky waters by compiling the Florida Standards for Imposing Lawyer Sanctions. While not binding on this Court those standards are valuable in that they comprehensively address this serious issue looking at each of the following questions before deciding the appropriate discipline:

(1) Duties violated;

(2) The lawyer's mental state;

(3) The potential or actual injury caused by the lawyer's misconduct;

(4) The existence of aggravating or mitigating circumstances.

The Florida Bar Journal/September 1987, p. 115. While this guide was created by The Bar it was not referred to by the referee when imposing discipline.

Each of the alleged violations fall into one of two catagories established by the standards: Violations of Duties owed to clients, Lack of Diligence (Counts I-V, IX) and Violations of Duties Owed to the Legal System, False Statements, Fraud and Misrepresentation (Counts VI - VII). The latter is generally for deceit to a Court for which standards should be even more strict but for illustrative purposes the appropriateness will be presumed.

Under this catagory the submitting of worthless checks under the circumstances could, at worst, show Respondent "negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld." Florida Standards for Imposing Lawyer Sanctions §6.13. The Standards assess public reprimand under those circumstances unless mitigating or aggravating factors are proven.

Under the former catagory if "a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client" the recommended sanction is private reprimand in the absence of mitigating or aggravating circumstances. Id. at §4.44. If actual or potential injury does occur then the sanction is upgraded to a public reprimand. Id. at §4.43.

It is difficult to discern a clear pattern of discipline in the caselaw since most of the reported cases are devoid of mitigating or aggravating factors which might have substantially impacted on the decisionmaking process. Many cases, however, seem to fall within the parameters established in the Standards.

One such case is The Florida Bar v. Long, 486 So. 2d 591 (Fla. 1986). In Long, the Respondent was found guilty of nine counts which included: conduct adversely reflecting on fitness to practice law; charging an excessive fee; neglect of a legal matter; failure to carry out a contract of employment; failure to deposit client's funds in a trust account; and failure to deliver client's funds. This Court found that a Public Reprimand and three years probation. This Court earlier found that neglect of a legal matter, failing to properly withdraw and leaving a case unattended, failing to promptly render

appropriate rendering of client funds and failure to refund remaining funds for almost two years after the grievance committee hearing warranted a public reprimand. The Florida Bar v. Oberhausen, 453 So.2d 807 (Fla. 1984). Another opinion from this Court held that engaging in conduct adversely reflecting on fitness to practice law, neglecting a legal matter and committing an act contrary to honesty, justice, or good morals warrants a two year probation. The Florida Bar v. Swedlow, 475 So.2d 229 (Fla. 1985).

In one of the few reported cases where the respondent appeared before this Court on the issue of the abandonment of the practice of law as well as other charges including failing to promptly pay funds which a client is entitled to receive, conduct reflecting adversely on the practice of law, failing to carry out a contract for professional services, neglect of a legal matter, engaging in conduct involving fraud, misrepresentation, dishonesty and deceit this Court approved a six month retroactive suspension. The Florida Bar v. Shannon, 566 So.2d 1037 (Fla. 1987). No mitigating circumstances were evident for the shocking actions of Respondent in that case.

In the case at bar the mitigation, as outlined previously, is overwhelming. But the cry for justice has been muted by time. Respondent has been suspended from the practice of law relating to these charges since January 26, 1987. Arguing for a public reprimand or purely for probation does nothing more than an eighteen month suspension retroactive to the date of the temporary suspension. The time cannot be returned. But disbarment is unjust in light of the Complaint, Factual Stipulation, and mitigation proffered to this Court.

CONCLUSION

Under the circumstances as presented in these proceedings this Court should overrule the findings of the referee as to violation and discipline and impose no sanction greater than eighteen months suspension retroactive to the date of the temporary suspension and a period of probation with a special condition of continued affiliation with Florida Lawyers Assistance, Inc. to assist Respondent in dealing with his substance abuse problem.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Patricia Etkin, Esq., The Florida Bar, Suite # 211, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 on this 16th day of May, 1988.

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