IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

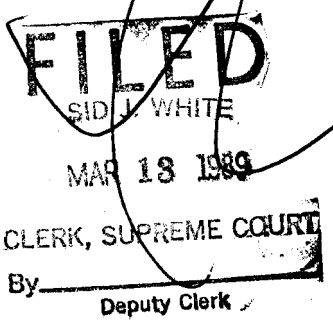
v.

BRUCE D. FRANKE,

Respondent.

_____/

CASE NO. 72,643
TFB NO. 88-10,001 (20B)



RESPONDENT'S ANSWERING BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The appellee, Bruce D. Franke, will be referred to as "the respondent".

STATEMENT OF THE FACTS

The Referee's Findings of Fact are stipulated to be the facts of this case.

SUMMARY OF THE ARGUMENT

The discipline recommended by the Referee in this case is more than sufficient. Ninety (90) days suspension will follow this Court's temporary suspension order of September 28, 1988. Respondent will have been barred from practice for approximately nine (9) months and faces two years probation during which Respondent could be suspended if he fails to abstain from the use of any illegal substance.

The recommended proof of rehabilitation is built in to the requirement of successful completion of the Florida Lawyers' Assistance for Substance Abuse Rehabilitation Program and the two year probationary period.

Further delay in Respondent's right to resume practice imposes a severe economic hardship and would, in effect, make it very difficult for him to resume the practice of law in Naples.

ARGUMENT

ISSUE: Whether the Referee's recommendation of a ninety (90) day suspension from the practice of law and successful completion of the Lawyers' Assistance for Substance Abuse Program is an adequate disciplinary measure.

In his argument, counsel for the Florida Bar makes a number of assumptions that lead him to reach conclusions not supported by evidence. There is no evidence that Respondent had "a significant problem" with the use of cocaine. Respondent admitted using it on several occasions. There is no evidence that Respondent's drug problems "have been extensive". The fact that he voluntarily entered a treatment program at the request of his family is not evidence of the extent of the problem. Some family members, because of background and experience, may be more sensitive to the problems of drug dependency and may be prone to take action and seek solutions earlier than others. He should not be punished for acting responsibly.

The fact that Respondent was expelled from the treatment program after four weeks, when coupled with the fact that his

counsellor was also terminated from the staff at the same time, does not support a conclusion as to who was at fault for failure to complete the program. The failure of the program administrator to respond to inquiries of the undersigned gives rise to inferences contrary to the conclusion made by counsel for The Bar. The Respondent did complete thirty (30) days of treatment which is the duration of many programs.

We all evaluate the facts and reach conclusions based upon personal experiences outside the record to some extent. Counsel for The Bar has demonstrated this tendency, Counsel quotes Charles Hagen as saying drug abusers are "good con artists", and that "these people'' seldom can handle the problems on their own, (TR. p.37, lines 23-25) This argument is an effort to exaggerate Respondent's problem beyond any supporting evidence.

Counsel makes much of the fact that the Referee stated that Respondent demonstrate that he is fully rehabilitated after completing the substance abuse rehabilitation program. Counsel argues that this is inconsistent with the recommended ninety (90) day suspension, and therefore wants to lengthen the suspension by one day to trigger a greater penalty and greater delay in the return to practice by virtue of Rule 3-5.1 (e). The Referee demonstrated compassion and concern for Respondent. the Referee recommended ninety (90) days, not ninety-one (91) days, for good reason. Respondent has been suspended from the practice since this Court's order of September 28, 1988, more than five months

ago. Even with a ninety (90) day suspension, Respondent will have been unable to practice for about nine (9) months by the time this action is concluded. To add additional road blocks to resuming the practice of law would be an excessive penalty in view of Respondent's candor and cooperation. Two years of probation will still remain to demonstrate rehabilitation.

Respondent was never informed following the October 31, 1988 hearing that he should enroll in the substance abuse rehabilitation program prior to the adoption by this Court of the Referee's report, He has attended several AA meetings with friends of his family to gain an understanding of the program.

The facts of this case are very similar to the facts in The Florida Bar v. Holtzinger 505 So. 2d 1329 (Fla. 1987). The only basic difference involves the incident in instant case with the pocket knife. Respondents in both cases stipulated as to the offense, made a full and free disclosure, and had no prior criminal or disciplinary record.

The referee in both cases recommended a ninety (90) day suspension and a two (2) year term of probation. In Holtzinger a condition of probation was periodic evaluation to determine any use of illegal drugs for six (6) months, In the instant case, the condition is enrollment in and completion of the Substance Abuse Rehabilitation Program which involves abstaining from the use of illegal substances during the entire probationary period. This, compared to Holtzinger, is a more stringent condition that Respondent is prepared to meet.

A greater penalty would impose undue economic hardship and reduce the possibility that Respondent could regain the status of a practicing attorney after such a lengthy delay.

In this case no client was injured, no money was taken and the harm done has been to Respondent himself. He has suffered the embarrassment of having to withdraw from practice, close his accounts and turn away his clients. He has suffered great economic hardship. He has, indeed, been punished for his transgressions.

The Referee listened carefully to all of the testimony, asked pertinent questions of the Respondent and in the exercise of good judgment reached fair conclusions upon which he based his recommendations. There are insufficient reasons advanced by The Bar to reject these recommendations.

CONCLUSION

A ninety (90) day suspension, coupled with enrollment in and successful completion of the Florida Lawyers' Assistance for Substance Abuse Rehabilitation Program over a two (2) year probationary period is sufficient discipline under the facts of the case. To add to the Referee's recommended penalty would add obstacles to readmission (i.e. possible re-examination and proof of rehabilitation . . . by some unknown standard) and impose economic hardship to such an extent as to lessen the opportunity for Respondent to survive as a lawyer.

Respondent respectfully asks this Court to extend the understanding and compassion that has historically been the hallmark of justice. The recommendation of the Referee should be adopted since his recommendation has not been shown to be erroneous, unlawful or unjustified in accordance with Rule 3-7.6 (e)(5).

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, RESPONDENT'S ANSWERING BRIEF, has been furnished to THOMAS E. DEBERG, Assistant Staff Counsel for The Florida Bar, at his address of The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607 and to JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by regular U.S. Mail; on this 10th day of March, 1989.

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