IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

HIRAM LEE BAUMAN,

Respondent.

_____/

Supreme Court Case
No. 72,868



**ANSWER BRIEF OF RESPONDENT**

NICHOLAS R. FRIEDMAN
FRIEDMAN, BAUR, MILLER & WEBNER, P.A.
Attorneys for Respondent
21st Floor, New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132-2306
(305) 377-3561

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## INTRODUCTION

The Florida Bar, Complainant, will be referred to as "the Bar" or "The Florida Bar". Hiram Lee Bauman, Respondent, will be referred to as "Mr. Bauman" or "Respondent". References to the transcript on the record below refer to the transcript of the final referee hearing which was held on May 22, 1989. The symbol "TR" followed by page references will be used to designate the transcript. All emphasis has been added.

The Respondent does not fully accept the Statement of Facts and Case presented by The Florida Bar in its Brief and has presented its own Statement.

## STATEMENT OF FACTS AND CASE

The Respondent was a practicing attorney who was suspended from the practice of law in Florida by an Order of the Supreme Court dated April 16, 1987. A true copy is appended to the pleadings of The Florida Bar as Appendix 11. On August 8, 1988, The Florida Bar filed a Petition for Order to Show Cause why Respondent, Hiram Lee Bauman, should not be held in contempt of the Supreme Court of Florida for practicing law while suspended. After the case was assigned to the Honorable Harvey Baxter as Referee, and after a Pretrial Conference of May 1, 1989, The Florida Bar filed an amended Petition which by stipulation with the Respondent, Mr. Bauman, was permitted nunc pro tunc to replace the initial Petition. Respondent admitted most of the allegations of the Amended Petition. TR 1-6. He specifically admitted that he had given the impression of practicing law. TR 19-21. Respondent admitted violating the suspension Order, admitted that his conduct was wrong, and was asking the Court to give him a last chance. TR 218-219. The Court heard the testimony of Judge Nutaro, who advised that although she contacted the Bar because she felt he had given the impression of being an attorney (obviously in violation of the suspension Order), he did not file an appearance, she did not remember his exact words, (TR 43), and that Mr. Bauman had come forward **on his own initiative** and indicated that he was not admitted. TR 45. (Emphasis supplied).

Testimony was taken of attorney Holmes, who was also left with the impression that Mr. Bauman was acting as an attorney in a matter in which Mr. Holmes became involved (TR **65**). Mr. Holmes admitted that Mr. Bauman did not hold himself out as an attorney in any conversation, (TR **66**), but he indicated in his testimony that he **felt** that Mr. Bauman had affirmatively stated to him he was a fellow attorney or practicing attorney. TR **54** and **63**. (Emphasis supplied).

Testimony was taken of Mr. Miller, who also testified that although Mr. Bauman never said he was an attorney, (TR **84-85**), he got that impression.

Ms. Thomas was called as a witness, who also stated that she got the impression that Mr. Bauman was acting as an attorney (TR **99**).

Judge Person was called as a witness in the same matter that Ms. Thomas was involved in and admitted that Mr. Bauman came before him, apparently on **his own initiative,** (TR 113), and admitted that he (Bauman) had done an "incredibly stupid thing." (TR **115**).

The witness who testified the longest and was intended to be the most damaging was The Florida Bar's own investigator, Mr. Sanchez. Mr. Sanchez testified at length purporting to show that Mr. Bauman had made affirmative statements holding himself out as an attorney, particularly in response to questioning by the Referee. During his testimony, however, Mr. Sanchez, The Florida Bar's in-house investigator, appearedto be hesitating (TR **160**) and appeared to contradict his own prior statements, (TR **139** and 155),

both of which indicated that Mr. Bauman never affirmatively held himself out to be an attorney.

From the testimony of the Bar's own investigator and the comments by the referee while questioning him, it is absolutely clear the court did not find the Bar's investigator to be a credible witness. TR **154-155; 157; 164-165.** The court **so** indicated on the record TR 223; also see TR **160.** Mr. Bauman also admitted all the salient facts and was at all times cooperative with The Florida Bar investigation.

The referee, who had the ability to review the demeanor of the witnesses, and to assess the risk, if any, to the public, as well as to balance the factors presented to him by The Florida Bar's evidence and arguments then entered a report finding an additional three year suspension with a provision that a single violation would result in the sentence being changed to disbarment. The respondent agreed, but the Florida Bar has filed its appeal.

## SUMMARY OF ARGUMENT

The Referee below heard and reviewed the testimony of the witnesses and determined the credibility of each. He specifically went on the record (TR at 223) to state that the testimony of The Bar's own investigator was "purported testimony" and that The Florida Bar should do better than to put on that kind of testimony. After weighing the credibility of the witnesses and all of the other factors within his discretion, the Referee ordered a three year suspension, as additional punishment for an attorney who had previously been suspended for six months. The Bar has failed to show that the Referee's report is not based on competent, substantial evidence in the file. The Bar did not present the majority of the relevant case law on the question of whether or not a referee, and this Court, can properly suspend someone for the offense of practicing law while previously suspended. In fact, the most recent case and the majority of cases decided by this Court have punished the offense of practicing while suspended by an additional suspension. The only two cases on point cited by The Florida Bar were both unusual and unique, in that one of them was based on egregious prior violations which never ceased, and the other was simply the affirmance of a Report of Referee, which recommended disbarment. In no similar case has this Court specifically overruled a Referee who suggested additional suspension. This Court should not do so in this case.

## ISSUES AND ARGUMENT OF COUNSEL

I.

WHETHER THE FLORIDA BAR HAS CARRIED ITS BURDEN ON APPEAL TO SHOW THAT THE FINDINGS OF THE REFEREE WERE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE?

The Report of the Referee in this case comes before this Court with a presumption of correctness, and the Referee's findings must be sustained if supported by competent and substantial evidence. The Florida Bar vs. Hooper, 509 So.2d 289, 290-291 (Fla. 1987). In the proceeding below, The Florida Bar had the burden to prove by clear and convincing evidence its position, and the proceedings before this Court do not take on the nature of a trial de novo. Hooper, supra at 291. The findings of facts of the Referee and recommended discipline are therefore presumed correct and normally upheld. The Florida Bar vs. Seldin, 526 So.2d 41 (Fla. 1988); The Florida Bar vs. Hooper, supra; The Florida Bar vs. Hooper, 507 So.2d 1078 (Fla. 1987); The Florida Bar vs. Golden, 502 So.2d 891 (Fla. 1987); and The Florida Bar vs. Neely, 502 So.2d 1237 (Fla. 1987).

This Court has held that "[d]isbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable." The Florida Bar vs. Davis, 361 So.2d 159, 161 (Fla. 1978); see also The Florida Bar vs. Felder, 425 So.2d 528, 530 (Fla. 1982). Each case is unique and must be assessed or

determined individually. The Florida Bar vs. Breed, 378 So.2d 783 (Fla. 1980). The determination in each case is through the examination of evidence and the filing of a report by a referee appointed by the Supreme Court of Florida. Art. XI, R.11.06 of the former Integration Rule of The Florida Bar and current Rule of Discipline 3-7.5. The referee needs to decide from all the facts if a less severe punishment than disbarment is appropriate, even in the event that The Florida Bar petitions for disbarment. The Florida Bar vs. Pincket, 398 So.2d 802 (Fla. 1981).

In order to sustain its burden of proof that a respondent attorney be disbarred, The Bar must prove not only that a wrong has occurred, but that the attorney was motivated by a corrupt motive. The Florida Bar vs. Thomson, 271 So.2d 758, 761 (Fla. 1972); Gould vs. State, 127 So. 309 (Fla. 1930). The burden of The Florida Bar in this respect, as in all other respects is a burden to prove its case by clear and convincing evidence. This is a burden higher than a mere preponderance, but less than proof beyond and to the exclusion of a reasonable doubt.

On behalf of the Respondent, as the party prevailing below, the evidence and facts ought to be reviewed in the light most favorable to the Respondent. Shapiro v. State, 390 So.2d 344, 346-347 (Fla. 1980). Particularly, we point out that among the specific findings of the Referee was the Referee's on the record dissatisfaction with the "purported testimony" of The Florida Bar's investigator. The Court went on the record at page 223 to state that it felt that The Florida Bar needed to do better than the type

of testimony which lead The Florida Bar to some of its position and argument before the Court. We would point out that in numerous instances, Mr. Sanchez admitted errors in his Affidavits before the Court, TR at Pages **154-155**, admitted that portions of his report were missing, TR at **157**, admitted that his alleged records were not truly the kinds of records upon which one ought to be able to rely, TR at **164-165**, and was **so** hesitant in his testimony that the Court below specifically commented about it, TR at **160**. While the Respondent is certainly not without blame for his actions, these are the types of factors which a Referee is intended to weigh and for which a Referee is appointed. This Referee specifically looked at those factors and weighed them, and was unpersuaded by much of the testimony that was presented, especially testimony of an employee of The Florida Bar itself. It cannot honestly be said that from the record before the Referee, he failed to understand it or was unsupportive in the conclusions that he drew from these specific errors and admissions of The Florida Bar's own staff investigator. And, after all, it is the evidence adduced before the Referee which is the matter to be weighed by the Referee and ultimately then this Court.

In each and every case, there are mitigating factors which the court consider both for determining whether disbarment is an appropriate discipline, and for setting the length of a suspension and when it is to begin. The Florida Bar vs. Lord, **433** So.2d **983** (Fla. **1983)**; The Florida Bar vs. Carbonaro, **464** So.2d **549** (Fla. **1985)**. Even where a crime has occurred, including an offense

against the attorney's own client, the Court has pointed out that disbarment could have been avoided, if the respondent had presented appropriate evidence of mitigating facts at the time of trial. The Florida Bar vs. Wilson, 425 So.2d 2 (Fla. 1983).

The potential rehabilitation of the Respondent attorney is absolutely a factor which the Referee should consider. Lord, supra; Davis, supra. Where such potential rehabilitation is believed to be present by the Referee, to demand disbarment is an improper argument and "to follow it when there is an expectation of rehabilitation would needlessly blur the distinction between suspension and disbarment." The Florida vs. Blessing, 440 So.2d 1275, 1277 (Fla. 1983).

In contrast to the single-minded approach of The Bar, the culpability of the lawyer involved should depend not only on the nature of an offense but also on the attendant circumstances. The Florida Bar vs. Davis, 361 So.2d 159, 161 (Fla. 1978). Even after the commission of an offense, if the Referee can find that there is no improper intent, that is one of the facts which must be considered. Davis, supra. As was pointed out above, The Court in David specifically stated the following:

> "Disbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable." Davis, supra.

This Court should look at the evidence adduced below and determine whether any punishment less severe than disbarment can accomplish the desired purposes of Bar discipline. The Florida Bar

vs. Moore, 194 So.2d 264 (Fla. 1966); The Florida Bar vs. Ruskin, 126 So.2d 142 (Fla. 1961).

The argument of The Florida Bar really is predicated upon a single concept. That concept is that disbarment is the only punishment (under any circumstances) for practicing law when suspended. See the Bar Brief at pages 6, 9, and 11. The Bar relies on two cases, The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978) and The Florida Bar v. Hartnett, 398 So.2d 1352 (Fla. 1981). Both cases, however, are substantially different from the current case. In the Hirsch case, the Referee in the suspension case appears from the dicta to have recommended disbarment, whereas in the current case the Referee specifically did not recommend disbarment. It is true that in the Hartnett case, the respondent was disbarred for practicing law while suspended.

The Florida Bar's reliance on the Hartnett case is, however, misplaced. The circumstances and facts of the Hartnett case were very usual and unique. The court may look at its own records to confirm that Mr. Hartnett was an alcoholic for whom an agreed two year suspension for multiple counts of theft, neglect, and failure to account was also to be an opportunity to obtain help and straighten out his life. Instead, Mr. Hartnett merely continued the myriad violations and never in any fashion gave up the practice Of law. Mr. Hartnett did not present any of the mitigating factors which my client, Mr. Bauman, presented. His disbarment did not result from a referee's report, but was in fact without any report Of the referee. See Harnett, dissent at 1353. The Bar's reliance

on the Hartnett case is a misplaced reliance and inappropriately draws a conclusion not supported by the facts of Mr. Bauman's case.

The Bar makes one other argument which really is irrelevant, but was responded to in the transcript. The argument of The Florida Bar, at pages 5 and 6 of its Brief, is that the Respondent allegedly never made any effort to be reinstated from its prior suspension. This is not supported by the record, is contradicted by the record, and is false. Mr. Bauman testified (TR at 20) that he had taken and gotten a 98% on the Ethics portion of the Bar examination. Mr. Stamm, the Bar's attorney, was aware of that fact and had requested the results from the Board of Bar Examiners in Tallahassee. TR at 22. Mr. Bauman further testified that at the time when he was preparing for reinstatement, he was unexpectedly charged with a to date unproved allegation which was already five (5) years old at time, and that the timing accordingly was such that he realized he would probably have his petition denied until the matter had been decided and would then be delayed additionally because of the one (1) year requirement before he could reapply. TR at 24 through 28.

Not only has The Bar failed to show error, but the record below does not support overruling the Referee for lengthening a Suspension, instead of ordering disbarment, as The Bar now seeks. The majority of cases support the findings of the Referee in the instant case.

II.

## WHETHER OR NOT THE REFEREE MAY FIND THAT SUSPENSION IS AN APPROPRIATE DISCIPLINE FOR THE OFFENSE OF PRACTICING LAW WHILE SUSPENDED?

There are several cases, cited below, which show that suspension is an appropriate discipline for the offense of practicing law while suspended. The single most recent case on the point, The Florida Bar v. Levkoff, 511 So.2d 556 (Fla. 1987), is such a case as are several other cases which overlap with those cited by The Florida Bar. This is in sharp contrast to the single-minded and one concept argument which is pursued by The Florida Bar.

The Florida Bar suggests, by citing the Hartnett case and the Hirsch case, supra, that disbarment is the only proper discipline for such an offense. Those unique cases are contrary to the preponderance of the case law, which The Florida Bar failed to cite. The Hartnett case has already been substantially distinguished by the unique circumstances of the case, which the Court can properly observe from its own files. The Hirsch case was one in which the findings of a referee were upheld. Hirsch, supra, at 857. In this case, we equaliy want the findings of the referee upheld. More notably in the Hirsch case, Mr. Hirsch denied that his conduct constituted violation of the prior Court Order. Hirsch, supra, at 857. To determine the believability of the witnesses and to ascribe the correct punishment is the task which

is assigned to the referee. In the instant case, unlike the Hirsch case, the referee found that the conduct should not be punished by disbarment. Indicated below are the other cases which support the discipline of suspension and which The Florida Bar failed to cite or distinguish in its brief.

The most recent case that the undersigned was able to locate with respect to practicing while suspended, (more recent by several years to any of the other cases on point) is The Florida Bar v. Levkoff, 511 So.2d **556**, (Fla. **1987**). In that case, this Court was faced with a respondent who had been suspended from the practice of law, but performed "numerous functions as an attorney over a seven **(7)** month period", after being suspended. Mr. Levkoff admitted the violation. In that case, the Court grappled with precisely the issue now argued by The Florida Bar, and indeed found that suspension for practicing while suspended was a reasonable discipline. Levkoff at **556**.

In another case, that of Ernest M. Breed, decided by this Court in **1979**, Mr. Breed was guilty of continuing to have his sign outside his door with the words "Law Offices, Ernest M. Breed, **154**." and continued to engage in correspondence using his legal stationery identifying himself as an attorney. The Florida Bar v. Breed, **368** So.2d **356**, **357** (Fla. **1979**). Although Mr. Breed was found in contempt, he was not punished at all, provided that he removed the sign and ceased using the stationery. There ought to be no more obvious circumstance of someone presumed to be a lawyer than one who writes correspondence on his legal stationery, without

mentioning the fact of his suspension. That case, notwithstanding the mild punishment, is blatant.

In The Florida Bar v. Pryor, 350 So.2d 83 (Fla. 1977) an attorney appeared in court and intentionally misrepresented his status as member in good standing with The Bar. This was coupled with drunkenness to the point where he could not get out of his car under his own power. Pryor, at page 84. For this offense, Mr. Pryor was publicly reprimanded with three years probation. In the case Of The Florida Bar v. Brigman, 322 So.2d 556, (Fla 1975), an attorney who was suspended for six months continued to utilize his law office, his stationery, and failed to notify his clients of his suspension. His six months suspension was supplemented by a one year suspension. In 1973, this court considered the suspension of Mr. Ossinsky. In re: Ossinskv, 279 So.2d 292 (Fla. 1973). Mr. Ossinsky appeared in court and actively participated in a felony proceeding, representing the defendant after he knew he was suspended from practicing law. He was given an additional sixty (60) day suspension. Ossinskv at 293.

A fair look at all of these cases shows that this Court properly assigns matters to a referee or commissioner for the purpose of interpreting the evidence, the demeanor and credibility Of the witnesses, and evaluating the respondent. After listening to the argument of the respondent and the single-minded position Of The Florida Bar, the Referee below chose to impose a three (3) year suspension with what amounts to a condition of probation throughout the suspension where any proven act of practicing or act

similar to those which respondent below admitted would result in immediate disbarment. Such a discipline is harsher than most of the Bar's disciplines issued for practicing law while suspended, but is supported by the evidence of the case at bar. Neither is it an insignificant punishment. In this regard the record must be received in the light most favorable to the respondent. Shapiro v. State, 390 So.2d 344, 346-347 (Fla. 1980). It offers the respondent the chance for rehabilitating himself and reinstatement if he complies scrupulously with the requirements of the Court.

Essentially, the Bar's position says it seeks an automatic disbarment rule for practicingwhile suspended. That is the single minded argument of The Bar and is the framework in which it has taken its appeal. The wisdom of not having such a rule and the wisdom of allowing attorneys, if a referee so recommends, an opportunity for reinstatement after a lengthy suspension has frequently been rewarded by the return of attorneys to the practice Of law with honor and distinction. The referee below made a finding, well within the record, including specifically the candid discussions at the pretrial conference on May 1, and well within the parameters established by a majority of similar decisions, including the Levkoff case. While this court has broad authority, the record below supports the findings of the referee, and it should not be overturned. Shapiro, supra.

## CONCLUSION

The Referee's report is supported by competent, substantial evidence in the record. The Bar has not proven that the Referee's report should be overturned. The majority of the cases support that additional suspension is an adequate discipline, as has been determined by the Referee below.

Accordingly, the Referee's report should be affirmed.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Answer Brief of Respondent was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, by Federal Express, and by regular mail to Warren Jay Stamm, Assistant Staff Counsel, The Florida Bar, Suite 211, Rivergate Plaza, Miami, Florida 33131, on this 31st day of October, 1989.

NICHOLAS R. FRIEDMAN