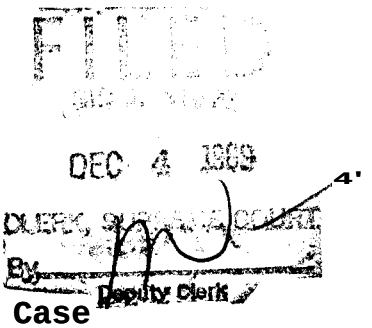
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Complainant/Appellant

V.

JEFFREY SHUMINER,

Respondent/Appellee

_____/

Supreme Court Case No. 72,886

The Florida Bar File No. 88-70,993 (11F)

ANSWER BRIEF OF THE RESPONDENT

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REFERENCES AND ABBREVIATIO

In this brief, the appellant will be referred to as "The Florida Bar", and the appellee will be referred to as "the Respondent".

References to the Report of the Referee of July 10, 1989 will be designated "RR". References to the transcript of the hearing before the Referee on June 16, 1989 will be designated "T".

STATEMENT OF THE CASE

This case was initiated on May 12, 1988 by referral to a grievance committee of a complaint against the Respondent. Just prior to a hearing before the grievance committee on June 28, 1988, the Respondent waived a probable cause hearing and the matter was referred to a referee. On August 16, 1988 the Florida Bar mailed its Complaint and its Request for Admissions to this Court and the Respondent. On August 29, 1988, this Court appointed the Honorable Steven Shutter as Referee to hear this matter. The Respondent submitted his Answer and Affirmative Defenses to the Complaint and his Answer to Request for Admissions on October 17, 1988.

On October 20, 1988, the Florida Bar served its First Set of Interrogatories and its Request for Production. On December 5, 1988, the Florida Bar filed a Motion Compelling Discovery and Motion for Sanctions as a result of Respondent's failure to respond to these discovery requests. On January 3, 1989, Respondent filed his Motion to Stay Proceedings. On January 17, 1989, the Referee deferred ruling on The Florida Bar's Motion for Sanctions, affording Respondent the opportunity to petition this Court for an extension of time in which to conclude the proceedings. On January 17, 1989, Respondent filed a Motion for Extension of Time Within which to Conclude Referee Hearing and Filing of Referee Report. On January 26, 1989, The Florida Bar and Respondent entered into a Stipulation whereby Respondent

would enter a guilty plea admitting the facts alleged in the Bar's complaint as well as the disciplinary rule violations and The Florida Bar would not oppose Respondent's Motion for Extension of Time. On January 31, 1989, this Court granted Respondent's Motion for Extension of Time to May 30, 1989. On February 23, 1989, Respondent filed an Unconditional Guilty Plea, reserving the right to present testimony and evidence relevant to discipline.

On May 12, 1989, The Florida Bar filed a Motion to Set Date for Final Hearing and Motion for Sanctions. On May 18, 1989, Respondent filed his Response to Motion for Sanctions and his response to the requested discovery. On May 23, 1989, Respondent filed a Motion for Extension of Time Within which to Conclude Referee Hearing and Filing of Referee Report. On May 30, 1989, this Court granted Respondent's Motion for Extension of Time to June 30, 1989. A final hearing was held before Judge Sutter, acting as Referee, on June 16, 1989. On July 7, 1989, this Court granted the Referee's Request for Extension of Time to file Referee Report to July 17, 1989. The Report of Referee was filed on July 10, 1989, finding Respondent guilty of all violations charged by The Florida Bar and to which Respondent had entered an Unconditional Plea of Guilty, and recommending that Respondent be suspended from the practice of law for eighteen (18) months, that he serve a probationary period of thirty (30) months during which he would not have the use of trust funds and would be under the supervision of Florida Lawyers Assistance, Inc., that he perform

100 hours of community service following his suspension, and that he pay $2,956.10 in costs.

This cause was considered by the Board of Governors of The Florida Bar at its meeting which ended September 23, 1989. The Florida Bar filed its Petition for Review on October 9, 1989 appealing the Referee's recommended discipline of an eighteen month suspension. The Florida Bar served its Initial Brief on November 7, 1989, seeking disbarment.

STATEMENT OF THE FACTS

The Respondent would adopt and does not dispute the findings of fact contained in the Report of Referee of July 10, 1989, and incorporated into the Initial Brief of The Florida Bar.

SUMMARY OF THE ARGUMENT

The recommendation of the Referee that the Respondent be suspended from practice for eighteen months, that he serve a probationary period and perform community service after completing his suspension, and that he pay costs is appropriate for the actions admitted by the Respondent in light of the substantial mitigating factors considered and accepted by the Referee, and is in conformity with prior decisions of The Supreme Court of Florida concerning attorney discipline.

ARGUMENT

I. THE REFEREE'S RECOMMENDATION OF AN EIGHTEEN MONTH SUSPENSION, FOLLOWED BY A PROBATIONARY PERIOD OF THIRTY MONTHS AND 100 HOURS OF COMMUNITY SERVICE, IS APPROPRIATE IN CONSIDERATION OF THE ACTIONS ADMITTED BY THE RESPONDENT AND THE MITIGATING FACTORS CONSIDERED BY THE REFEREE.

While it is clear that the Florida Supreme Court exercises a broad scope of review in evaluating a referee's recommendation of discipline, The Florida Bar v. Patarini, 14 F.L.W. 458 (Sept. 22, 1989); The Florida Bar in re Ingles, 471 So.2d 38 (Fla. 1985), the Referee's report comes before the Court "clothed in correctness", The Florida Bar v. Miller, 14 F.L.W. 399 (Aug. 4, 1989), and will be upheld unless it is shown to be erroneous,

without record support, unlawful, or unjustified, The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987); The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986); The Florida Bar V. Price, 478 So.2d 812 (Fla. 1985); Rule 3.7-6(c)(5) of the Rules Regulating the Florida Bar (Discipline). The Florida Bar has not made such a showing.

From the time of his initial contact with the auditor for The Florida Bar in February 1988, the Respondent has been candid and forthright regarding his behavior and his actions, and has cooperated with the disciplinary proceedings (RR 8). The Respondent has never disputed that during his first year of legal practice, his actions with regard to certain client funds represented violations of the rules regulating trust accounts and the rules of professional conduct, and he filed an Unconditional Plea of Guilty to that effect some four months prior to the hearing before the Referee (RR 1).

Likewise, since the initiation of this case, the Respondent has, by way of explanation and not excuse, been completely open in admitting his drug and alcohol addiction. At the hearing before the Referee, testimony was adduced concerning the Respondent's chemical dependency history and his successful efforts at rehabilitation (RR 7; T 15-54, 94-95, 114). After hearing the testimony, the Referee, in recommending discipline, found as mitigating factors the following:

1. The Respondent had no prior disciplinary complaints filed against him;

2. The Respondent, at the time of the violations, had been undergoing severe emotional problems resulting from his addiction to cocaine and alcohol, as well as other family and personal problems;

3. The Respondent had been making serious and successful efforts at rehabilitating himself through an ongoing program of recovery from his addiction;

4. The Respondent had made a timely and good faith effort to make restitution to his clients who were affected by his trust fund violations, and had entered into a repayment plan with the two medical providers to whom money remained owing;

5. The Respondent had cooperated in the disciplinary proceedings by waiving a probable cause hearing and filing a voluntary unconditional plea of guilty:

6. The Respondent was not an experienced attorney, having been in practice for only one year at the time of the violations;

7. The Respondent had demonstrated his understanding of the nature of the violations and had demonstrated genuine remorse regarding his conduct (RR 8).

In determining appropriate discipline in this type of case, The Florida Supreme Court has held:

> "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.", The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

There is no question that the misuse of client funds is one of the most serious violations an attorney can commit, The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987); The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979). The Respondent has never denied or sought to minimize this fact (T 97). While there is a presumption that disbarment is appropriate upon a finding of such misuse of funds, The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), mitigation should be taken into consideration unless a specific penalty is mandated for a particular conduct, The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981). Contrary to The Florida Bar's assertion in its brief (p. 17), Florida's Standards for Imposing Lawyer Sanctions do not "mandate that Respondent be disbarred for his misconduct", but state that,

> "Absent aggravating or mitigating circumstances ... disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.", Rules 4.1 and 4.11 (Emphasis supplied).

In the present case, substantial mitigating factors were presented to and accepted by the Referee. This Court has, in the past, held that an adequate showing of any of these mitigating factors or a combination thereof, can serve to rebut the presumption for disbarment.

The Respondent testified and the Referee found that the Respondent was undergoing severe emotional upheavals at the time the violations occurred, including the breakup of his marriage coupled with the recent birth of his child (T 94), see The

Florida Bar v. Patarini, supra. The Referee further found that no previous disciplinary complaints had been filed against the Respondent (RR 8), a finding not contradicted by The Florida Bar, cf. The Florida Bar v. Mims, 532 So.2d 671 (Fla. 1988); The Florida Bar v. Newhouse, 539 So.2d 473 (Fla. 1989). In fact, two witnesses, both of whom were sitting judges, testified to the Respondent's competence and moral character, see The Florida Bar v. Diamond, 14 F.L.W. 459 (Sept. 22, 1989).

This Court has held that a respondent's cooperation with The Florida Bar and restitution of funds involved are mitigating factors which are to be given substantial weight, The Florida Bar v. Pincket, supra. at 803; The Florida Bar v. Schiller, supra. at 993; The Florida Bar v. Harper, 518 So.2d 262 (Fla. 1988). The Respondent in this case testified that he had made full restitution to all clients (T 98-101) and had entered into a repayment plan with the physicians to whom money was owed (T 103-104), and the Referee so found (RR 8). Conversely, in a very recent case, this Court has held that the failure to make restitution and a lack of cooperation in a similar situation will be considered aggravating factors which warrant disbarment, despite proven chemical dependency, The Florida Bar v. Golub, 14 F.L.W. 489 (Oct. 6, 1989).

The Respondent further testified that despite his in-patient treatment for chemical dependency, with the strict prohibitions against communication such treatment entailed (T 123), and the difficulty he had in obtaining records (T 116, 137), he had

attempted to the best of his ability to cooperate in the disciplinary proceedings against him (T 106). Such cooperation included the Respondent's waiving a probable cause hearing and filing an unconditional plea of guilty to the facts alleged against him (RR 8).

In explaining the root cause of his problems, the Respondent presented the Referee with an extensive history of chemical dependency. At the outset, it should be stressed that at no time did the Respondent seek to excuse his behavior by hiding behind his addiction and, in fact, agreed that his actions required sanctions to be imposed (T 96-97). The Florida Bar in its brief (p. 20) argues that addiction must be proven by clear and convincing evidence to be the cause of the misconduct, but can cite no Florida caselaw imposing that standard. At the hearing before the Referee, both the expert witness called by the Respondent and the Respondent himself presented detailed testimony regarding the Respondent's chemical dependency history and the nature of his addiction (T 15-54, 94-95, 114). Further, the Respondent's expert, Dr. John Eustace, specifically testified that but for the Respondent's addiction, he would not have committed the violations at issue (T 54-57). The evidence of chemical dependency and Dr. Eustace's opinion were not contradicted by The Florida Bar and were accepted by the Referee (RR 8). A referee is permitted to place great weight on an expert's opinion in the area of chemical dependency, The Florida Bar. v. Headley, 475 So.2d 1213, 1214 (Fla. 1985). The Bar made

no showing before the Referee and has advanced no argument in its brief as to why Dr. Eustace's opinion and the Respondent's own testimony should be disregarded.

It is this Court's heavy responsibility to mete out discipline to attorney's charged with ethical violations. As stated by The Bar in its brief (p. 20), this Court is being presented more and more frequently with instances where an attorney's chemical dependency inevitably leads him to a disciplinary hearing before this forum. Unfortunately, a license to practice law does not act as a shield against a disease which is ravishing this country. However, the members of the bar in Florida have an advantage that lawyers in many other states do not: first, this Court is enlightened regrading the disease of addiction; and, second, as a result of this enlightenment, it has developed a theory and practice in disciplinary matters involving chemical dependency which both protects the public and offers the attorney a chance to recover from his or her illness.

In The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982), this Court stated:

> "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."

Clearly, an attorney cannot come before this Court, allege chemical dependency as the cause of his ethical violations or criminal conduct and, without more, expect the Court to mitigate the severity of the sanctions imposed, see The Florida Bar v.

Golub, 14 F.L.W. 489 (Oct. 6, 1989). However, in The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987), this Court stated:

> "An attorney with a chemical dependency problem, whether the drug of his choice is legal such as alcohol, or illegal such as cocaine, should be encouraged to seek treatment to rid himself of the dependency. We have held in prior bar disciplinary cases that an addicted attorney who has demonstrated positive efforts to free himself of his drug dependency should have that fact recognized by the referee and this Court when considering the appropriate discipline to be imposed."

Where efforts at rehabilitation have been demonstrated, this Court has often determined that the sanction of suspension rather than disbarment is called for, even in circumstances involving misuse of client trust funds, The Florida Bar v. Blalock, 325 So.2d 401 (Fla. 1976) (indefinite suspension, demonstration of rehabilitation). Likewise, the Court has ordered suspension rather than disbarment in disciplinary matters involving chemical dependency, The Florida Bar v. Franke, 14 F.L.W. 460 (Sept. 22, 1989) (petty theft - use of drugs: 90 day suspension, 2 year probationary period, completion of F.L.A. program); The Florida Bar v. Finkelstein, 522 So.2d 322 (Fla. 1988) (possession of drugs - DUI: 1 year suspension, 2 year probationary period, completion of F.L.A. program); The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987) (possession and delivery of cocaine: 3 year suspension); The Florida Bar v. Shores, 500 So.2d 139 (Fla. 1986) (neglect of legal matter - misconduct constituting a felony or misdemeanor: 2 year probation, compliance with F.L.A. program); The Florida Bar v. Thompson, 500 So.2d 1335 (Fla. 1986)

(possession of cocaine: 91 day suspension, 2 year probationary period, drug treatment evaluation); The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986) (drug trafficking: 3 year suspension); The Florida Bar v. Dietrich, 469 So.2d 1377 (Fla. 1985) (neglect of law practice - defalcations: 2 year suspension, proof of rehabilitation); The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982) (conduct prejudicial to administration of justice - neglect of legal matter: 91 day suspension, proof of rehabilitation).

In the present case, the Respondent testified regarding his efforts at rehabilitation and recovery (T 108-114). These efforts were corroborated by Dr. Eustace, who continues to see the Respondent to this day (T 17-18, 32-36), and by William Kilby, staff attorney for Florida Lawyers Assistance, Inc. (T 60-62), and were accepted by the Referee (RR 8).

In summary, "the stigma of disbarment is a burden on Respondent which is not necessary to encourage reformation or rehabilitation of Respondent and would not result in any greater protection of the public, than would ... suspension.", The Florida Bar v. Diamond, 14 F.L.W. 459 (Sept. 22, 1989), citing The Florida Bar v. Blessing, 440 So.2d 1275, 1277 (Fla. 1983). This Court held in The Florida Bar v. Carbonaro, 464 So.2d 549, 551 (Fla. 1985):

> "Disbarment is the extreme measure of discipline that can be imposed on any lawyer. It should be resorted to only in cases where the person charged has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards. To sustain disbarment there must be a showing that the person charged should never be at the bar. It should never be decreed where punishment less

severe, such as reprimand, temporary suspension, or fine will accomplish the desired purpose.", citing The Florida Bar v. Moore, 194 So.2d 264, 271 (Fla. 1966).

In the present case, it is clear that based on the Respondent's attitude during the disciplinary proceedings, his restitution, his chemical dependency and his ongoing efforts at rehabilitation and recovery from the same, and this Court's pronouncements regarding proper discipline in matters such as this, the sanction of disbarment is in no way warranted. Instead, the Referee's recommended discipline will achieve the desired ends of protecting the public while not irrevocably denying it the services of a qualified attorney, punishing the Respondent while at the same time encouraging him to continue his recovery from addiction, and deterring other members of the bar from engaging in similar conduct.

CONCLUSION

Based on the above, the Respondent respectfully requests this Honorable Court to accept the Referee's report in its entirety and impose discipline consisting of an eighteen month suspension from the date of the Referee's report, a thirty month probationary period after conclusion of the suspension, performance of 100 hours of community service, and payment of all restitution and costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to Jo-Ann Braverman, Esq., Bar Counsel, The Florida Bar, **444** Brickell Avenue, Suite **211**, Miami, Florida **33131**; and John **T.** Berry, Esq., Staff Counsel, The Florida Bar, **650** Apalachee Pkwy., Tallahassee, Florida **32399-2300**, on December **1**, 1989.

RICHARD BARON