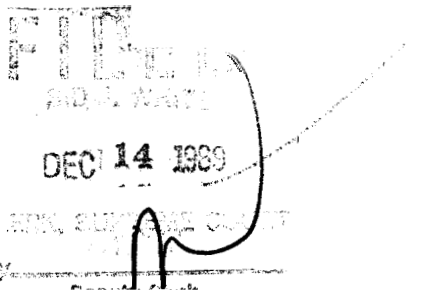
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Complainant,

v.

JEFFREY SHUMINER,

Respondent.
_____/

Supreme Court Case
No. 72,886

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

REPLY BRIEF OF APPELLANT, THE FLORIDA BAR

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DISBARMENT IS THE APPROPRIATE DISCIPLINE AND THE REFEREE'S RECOMMENDATION OF AN EIGHTEEN MONTH SUSPENSION IS INAPPROPRIATE GIVEN THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT

The issue being appealed is whether the Referee's recommendation of discipline to be imposed is appropriate given the serious nature of Respondent's misconduct. Contrary to Respondent's assertion that, "the Referee's report comes before the Court clothed in correctness," The Florida Bar v. Miller, 14 F.L.W. 399 (Aug. 4, 1989) cited by Respondent for this proposition actually states, "A referee is the trier of facts and his findings come to us clothed with correctness; thus, we could not set aside the factual finding in paragraph 7 unless it was clearly erroneous." While a referee's finding of fact is presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support, this Court has a broad scope of review in evaluating a referee's recommendation of discipline and this Court is not bound by the Referee's recommendation of the discipline to be imposed. The Florida Bar v. Patarni, 14 F.L.W. 458 (Sept. 22, 1989); The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978).

Despite Respondent's contention in his brief that since his initial contact with the auditor for The Florida Bar in February 1988, he has been candid and forthright regarding his behavior and his actions and has cooperated with the disciplinary proceedings, citing the Referee's findings as to mitigation, in actuality, all the Referee found was "cooperation with the Bar in

that a probable cause hearing was waived and an unconditional guilty plea was entered in the proceeding" (RR-8). Quite the contrary, as expanded on The Florida Bar's brief on pages 25-26, Respondent did not cooperate with The Florida Bar's proceedings which began in August 1988. In Respondent's Answer to Request for Admissions filed on October 17, 1988, Respondent denied certain allegations contained in the Complaint, allegations he later entered an Unconditional Guilty Plea to on February 23, 1989. Accordingly, Respondent has not been candid and forthright regarding his behavior and actions, and has disputed that his actions represented violations up until February 23, 1989.

Testimony was adduced from Respondent's expert witness that Respondent was recovering from his disease of addiction and that Respondent's prognosis for continued recovery was excellent if Respondent stayed in the recovery process (T 33-34). However, Respondent's expert also testified that other things took priority over Respondent's being in treatment and he was discharged against medical advice when he was no longer participating the way he should have been (T 17-18). As late as March, 1988 Respondent denied the depth of his substance abuse (T-38).

Contrary to Respondent's assertion in his brief that the Referee, in recommending discipline, found as a mitigating factor that "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, (emphasis added) what the referee in fact found was

"great personal and emotional problems including his disease of addiction, his impairment and his family and material problem" (emphasis added) and that Respondent was "mentally impaired due to his addiction." No where in the Referee's findings of fact does the referee conclude that Respondent's problems were a result of his addiction or that Respondent's mental impairment caused his misconduct. The Florida Bar does not dispute that Respondent may have had personal and emotional problems, drug addiction, impairment, family and material problems. However, Respondent has had this disease of addiction for twenty years. Respondent has been impaired at other times during this twenty year period. Respondent testified that in 1978 his addiction escalated to a point that he had to drop out of college (T-92). Respondent then returned to college, received his undergraduate degree, went to law school and received his law degree and passed the Bar (T-92). Yes, Respondent is a drug addict, and maybe mentally impaired to a degree, but such drug addiction and impairment have not been shown to have been the underlying cause of his serious misconduct. Respondent's drug addiction and impairment have not been shown to be any different than his drug addiction that has existed for twenty years.

The facts of the cases Respondent cites to support his contention that an adequate showing of mitigating factors can serve to rebut the presumption for disbarment differ vastly from Respondent's own case. In The Florida Bar V. Patarni, 14 FLW 458 (Sept. 22, 1989), Respondent presented testimony from a clinical psychologist that Respondent's conduct was an aberration which

arose from the emotional strain he was suffering as a result of the marriage dissolution and post dissolution proceedings, his actions taking place during a period of intense emotional upheaval precipitated by his divorce. Conversely, Respondent only testified that his marriage was not working out and he had a newborn child (T-94). In The Florida Bar v. Diamond, 14 FLW 459 (Sept. 22, 1989), Respondent presented a multitude of character witnesses including a past president of The Florida Bar, a past mayor of Miami Beach, persons who had dealt with Respondent in business, the law, public service, and the judge who had tried Respondent's criminal case. Conversely, Respondent's witnesses were two judges Respondent had practiced before.

The Florida Bar has not argued that addiction, in Florida, must be proven by clear and convincing evidence to be the cause Of the misconduct. (T-20). However, Florida does require that this addiction be the underlying or direct cause of the misconduct. The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982). The Florida Bar v. Headley, 475 So.2d 1213 (Fla. 1985). Respondent has not shown such a nexus between his twenty year abuse of drugs in which he functioned quite competently in society and such drug abuse being the underlying or direct cause Of his serious misconduct. Just as people who are not addicted to drugs misappropriate client funds and misrepresent to clients the status of their cases, people who do have a drug addiction do not always commit similar acts of misconduct as Respondent has.

An eighteen month period of suspension will not achieve the desired ends of protecting the public from unethical conduct and

deterring others who might be prone or tempted to become involved in like violations or disciplining the Respondent while at the same time encouraging him to continue his recovery from addiction. Respondent's own expert witness testified that he did not believe a year's suspension would be a deterrent to other attorneys (T-68). Respondent's other expert witness agreed that if a person who engaged in wrongful conduct is allowed to escape severe sanctions or the consequences of his wrongful acts, it would not help or assist in his recovery (T-45).

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court to reject the Referee's recommended discipline of an eighteen month suspension and order instead disbarment and payment of costs of these proceedings in the amount of $2,956.10.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing answer brief of The Florida Bar was furnished to Richard Baron, Attorney for Respondent, 11077 Biscayne Boulevard, Suite 307, Miami, Florida 33161 this 13 day of December, 1989.

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