047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ALFRED S. WELLS,

Respondent.

CASE NO: 74,320

RESPONDENT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

The symbols and references used in this brief are as follows:

R.I. = Transcript of Referee hearing of April 6, 1990

R.II. = Transcript of Referee hearing of May 18, 1990

Comp. Br. = Complainant's Initial Brief

STATEMENT OF THE CASE AND THE FACTS

Respondent accepts and adopts the statement of the case and of the facts as set forth in Complainant's brief, but adds the following facts from the record below omitted by Complainant.

In addition to the testimony of Circuit Judge Manuel Menendez, Reverend Brown, and Joe Murphy, Esquire the following witnesses testified on Respondent's behalf.

Debra Serrette, an ex-client, testified that she hired Respondent to represent her on two charges of aggravated child abuse, which are second degree felonies. [R.I. 115, 117]. Respondent initially quoted Ms. Serette a total fee of $3,000.00. [R.I. 116]. Ms. Serette testified that she did not have any money the first day and could only pay a maximum of $100.00 per month. Nevertheless, Respondent took Ms. Serette's case. [R.I. 117, 118]. Eventually, because Ms. Serette was having difficulty paying, Respondent reduced the total fee to $1,500.00. [R.I. 118]. Ms. Serette indicated that Respondent worked on her case, met with her and kept her advised, and eventually, Respondent's efforts resulted in a not guilty verdict at trial. [R.I. 118, 119].

Additionally, George Robinson testified that Respondent was a client of Mr. Robinson in his position as drug therapist for DACCO. [R.I. 105]. Mr. Robinson stated that Respondent was placed in a group for drug treatment and always had a

positive attitude. [R.I. 106]. Respondent met with Mr. Robinson's group for a three month period, twice each week for one hour and a half. Based on their dealings, Mr. Robinson felt that Respondent is a good candidate for recovery. [R.I. 111, 112].

Attorney Ricky Williams also testified on Respondent's behalf. Mr. Williams indicated that he has known Respondent since 1979. [R.I. 63]. Mr. Williams further stated that Respondent was an excellent lawyer, but that Respondent's behavior changed due to drug use [R.I. 65], and that Respondent's divorce and separation from his children destroyed him. [R.I. 69]. However, since Respondent's criminal problems, Mr. Williams indicated he has noticed a complete change in Respondent, and that Respondent has since worked hard at two jobs and maintained a good family life. [R.I. 68].

Finally, Respondent's present wife testified that Respondent was going through a variety of problems during the height of his drug use. [R.I. 121]. Mrs. Wells stated that Respondent's problems included his divorce, not being able to see his children, (previous marriage), and the collapse of his practice. [R.I. 121]. After Respondent returned from the rehabilitation program, Mrs. Wells stated she could see things were changing. [R.I. 122]. Mrs. Wells further stated that she thereafter agreed to marry Respondent because she could see changes in Respondent in taking time with her children, time spent with her and his work ethic. [R.I. 123]. Mrs. Wells also testified as to Respondent's love for the practice of law and his desire to again practice one day. [R.I. 125, 128, 129].

SUMMARY OF ARGUMENT

The abandonment of Respondent's practice was precipitated by a substance abuse problem brought on by personal problems, i.e., divorce and separation from his children and a failing law practice. Prior to the abandonment, Respondent enjoyed a good reputation with the bench, bar, and his clients as a competent trial lawyer. Since his arrest for D.U.I. and drug charges over two years ago, Respondent has remained drug free, has remarried and had a child and worked at a clearinghouse doing legal research. Moreover, Respondent has successfully complied with both misdemeanor and felony probation, including performing 300 hours of community service.

Based upon the referee finding seven mitigating factors, including absence of dishonest or selfish motive, and personal and emotional problems, the recommendation of an eighteen month suspension followed by two years probation is appropriate. This position is buttressed by the recent decisions of this court and the Standards For Imposing Lawyer Sanctions established by the Board of Governors of The Florida Bar discussed herein.

ARGUMENT

THE REFEREE WAS CORRECT IN RECOMMENDING AN EIGHTEEN MONTH RETROACTIVE SUSPENSION (TO THE DATE OF RESPONDENT'S FELONY SUSPENSION) FOLLOWED BY A TWO YEAR PERIOD OF PROBATION IN THE EVENT OF REINSTATEMENT WITH THE REQUIREMENT THAT RESPONDENT SUBMIT TO RANDOM DRUG SCREENINGS AND THAT RESPONDENT BE REQUIRED TO REPAY EACH CLIENT REFERENCED IN THE FLORIDA BAR'S COMPLAINT AS TO ANY FEES NOT EARNED.

The Complainant urges disbarment upon Respondent for the misconduct set forth in the nine count complaint, the allegations of which were deemed admitted.

The Referee, having the benefit of the Complainant's same plea for discipline, based upon the same reasoning in the case below, found an eighteen month suspension to be the appropriate discipline. It is the Complainant's burden "to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified". Rule 3-7.7(c)(5), Rules of Discipline, Rules Regulating The Florida Bar. However, Complainant has failed to meet this burden as disbarment is contrary to this Court's past decisions, the Florida Standards for Imposing Lawyer Sanctions, and the recently promulgated Standards for Imposing Lawyer Sanctions in Drug Cases. Moreover, the cases relied upon by the Complainant are clearly distinguishable from the case below.

Complainant cites The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986) and The Florida Bar v. Shuminer, 15 FLW S385 (Fla. July 5, 1990). The facts in the Knowles case are so dissimilar to the case at bar, Respondent wonders how the

Complainant comes to rely upon them. In Knowles, the accused attorney misappropriated to his own use, $197,900.00 of client funds. Knowles was subsequently charged with eight counts of grand theft, for which he was placed on probation and fined. Although the accused's alcoholism was used as a defense, the court did not see sufficient mitigation to avoid the extreme sanction of disbarment.

Additionally, the facts in Shuminer are comparably dissimilar to the facts established below. Shuminer misappropriated approximately $20,000.00 of clients funds, lied to clients about the status of their claims to conceal the thefts, and failed to satisfy doctor's liens on behalf of clients; instead utilizing the funds so earmarked for personal expenses. Remarkably, the offending attorney used one client's personal injury settlement to purchase a Jaguar automobile for himself. Although Shuminer pled alcohol and drug addiction as an excuse, the court found "he used a significant portion of the stolen funds not to support or conceal his addictions, but rather to purchase a luxury automobile". at S386. Accordingly, Shuminer was disbarred.

Even a cursory reading of Knowles and Shuminer reveal that the disbarment ordered in each case was predicated upon the theft of client funds. It is difficult to comprehend how the complainant draws a parallel between Knowles and Shuminer and the instant case insofar as the misconduct involved.

Respondent below was neither accused of, nor proven to have misappropriated any client funds. While Respondent admitted to utilizing funds earmarked for payment of court reporter costs in one case, for the benefit of a second client, such conduct can hardly be compared to the situations in Knowles and Shuminer. Respondent testified that he took depositions on behalf of a client, Debra Serrette who was charged with aggravated child abuse, [R.I. 115], with money which should have gone to pay Betty Lauria, a court reporter owed fees from a different case and client. While such conduct is clearly improper, and the Referee so found, it pales in comparison to nearly a $200,000.00 theft in Knowles, and buying a luxury car, inter alia, with client funds in Shuminer. Accordingly, Complainant's reliance on Knowles and Shuminer in seeking disbarment is misguided and unjustified.

Complainant also cites The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1983) wherein the accused attorney was disbarred for eight instances of violation of the Code of Professional Responsibility. The court felt the "cumulative demonstration of his acts" established he was unfit to practice law. at 220. Of critical note, the case does not recite the nature of the misconduct; does not set forth any mitigation and further, it is clear that Mavrides did not even make an appearance, and therefore, did not contest or defend against the charges. Nevertheless, Complainant feels Mavrides is similar to the case at bar.

Contrast this Court's ruling in The Florida Bar v. MacPherson, 534 So.2d 1156 (Fla. 1988). MacPherson like Respondent abandoned his practice. Such action, as here, caused harm to several clients. MacPherson also failed to return files and money to numerous clients.

In MacPherson, the referee and Court found the following mitigating factors; absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal and emotional problems, and remorse. In justifying the imposition of MacPherson's six month suspension followed by one year probation the court stated,

> Most importantly, the referee found that MacPherson acted without any dishonest or selfish motives. This recommendation and finding of mitigating circumstances distinguishes this cause from The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1983). . . at 1157.

The similarities between the facts in MacPherson and the case below are striking. Respondent basically abandoned his practice due to drug addiction and other personal problems. Such abandonment caused harm to several clients. Respondent, too, failed to return money to several clients and failed to return files to at least one client. The referee below found that Respondent had three more mitigating factors than did MacPherson. It is significant below that, as in MacPherson, the referee found that Respondent acted without any dishonest or selfish motive. This most important factor distinguished MacPherson from Mavrides as stated by the court, and logically must distinguish the case at bar from Mavrides as well.

Accordingly, Complainant's reliance on Mavrides cannot withstand scrutiny.

While Respondent was found guilty of each of the nine counts alleged by the Complainant, substantial mitigation testimony was presented on Respondent's behalf. As noted by the Referee in his report, Circuit Judge Manuel Menendez testified that Respondent did a very good job as an assistant state attorney and criminal defense lawyer prior to the drug problem causing Mr. Wells judgment to be impaired. [R.I. 12]. Attorney Ricky Williams also testified that Respondent was a highly competent, well prepared, aggressive and determined trial lawyer. [R.I. 64]. George Robinson, a former DACCO drug therapist indicated the Respondent had a positive attitude concerning his drug problem and that Respondent was a good candidate for recovery. [R.I. 112]. Additionally, Joe Murphy, Esquire, a monitor for Florida Lawyers Assistance, Inc., testified concerning Respondent's participation with the F.L.A., Inc., program. Mr. Murphy indicated the Respondent's attitude was very good and that Respondent had attended 90 meetings in 90 days. [R.I. 90, 91]. Mr. Murphy further testified that Respondent's prognosis for handling his drug problem is good. [R.I. 91].

Moreover, the Respondent's wife testified as to Respondent's rehabilitation efforts and Reverand Abe Brown, the organizer of the Prison Crusade testified well of the Respondent's character and of his assistance in the Youth

Outreach Program. [R.I. 100, 101]. Most important, it is clear Respondent has remained drug free for a period of 21 months at the time of the hearing before the Referee. (Report of Referee at 13). It is also clear that Respondent, at the time of the Referee hearing in May, 1990 had completed nearly 150 hours of community service towards his felony probation, [R.II. 19], in addition to the 126 hours performed towards his misdemeanor probation. [R.I. 165, 166].

Despite the torrent of mitigation evidence, Complainant still maintains disbarment is the appropriate discipline. This insistence seems to be based upon a series of facts the Complainant finds to be disqualifying. First, Complainant finds fault with Respondent's failure to pay back to clients any fees not earned, and the failure to pay back money borrowed from Mr. Davis. While Complainant suggests that this failure to repay is indicative of a character flaw requiring disbarment, Respondent would respectfully submit that his failure to pay is more indicative of financial inability. The record supports our contention.

Since attempting to reform and rehabilitate himself, Respondent has remarried and had a child [R.I. 163]; has a child support obligation to his children by his ex-wife [R.I. 171]; worked two jobs at times, including bagging groceries at a supermarket; [R.I. 14, 169], has had difficulty paying supervision costs to his probation officer [R.I. 32]; and has performed nearly 300 hours of community service; 76 hours of

which were performed because Respondent could not pay a fine of $385.00 towards his misdemeanor charge. [R.I. 165]. Such a scenario does not depict a man unwilling to pay, indeed, Respondent has indicated a desire to repay those owed. [R.I. 160]. Respondent has simply not yet had the ability to pay these obligations.

Complainant further finds fault with Respondent questioning and criticizing the work of an assistant state attorney and HRS in separate investigations. [Comp. Br. at 29, 30]. This, in the words of Complainant, exhibits in Respondent an unacceptable attitude towards "rules, requirements and authority". It is hard to fathom that Respondent's characterization of he and his wife as "victims", of what he perceived to be an unwarranted HRS investigation, constitutes an unacceptable attitude towards authority. Moreover, we suggest that Respondent's disapproval of an assistant state attorney's decision to treat an aggravated assault as a "domestic dispute" does not demonstrate any problem with accepting authority. The Complainant appears to be stating that questioning the acts and decisions of state employees is a privilege one relinquishes upon becoming a lawyer. Respondent hopes that such a narrow view is not widely held.

Complainant also feels the fact that Respondent used drugs over a substantial period of time is somehow aggravating. However, Complainant cites no case to support this proposition and the Florida Standards for Imposing Sanctions in Drug Cases

makes no such distinction. Nevertheless, it is important to note that Respondent's period of drug abuse, to the point of disrupting his life and practice, spanned a relatively short period.

The Referee properly considered both the Florida Standards for Imposing Lawyer Sanctions and the Standards for Imposing Lawyer Sanctions in Drug Cases in arriving at his recommendation. [Report of Referee at 14]. The Standards for Imposing Lawyer Sanctions in Drug Cases promulgated by the Board of Governors of The Florida Bar, read in pertinent part:

> 3. Absent the existence of aggravating factors, the appropriate discipline for an attorney found guilty of felonious conduct as defined by Florida State law involving the personal use and/or possession of a controlled substance who has sought and obtained assistance from F.L.A., Inc., or a treatment program approved by F.L.A., Inc., as described in paragraph one above, would be as follows:
>
> (a) A suspension from the practice of law for a period of 91 days or 90 days if rehabilitation has been proven; and
>
> (b) A three-year period of probation subject to possible early termination or extension of said probation, with a condition that the attorney enter into a rehabilitation contract with F.L.A., Inc. prior to reinstatement.

Obviously, since other Rule violations were involved the Respondent does not now, nor has he ever suggested that a 90 or 91 day suspension is appropriate. However, given Respondent's treatment in a rehabilitation center, successful participation in F.L.A., Inc., and favorable random drug screenings for the past two years, [R.I. 49], it is obvious that absent other

violations, Respondent would be eligible for and deserving of a 90 day suspension. Moreover, it is clear from recent decisions of this court that felony use of drugs will often result in a 90 day suspension. The Florida Bar v. Franke, 548 So.2d 1119 (Fla. 1989); The Florida Bar v. Weintraub, 528 So.2d 367 (Fla. 1988).

However, as Respondent acknowledges other violations, a suspension in excess of 90 days is warranted. In considering what period of suspension is appropriate, the Referee found the following mitigating factors, as set forth in Standard 9.3 of the Florida Standards for Imposing Lawyer Sanctions, to be present; personal and emotional problems, absence of dishonest or selfish motives, inexperience in the practice of law, character and reputation, interim rehabilitation, imposition of other penalties, and remorse shown by Respondent. [Report of Referee at 14].

This court has previously dealt with almost identical facts in The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987). In Sommers, the accused attorney was charged with 12 counts of misconduct in three complaints brought by The Florida Bar. One eight-count complaint alleged failure to perform legal work in a timely fashion. A second three-count complaint alleged neglect of legal matters, and the last complaint was a one-count complaint alleging insufficient accounting and record keeping. Sommers was found guilty on all counts, but one, (failure to timely perform work). The referee and court found

that Sommers misconduct was related to an unspecified substance abuse problem. Moreover, prior to the hearing, Sommers was treated residentially for his problem.

In Sommers, this court found

"[the evidence in this case showing numerous counts of client neglect, depicts a practitioner who allowed his law practice to deteriorate rapidly into a state of disarray and disorder. If there were not the debilitating effect of chemical dependency or some other cause as an explanation, the level of client neglect shown would call into question a person's fitness for the practice of law." at 343.

Considering the effects the addiction had upon the demise of Sommer's practice, the court suspended Sommers for ninety days and placed him on three years probation, required restitution to clients and further ordered Sommers' participation in F.L.A., Inc.

The case below, from a factual standpoint is virtually a mirror-image of the Sommers case. Here, Respondent was found guilty of nine counts of misconduct, most of which related to neglect or failure to timely perform services. Additionally, the testimony clearly established that Respondent's problems in performing legal services were related to his substance abuse problems as shown through the testimony of the Honorable Manuel Menendez, Ricky Williams, and the Respondent.

As in Sommers, not only has Respondent completed a residential drug treatment program, [R.I. 122, 151], but he has additionally participated in F.L.A., Inc. since January, 1990. [R.I. 86].

Respondent acknowledges that both misdemeanor and felony charges are present here, and are not present in Sommers. However, such a distinction should not elevate the appropriate discipline to disbarment. Even the Board of Governors in their Standards for Imposing Sanctions in Drug Cases refer only to "felonious conduct" . . . involving personal use and/or possession of a controlled substance". . . (Florida Bar Journal, 1990 at 123). In these standards there is no regard given to the fact of prosecution or conviction.

In all other respects, the Sommers and MacPherson cases cited below are comparable from a factual and mitigation standpoint. Therefore, the Referee was palpably correct in his recommendation of an eighteen month suspension and two year probation in the event of proof of rehabilitation at a reinstatement hearing. Moreover, the recommendation of requiring repayment to any client owed and random drug screenings is equally appropriate.

The well-settled rule of this court is that in disciplinary cases three purposes must be kept in mind. As this court stated in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

> 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.

Disbarment would not be fair to Respondent, nor encourage further reformation and rehabilitation. The referee's recommendation should be approved.

CONCLUSION

Respondent, although guilty of numerous counts of misconduct, has shown a two year period of interim rehabilitation. Additionally, prior to his personal and emotional problems, Respondent was a competent, hardworking attorney. Given the absence of any dishonest or selfish motive and the recent decisions of this Court, it is clear that an eighteen month suspension followed by a two year probation period, in the event Respondent can prove his rehabilitation, is a fair, but not lenient discipline.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 19 day of December, 1990, to: Thomas E. DeBerg, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607.

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