IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ALFRED S. WELLS,

Respondent.

_____/

Case No. 74,320
TFB Nos. 88-10,149(13E)
88-10,506(13E)
88-10,685(13E)
88-10,869(13E)
88-10,911(13E)
88-11,497(13E)
88-11,538(13E)
89-10,992(13E)
89-10,123(13E)

THE FLORIDA BAR'S INTITIAL 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, ALFRED S. WELLS, will be referred to as "The Respondent." "C" will denote the Complainant. "RR" will denote the Report of Referee in the instant case. "RR2" will denote the Report of Referee in The Florida Bar v. Wells, Supreme Court Case No. 71,927 (March 2, 1989). "RA" will denote the Request for Admissions and Order Deeming Matters Admitted. "TR" will denote the transcript of Referee proceedings in the instant case on April 6, 1990. "TR2" denotes the transcript of Referee proceedings in the instant case on May 18, 1990.

STATEMENT OF THE FACTS AND OF THE CASE

Client complaints to The Florida Bar against Respondent arose out of misconduct beginning at least by late 1986 or early 1987. In 1986, Respondent was appointed by a United States Magistrate to represent Jerry L. Cook regarding a Petition for a Writ of Habeas Corpus. (RR, p.3). In March, 1982, Mr. Cook had been convicted of bank robbery. In approximately July, 1986, Mr. Cook gave the Respondent all of his legal papers pertaining to the Writ. (RA, para.13). On December 8, 1986, Respondent was instructed by the Court to file a brief by January 17, 1987 regarding the Petition. (RR, p.13). Respondent failed to submit the requested brief by the time specified. (RR, p.3). Thereafter, Mr. Cook's wife contacted the Respondent by telephone to inquire into the status of the Petition. On several occasions, the Respondent told Mrs. Cook to come to his law office to obtain the brief, but repeatedly Respondent failed to provide it to her. (RA, para.16-18).

From approximately January, 1987 to August, 1987, Mrs. Cook attempted to communicate with the Respondent but was unable to do so because the Respondent had moved his law office and changed his telephone number without advising his client or Mrs. Cook. RA, para.19,20). Mrs. Cook did, subsequently, obtain Respondent's new address through the Magistrate's office and

contacted Respondent. At that time, she requested that all legal papers pertaining to her husband's case be returned to her. Respondent failed to return the papers. (RA, para.21-23). On August 25, 1987, Respondent was contacted by the staff of the U.S. District Court regarding his failure to file the brief as directed. Respondent assured the Court that his brief would be filed within one (1) week. (RA, para.24-25). Nevertheless, he once again failed to file the brief within the prescribed period of time. (RA, para.26). Respondent was contacted again by the Court on about September 15, 1987 regarding his failure to file the brief. (RA, para.27). On October 9, 1987, the Court filed an Order directing the Respondent to submit the brief no later than October 23, 1987; Respondent did file the brief prior to the October deadline. (RR, p.3). Thereafter, Mr. Cook retained other counsel to represent him. On several occasions, Mr. Cook's new counsel advised Respondent that he required Mr. Cook's legal papers, but Respondent did not provide them to Mr. Cook, nor to his new counsel. (RA, para.30-34). The Respondent testified in the Bar proceeding that he let his personal feelings toward Mr. Cook influence him (RR, p.3), and that after Mr. Cook made a "totally false" allegation about Respondent, Respondent absolutely refused to do anything for Mr. and Mrs. Cook, including giving files to Mrs. Cook. (TR, p.2, 1.53; 1.10-16).

Based on the foregoing, Respondent was found by the Referee

to have violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information); Rule 4-1.15(b) (a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); Rule 4-1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest); and Rule 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). (RR, p.4).

In an adoption case undertaken by Respondent, he abandoned his client. In November, 1986, Respondent was retained by Bernie Mae Reid to represent her in her efforts to adopt her grandchildren. (RR, p.7). Respondent testified that Ms. Reid is an elderly black lady with very meager means and very little education. (TR, p.156, 1.17-21). Respondent was paid a $50.00 retainer by Ms. Reid on November 12, 1986 and in February, 1987, Ms. Reid paid an additional $250.00, which had been requested by Respondent. (RR, p.7). Ms. Reid provided Respondent with the birth certificates of her grandchildren. Thereafter, she attempted on several occasions to contact Respondent, and she

left messages with the Respondent's secretary. Respondent failed to return any of Ms. Reid's phone calls. Ms. Reid did succeed in contacting Respondent at his law office, and she was assured that the adoption papers would be filed. However, Respondent failed to file the adoption papers. (RA, para.45-50). Respondent testified that there were problems getting things done, the case dragged on, things began going bad for the Respondent, and he and Ms. Reid "drifted apart." (TR, p.156, 1.17-21). He further testified that there were several miscommunications. (TR, p.157, 1.1-3). Even though Respondent did not follow through with the adoption, at no time has Respondent returned any unearned fees to Ms. Reid. (RA, para. 51). Respondent claimed that his failure to act diligently related to his drug use. (TR, p.157, 1.7-10). In the Reid count, the Referee found that the Respondent violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 4-1.15(b) (a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); Rule 4-1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as

refunding any advance payment of fee that has not been earned); and Rule 5-1.1, Rules Regulating Trust Accounts (money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, shall be held in trust and must be applied only to that purpose). (RR, p.8).

Another client affected by Respondent's abandonment of his practice is Mary Thompson. In January, 1987, Respondent was retained by Mary Thompson to represent her in a probate matter. (RA, para.63). Respondent testified that he thought the case was a simple estate matter about which he could educate himself, but that problems arose which hindered his ability to handle it effectively. (TR, p.143, l.17-25). Respondent made several appointments with Ms. Thompson for her to come to his office, but he failed to keep those appointments. Ms. Thompson at times waited for Respondent outside his law office because that office was closed and locked. She attempted to communicate with him by telephone on numerous occasions and left messages, but Respondent failed to return any of the phone calls. (RA, para.65-68). Ms. Thompson specifically asked Respondent whether there were any liens on the estate, and Respondent failed to advise her that, in fact, there was a lien. (RA, para.69-70). In January, 1988, Respondent failed to attend a court hearing in the probate matter and, consequently, Ms. Thompson requested that all of her legal documents in the possession of the Respondent be returned to her.

(RA, para. 71-72). Respondent failed to comply with the requests. (RA, para.73). The period of neglect and failure to follow through in the Thompson matter extended over approximately one (1) year. Respondent testified that his drug use did not affect his ability to help Ms. Thompson, other than through an erosion of his character. (TR, p.144, l.1-15).

Based on the foregoing, the Referee found Respondent violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 4-1.15(b) (a lawyer shall promptly deliver to a client or third person any funds or other property that the client or third person is entitled to receive, and upon request by the client or third person, shall promptly render a full accounting regarding such property); and Rule 4-1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest). (RR, p.9-10).

In July, 1987, Respondent was retained by Lloyd Davis for representation in a worker's compensation case. Respondent, as attorney for Mr. Davis, was sent two (2) checks from Transamerica Company, one for $15,000.00 and one for $12,000.00. (RA,

para.75-77). At some point, either concurrent with the distribution of these checks to Mr. Davis or thereafter, Respondent states that he borrowed $1,000.00 from Mr. Davis. (TR, p.159, l.5-7). Respondent testified that it was a non interest loan, granted to him by Mr. Davis pursuant to an earlier agreement that the loan would be made if the case was handled expeditiously. (TR, p.159, l.5-7; TR2, p.7, l.1-4). Subsequently, Mr. Davis attempted to contact Respondent to inquire why he had not been paid back the $1,000.00 (or $1,500.00), but Mr. Davis was unable to contact Respondent, who had changed his telephone number without advising Mr. Davis. (RA, p.85-86). When Mr. Davis eventually contacted Respondent at his law office and asked why the money had not been repaid, Respondent advised Mr. Davis that he did not, at that time, have the money available. (RA, para.87-88). Respondent testified at the disciplinary phase of the Referee hearing that he had not yet attempted to contact Mr. Davis to resolve this debt. (TR2, p.7, l.21-24). It was approximately two (2) years and eight (8) months from the time that the non-interest loan was obtained to the date of the final hearing. Respondent commented at the final hearing that he was not aware that the loan was any particular kind of violation, but that he would not do it again. (TR, p.159, l.5-13). He indicated that he would pay Mr. Davis "sooner or later." (TR, p.160, l.4-5).

Pursuant to the foregoing, the Referee found that Respondent violated Rule 4-1.15(b) (failure to promptly deliver to a client funds or property to which he is entitled), and Rule 4-8.4(a) (violating Rules of Professional Conduct). (RR, p.10).

In August, 1987, Respondent was retained by Ronald Zito for representation in a foreclosure and bankruptcy, and was paid $350.00. (RA, para.90-91). Respondent advised Mr. Zito that a Chapter 13 Bankruptcy should be filed before the foreclosure was finalized, and it was agreed that Respondent would do so. (RA, para.92-93). A final judgment foreclosing Mr. Zito's home was entered by the Court on August 27, 1987; Respondent did not file the Chapter 13 Bankruptcy petition until October 2, 1987. (RA, para.94-95). Notice of the Chapter 13 Bankruptcy proceeding was not sent out until November 16, 1987. (RA, para.96). Mr. Zito's home was foreclosed on. (RA, para.97). Respondent failed to keep Mr. Zito advised as to hearing dates in Mr. Zito's case, and in December, 1987, Respondent failed to attend a hearing regarding the Zito bankruptcy case. (RA, para.98,99). Between approximately January, 1988 and November, 1988, Mr. Zito attempted to communicate with Respondent but was unable to do so because Respondent had moved his office and changed his telephone number without advising Mr. Zito. (RA, para.100).

Based on the foregoing, Respondent violated the following Rules of Professional Conduct; Rule 4-1.3 (a lawyer shall act

with reasonable diligence and promptness in representing a client); Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter); and Rule 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). (RR, p.11).

Respondent's misconduct also involved violations of Rules governing trust accounting procedures, and misuse of trust funds. On or about May 15, 1987, Respondent wrote a check on his client trust account for $1,121.70 to Betty Lauria, a court reporting service, for deposition costs. (RR, p.4). The check was returned by the bank due to insufficient funds. (RR, p.4). Respondent testified that he had used trust money which should have gone to Betty Lauria to take depositions in the Debra Surette case. (TR, p.154, l.19-25 & p.155, l.1-7). Respondent indicated that he knew that using the trust money was wrong, but stated, "I honestly thought that it would be covered, and I just hoped that I could break the rules and not get caught. I wasn't smart enough to even cheat right." (TR, p.155, l.1-10). Betty Lauria subsequently sued Respondent for $1,121.70, and that action was settled shortly before final hearing in this matter by Respondent paying the majority of the amount owed.

Based on the foregoing, the Referee found the Respondent violated the following Rules of Professional Conduct: Rule 5-1.1(b), Rules Regulating Trust Accounts (Rule 11.02(4)(b)

before January 1, 1987), (the records of all accounts pertaining to the funds or property of a client shall be maintained for a period of not less than six years subsequent to the final conclusion of the representation of a client relative to such funds or property); Rule 5-1.2(b)(2) (Bylaws Section 11.02(4)(c)2.b. before January 1, 1987) (original or duplicate deposit slips clearly identifying the date and source of all trust funds received, and the client or matter for which the funds were received, shall be maintained by the attorney); Rule 5-1.2(b)(3) (Bylaws Section 11.02(4)(c)2.c. before January 1, 1987) (original cancelled checks shall be maintained by the attorney); Rule 5-1.2(b)(5) (Bylaws Section 11.02(4)(c)2.e. before January 1, 1987) (a separate cash receipts and disbursements journal shall be maintained by the attorney); Rule 5-1.2(b)(6) (Bylaws Section 11.02(4)(c)2.f. before January 1, 1987) (a separate file or ledger with an individual card or page for each client or matter shall be maintained by the attorney); Rule 5-1.2(b)(7) (Bylaws Section 11.02(4)(c)2.g. before January 1, 1987) (all bank or savings and loan association statements for all trust accounts shall be maintained by the attorney); Rule 5-1.2(c)(1) (Bylaws Section 11.02(4)(c)3.a. before January 1, 1987) (monthly reconciliations of all trust accounts, disclosing the balance per bank, deposits in transit, outstanding checks, and any other items necessary to reconcile the balance per bank

with the balance per checkbook, and the cash receipt and disbursements journal, and a comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards, together with specific descriptions of any differences between the two totals and the reasons therefore, shall be made by the attorney); Rule 5-1.2(c)(2) (Bylaws Section 11.02(4)(c)3.b. before January 1, 1987) (at least annually, a detailed listing identifying the balance of the unexpended trust money held for each client or matter shall be made by the attorney); Rule 5-1.2(c)(3) (Bylaws Section 11.02(c)3.c. before January 1, 1987); (the reconciliations, comparisons, and listings shall be retained for at least six (6) years by the attorney); Rule 5-1.2(c)(4) (Bylaws Section 11.02(4)(c)3.d. before January 1, 1987 (a lawyer shall authorize and request any bank or savings and loan association where he is a signatory on a trust account to notify Staff Counsel, The Florida Bar, in the event any trust check is returned due to insufficient funds or uncollected funds, absent bank error); Rule 4-1.15(d), Rules of Professional Conduct (a lawyer shall comply with The Florida Bar Rules Regulating Trust Accounts. (RR, p.5-7).

In November, 1987, Respondent filed for an uncontested divorce on behalf of Leando Francis. (RA, para.53). Following a hearing in the matter, he assured Mr. Francis that he would advise him of the outcome of the hearing. (RA, para.56-57). From July, 1988

through November, 1988, Mr. Francis attempted to contact Respondent to discover the outcome of the hearing, but Mr. Francis was unable to reach the Respondent because the Respondent had moved his office and changed his phone number without advising Mr. Francis. (RA, para.58-60). Respondent testified that he did file for the dissolution, but that he did not follow through. (TR, p.158, l.5-7). Respondent further testified that he does not know if or when Mr. Francis' marriage was dissolved. (TR, p.158, l.8-9).

Based on the foregoing, the Referee found that the Respondent violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); and Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information). (RR, p.9).

In approximately February, 1988, Respondent was retained by Darrold Hunter to represent him in two (2) criminal cases involving possession and delivery of cocaine. (RA, para.1; TR2, p.4, l.22-25; TR2, p.3, l.1-2). Respondent failed to appear at the trial held on May 31, 1988, although still attorney of record, and did not notify the presiding Judge, the Clerk's Office, or State Attorney's Office that he would be unable to be present. (RA, para.2-4). Respondent had not engaged in discovery

on behalf of Mr. Hunter, had not taken depositions, and had no client contact. (RA, para.8-9). On April 7, 1988, Respondent had been arrested for DUI. (TR, p.19, l.10-25 & p.20, l.1-12). At that time, he had been using cocaine (TR, p.20, l.1-3), and was in possession of a pipe which contained traces of cocaine. (TR, p.19, l.16-25; TR, p.1, l.1-3). On May 20, 1988, a second pipe with traces of cocaine was found in Respondent's possession. By May 31, 1988, the day of Mr. Hunter's trial, the Respondent had entered the PAR Program, seeking assistance for his drug and/or alcohol problems. (TR, p.151, l.6-11). At the trial scheduled for May 31, 1988, due to the Respondent's absence, an Assistant Public Defender was appointed to represent Mr. Hunter. (RA, para.6-7). Respondent testified that he had completely forgotten about the trial date. (TR, p.151, l.17-18).

For his conduct in representing Mr. Hunter, Respondent was found to have violated the following Rules of Professional Conduct: Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest); and Rule 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). (RR, p.2-3).

On April 7, 1988, Respondent was arrested on a charge of

driving under the influence of alcohol. (RR, p.11). A search of the Respondent's car conducted at that time led to the discovery of a pipe which contained traces of cocaine residue. (RR, p.11). On May 20, 1988, Respondent was arrested, pursuant to a warrant issued based on testing of the pipe confiscated on April 7, 1988. At the time of the arrest, Respondent was again found to be in possession of a pipe containing cocaine residue. (RR, p.12). In June, 1988, the State Attorney's Office filed an Information charging Respondent with possession of cocaine and possession of controlled substance paraphernalia related to the April 7, 1988 incident. In September, 1988, an Information charging similar violations was filed against Respondent based on the May 20, 1988 occurrence. On November 14, 1988, Respondent entered a plea of no contest to the felony charges. (RA, para.102). He was placed on probation for five (5) years, beginning on December 21, 1988, and adjudication was withheld. (Respondent's Exhibit 2).

Based on the foregoing, Respondent was found to have violated the following Rules of Professional Conduct; Rule 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects). (RR, p.12).

Respondent began experimenting with drugs during his second year of law school. (TR, p.135, l.25; p.136, l.1). Shortly after passing the Bar examination in 1982, he began working for the

State Attorney's Office, graduating to the felony division after just nine (9) months. (TR, p.137, l.2-8). Respondent remained at the State Attorney's Office until January 1986. (TR, p.138, l.20-21). He used drugs while working as an Assistant State Attorney, with his use escalating through 1985, when Respondent became a regular (weekly) user. (TR, p.141, l.12-24). Although abusing drugs regularly, Respondent had sufficient control over his use to restrict it to weekends. (TR, p.141, l.15-24). In January 1986, Respondent left the State Attorney's Office and went into private practice, opening up his own office as a sole practitioner. (TR, p.10, l.2-18). By mid to late 1987, Respondent's drug use was clearly affecting his practice (TR, p.142, l.2-6), but although he was chronically late, he still was thoroughly prepared for trials. (TR, p.142, l.7-12).

Respondent's first brush with the law over drug use occurred as early as April or May 1986. After ingesting cocaine with a female companion in a hotel room, Respondent became violent and began damaging the room. (RR2, p.1). His female companion became alarmed and called the police, but by the time they came, the Respondent had disposed of the cocaine. Id. Respondent was not arrested, but later confided to the Tampa Police Department regarding his drug use. (RR2, p.2).

At the final hearing in the instant case, held on April 6, 1990, Judge Manuel Menendez, Circuit Judge for the Thirteenth

Judicial Circuit, testified that Respondent had done a very good job representing his clients, and had been helpful and friendly (TR, p.12, l.18-20) until sometime in late '86 or early '87 when he changed. (TR, p.15, l.6-14). In his opinion, Respondent then became belligerent, arrogant at times, argumentative and aggressive. (TR, p.12, l.19-22). However, he also noted, Respondent certainly knew the difference between right and wrong during this time. (TR, p.17, l.2-7).

He observed that Respondent now seems to have changed for the better, to the old Alfred Wells the Judge first met, (TR, p.13, l.19-24) and could be a productive member of The Florida Bar if he continues to not allow himself to destroy his own life with cocaine. (TR, p.14, l.10-14). The old Alfred Wells the Judge first met was using drugs.

Respondent has been on probation for the possession of cocaine since December 21, 1988. He has complied with most conditions of probation, including participation in treatment programs for substance abusers, and completion of many hours of required community service. Community service hours for the State were to begin on approximately February 1, 1989 and Respondent was advised by his probation officer that he would have to provide written proof of hours of service. (TR, p.37, l.15-25; TR, p.38, l.1-2). When Respondent presented a tape as evidence of compliance, he was reminded of the requirement of

written proof, and told to submit it by May 10, 1989. (TR, p.38, 1.3-9). He failed to meet the May 10th deadline, so on August 2nd he was again reminded of the need for bringing in the community service papers. He was also reminded on October 26th, because of his continuing failure. When his first probation officer left the Department of Probation and Parole on January 4, 1990, Respondent had not yet submitted the requested documents. (TR, p.38, 1.3-25). His initial probation officer testified that although Respondent is a very strong headed and arrogant man, and did not do everything he was asked to do, he was cooperative and easy to work with. (TR, p.36, 1.7-15). Those things which he failed to do were primarily the reporting requirements. The first probation officer, did not believe that Respondent was lying about hours of community service he claimed he had performed, but indicated the fifty (50) hours of community service he did report did not satisfy the requirement set down by the State of Florida. (TR, p.43, 1.2-16). Respondent had completed those hours as part of his requirement for his misdemeanor probation community service hours. Id.

In late January or February, 1990, Respondent was assigned a new probation officer. (TR, p.53, 1.20-23). She also noted that Respondent complied with the majority of his conditions of probation (TR, p.55, 1.5-6), but he was having difficulty complying with the community service hour requirement, and

therefore the requirements were ultimately modified. (TR, p.58, 1.21-23). Respondent initially brought his new probation officer a tape to show he had done some community service hours, but the written document provided to show compliance was not submitted. (TR, p.57, 1.9-14). The appropriate community service form was finally brought in by Respondent some time after March 28, 1990. (TR, p.57, 1.19-24), about two (2) weeks before the Referee hearing in the instant case. Overall, however, the probation officer felt Respondent was cooperative. (TR, p.58, 1.17-20). Respondent stated that although once he may not have fully complied with the community service hours, when he realized the seriousness of all the requirements, he did not want to get arrested so in 1990 he took four (4) days off work to complete the hours. (TR, p.166, 1.21-25); TR, p.167, 1.1-10).

Respondent has apparently been participating in the Florida Lawyer's Assistance Program very well, at least from January through March, 1990, (TR, p.86, 1.7-10; & p.90, 1.1-13; & p.91, 1.9-18), and his monitor for the three (3) month period opines that the prognosis for someone with a cocaine problem is excellent if he involves himself in either Alcoholics Anonymous or Narcotics Anonymous (TR, p.3, 1.18-23). The monitor added that he certainly could not assure the Court that Respondent was committed to the program, because only the Respondent can do that. (TR, p.94, 1.16-20). He did not comment directly on

Respondent's prognosis. He did feel Respondent had certainly changed since two (2) or three (3) years previously. (TR, p.96, 1.2-10).

Reverend Brown, Respondent's former neighbor and an organizer of an outreach program to deal with community problems (TR, p.97, 1.22-24; TR, p.99, 1.8-9) has observed Respondent when Respondent worked as a counselor in his program. (TR, p.101, 1.9-19). He feels Respondent is sincere, has put the drug problem behind him, and can become a productive member of society again. (TR, p.103, 1.5-13).

In his testimony about personal matters contributing to his problems, Respondent stated that his current wife's ex-husband had once pulled a gun on him, and he reported the incident to the State Attorneys Office. However, the attorney reviewing the case decided it was a domestic dispute, and "I (Respondent) have yet to go over and spit on his (the Assistant State Attorney's) lawn." (TR, p.167, 1.13-19). In describing an August, 1986 H.R.S. investigation of child abuse allegations, he states that we (Mrs. Myrick and Respondent) were "victims" of an investigation. (TR, p.168, 1.18-20). The investigation occurred during the time he says he was a regular user of cocaine.

Random drug screenings and testimony of witnesses support the Respondent's claim that he had been drug free for twenty-one (21) months by the time of the final hearing. (RR, p.13).

The Referee recommended that Respondent be suspended for eighteen (18) months, retroactive to the date of his felony suspension on February 14, 1989. He also recommended that Respondent be placed on two (2) years probation following reinstatement, during which he would be required to submit to random drug screenings; that he repay the $1,500.00 borrowed from Mr. Davis; that he repay the amounts of retainers not earned in applicable cases; and that he pay costs taxed against him in the disciplinary case. (RR, p.14-15).

The Florida Bar Board of Governors, having reviewed the Report of Referee and a summary of testimony, voted to seek disbarment in this matter.

SUMMARY OF ARGUMENT

Respondent has demonstrated, over a prolonged period, his disregard for his obligations to clients, and his duty to obey the law and to comply with rules and regulations governing his conduct.

Respondent has been using illegal drugs since his second year in law school , and continued recreational use even while he was an Assistant State Attorney, sworn to uphold and enforce the laws of the State of Florida. In 1985, after years of recreational drug use, he became a "regular" user. He was eventually found guilty of driving under the influence of alcohol, possession of cocaine on two (2) different occasions, and consequently sentenced to five (5) years probation. Even before his arrest, he had escaped another probable possession charge only by destroying incriminating evidence.

While in private practice, Respondent abandoned several clients' cases, and eventually abandoned his practice without notice to clients and without protecting his clients' interests. He intentionally misapplied client trust funds because he thought he could get away with it. He refused to cooperate with at least one client and his attorney because he was angry at the client, At the time of the final hearing in the instant case, he still had not taken any steps to ameliorate the difficulties created by his abandonment of his practice, nor did he contact directly or

through an intermediary those former clients to whom he owed reimbursement of unearned legal fees to at least advise them that those fees would eventually be repaid.

His failure to fully meet his responsibilities, and tendency to blame others for his difficulties, persists even though he probably has been drug free for about twenty-one (21) months. This is evidenced by his repeated failure to provide his probation officer with written proof of compliance with community service hours in spite of numerous reminders. His hostility towards those who disagree with him or question his conduct peers out from behind his superficially pleasant demeanor in spite of his efforts to conceal it. He stated at the final hearing that he had yet to go over and spit on the lawn of an Assistant State Attorney who did not prosecute a complaint he filed with the State Attorney's Office; he called his current wife and himself " victims" of an H.R.S. investigation even though at the time of the investigation he was involved in cocaine abuse.

Respondent's rehabilitation (abstaining from the use of illegal substances for the past twenty-one (21) months) has not resulted in a sufficient correction of the underlying attitude which led to the Respondent's problems with the law and the damage to his clients.

The combination of Respondent's use of illegal substances,

abandonment of practice, harm to clients, and failure to make attempts to correct the difficulties he has created, dictates that Respondent be disbarred.

Therefore, The Florida Bar respectfully requests that this Court disapprove the Referee's recommendation of an eighteen (18) month suspension retroactive to the date of Respondent's felony suspension, along with its associates conditions, and order that the Respondent be disbarred from the practice of law in the State of Florida.

ARGUMENT

ISSUE: WHETHER AN EIGHTEEN (18) MONTH SUSPENSION, RETROACTIVE TO RESPONDENT'S FELONY SUSPENSION, TO BE FOLLOWED BY A TWO (2) YEAR PERIOD OF PROBATION WITH DRUG TESTING, IS AN INSUFFICIENT DISCIPLINARY SANCTION FOR AN ATTORNEY WHO ABANDONS HIS PRACTICE, KNOWINGLY MISAPPLIES CLIENT TRUST FUNDS BECAUSE HE FEELS HE CAN GET AWAY WITH IT, USES DRUGS RECREATIONALLY WHILE A LAW STUDENT AND A STATE ATTORNEY, HAS BEEN CONVICTED ON TWO (2) COUNTS OF POSSESSION OF COCAINE AND ONE COUNT OF DRIVING UNDER THE INFLUENCE OF ALCOHOL, WHO AVOIDED A THIRD PROBABLE ARREST FOR POSSESSION BY DESTROYING EVIDENCE, ALTHOUGH THE ATTORNEY IS PARTICIPATING IN A REHABILITATION PROGRAM AND APPEARS TO HAVE BEEN DRUG FREE FOR TWENTY-ONE (21) MONTHS.

Impairment due to addiction does not provide sufficient mitigation in the instant case to warrant a discipline less than disbarment, nor does Respondent's drug rehabilitation. In both The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986), and The Florida Bar v. Shuminer, Florida Supreme Court Case No. 72,886 (July 5, 1990), the Court found that the addictions of the Respondents did not rise to a sufficient level of impairment to outweigh the seriousness of the offenses which occurred. In Shuminer and Knowles, the Respondents had misappropriated client money, and the Court noted that stealing from a client must be among the higher priority of offenses for which lawyers may be disciplined. Shuminer was disbarred for a period of five (5) years, after which he might petition for reinstatement, at which time he would be required to submit proof of alcohol and drug

rehabilitation. It was found that Shuminer had shown remorse which the Referee felt to be genuine, that he was productively and successfully involved in a rehabilitation program for over one (1) year, that he was clearly mentally impaired due to his addiction, his reputation and character were good as testified to by two (2) judges, his experience in the practice of law was only one (1) year, he cooperated with The Bar in the probable cause hearing, and he had made a good faith effort to make restitution to all clients. Id. at 2-3.

Although Shuminer and Knowles can be distinguished from the instant case on major points (lack of theft by Respondent in the instant case and impact of drug abuse on Respondent's practice), the basic principle still applies.

Respondent's impairment does not rise to a sufficient level to outweigh the seriousness of his conduct. Respondent testified that during at least part of the time during which he neglected cases, he was able to thoroughly prepare his cases and never had to ask for a continuance. (TR, p.142, l.7-12). This testimony was supported by Respondent's current wife, who indicated that, Respondent retained his ability to function well in Court. (TR, p.130, l.16-23). Further, according to the testimony of Judge Menendez, the Respondent knew the difference between right and wrong even after his moods began to change due to drug abuse. (TR, p.17, l.19-22). Respondent functioned well as an attorney

when he had to. The Respondent's capacity to prepare his cases, think logically and rationally, and to understand the difference between right and wrong was not so diminished that he should not be held fully responsible for his actions.

At least some of Respondent's misconduct was based on deliberate, conscious decisions. For example, Respondent did not return legal documents to Mrs. Cook, a client's wife, nor to his client's new counsel, because he let his personal feelings towards Mr. Cook influence him. (RR, p.3; TR, p.153, l.10-16). He was angry at his client, so he violated his client's rights. In the Davis case, Respondent obtained a $1,000.00 or $1,500.00 non-interest loan from his client, pursuant to an agreement that the loan would be made if the case were handled expeditiously. (TR, p.30, l.11-14). He did not recommend to the client that he consult with another attorney before entering in to the agreement. (TR2, p.7, l.1-15). It is startling that the Respondent commented at the final hearing that he is not aware that the loan was any particular violation. (TR, p.30, l.11-21). He apparently to this day does not understand how unfair the arrangement was for his client, nor does he seem to see the inherent conflict in the transaction. It was approximately two (2) years and eight (8) months from the time that the loan was obtained to the date of the final hearing. In spite of his participation for an extended period in rehabilitation, the

Respondent admitted that he had not made any attempts to contact Mr. Davis, and had not repaid the non-interest loan. He did say that he would pay Mr. Davis "sooner or later." (TR, p.31, l.11-12).

When discussing his misuse of client trust money, Respondent indicated that he had applied $1,121.70, which he had received to be paid to a court reporter, to costs for another client. His testimony indicates that he made a conscious decision to break the rules. He states "I knew that using the trust money was wrong, but I honestly thought that it (the check) would be covered, and I just hoped that I could break the rules and not get caught. I wasn't smart enough to even cheat right." (TR, p.26, l.14-17). This testimony again evidences a blatant disregard for rules governing attorney conduct.

Respondent's willingness to break the law goes back far beyond the period during which he claims use of illegal substances affected his judgment. Respondent has testified that he was using drugs during his second semester of law school, which was approximately in 1977. (TR, p.7, l.7-8). After passing the Bar examination in 1982, he began working for the State Attorney's Office, but continued to use illegal drugs on a recreational basis, even after he moved up to the felony division after just nine (9) months. (TR, p.8, l.5-14). It is significant that during most of the years when he was using illegal drugs,

Respondent had sufficient control over his use to restrict it to weekends (TR, p.13, l.5-7). He elected to continue the illegal conduct even while prosecuting others for violating the law. In approximately 1985, his drug use escalated and he became a regular (weekly) user. (TR, p.12, l.20-25). As early as April or May, 1986, he faced potential arrest for possession of cocaine after a female companion reported him to the police (RR, II p.1,2), but by the time the police arrived at the scene, Respondent had disposed of the evidence. Id. Although Respondent was not arrested at that time, he did confide to the Tampa Police Department that he was using drugs. (RR, II p.4,5). In spite of his brush with the law in 1986, Respondent's drug use continued, and on May 20, 1988 he was arrested pursuant to a warrant based on charges of possession of cocaine.

Respondent's disregard for rules and laws did not entirely cease when he discontinued his drug use. Respondent has been on probation since December 21, 1988. He is certainly to be congratulated for the degree to which he has participated in the treatment programs for substance abusers, and for his completion of many hours of community service. However, it is noteworthy that he blatantly did not comply with at least one requirement of his probation until a few days before the Referee hearing in the disciplinary proceeding. As part of his probation, the Respondent was required to provide written proof to his probation

officer of the hours of community service which he had performed. (TR, p.37, l.15-25; TR, p.38, l.1-2). The Respondent did present a tape as evidence of compliance, but although reminded on numerous occasions that proof must be in writing, he simply did not provide what was required. (TR, p.38, l.3-25). This was in spite of the fact that in many respects he was cooperative and easy to work with, although very headstrong and arrogant. (TR, p.26, l.7-15). He did not fully comply with the community service hour requirement until he feared being arrested. Once he realized the seriousness of all the requirements, he took four (4) days off work to complete the hours. (TR, p.166, l.21-25; TR, p.167, l.1-10; TR, p.167, l.1-10).

Respondent's continuing unacceptable attitude towards rules, requirements, and authority is further demonstrated by statements he made at the final hearing. For example, the Respondent reported that his current wife's ex-husband had pulled a gun on him, and that he had reported the incident to the State Attorney's Office. He notes that the attorney reviewing the case decided it was a domestic dispute, and "I (Respondent) have yet to go over and spit on his (Assistant State Attorney's) lawn." (TR, p.167, l.13-19). In describing an incident involving allegations of child abuse, apparently against his current wife and Respondent, Respondent indicates that they were victims of an investigation. He uses the terms "victims" even though during

the time the investigation occurred, he was, or had recently been, abusing drugs. The Respondent indicates the charges of abuse were found to be without merit. The incidents recited above, and Respondent's overall testimony, demonstrate an attitude towards rules, responsibilities, and authority that ill befits a member of The Florida Bar.

Respondent's rehabilitation, and the contribution of drug abuse to his misconduct, is not sufficient to outweigh the totality and duration of Respondent's behavior. Respondent has not made arrangements through other attorneys or through The Florida Bar to insure that those clients who were damaged by his misconduct are made whole. He took fees, did not earn them, and even twenty-one (21) months into rehabilitation he has yet to at least advise his clients that he has some intention someday of paying them back; he indicates that he has been too embarrassed to face them, and he states that he does not have the money to repay them. (TR2, p.17, l.24-25); TR2, p.18, l.1-14). He did not even follow-up on cases of those clients with very personal and highly emotional needs, such as the elderly, poor client who wished to adopt her grandchildren.

The totality of Respondent's misconduct must be considered. In The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1983), the Court notes that although individually the eight (8) instances of violations of the Code of Professional Responsibility standing

alone might not require disbarment, the cumulative demonstration of Mavrides' acts indicated that he was unfit to practice law. When the Court considers whether or not this particular Respondent should be disbarred, it is critical that all conduct related to the question of whether or not he is fit to practice law be considered. Evidence of his unfitness precedes the criminal violations and abandonment of his practice, includes his neglect of his clients, is reflected in his overall attitude towards those who paid him to represent them, and his attitude towards rules in general.

The Standards for Imposing Lawyer Sanctions, Black Letter Rules, indicate that disbarment is appropriate when:

Rule 4.41 (a) a lawyer abandons his practice and causes serious or potentially serious injury to a client; or

(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potential serious injury to a client.

All of the factors above are present in the instant case. The extended period of time over which illegal conduct took place, the prolonged neglect of client matters, and the conscious decisions to not comply with Rules Regulating The Florida Bar far outweigh the mitigating factors found by the Referee to be present. There is no question that the Respondent had personal and emotional problems during at least some of the period in question, that he had been an attorney only since 1978, and licensed to practice only since 1982, and that he has people who testified that he is of good character. There has been interim rehabilitation with respect to his cocaine use and improvement in his interactions with others, and he has received criminal penalties. There is also an indication of remorse, at least for what he did to himself. The Referee also found an absence of honest or selfish motives. Nevertheless, the cumulative nature of Respondent's misconduct indicates Respondent is unfit to practice law.

In summary, the mitigating circumstances are far outweighed by the totality of Respondent's conduct. The appropriate discipline in the instant case is disbarment.

CONCLUSION

Disbarment is the appropriate discipline for long term use of illegal drugs, abandonment of practice, and intentional violations of Rules Regulating The Florida Bar. Respondent's impairment due to addiction did not rise to a sufficient level to outweigh the seriousness and cumulative nature of Respondent's misconduct.