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 REPLY BRIEF

THOMAS E. DEBERG
Assistant Staff Counsel
Atty. No. 521515
The Florida Bar
Tampa Airport, Marriott Hotel
Suite C-49
Tampa, Florida 33607
(813) 875-9821

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SYMBOLS AND REFERENCES

In this Reply 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 Complaint. "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. "CB" denotes the Complainant's Initial Brief. "RA" will denote the Respondent's Answer Brief.

STATEMENT OF THE FACTS AND OF THE CASE

Complainant accepts and adopts the supplemental statement of facts as set forth in Respondent's Answer Brief, but adds the following facts to clarify the testimony of witnesses referred to by Respondent.

Attorney Ricky Williams did indeed testify on Respondent's behalf. To place that testimony in perspective, the following should be noted. Mr. Williams indicated that he had known Respondent from their days together in law school around 1976, and that they had been in close contact since then, including daily contact while they were both with the State Attorney's Office. (TR p.63, L.3-11; p.63, L.19-25). In spite of this indication of close contact, Mr. Williams further testified that he first became aware of Respondent's drug problem in 1987 from rumors. (TR p.76, L.12-21). This would have been many years (approximately 10) after Respondent began using illegal drugs. Mr. Williams further indicated that, in his opinion, when one is working for the State Attorney's Office on a salary, they do not have the funds to party, but that private practice contributed to Mr. Wells' problem because he had money that he could do other things with. (TR p.71, L.21-25; p.72, L.1-8). Mr. Williams also noted that he and the Respondent had built up a brotherhood as men of the Bar, and that consequently when

Respondent was going through a divorce and asked to live with Mr. Williams, there was no way that Mr. Williams could turn him down. He testified that that (relationship) is why he was testifying at the Referee Hearing, because he would expect the same from Mr. Wells. (TR p.66, L.3-10). He further stated that he is a friend of the Respondent's, and that that goes well beyond being a member of The Florida Bar. (TR p.67, L.6-11).

The current Mrs. Wells testified that during the time when Respondent was going through all the trials and turmoil, he was still practicing law and winning cases. She suggested that drugs never interfered with him, as far as outside the courtroom, because he performed well, and that no one actually knew he had a drug problem because he continued to do his work. (TR p.124, L.6-18).

SUMMARY OF ARGUMENT

In rendering decisions in disciplinary cases, this Court has repeatedly used the phrase "under the facts of this case" or a similar statement, suggesting that discipline depends on the totality of facts before the Court. The totality of facts in the instant case indicates that Respondent's problems extend to the period prior to when it is suggested his judgment was affected by his substance abuse, that his reasoning ability in many respects remained intact during the time when he was abusing illegal substances, and that his participation in the rehabilitation program has not resulted in a correction of his failure to understand his responsibility to make arrangements to ameliorate problems his misconduct has created for those clients. The mitigation suggested by the Respondent is insufficient to outweigh the severity of the misconduct.

In the instant case, Respondent's addiction did not rise to a sufficient level, for a sufficient portion of the time during which misconduct occurred, to outweigh the seriousness of his offenses. The appropriate discipline is disbarment.

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.

Respondent correctly states that, pursuant to Rules Regulating The Florida Bar, Rule 3-7.7(c)(5), the burden in a review of a Report of Referee is upon the party seeking review to demonstrate that a Report of Referee is erroneous, unlawful, or unjustified. The Referee's findings of fact enjoy the same presumption of correctness as the judgment of the trier of fact in the civil proceeding. The Florida Bar In re Inglis, 471 So.2d 38 (Fla. 1985). The Complainant and Respondent in the instant case have adopted one another's statements of facts as given in the Complainant's Initial Brief and in Respondent's Answer Brief. The Referee's findings of fact, supplemented by the Complainant's and Respondent's statements of facts are not being challenged. However, with regard to legal conclusions and recommendations of a Referee, the Court's scope

of review is somewhat broader, as it is ultimately the Court's responsibility to enter an appropriate judgment. Id. at 41.

In his Answer Brief, Respondent notes that the facts in Knowles and Schuminer are dissimilar from the facts in the instant case. In many respects that is correct, as acknowledged in Complainant's Initial Brief. Nevertheless, the Complainant offers those cases as support for the basic proposition that impairment does not necessarily preclude disbarment as an appropriate discipline. Each case must be considered on its own merits. The disbarment in Knowles and Schuminer was indeed predicated upon the theft of client funds, and was ordered in spite of substantial mitigation. In the instant case, the disbarment should be predicated upon the blatant disrespect for clients' needs and rights, the disgrace to the Office of the State Attorney that results when one of their former prominent attorneys is arrested for use of cocaine and it is discovered he was using recreationally while on their staff, and because of Respondent's continuing failure to realize the damages he has caused and his responsibility to arrange to correct those damages. Rehabilitation from drugs is commendable, but insufficient to mitigate against what he has done. Schuminer and Knowles took money. Respondent took away clients' rights to have their matters litigated promptly and to completion. Certainly it is not necessarily a lesser evil to fail someone who is, for example, spending what little money they have to adopt their

grandchildren than it is to misappropriate client money.

Complainant cites The Florida Bar v. MacPherson, 534 So.2d 1156 (Fla. 1988), suggesting that the similarities between the facts in MacPherson and Wells are striking. In both instances, the attorneys abandoned their practice due to personal problems, and failed to return files and money to numerous clients. MacPherson received a six (6) month suspension followed by a one (1) year probation. In addition, in both MacPherson and the instant case, the Referee found that the Respondent acted without any dishonest or selfish motive, and demonstrated remorse.

However, there are also significant differences between MacPherson and the instant case. In addition to abandoning his practice and failing to return money and files to clients, unlike MacPherson the Respondent engaged in long term use of cocaine, including using it recreationally while a State Attorney. (See TR p.141, L.12-24). Further, the record in MacPherson does not portray an individual who punished a client because he was angry at him (See TR, p.153, L.10-16), knowingly violated trust account rules because he thought he could get away with it (See TR, p.155, L.1-10), failed to complete an adoption case because he and the client "drifted apart" (TR p.156, L.17-21), gave false assurances to the court that he would file briefs for an individual incarcerated but then failed to follow through within the prescribed period (RA para.24-27), borrowed money from a client without providing for any interest payment on that money

and then neglected to recontact the individual to make some kind of arrangement for present or future repayment (See TR p.159, L.5-7; TR2 p.7, L.5-8), and displayed the overall disrespect for the legal system that Respondent has demonstrated. There is also a marked difference between remorse for what one has done to himself and remorse for the damage done to one's clients. For the most part, the latter type of remorse is sadly lacking in the Respondent's testimony in the instant case.

In addition, MacPherson had no pending or prior discipline at the time that the decision was rendered in The Florida Bar v. MacPherson, 534 So.2d 1156 (Fla. 1988). However, in The Florida Bar v. Alfred S. Wells, Supreme Court Case No. 71,927, on January 3, 1989, the Referee recommended that Respondent be suspended for ninety-one (91) days and thereafter until proof of rehabilitation. The Referee found in Case No. 71,927 that the Respondent had, around April or May of 1986, used cocaine with a female companion, become violent and began damaging the motel room, and then destroyed the cocaine after his companion had notified the Polk County Sheriff's Department. The Respondent was not arrested, but later confided to the Tampa Police concerning his drug use. The uncontested Report of Referee was approved on March 2, 1989.

As Respondent indicates, Judge Menendez did testify that the Respondent did a good job as an Assistant State Attorney and criminal defense lawyer prior to Respondent's drug problem, which

caused Respondent's judgment to be impaired. (TR p.12, L.3-8). He further testified that Respondent certainly knew the difference between right and wrong. (TR p.17, L.1-7). At least in that significant respect, Respondent's judgment, in Judge Menendez' opinion, was not affected.

Mr. Murphy, an F.L.A. counselor, did testify about Respondent's prognosis for handling his drug problem. He indicated that if Respondent continues his present course on a daily basis, Respondent is going to be okay. On a daily basis, he said, "I think the prognosis is good." (TR p.91, L.3-6). Mr. Murphy further testified that a distinction has to be made between people who come in with the intent that they can complete the program, which is a group that will go back out and use again, and those who understand that the program is a way of life and a life long job. The latter group, according to Mr. Murphy, has a hundred (100) percent chance of success. He indicated that he certainly could not assure that Mr. Wells had made that kind of commitment. (TR p.94, L.1-20).

Respondent notes that the Complainant has found fault with the Respondent's failure to pay back to clients any fees not earned, and the failure to pay back money borrowed from Mr. Davis. Respondent submits that his failure to pay is more indicative of a financial inability than of any character flaw. (RB p.9). Respondent points out the financial burdens which he has experienced during the period of his attempts to rehabilitate

himself, child support obligations, and his efforts to pay back supervision costs while working two (2) jobs. Respondent suggests that this scenario does not depict a man unwilling to pay, and notes that the Respondent indicated a desire to pay those owed. (RB p.10). As noted on page 30 of Complainant's Initial Brief, the Bar's concern is not solely the failure to repay, but also the fact that the Respondent has not even made arrangements to at least advise his former clients that he has some intention someday of paying them back. As an excuse for this failure of basic courtesy, Respondent notes that he has been too embarrassed to face them. (TR2 p.17, L.24-25; TR2 p.18, L.1-14). He also has failed to follow-up on those cases where clients' cases were neglected. While personal contacts with clients would be forbidden in light of Respondent's suspension, he is not precluded from assuring that other attorneys have made some effort to ameliorate what he has done.

Respondent comments that there is no case law to support the proposition that drug use over a substantial period of time is somehow aggravating, and goes on to note that the period of drug abuse which was disruptive to Respondent's life and practice spanned a relatively short period. Nevertheless, an important consideration is the length of time during which Respondent repeatedly elected to commit recreational felonies, even while a State Attorney. A pattern of misconduct and numerous offenses is relevant in determining appropriate discipline.

The Respondent indicates that The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987) is almost identical factually to the instant case. In support of that proposition, Respondent notes that in Sommers, the attorney was charged with twelve (12) counts of misconduct, including one eight (8) count complaint alleging failure to perform legal work in a timely fashion. In addition, there was a complaint alleging insufficient accounting and record keeping. The Court in Sommers found that the misconduct was related to an unspecified substance abuse problem. The case as reported in the Southern Reporter does not provide sufficient facts nor the underlying testimony which would be necessary to closely compare Sommers with the case at Bar, although certainly there are many similarities. Sommers, as reported, does not indicate whether Attorney Sommers, like the Respondent, knowingly violated trust account rules because he thought he could get away with it, had vindictively denied client access to records, had engaged in felony use of drugs on a recreational basis while a State Attorney, had obtained a non-interest loan from a client without advising that client to seek outside legal advise regarding the loan, and engaged in the other array of misconduct exhibited by the Respondent in the instant case.

The Respondent suggests that the Complainant's comments on Respondent's disapproval of a State Attorney's decision to treat an alleged aggravated assault as a domestic dispute is somehow an indication that Complainant believes an attorney must cease

questioning the acts and decisions of state employees. The Respondent's conduct in these instances has been reviewed in the Bar's Initial Brief not to indicate that Respondent should not retain the right to question the actions of authorities, but rather to demonstrate the attitude he takes when authorities do not do what Respondent thinks is proper, and his failure to accept the consequences of his actions. It is not his basic questioning of their decisions that is striking. Rather it is instructive to note that inspite of H.R.S. having a solid basis for wondering whether the Respondent and his girlfriend would be proper custodians of their children, a basis provided at least in part by the Respondent's own conduct, he still views himself and his wife as victims. In addition, with respect to the State Attorney, there is a marked difference between disagreeing with the decision of a state employee and suggesting that one has "yet to go over and spit on his lawn." (TR p.167, L.13-19).

In the final analysis, after Respondent and Complainant have argued through counsel about whether various cases are off point, instructive, informative, or on all fours, the Court is faced with facts upon which the parties agree, and it is in a position to decide whether or not Mr. Wells is an individual who should be licensed as an attorney in the State of Florida at the present time. The key phrase is "under the facts of this case", and it is those very facts which portray an individual who should not be licensed as an attorney in Florida. He has by his actions from

the day when he was a second year law student forfeited that privilege. A message to the Respondent in the instant case and a message to the public at large will be given by this Court. On the one hand the public can be advised that in spite of the multiple instances of misconduct by the Respondent, his general attitude toward rules and authority, the damage he did to clients, and the disrepute he has brought on the legal profession, he is fit to be called an attorney in the State of Florida, albeit suspended. On the other hand, the Court can advise the public and other attorneys that conduct of this type cannot be tolerated, will not be tolerated, and that the only fitting penalty is disbarment.

CONCLUSION

Disbarment is the appropriate discipline under the facts of the instant case. Mitigation based on Respondent's impairment due to addiction does not rise to a sufficient level to outweigh the seriousness and cumulative nature of Respondent's misconduct.

Respectfully submitted,

THOMAS E. DEBERG
Assistant Staff Counsel
Atty. No. 521515
The Florida Bar, Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing THE FLORIDA BAR'S REPLY BRIEF has been delivered by U.S. Regular Mail to Scott K. Tozian, Counsel for Respondent, at 109 Brush Street, Suite 150, Tampa, Florida, 33602, and also a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300; this 28 day of December, 1990.

Thomas E. DeBerg

THOMAS E. DEBERG
Assistant Staff Counsel
Atty. No. 521515
The Florida Bar, Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821