Q47

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

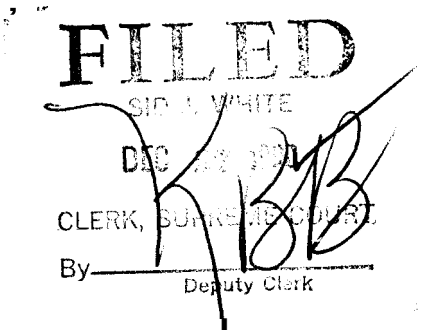
Complainant,

v.

RICHARD L. CLARK,

Respondent.

CASE NO. 75,115
(TFB NO. 89-16,912(06A)



RESPONDENT'S ANSWER BRIEF

MARTIN ERROL RICE, P.A.
Post Office Box 205
St. Petersburg, FL 33731
(813) 821-4884
SPN #00002861
FLA BAR #183594
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS ii

SYMBOLS AND REFERENCES iii

STATEMENT OF THE FACTS AND OF THE CASE 1

SUMMARY OF ARGUMENT. 2

ARGUMENT.. 3

Issue: Whether a three (3) year suspension is appropriate disciplinary sanction in light *of* the mitigating factors cited by the Referee.

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF CITATIONS

CASES	PAGES
The Florida Bar v. Moore, 194 So.2d 264, 271 (Fla. 1966)	3
The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986)	5
The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986).	5
The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982).	5,6
The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla. 1985).	6,7
The Florida Bar v. Giordano, 500 So.2d 1343 (Fla. 1987).	7
The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985).	7
The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983).	8
The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985)	8,9
The Florida Bar v. Ferting, 551 So.2d 1213 (Fla. 1989)	8
The Florida Bar v. West, 550 So.2d 462 (Fla. 1989).	9
The Florida Bar v. Franke, 548 So.2d 1119 (Fla. 1989)	9
The Florida Bar v. Samaha, 557 So.2d 1349 (Fla. 1990)	9
The Florida Bar v. Caillaud, 560 So.2d 1169 (fla. 1990)	9
Florida Standards for Imposing Lawyer Sanctions	2,3,10

SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The appellee, Richard L. Clark, will be referred to as "Respondent". "PB" for petitioner's brief. "TR" will denote the transcript of the Final Hearing before the Referee. "R" will refer to the record in this cause. "RR" will refer to the Report of Referee.

STATEMENT OF FACTS AND THE CASE

Respondent agrees with the Statement of the Facts and the Case as the same is set forth by The Bar, except to the extent that said statement may imply that Respondent contested the Bar's charges against him. Initially, counsel for Respondent was compelled to file a general denial to the Bar's complaint due to his inability to communicate with the incarcerated Respondent. Upon communication with the Respondent, the Bar was promptly informed that an admission would be entered by Respondent and that no evidence in support of the complaint need be submitted by the Bar.

SUMMARY OF ARGUMENT

The Referee below recommended that the Respondent be suspended from the practice of law for three (3) years. Said recommendation was based upon the Referee's factual determination that twelve (12) mitigating factors were present. Those mitigating factors are set forth more fully in the argument to follow. The presence of these numerous mitigating factors is not challenged by the Bar. Instead the Bar argues that lawyer involvement in drug activity equates with disbarment. That is not the law of the State of Florida as expressed by this Court or by The Florida Standards for Imposing Lawyer Sanctions.

The recommendation of the Referee is presumed to be correct, it falls well within the bounds of the prior case law of this Court and the perimeters of The Florida Standards for Imposing Lawyer Sanctions, accordingly the recommendation should be affirmed.

ARGUMENT

Issue: Whether a three (3) year suspension is an appropriate disciplinary sanction in light of the mitigating factors cited by the Referee.

A three (3) year suspension is an appropriate disciplinary sanction for the Respondent's conduct in light of the mitigating factors presented. This Court has articulated the standard to be meet to justify the imposition of disbarment, and that standard is not meet by the Bar in this case. In The Florida Bar v. Moore, 194 So.2d 264, 271 (Fla. 1966), this Court stated:

> "[D]isbarment is the extreme measure of discipline that can be imposed on any lawyer. It should be resorted to only in cases where the person charged has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards. To sustain disbarment there must be a showing that the person charged should never be at the bar. It should never be decreed where punishment less severe, such as reprimand, temporary suspension, or fine will accomplish the desired purpose."

Since this Court's pronouncement in Moore this Court has focused on the existence of mitigating and/or aggravating factors as a means of determining the appropriate discipline in each case. Likewise, The Florida Standards for Imposing Lawyer Sanctions (hereinafter, The Standards), have recognized the critical role of mitigating factors in determining the appropriate discipline for an attorney's defalcation. Section 5.1 of the Standards expresses that, "absent aggravating or mitigating factors, disbarment is appropriate when a lawyer is convicted of a felony under applicable law or when a lawyer engages in the

sale, distribution, or importation of controlled substances." Obviously, absent mitigating factors this Court has pronounced that disbarment is the appropriate punishment for lawyer involvement like that of Respondent. In the presence of mitigating factors however, the rule recognizes that other punishment may be appropriate. Here given the numerous mitigating factors cited by the referee the recommended three (3) year suspension should be upheld.

After receipt of the evidence below the Referee made a factual determination supporting the following mitigating factors:

1. Respondent was, at the time of the criminal activity, experiencing personal problems associated with the break-up of his marriage, and the divorce from his wife;

2. Respondent was, at the time of the criminal activity, attempting to operate a law office in partnership with his father, who drank to excess, and was attempting to carry the workload for both himself and his father due to his father's failing health;

3. Respondent admitted his involvement in the criminal activity;

4. Respondent's criminal activity was remote in time to the disciplinary proceedings;

5. Respondent did not participate in any other criminal activity;

6. Respondent was truly remorseful for his offense;

7. Respondent's offense did not involve a client;

8. Respondent's cooperative attitude in the disciplinary proceedings by admitting the allegations of the Bar's Complaint;

9. Respondent's reputation in the legal community for honesty and integrity (RR, p. 3, 4);

10. Respondent has cooperated with the law enforcement agencies (TR 36, 37/42; RR 3);

11. Respondent has no prior disciplinary record (RR3); and

12. The incident in no way adversely affected Respondent's fulfillment of his legal duties (RR 4), which he continued to perform for almost five years after the incident.

These findings of fact come to this Court with a presumption of correctness, and in that light the Bar apparently does not challenge same, see e.g., The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986); instead the Bar argues that these mitigating factors are insufficient to deviate from a punishment of disbarment.

Similar mitigating factors have however stood as a basis for the imposition of less than disbarment in cases arising out of lawyer involvement with controlled substances.

One such example is The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982). In Pettie, an attorney knowingly engaged in a series of illegal acts relating to a conspiracy to import marijuana. While the Referee recommended disbarment, the Florida Bar recommended a one year suspension in view of the attorney's cooperation with law enforcement; this Court approved the Bar's position.

Like attorney Pettie, Respondent, cooperated with law enforcement officials, confessed his illegal acts, suffered

the loss of his law practice, and was prior to the offense a well-respected lawyer in his community. Id. at 735-36. These similarities call for approval of the Referee's recommendation.

While the Bar argues that the Pettie case is distinguishable from the present case, the only difference between the two is that Respondent's case involves more not fewer mitigating factors. In Pettie, the attorney knowingly engaged in a series of acts to import a controlled substance. Here, Respondent committed only one illegal act, which occurred five (5) years before being questioned about same. At the time of his questioning, there were no illegal drugs in the possession of the authorities, there were no eye witnesses to the offense, just the word of a recently apprehended admitted drug importer. Yet, the Respondent cooperated with the legal authorities and admitted his involvement in the episode.

Similarly, in The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla. 1985), the referee recommended a three (3) year suspension rather than disbarment for an attorney who was convicted of conspiracy to possess with intent to distribute cocaine. In reaching his conclusion the Referee considered a series of mitigating factors strikingly similar to those present here. There the criminal act was an isolated incident, the attorney showed remorse, the attorney had suffered personal and financial hardship, the criminal act was unrelated to the practice of law, and no violations of

client trust were involved. This Court sustained the Referee's recommendation in Carbonaro, and should do same here.

Further support for the imposition of a punishment short of disbarment may be found in The Florida Bar v. Giordano, 500 So.2d 1343 (Fla. 1987). In Giordano, the referee recommended and this Court approved a three (3) year suspension for an attorney convicted of one count of possession with intent to distribute cocaine and three counts of distribution of marijuana. Although the mitigating and aggravating factors considered in Giordano were not reported, the similar illegal acts of Giordano and the Respondent demonstrate that a three (3) year suspension, if mitigating factors are present, is appropriate. Thus, the Referee's recommendation should be approved.

Granted several cases may be cited with respect to disbarment as an appropriate punishment in cases involving lawyer participation in activities relating to controlled substance. The cases cited by the Bar however are distinguishable from that at hand.

For example, in The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985), cited by the Bar, Mr. Price was disbarred due to his participation in the importation of marijuana. A review of Price however reflects the complete absence of mitigating factors, furthermore, the referee found Price's testimony unworthy of belief. Id. at 813.

Likewise, in The Florida Bar v. Wilson, 425 So.2d (Fla. 1983), cited by the Bar, no mitigating factors were considered. In Wilson, an attorney was convicted of solicitation to traffic in cocaine and attempted trafficking in cocaine. Specifically, Wilson solicited an incarcerated client to arrange to have cocaine delivered to him. The Florida Supreme Court disbarred Wilson. The court, however, stated that had evidence in mitigation been offered, "the complexion of the case may very well have been different." Id. at 3. Here, numerous mitigating considerations have been cited by the Referee which distinguish Respondent's situation from that of Wilson's.

Finally, the Bar cites The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985), to support their contention that disbarment is in order. While some of the mitigating factors present in this case where likewise present in the Hecker case this case involves additional mitigating factors. The offense occurred nearly five (5) years prior to the Bar proceedings, during which time the Respondent fulfilled his responsibilities to the Court, his clients and the Bar. This Court has observed that a substantial period of time between the commission of the offense and the Bar proceedings is an appropriate mitigating factor, Florida Bar v. Ferting, 551 So.2d 1213 (Fla. 1989). The Respondents activity did not involve a client, the Respondent was under great stress as a result of his wife's removal of his son to

another state and the alcoholic difficulties of Respondent's law partner father.

This Court since Hecker has recognized that each case must be viewed on its own facts and has concluded that involvement with a controlled substances does not automatically result in disbarment, See The Florida Bar v. West, 550 So.2d 462 (Fla. 1989); The Florida Bar v. Franke, 548 So.2d 1119 (Fla. 1989).

Likewise with respect to the commission of other criminal offenses, this Court has observed that in light of mitigating factors suspension is the appropriate punishment, See The Florida Bar v. Samaha, 557 So.2d 1349 (Fla. 1990); The Florida Bar v. Caillaud, 560 So.2d 1169 (Fla. 1990).

As the foregoing case law indicates, this court should be guided by the presence or absence of mitigating and/or aggravating factors in determining the appropriate disciplinary sanction in each case. The facts in the case at bar as contained in the transcript and referee's report demonstrate that the mitigating factors present justify the imposition of a three (3) year suspension rather than disbarment.

When considered in total, the facts of Respondent's case warrant a three (3) year suspension, and the Referee's recommendation should be approved.

CONCLUSION

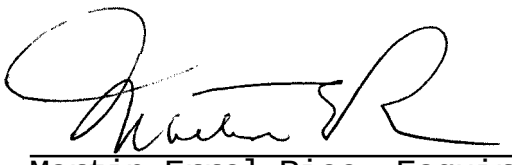
This Court has held, and the Standards For Imposing Lawyer Sanctions provide that suspension is appropriate if sufficient mitigating factors are present.

A review of the mitigating factors here show that they are sufficient to justify the sanction recommended by the Referee.

WHEREFORE, Respondent respectfully requests this Honorable Court to approve the Referee's recommended discipline, and suspend the Respondent from the practice of law for three (3) years.

Respectfully Submitted,

MARTIN ERROL RICE, P.A.



Martin Errol Rice, Esquire
Post Office Box 205
St. Petersburg, FL 33731
(813) 821-4884
FLA BAR #183594
SPN #00002861

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Reply Brief has been furnished by U.S. Regular Mail to BONNIE L. MAHON, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607 and to JOHN T. BERRY, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida **32399-2300**, this 26th day of December, **1990**.

MARTIN ERROL RICE, ESQUIRE