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FILED
SID J. WHITE
MAY 6 1991
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

KENNETH P. LIROFF,

Respondent-Appellant.

______________________________/

Supreme Court Case No. 76,460

The Florida Bar File No.
91-50,147 (17C)

ANSWER BRIEF OF THE FLORIDA BAR

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APPENDIX:

I. SUPREME COURT ORDER DATED 3/26/87 IN THE FLORIDA BAR V. LIROFF, NO. 69,365

II. SUPREME COURT ORDER DATED 8/31/89 IN THE FLORIDA BAR V. LIROFF, NO. 73,570

III. AFFIDAVIT OF WILLIAM KILBY, WITH EXHIBITS

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COUNTERSTATEMENT OF THE FACTS

In that appellant's statement is devoid of facts, the bar regards it as necessary to present this counterstatement.

Appellant, a dentist as well as an attorney (33)*, became addicted to a synthetic morphine cough syrup known as hycodan in January, 1984 (12). The bar discovered appellant's problem in connection with a formal disciplinary proceeding (The Florida Bar v. Liroff, No. 69,365 (March 26, 1987)) which culminated in an order imposing a reprimand for violation of Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility and which order adopted the referee's recommendations that appellant:

> (b)e required to contact Charles Hagan, Jr., Executive Director of Florida Lawyers' Assistance, Inc., for an evaluation regarding whether he needs counseling or treatment for substance abuse and that he be required to follow through with any recommendations made by Dr. (sic) Hagan or Florida Lawyers' Assistance, Inc.

A copy of the Court's order is attached as Appendix I.

Appellant failed to comply with the referenced order. As a result, the bar petitioned for and was granted an order placing appellant on probation for a period of two (2) years and thereafter until such time as he would be able to demonstrate to the Board of Governors of The Florida Bar that he had successfully completed a rehabilitation program approved by Florida Lawyers' Assistance, Inc. (hereinafter called FLA, Inc.). The Florida Bar v. Liroff, No. 73,570 (August 31, 1989). A copy of the Court's August 31, 1989 order is attached as Appendix II.

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* All page references are to the November 30, 1990 transcript of final hearing.

This proceeding results from an application by the bar seeking an appropriate sanction due to appellant's repeated and substantial violations of the Court's August 31, 1989 order.

Within days of such order, appellant, on September 21, 1989, tested positive for a barbiturate, viz., phenobarbital. Notwithstanding such test results, FLA, Inc. continued to work with appellant, not seeking to void his probation. Appellant was advised that any future violation would result in bar action (See paragraph 11 of William H. Kilby affidavit attached hereto as Appendix III).

On December 27, 1989, Roger G. Stanway, Esquire, appellant's FLA, Inc. monitor, reported to FLA, Inc. that appellant had totally neglected his monthly monitor meetings and monthly fee payments. Still, appellant's probation was not revoked. Rather, appellant was, once again, given written notice of his breach, his responsibilities and the possible consequences flowing from his breach (see paragraph 12 of the Kilby affidavit, Appendix III).

On April 18, 1990, Mr. Kilby telephoned appellant and, detecting a speech slur, directed an immediate drug test. Appellant, knowing that he had ingested the very substance that he was addicted to, rather than submit to the drug test, sent a letter to Mr. Kilby reporting his (appellant's) use of hycodan (see paragraphs 13 and 14 of Kilby affidavit, Appendix III).

The original final hearing date in this proceeding was scheduled for November 20, 1989 (41). While appellant produced an affidavit from his FLA, Inc. monitor that his reports and payments were current, the fact is that such reports and fees were in arrears up to the eve of the first scheduled hearing date when appellant brought his arrears current

(40, 44). Appellant claimed that his monitor reports had been stolen from his automobile (41).

After the original disciplinary order (Appendix I) directing appellant to follow through on FLA, Inc. recommendations, appellant refused to enter into a proposed FLA, Inc. contract, instead, submitting a counterproposal in which he denied having the disease of addiction (see Exhibit C attached to Kilby affidavit, Appendix III).

Roger A. Goetz, M.D., Director of the Florida Medical Foundation, Committee on Impaired Physicians, in a 1987 evaluation, observed:

> During the discussions about his recovery, Dr. Liroff claimed to be chemically free for a period of one and a half years, however, there is considerable question raised in my mind as to the veracity of this statement. The long and rather elaborate discussions and heavily worded arguments against a recovering contract certainly indicate a failure to "surrender" in Alcoholic's Anonymous terms, and also raise some question in my mind as to his ability to function in a logical manner and manner consistent with the practice of either dentistry or law (See Exhibit E attached to Kilby affidavit, Appendix III).

William H. Kilby, Staff Attorney for FLA, Inc., testified, without any attempt on behalf of appellant at cross examination, as follows:

> MR. KILBY: Your Honor, the problem I see with Mr. Liroff is the continuing use of opiates. He's opiate dependent.
>
> None of the doctors or FLA or anyone has been successful. His therapists have not been successful. He is still using.
>
> I think probably one of the problems, and he has other things to deal with -- he's got a problem of major depression on top of his addiction, and he's got a severe weight problem, and these are all affecting his health, and I'm really concerned about him.
>
> My feeling is if he went into treatment he should go into long-term in-patient treatment, and it should be at least three months because in that way he will be forced to address all of the issues that he needs to address.

> The problem now is he has problems at home. He has problems in his law office. He has stress and strains, and that removes him from his other influences and gets him where he has to concentrate on the most important thing, that man's life.
>
> The practice means nothing. The family means nothing, because it's going to kill him, and I really believe that.
>
> Obviously he is well educated and a bright man, but he is unable to deal with this all-consuming disease. It is tough for all of us, but particularly tough for him (50, 51).

On the basis of the foregoing, the referee concluded that appellant was in denial and recommended that he be suspended for a period of two (2) months with appellant's entry to a FLA, Inc. approved in-patient drug treatment facility within the suspension period.

SUMMARY OF ARGUMENT

In assessing a report of referee, the test to be applied is not whether or not evidence adduced by a respondent supports conclusions different from those of the referee, but rather whether or not the cumulative weight of the evidence supports the referee's conclusion.

The history of respondent's failures to comply with this Court's directives, his failures to cooperate or comply with requirements imposed by Florida Lawyers' Assistance, Inc., his post-disciplinary proceeding use of hycodan and barbiturates as related in the affidavit and exhibits thereto as well as in the live testimony of the bar's witness, constitute competent, substantial evidence in the record to support the referee's findings herein.

ARGUMENT

I. THE RECORD CONTAINS SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT THE REFEREE'S RECOMMENDATIONS.

Appellant correctly recites and supports by citations the axiom that a referee's findings must be sustained if supported by competent and substantial evidence. Additional citations would constitute surplusage. Appellant also accurately defines the linchpin of review, viz., that to overcome a referee's recommendations, an appellant must demonstrate that they are clearly erroneous, or lacking in evidentiary support. Appellant has failed in both respects.

Appellant's attack is not predicated upon an insufficiency of evidence to support the referee's recommendations, but, rather, upon an attempt to convince the Court that his experts are better than those of the bar. Thus, appellant's argument, while asserting that the evidence underlying the referee's recommendations is insufficient, merely narrates what his own experts had to say, not why or how the bar's evidence failed to support the referee's conclusions. To compound the effect, appellant attached a copy of an affidavit of the bar's witness, William H. Kilby, Staff Counsel to Florida Lawyers' Assistance, Inc. to appellant's brief as Appendix I, but failed to include the fifteen (15) exhibits made reference to therein, all of which are relevant and were available to the referee in arriving at his recommendations. Such exhibits are pregnant with data supporting the referee's findings.

Distilled to its essence, the Kilby affidavit, exhibits and testimony portray appellant as an addict who from the outset of the bar's intervention, commencing with the 1987 disciplinary proceeding, has found it impossible to comply with either the terms of probation imposed by this Court or the directives of FLA, Inc. He could not even summon the fortitude timely to pay the nominal, monthly monitoring fees (see Kilby affidavit, Appendix I, Exhibits F and L). Most chilling of all, appellant, even after his two (2) encounters with the disciplinary process, was drawn to barbiturates and to the siren's song of hycodan, the very substance underlying his addiction (see Kilby affidavit, Appendix III, Exhibits J and O).

In making his recommendations of a two (2) month suspension with a requirement of in-patient treatment, the referee noted that respondent was in the "denial phase" of his drug problem (see report of referee, page 2, item 5). That observation is certainly understandable and reasonably based upon the evidence available. It is respectfully requested that the court consider, in addition to reports, drug tests, monitor violations, etc. established by the Kilby affidavit and testimony, the testimony of appellant when queried by his own attorney concerning appellant's return to hycodan. Appellant, a self proclaimed addict to hycodan (12), under a probation imposed by this Court, accountable to FLA, Inc. which was attempting closely to monitor him, with his medical background and expertise as a dentist, upon catching a cold, determined, as a curative, to ingest the very drug that bedeviled him (23, 24). In the bar's view, that testimony, alone, is so compelling as to virtually mandate the referee's observations regarding respondent's "denial phase." The application of a modicum of

common sense would permit a logical and reasoned finding that an individual such as appellant, claiming to be recovered from a drug addiction, would not, under any circumstances, knowingly and intentionally use the drug in question; that the attempt to rationalize such use, under such circumstances, constitutes a "denial."

II. THE REFEREE'S RECOMMENDED SANCTION IS APPROPRIATE.

Appellant has not complied with this Court's order issued in 1987 or its subsequent order of August 1, 1989. Appellant's subsequent use of verboten drugs including hycodan, the drug underlying his addiction, supports a conclusion that appellant remains addicted and should be suspended until he successfully completes drug rehabilitation.

Rule 3-5.1(c), Rules of Discipline, specifically provides that an attorney may be punished for contempt or suspended from the practice of law on petition of the bar based upon an attorney's failure to observe the conditions of probation.

Failure to comply with an order for rehabilitation is cause for suspension until such time as compliance is achieved. The Florida Bar v. Shores, No. 70,516 (Fla. 1987) (hereinafter, Shores II). In Shores, an attorney was ordered to comply with a contract entered into between the attorney and FLA, Inc. as part of his probation. The Florida Bar v. Shores, 500 So.2d 139, 140 (Fla. 1986). Shores was an alcoholic. When he did not comply with the Court order, he was suspended until further order of the Court. Shores II, No. 70,516.

Appellant, like Shores, is a substance abuser. As part of the disciplinary process, appellant agreed to comply with FLA, Inc.'s recommendations. Like Shores, appellant failed to do so. Both appellant's disobedience of a Court order and his continued addiction justifies the imposition of a suspension and a direction for in-patient rehabilitation.

Appellant's drug use, in and of itself, warrants suspension. See The Florida Bar v. Holtsinger, 505 So.2d 1329, 1330 (Fla. 1987); The Florida Bar v. Corrales, 505 So.2d 1327, 1328 (Fla. 1987). In Holtsinger and Corrales, attorneys received ninety (90) day suspensions for personal use of drugs. Both attorneys were required to undergo periodic drug screenings.

Failure to comply with a Court order is cause for discipline. The Florida Bar v. Wishart, 543 So.2d 1250 (Fla. 1989); The Florida Bar v. Rubin, 549 So.2d 1000 (Fla. 1989); The Florida Bar v. Jackson, 494 So.2d 206 (Fla. 1986). In Jackson, supra, an attorney defied a trial court order to appear in court on a religious holiday and was suspended for thirty (30) days.

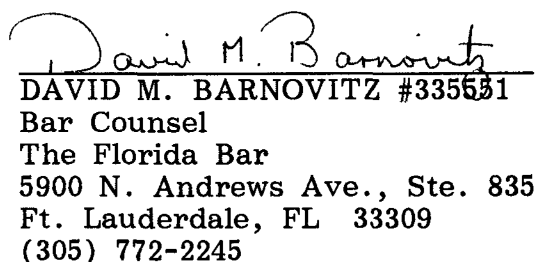
This Court's August 31, 1989 order (Appendix II) specifically directed that appellant be placed on probation "until he is able to demonstrate to the Board of Governors of The Florida Bar that he has successfully completed the rehabilitation program pursuant to the contract entered into by him with the Florida Lawyers' Assistance, Inc." The evidence is undisputed that appellant did not so comply. The case is similar to Jackson in that both involve attorneys who have refused to obey a court mandate. The fact that a suspension was imposed in Jackson demonstrates that failure to obey such a mandate warrants suspension. What is at stake at the case at bar, however,

transcends the failure by an attorney merely to attend a court appearance. Appellant's continued addiction, which this Court and the bar have repeatedly attempted to address, constitute a basis not only for sanction but for aggressive treatment and hopefully a road to recovery which the in-patient treatment will address.

CONCLUSION

From the outset, appellant has demonstrated an absolute unwillingness and/or inability to comply with the mandates of this Court and the directives of FLA, Inc. He continues in such posture in the extant appeal in insisting upon dictating his own prescription, vis a vis sanction. His previous insistence upon directing his own rehabilitation has led nowhere but to lapses and denial. Upholding the referee's recommendations will not only serve to meet the sanction tests as expressed in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) but to help appellant help himself.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished to J. David Bogenschutz, Esquire, attorney for respondent, 633 S.E. 3rd Ave., Ste. 4F, Ft. Lauderdale, FL 33301 by regular mail, on this 1st day of May, 1991.

DAVID M. BARNOVITZ #335551