IN THE SUPREME COURT
OF FLORIDA

SUPREME COURT
CASE NO. 78,489

THE FLORIDA BAR
CASE NO. 92-70,218(11N)

THE FLORIDA BAR,

Complainant,

v.

STEVEN NECKMAN,

Respondent.
_____ /

ANSWER BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

The Florida Bar argues that the Referee's disciplinary recommendation is inappropriate and that the Respondent should be disbarred. However, pursuant to Standards 7.1 and 8.1 of the Florida Standards for Imposing Lawyer Sanctions disbarment is appropriate only in cases of intentional violations or misconduct. Under the worst interpretation of the Respondent's conduct, he was no more than negligent within the meaning of the Florida Standards. As this Court has previously held, "the extreme sanction of disbarment is to be imposed only in those rare cases where rehabilitation is highly improbable." The Florida Bar v. Rosen, 495 So.2d 180, 182 (Fla. 1986), quoting The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978).

Furthermore, as the Referee stated, "the mitigating factors under this unique set of circumstances clearly outweigh those factors in aggravation" (emphasis added)--in particular, the Respondent's struggle with the disease of alcoholism and drug addiction, and his demonstrated progress in rehabilitation. Supplemental Report of Referee, p. 7.

Accordingly, the Referee's disciplinary recommendation is appropriate and should be approved by this Court.

ARGUMENT

THE REFEREE'S RECOMMENDATION THAT THE RESPONDENT(1) RECEIVE A PRIVATE REPRIMAND, (2) IMMEDIATELY BE PLACED ON PROBATION UNTIL HE IS ELIGIBLE TO APPLY FOR READMISSION TO THE FLORIDA BAR, (3) BE REQUIRED TO PERFORM A MINIMUM OF TEN HOURS OF COMMUNITY SERVICE WORK PER MONTH, (4) CONTINUE HIS COUNSELING AND TREATMENT UNDER THE DIRECTION OF FLORIDA LAWYERS ASSISTANCE, AND (5) PAY THE COSTS INCURRED BY THE FLORIDA BAR IN CONNECTION WITH THIS PROCEEDING IS APPROPRIATE DISCIPLINE AND SHOULD BE APPROVED BY THIS COURT.

The only issue on appeal before this Court is whether the Referee's disciplinary recommendation is appropriate under the unique set of circumstances involved in this case.

The Florida Bar demands disbarment. In support of its position, the Bar quotes Standard 8.4 of the Florida Standards for Imposing Lawyer sanctions, dealing with the sanction of admonishment. Significantly, the Bar avoids quoting the Standards for disbarment. Standard 7.1, which deals with, inter alia, the unauthorized practice of law, reads as follows:

> Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system [emphasis added].

Standard 8.1, which deals with conduct in violation of prior discipline orders, reads as follows;

> Disbarment is appropriate when a lawyer:(a) intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession; or (b) has been

> suspended far the same or similar misconduct, and intentionally engages in further similar acts of misconduct [emphasis added].

"Intent" is defined in the Florida Standards as "the conscious objective or purpose to accomplish a particular result," which is remarkably similar to the language of the Model Penal Code, from which it was evidently adopted. (See Sections 1.13 and 2.02, Model Penal Code [U.L.A.].)

It hardly needs to be pointed out that "intent" is the most culpable state of mind of a criminal defendant and is a grossly inappropriate characterization of the Respondent. Under the very worst construction of the Respondent's conduct, he was no more than negligent within the meaning of the Florida Standards.

In The Florida Bar v. Golden, 563 So.2d **81,** 82 (Fla. 1990), the Respondent enqaqed in the unauthorized practice of law by "counselling and attempting to assist his client in requesting two continuances," while he was under a ninety-day suspension from the Bar for a "lengthy history of past disciplinary violations." The Referee recommended a one-year suspension, while the Bar, as in the case sub judice, recommended disbarment. This Court approved the Referee's recommendation on the grounds that the unauthorized practice was "minimal" and not sufficiently "direct" or "substantial" to warrant disbarment. See also: The Florida Bar v. Weil, 575 So.2d 202 (Fla. 1991); **The Florida Bar v. Levkoff, 511** So.2d *556* (Fla. **1987).**

Furthermore, this Court has a long-standing and enlightened policy of treating alcoholism and drug addiction as a significant

mitigating factor when it is the underlying cause of misconduct. See: The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982); The Florida Bar v. Headley, 475 So.2d 1213 (Fla. 1985); The Florida Bar v. Mike, 428 So.2d 1386 (Fla. 1983).

In The Florida Bar v. Rasen, 495 So.2d 180 (Fla. 1986), the Respondent was found guilty of two federal felony counts of possessing cocaine with intent to distribute. The Bar sought disbarment. This Court showed its grasp of the realities of addiction in describing the course of the Respondent's disease:

> As is so often the case, [the Respondent's] productivity as a member of society precipitously plummeted as he became increasingly addicted . . . [H]e. . . lost the ability to . . . care for himself, and continued to withdraw into the nightmarish nether-world of cocaine addiction [Rosen, at 181].

In rejecting the Bar's recommendation, the Court held that "the extreme sanction of disbarment is to be imposed only 'in those rare cases where rehabilitation is highly improbable.'" Rosen, at 181, quoting The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978). In language similar to the Referee's findings in the instant case, the Court noted that the Respondent has "an excellent chance of beinq a great asset to the bar of this state" after rehabilitation, and that disbarment "may well deprive the legal community of the benefit of [the Respondent's] participation as an attorney in the future." Rosen, at 182.

In The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988), the Respondent was found guilty of four counts of trust account

violations. The Bar again souqht disbarment. In rejecting the Bar's recommendation in this case, the Court quoted the Referee's findings as to mitigation:

> Respondent's violation were extensive; however, these violations were without intent but were attributable to marital difficulties and the concomitant use of drugs and alcohol. Although possibly not forthright initially, he cooperated with the Bar's investigation . . . and acknowledged his quilt.
>
> The Respondent has suffered the consequences of adverse newspaper publicity and the stigma resulting therefrom. He has faced up to his responsibilities, and pursued rehabilitation, including close monitoring by a fellow attorney. . . . His rehabilitation has shown steady progress and his prognosis is good [Hartman, at 608].

As the Referee stated in the instant case, Steven Neckman's "rehabilitation seems to be in order and seems to be progressing rapidly. . . . [T]he Respondent is aware of the seriousness of his violations and , consequently, there is little or no likelihood of repetition. Therefore, it would seem appropriate to avoid further damage to the Respondent's reputation when future ethical violations seem unlikely." Supplemental Report of Referee, p. 7.

In the recent case of The Florida Bar v. Dubbeld, 594 So.2d 735 (Fla. 1992), this Court again demonstrated its understanding of the seriousness of the disease of alcoholism and drug addiction, and its commitment to promoting recovery amonq members of the Bar. In Dubbeld, the Respondent, who had been admonished for misconduct on two prior occasions, was found guilty of Bar

violations based upon a DUI conviction and an "obscene" or "patently offensive" phone call. As a result of his second prior admonishment (for wife beating and disorderly intoxication), the Respondent had been placed under contract with Florida Lawyers Assistance, Inc., a contract which he failed to perform. Nevertheless, the Referee unwisely recommended an unsupervised two-year probation, conditioned upon the Respondent's "not drinking to excess and not driving within four hours of drinking any alcohol." Dubbeld, at 737, footnote 2.

In evaluating the Referee's findings and recommendations, this Court reviewed some of its previous holdings in similar circumstances:

> There are three primary purposes in disciplining attorneys: The discipline must be: (1) fair to the public both by "protecting the public from unethical conduct and . . . not denying the public the services of a qualified lawyer"; (2) fair to the attorney by "being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation"; and (3) "severe enough to deter others who might be prone or tempted to become involved in like violations" [Dubbeld, at 736].
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> . . . . . .
>
> As we have recognized before, however, "a practicing attorney who is an alcoholic can be a substantial danger to the public and the judicial system as a whole." . . . Most, if not all of Dubbeld's misconduct stemmed from his use of alcohol. We are troubled by Dubbeld's apparent failure to complete his contract with Florida Lawyers Assistance, Inc., and to comply with the conditions of his second admonishment. At the referee's hearing Dubbeld produced no evidence substantiating his claim of rehabilitation. We, therefore, do not place as much emphasis on his mitigation as the referee did. Moreover, given Dubbeld's obvious problem with alcohol,

> we find the referee's recommended conditions of probation inappropriate.
>
> Therefore, we hold that Dubbeld shall receive a public reprimand, which will be accomplished by publication of this opinion, and that he shall be on two years' probation conditioned on his compliance with the conditions imposed by the grievance committee in connection with his second admonishment [Dubbeld, at 7371.

Unlike the Respondent in Dubbeld, Steven Neckman has presented substantial evidence of his rehabilitation: He is complying with the terms of his contract with Florida Lawyers Assistance, Inc.; he is actively participating in Alcoholics Anonymous; he submits to random blood and urine tests; he meets regularly with his Florida Lawyers Assistance, Inc., monitor; he has made restitution; and a number of knowledgeable character witnesses have testified convincingly of his rehabilitation. As the Referee in the instant case stated;

> Based upon the circumstances of this case this Court strongly recommends against disbarment. It is the belief of this Court that the Respondent has the ability to enhance and not damage the reputation of the Bar despite his prior addiction and resulting violations. The Respondent should be given the opportunity, through supervision, to establish that he can be a benefit and not a detriment to the Florida Bar [Supplemental Report of Referee, p. 7].

Like a great many people, the Referee in Dubbeld did not understand alcoholism and drug addition; such ignorance is excusable on his part. On the part of The Florida Bar, it is not. The Bar grudgingly acknowledges Steven Neckman's "rehabilitation efforts,'! but fails totally to appreciate the

devastating long-term impact of this disease, and fails also to appreciate the determination and courage necessary to recover successfully. The Bar seems to believe naively that an alcoholic or addict simply exerts his willpower to put down the drink or the drug and then strolls confidently out of his "nightmarish nether-world" as a cured and normal person. Such is not the case. There is substantial medical evidence of chemical dysfunction in the brain far months, and longer, after the use of alcohol or drugs has ceased.

From a more practical point of view, Alcoholics Anonymous--an indisputable authority on alcoholism--has from its very origin insisted that putting down the drink is only a bare beginning in recovery from the "insanity" (AA's word) of alcoholism--a process which requires for its successful consummation the "taking" of AA's famed "Twelve Steps." In its basic textbook (first published in 1939 and unchanged since), AA says in discussing Step Ten: "For by this time sanity will have returned" (emphasis added). Alcoholics Anonymous, p. 84. Recovery is not instantaneous: it is the result of a process over time.

Until the advent of Alcoholics Anonymous, alcoholism was regarded as a hopeless, untreatable, and terminal condition by most of the medical profession. Even today the percentage of permanent recoveries is relatively small in comparison with the total number of afflicted people. The reason is simple; in AA's words, the disease in "cunning, baffling, and powerful"--and it is a disease that is universally characterized by denial and

severely impaired judgment. In sum, the debilitating mental and emotional effects af alcoholism and drug addiction persist long after the actual substance abuse has ceased.

Previous holdings by this Court make it abundantly clear that the Court has a firm grasp on these facts about alcoholism and drug addiction.

The Florida Bar's Case Law:

The Bar relies heavily on The Florida Bar v. Winter, 549 So.2d 188 (Fla. 1989), as authority for its position. However, in Winter, the Respondent had previously resigned permanently from the Bar as a result of past disciplinary judgments and pending charges and was subsequently "found guilty of twenty-one counts of engaging in the unauthorized practice of law" (emphasis added). Winter bears very little resemblance to the case sub judice.

In The Florida Bar v. Greene, 589 So.2d 281, 282 (Fla. 1991), the Respondent, who had been previously suspended from the Bar for "a long history of disciplinary violations," was disbarred because he "completely disregarded lesser forms of discipline. . . . [and] failed to abide by conditions of probation."

In The Florida Bar v. Hartnett, 398 So.2d 2352, 1353 (Fla. 1981), the Respondent, who had been previously suspended, "avoided service of process" by the Bar and exhibited "clear disrespect for this Court."

In The Florida Bar v. Jones 571 So.2d 426, 428 (Fla. 1990), the Respondent, who was under suspension, "knowingly misrepresented his compliance with the suspension order" and engaged in the unauthorized practice of law on "numerous occasions" by appearing in court, preparing interrogatories, preparing and signing summons, pleadings, and financial affidavits.

In The Florida Rar v. Bauman, 558 So.2d 994 (Fla. 1990), the Respondent, who was under suspension for prior misconduct, "engaged in at least five distinct acts of practicing law" and "willfully, deliberately, and continuously refuses to abide by an order of this Court." In particular, the Respondent was "held in contempt by a circuit judge for holding himself out as an attorney. Yet subsequent to the contempt citation, he again represented clients in court."

In sum, the cases relied upon as authority by The Florida Bar are easily distinguished from the case now before this Court.

CONCLUSION

In view of the Florida Standards for Imposing Lawyer Sanctions, together with the precedent cited in this Brief, the Referee's disciplinary recommendation is appropriate and should be approved by this Court based upon the unique set of circumstances involved in this case and the presence of factors wh ch sign ficantly mitigate the Respondent's conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Answer Brief of Respondent was mailed to Jacquelyn P. Needelman, Esq., The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131; John T. Berry, Esq., The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-5600; John F. Harkness, Jr., The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 1 day of February, 1993.

Richard B. Marx, Esq.