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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

v.

JAMES A. HELINGER, JR.,
Respondent.
_____/

Case No. 79,370

TFB No. 91-11,585 (6C)

THE FLORIDA BAR'S REPLY BRIEF

SUSAN V. BLOEMENDAAL
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Attorney No. 347175

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SYMBOLS AND REFERENCES

In this Brief, the Petitioner, THE FLORIDA BAR, will be referred to as "The Florida Bar" or "The Bar". JAMES A. HELINGER will be referred to as "Respondent". "TR." will refer to the transcript of the Final Hearing held on August 5, 1992. "RR." will refer to the Report of Referee dated October 12, 1992. "RB" will refer to Respondent's Answer Brief.

ARGUMENT

Respondent's restatement of the issue in this case is simply an elaboration of the issue as stated in The Bar's Initial Brief.

Regardless of the wording, this Court must decide in this case, as in all disciplinary cases, the appropriate level of discipline based on the nature of the misconduct, and any mitigating or aggravating factors. In order to determine the appropriate level of discipline, this Court generally looks to previously decided cases and to the Florida Standards for Imposing Lawyer Sanctions. In 1970 this Court set out the purposes of discipline in The Florida Bar v. Pahules, 223 So.2d 130 (Fla.1970). The three purposes enunciated in Pahules attempt to balance societal concerns with fairness to an accused attorney. Since the Pahules decision this Court has, on a number of occasions, addressed the issue of impairment in connection with attorney misconduct. Respondent's brief cites a long line of cases where this Court first stated, then refined this principal. In The Florida Bar v. Shanzer, 572 So.2d 1382, 1384 (Fla.1991), this Court stated, "We recognize that mental problems as well as alcohol and drug problems may impair judgment so as to diminish culpability." Based on the referee's recommendation, Schanzer was disbarred despite mitigating evidence. Likewise, in The Florida Bar v. Knowles, 500 So.2d 140, 142 (Fla.1986) this Court disbarred an attorney despite significant mitigation, stating:

> We agree with the Referee and The Bar that the seriousness of the offense in this case warrants disbarment.

....

> Although we recognize that alcoholism was the underlying cause of respondent's misconduct, it cannot constitute a mitigating factor sufficient to reverse the Referee's recommendation to disbar under the facts in this case. The misappropriations occurred continuously over a period of approximately four years. During this time, respondent continued to work regularly. His income did not diminish discernably as a result of his alcoholism. (emphasis supplied)

In The Florida Bar v. Shuminer, 567 So.2d 430 (Fla.1990), this Court disbarred an attorney who had been diagnosed as being a drug abuser since the age of ten years old. The Referee's report indicated that Shuminer had presented evidence of treatment for addiction and an excellent prognosis for recovery. The Referee's report further outlined Shuminer's supervision by F.L.A., Inc. and full compliance with his F.L.A., Inc. contract. The report also noted testimony concerning Shuminer's excellent moral character and competence as an attorney. Despite these and other significant mitigating factors, this Court disbarred Shuminer, citing to the Knowles opinion, as follows:

> We pointed out that during the period when the misconduct occurred, Knowles had continued to work regularly and his income did not diminish discernably as a result of his alcoholism. So too here Shuminer has failed to establish that his addiction rose to a sufficient level of impairment to outweigh the seriousness of his offenses. He continued to work effectively during the period in issue, and he used a significant portion of the stolen funds not to support or conceal his addictions but rather to purchase a luxury automobile.

Shuminer at 432 (emphasis supplied)

These three cases, Knowles, Shuminer, and Shanzer, seem to indicate that alcoholism and drug addiction will be considered as significant mitigating factors only where judgment is impaired.

Both Shuminer and Knowles were guilty of stealing from clients, one of the most serious offenses an attorney can commit. In the case at bar, this Court must determine the relative seriousness of Respondent's conduct which involved the intentional and systematic harassment of a woman for a period of almost five years. This Court must then determine the extent to which Respondent's conduct can be mitigated to offset the sanctions to be imposed.

In Respondent's brief, he acknowledges that his conduct was "inexcusable" and that "it had a devastating effect on the victim." In spite of this acknowledgement, Respondent takes the position that "under the facts of this case the sanctions imposed should be minimal." RB 16. Respondent goes on to state in his brief: "in the scale of attorney misconduct, ranging from deceiving the Court on down to simple neglect, Respondent's misconduct rates really low." RB 26. (emphasis supplied)

The Florida Bar strongly disagrees with Respondent's assessment of the seriousness of his misconduct. In The Florida Bar's v. Corbin, 540 So.2d 105 (Fla.1989), this Court suspended an attorney and former judge for a three year period of time for a single incident of felony misconduct involving neither theft nor deceit, and for misconduct which was totally unrelated to the

practice of law. The Florida Bar strongly urges this Court not to send a message to the public and to the legal profession that conduct of an attorney who intentionally harasses a woman for a period of almost five years, and who has twice been criminally prosecuted for making harassing and obscene telephone calls to women "rates really low," and warrants only a "minimal" sanction.

As in Corbin, this Court should consider relevant mitigating factors, but not to the extent of mitigating the discipline to the 90-day suspension recommended by the Referee. Respondent, like Shuminer, has "failed to establish that his addictions rose to sufficient level of impairment to outweigh the seriousness of his offenses." Like both Shuminer and Knowles, Respondent continued to work regularly and effectively during the period that misconduct occurred. His judgment was not otherwise impaired. As the Referee noted in his report, Respondent during the time the misconduct occurred, was an outstanding lawyer, gave generously of his time and energy to a state university, was highly regarded in his work, and his "illness" did not interfere with his work. RR 9.

There is evidence in the record which significantly undermines any causal connection between Respondent's misconduct and alcohol or cocaine addiction. Although the Referee apparently accepted Respondent's self-serving testimony concerning a causal connection, there is evidence in the record to indicate otherwise. Respondent was able to conceal his conduct over a period of almost five years, and the Referee noted in his report that Respondent placed calls in Tallahassee specifically for the purpose of avoiding detection. RR

2. Even though the calls were apparently placed in the midst of an atmosphere of "continuous parties," Respondent was able to avoid detection. RR 2. After being threatened by the victim that she would have him put in jail if he did not stop the calls, Respondent was able to change the pattern of the telephone calls to a much more random pattern in order to avoid detection. TR 15. Further undermining the strength of any causal connection, is the fact that Respondent has engaged in this behavior since the age of 11, that the criminal charges against him in 1978 occurred before he began to use cocaine, and that the telephone calls apparently persisted even during periods of abstinence. While under probation for the 1978 offense, there was no diagnosis by the treating psychologist that Respondent's criminal conduct was caused by the use of alcohol or drugs. Most compelling however, is the testimony of Respondent's own therapist at the Final Hearing that, "unless he works the program, there is a high probability that even without the alcohol or cocaine, that problem can happen." TR 57. (emphasis supplied)

The three year suspension requested by The Florida Bar fulfills all of the purposes of discipline enunciated in Pahules. Respondent has engaged in a life long pattern of placing obscene and harassing telephone calls to women, for which he has twice been criminally prosecuted. This behavior, coupled with Respondent's abuse of alcohol and use of an illegal drug, provides a compelling reason for requiring Respondent to prove rehabilitation. There should be an affirmative duty on Respondent to be properly

evaluated and treated and to prove by clear and convincing evidence that he is rehabilitated and fit to practice law. A three year suspension would require proof of rehabilitation, and would also send a strong message to the public and to the legal profession that the Court considers Respondent's conduct to be of a serious nature requiring more than a non-rehabilitative suspension.

Respectfully Submitted,

SUSAN V. BLOEMENDAAL #347175
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, Florida 33607
(813) 875-9821

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 12 copies of the FLORIDA BAR'S REPLY BRIEF is being sent to SID J. WHITE, Clerk, The Supreme Court of Florida, 500 South Duval, Tallahassee, Florida 32399-2927, a copy to James A. Helinger, Jr., Esquire, c/o RICHARD T. EARLE, JR., Esquire, 150 2nd Avenue North, Suite 1220, St. Petersburg, Florida 33701-3342, and a copy to JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by regular U.S. Mail this 17th day of February, 1993.

SUSAN V. BLOEMENDAAL
Assistant Staff Counsel