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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case Nos. 80,983
81,450

v.

TFB Nos. 91-10,498(13E)
92-10,711(13E)

JEFFREY A. BLAU,

Respondent.

_______________________________/

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

The Florida Bar adopts the symbols and references used by Respondent as follows: The transcript of the final hearing will be referred to as T.R., the Report of Referee will be referred to as R.R., The Florida Bar's exhibits will be referred to as TFB Ex., and Respondent's exhibits will be referred to as R. Ex. Additionally, Respondent's initial brief will be referred to as I.B.

STATEMENT OF THE CASE AND OF THE FACTS

Case No. 80,983, TFB No. 91-10,498(13E): Respondent admitted all of the allegations as stated in the Complaint of The Florida Bar. (T.R. 3-5).

Between 1983 and 1986, Respondent possessed and used cocaine, a controlled substance, in violation of Chapter 893, Florida Statutes. Although no criminal prosecution was undertaken in this matter, Respondent's possession and use of cocaine constituted a third degree felony under the Florida statute. Respondent further admitted to using cocaine for several years until discontinuing its use in 1987. (T.R. 14).

Respondent's Statement of the Case and Facts alleges that in October, 1990, Respondent was given notice by The Florida Bar that a disbarred attorney had made a statement that he witnessed Respondent use cocaine sometime previously. (I.B. 1). This statement is factually incorrect and not supported by the record. (T.R. 71-72). The Florida Bar requests that this statement be stricken from Respondent's Initial Brief.

Case No. 81,450, TFB No. 92-10,711(13E): Respondent admitted all of the allegations as stated in the Complaint of The Florida Bar, with the exception of Paragraph # 9 of said Complaint wherein it was stipulated that Respondent had purchased marijuana every four or five months for the past two to three years prior to the date of the questioning by law enforcement. (T.R. 3-5).

On or about May 25, 1989, Respondent purchased marijuana at a residence in Tampa and was apprehended by Hillsborough County

Sheriff's deputies. Respondent admitted to consuming a marijuana cigarette in the residence. Respondent further admitted to purchasing marijuana every four or five months for the past two to three years prior to May 25, 1989. Respondent further admitted to having used marijuana since he was fifteen years old. (R.R. 1). Respondent cooperated with a law enforcement criminal investigation and was not charged with any crimes related to his possession, use and purchase of marijuana. The possession, use and purchase of marijuana, a controlled substance, is a first degree misdemeanor in violation of Chapter 893, Florida Statutes.

Following the Final Hearing on both cases, the referee found Respondent in violation of 3-4.3 (The commission of any act that is unlawful or contrary to honesty and justice, may constitute cause for discipline), and 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), Rules Regulating The Florida Bar. (R.R. 2)

The referee recommended that Respondent be suspended from the practice of law for sixty (60) days, to be followed by three years probation with the condition that Respondent undergo substance abuse evaluation and treatment. (R.R. 2)

SUMMARY OF ARGUMENT

A sixty day suspension followed by three years probation is an appropriate discipline for an attorney who possessed and used cocaine and marijuana, in violation of Florida criminal statutes. The referee's recommended discipline is appropriate in light of the facts of the case, the Florida Standards For Imposing Lawyer Sanctions and case law.

Absent mitigation, Respondent's illegal use and possession of cocaine and marijuana would warrant at least a ninety day suspension plus three years probation. The referee gave proper weight to Respondent's mitigation evidence by recommending a suspension below that suggested by the Florida Standards For Imposing Lawyer Sanctions in drug cases.

Respondent's conduct represents more than mere casual drug use and must be discouraged. Respondent's willful violation of the Florida criminal law warrants the imposition of discipline that is fair to respondent, fair to the public and the profession yet is proportional to the seriousness of the misconduct. A sixty day suspension with three years probation is sufficient after considering the seriousness of Respondent's misconduct, along with aggravating and mitigating factors, while acting as a deterrent to other attorneys who may consider committing similar transgressions in the future. The discipline will further protect the public.

ARGUMENT

A SIXTY DAY SUSPENSION WITH THREE YEARS PROBATION IS AN APPROPRIATE DISCIPLINE FOR AN ATTORNEY WHO POSSESSED AND USED COCAINE AND MARIJUANA, IN VIOLATION OF FLORIDA CRIMINAL STATUTES.

Respondent's conduct in the instant case clearly warrants a sixty day suspension and three years probation under Florida Standards For Imposing Lawyer Sanctions and case law. Respondent admits to the use and possession of cocaine and marijuana, which constitute a felony and misdemeanor respectively, in violation of the criminal laws of the State of Florida. (T.R. 3-5).

Standard 10.0, Standards For Imposing Sanctions In Drug Cases, is the proper standard to be applied in the instant case to determine the appropriate discipline. Standard 10.0 encompasses the personal use and/or possession for personal use of controlled substances, when no criminal conviction is obtained.

Standard 10.2 states that absent aggravating or mitigating circumstances, a 91 day suspension and probation is appropriate where there is misdemeanor conduct involving controlled substances. Standard 10.2 would apply to Respondent's use and possession of marijuana.

Standard 10.3 states that absent the existence of aggravating factors, a 91 day suspension or 90 days if rehabilitation has been proven, and a three year period of probation, is appropriate where there is felonious conduct involving the personal use and/or possession of a controlled substance. Standard 10.3 would apply to

Respondent's use and possession of cocaine. Furthermore, Respondent admits that absent mitigating circumstances, an imposition of a 90 day suspension would be appropriate. (I.B. 7). Respondent's conduct absent mitigation would warrant at least a 90 day suspension with three years probation.

Respondent claims that the referee failed to give proper weight to the mitigation evidence presented. (I.B. 5). However, the referee gave appropriate consideration to Respondent's evidence of mitigation by recommending a discipline lower than the 90 or 91 days suggested by the Standards For Imposing Lawyer Sanctions. The referee considered Respondent's truthfulness and cooperation with the Bar (RR 2) and the absence of a prior disciplinary record (R.R. 2) as mitigation in determining the appropriate discipline. The referee further acknowledged that Respondent discontinued the use of cocaine in 1987 as evidence of mitigation. (R.R. 1).

In The Florida Bar v. Holtsinger, 505 So. 2d 1329 (Fla. 1987), this Court suspended an attorney for 90 days with two years probation for possession and use of illegal drugs. Holtsinger had no prior disciplinary record. In The Florida Bar v. Corrales, 505 So. 2d 1327 (Fla. 1987), this Court determined that an attorney's personal use of marijuana warranted a 90 day suspension with two years probation. In both cases, this Court approved a Conditional Plea for Consent Judgment in imposing the discipline.

In The Florida Bar v. Thompson, 500 So. 2d 1335 (Fla. 1986), this Court imposed a 91 day suspension requiring rehabilitation for

the felony possession of cocaine, misdemeanor possession of a controlled substance, disorderly intoxication, and leaving the scene of an accident. Thompson plead guilty to the criminal charges and was sentenced to six months probation and a $500.00 fine.

Respondent's misconduct in the instant case involved violations of both felony and misdemeanor criminal drug statutes and is similar to the conduct in Holtsinger and Corrales. However, the use of controlled substances by Respondent in this case was shown to be a long term, continuing pattern. Absent mitigation, Respondent's conduct would warrant similar discipline. While the misconduct in Thompson was more extensive and involved a criminal plea, Respondent's conduct is no less serious merely because law enforcement chose not to prosecute the illegal conduct.

Respondent cites The Florida Bar v. Levine, 498 So. 2d 941 (Fla. 1986) as authority supporting a public reprimand. (I.B. 6). In Levine, this Court's opinion imposed a public reprimand for a federal conviction for misdemeanor personal use of cocaine. In the instant case, Respondent's possession of cocaine would constitute a felony in the courts of the State of Florida and Respondent admits that his possession and use of cocaine constitute a felony under state law. (T.R. 3-5).

When Respondent's use and possession of cocaine is combined with his use and possession of marijuana, the conduct is clearly more serious and continuous than the conduct shown in Levine, and

warrants a more severe discipline. The referee found that Respondent displayed a continued pattern of drug use from the age of fifteen and had used cocaine for several years. (R.R. 1). The Levine case does not show a continued pattern of drug use. The referee in the present case pointed to Respondent's use of marijuana after his apprehension in 1989 as a relevant aggravating factor in his decision. (R.R. 1).

Respondent argues that since he is a sole practitioner, a suspension would damage his practice. (I.B. 8). Respondent's ability to financially withstand a period of suspension should not be a factor in determining an appropriate discipline. A sole practitioner should not be given special consideration simply because of the effect on his law practice might be more severe than on a member of a law firm. This would effectively punish an attorney who happens to have chosen to become a member of a law firm.

Respondent's knowing and intentional use of controlled substances in contravention of the criminal laws of the State of Florida constitutes serious misconduct in violation of the Rules Regulating The Florida Bar. Such misconduct merits a suspension from the practice of law. Any discipline less than sixty days will not adequately serve the purposes of discipline as stated in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). The discipline must be fair to society, fair to respondent, and "severe enough to deter others who might be prone or tempted to

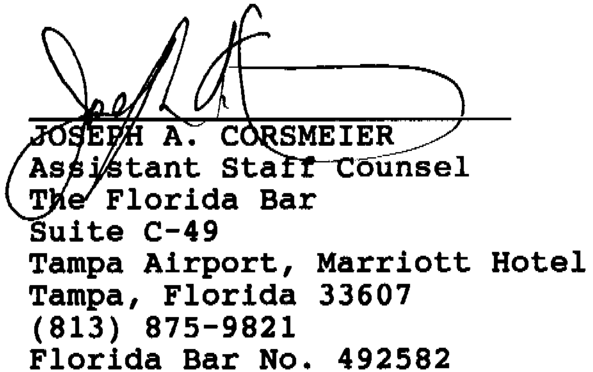
become involved in like violations." Pahules at 132. By taking his oath as an attorney, Respondent swore to follow and uphold the law. Respondent's knowing, intentional and blatant violations of the criminal laws of this state should not result in a mere "slap on the wrist" and a public reprimand is not appropriate given the seriousness of Respondent's misconduct.

A sixty day suspension with three years probation will deter other attorneys from engaging in criminal conduct, while demonstrating to the public that attorneys who knowingly and intentionally violate the criminal statutes are not above the law and will be appropriately disciplined for their misconduct.

CONCLUSION

The referee's recommendation of a sixty day suspension and three year rehabilitative probation is the appropriate discipline in this matter. Respondent's misconduct, absent mitigation, would warrant at least a 90 day suspension. The referee has recommended a discipline less than that suggested by the Standards For Imposing Lawyer Sanctions in recognition of Respondent's mitigation evidence. The recommendation by the referee should be upheld.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief has been furnished to Jeffrey A. Blau, Respondent, c/o Frank De La Grana, Counsel for Respondent, 111 East Madison Street, Tampa, FL 33602, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, by regular U.S. Mail this 6th day of October, 1993.

JOSEPH A. CORSMEIER