IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

vs.

JEFFREY A. BLAU
_____/

CASE NO. 80,983
81,450

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The following abbreviation is used in this brief:

T.R. = Transcript of Final Hearing

STATEMENT OF THE CASE AND THE FACTS

The Respondent was charged and found guilty of violating Rules 3-4.3 (commission of an act that is unlawful or contrary to honesty and justice, whether or not the act was committed during the course of the attorney's relations or otherwise) and 4-8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects). After making said findings, the Referee recommended that:

> "I recommend that the respondent be suspended from the practice of law for a period of sixty (60) days with automatic reinstatement at the end of period of suspension as provided in Rule 3-5.1(e), Rules of Discipline.
>
> I recommend that the respondent be placed on probation for a period of three (3) years during which time he will undergo substance abuse evalution (including testing) and treatment as required."

Although the Respondent is not contesting the actual substance of the Referee's findings, the Respondent is specifically contesting the Referee's Recommendation of discipline.

In October, 1990, the Respondent was given notice by The Florida Bar that an attorney who had been disbarred had made a statement that he had witnessed the Respondent use cocaine sometime previously. The Respondent was thereafter made to respond to said allegations by The Florida Bar. Despite the fact that the Respondent denies having used cocaine with his accuser, the Respondent candidly admits having used cocaine occasionally during a period of time beginning in 1983 and ending approximately May 1, 1987, (T.R.14). In addition, the Respondent admits

having used marijuana casually up until June of 1989 (T.R.14) with a single relapse sometime around February 16, 1990 or 1991 (T.R.15).

The Respondent in this case has sought evaluations by Drs. Melvin Gardner and Sidney Merin. Dr. Gardner specifically stated in his report that:

> "In my opinion, he is not now and has never been addicted to any drugs except tobacco and over-the-counter nasal spray." (T.R.5).

Furthermore, the Respondent has entered the F.L.A.,Inc. program and has cooperated fully with The Florida Bar during its initial investigation up through the filing of the formal complaint. In fact, based upon F.L.A.,Inc.'s evaluation and Dr. Gardner's report including several negative drug tests, it does not appear that the Respondent is in need of any type of drug rehabilitation at this time. (T.R.36)

The Respondent offered several witnesses, including himself, on his behalf. These witnesses included Dr. Sidney Merin, Ph.D.; Bruce Goldin, and Henry Huerta. Every witness familiar with the Respondent's professional ability testified to his competency, (see T.R.45 - T.R.53) preparation, and zealous representation in the courtroom. Moreover, Dr. Sidney Merin testified that the Respondent is a "prudent and sober type of individual" (T.R.32) who is not at all likely to have a problem now or in the future with cocaine or marijuana (T.R.36). There was no evidence offered to rebut these facts.

Based upon the evidence adduced at trial as referenced

above, the Referee recommended the Respondent be suspended from the practice of law for a period of sixty (60) days with automatic reinstatement at the end of the sixty (60) days. In addition, the Referee recommended that the Respondent be placed on probation for a period of three (3) years during which time he will undergo substance abuse evaluation and treatment as required.

ARGUMENT

I. THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS NOT APPROPRIATE DUE TO THE FACT THAT HE FAILED TO ACKNOWLEDGE AND GIVE PROPER WEIGHT TO THE UNREBUTTED EVIDENCE OF MITIGATION AS DELINEATED IN THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND FAILED TO FOLLOW PRECEDENT SET IN CASES INVOLVING SIMILAR MISCONDUCT.

The principal concerns of The Florida Bar and the Supreme Court in attorney discipline cases are three fold:

> "First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness and imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish the breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be proned or tempted to become involved in like violations." The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970)

This court has repeatedly reaffirmed the principals set forth in Pahules and has specifically emphasized that the encouragement of reformation and rehabilitation is of principal concern. The Florida Bar v. Sommers, 508 So.2d 341, 343 (Fla. 1987); The Florida Bar v. Hartman, 519 So.2d 606, 608 (Fla. 1988).

Additionally, the Standards for Imposing Lawyer Sanctions allow the referee and this court to consider mitigation when imposing discipline on an attorney for misconduct. The list of mitigating factors in Section 9.32 is as follows:

> (a) absence of a prior disciplinary record;
> (b) absence of a dishonest or selfish motive;
> (c) personal or emotional problems;
> (d) timely good faith to make restitution or to rectify consequences of misconduct;
> (e) full and free disclosure to disciplinary board or cooperative attitude towards proceedings;
> (f) inexperience in the practice of law;
> (g) character or reputation;

(h) physical or mental disability or impairment;
(i) unreasonable delay in disciplinary proceeding provided that the Respondent did not substantial contribute to the delay and provided further that the Respondent has demonstrated specific prejudice resulting from that delay;
(j) interim rehabilitation;
(k) imposition of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.

Furthermore, Section 11.0 provides for additional mitigation in drug cases. Section 11.01 states:

> "In addition to those matters of mitigation listed in Standard 9.32, good faith, ongoing supervised rehabilitation by the attorney, through F.L.A.,Inc. whether or not the referral to said program(s) was initially made by F.L.A.,Inc. occurring both before and after disciplinary proceedings have commenced may be considered as mitigation."

In the instant case, the Respondent does not have a prior record for discipline and did not have a dishonest or selfish motive. Moreover, the Respondent has made a timely good faith effort to rectify the consequences of his actions in that he has sought therapy and is continuing in therapy. He has been fully cooperative with the disciplinary proceedings, and F.L.A.,Inc. The Respondent has an excellent professional reputation, he is very intelligent, and he is known to be of good character. These mitigating factors went unrebutted by The Bar, and The Bar failed to provide any evidence of aggravation. Despite the substantial evidence requiring mitigation, the Referee did not give adequate consideration to the mitigating factors in his report. The referee clearly errored in this regard.

The Supreme Court of Florida has previously imposed ninety (90) day suspensions for cocaine usage on several occasions

involving cases without substantial mitigation. See e.g., The Florida Bar v. Franke, 548 So.2d 1119 (Fla. 1989), The Florida Bar v. Weintraub, 528 So.2d 367 (Fla. 1988), The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987) and The Florida Bar v. Holtsinger, 505 So.2d 1329 (Fla. 1987). In each of these cases, some factor or factors of aggravation existed other than the mere use of illegal drugs. In Weintraub, the Respondent was criminally charged with delivery of cocaine in addition to being found to have used the illegal drug. In Franke, the Respondent was found to have used both cocaine and marijuana and additionally, was found to have committed retail theft at a hardware store. In Sommers, the Respondent had a cocaine dependency problem as well as ten separate counts of misconduct relating to neglect and his failure to perform legal work in a timely manner. In Holtsinger, the Respondent was an assistant state attorney at the time of the alleged drug usage.

The Supreme Court of Florida has previously imposed a public reprimand for cocaine usage under other circumstances. In The Florida Bar v. Levine, 498 So.2d 941 (Fla. 1986), the Respondent was convicted of personal use of cocaine in federal court which is a misdemeanor under Federal Law. Apparently, there were no further aggravating circumstances to cause a suspension to be warranted.

CONCLUSION

The Florida Standards and the past case law suggest that absent mitigating circumstances, an imposition of a ninety (90) day suspension would be appropriate in this case. However, as outlined above, the circumstances surrounding the Respondent's drug usage are mitigating and dictate leniency. The Florida Bar recently consented to a public reprimand of a fellow lawyer who was the Respondent's employer at the time of the alleged cocaine use took place. The attorney who received the reprimand was also accused by the same individual who accused the Respondent. The Respondent's use of cocaine took place over ten years ago and the Respondent's marijuana usage was only recreational in nature and has ceased for approximately thirty (30) months. Since the initial stage of the proceedings before The Bar, the Respondent has cooperated fully with the investigating attorney for the local Grievance Committee, as well as voluntarily subjected to psychiatric evaluations and enrolled in the Florida Lawyers Assistance, Inc. program. The Respondent is well liked and respected in the legal community in the areas in which he practices. In addition, former and present clients have testified as to their confidence in the Respondent's ability to represent them competently and effectively. Knowing the consequences of his actions, the Respondent has at all times cooperated with The Florida Bar, as well as other law enforcement agencies in their investigation of the Respondent's misconduct, as well as information pertaining to his drug use. Finally, the

Respondent is a sole practitioner whose financial well being rests solely on his ability to continue to practice law.

Given the purposes for discipline set forth in Pahules, the absence of aggravating factors, and the existence of substantial mitigating factors, it is suggested that consistent with the authorities noted above, an appropriate discipline would be a public reprimand and a period of probation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Joseph A. Corsmeier, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607, by U.S.Mail this 16th day of September, 1993.

Frank de la Grana

Frank de la Grana, Esq.