

FILED

SID J. WHITE

NOV 30 1998

097
12/9

IN THE SUPREME COURT OF FLORIDA
THE FLORIDA BAR,

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Complainant,

Case No. 92,892

[TFB Case No. 98-31,911(07A)(OSC)]

v.

PAUL JOHN DUBBELD,

Respondent.

THE FLORIDA BAR'S ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 253847

AND

JAN K. WICHROWSKI
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314
(407) 425-5424
ATTORNEY NO. 381586

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SYMBOLS AND REFERENCES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

**WHETHER THE REFEREE'S RECOMMENDATION THE
RESPONDENT BE FOUND IN CONTEMPT AND BE
SUSPENDED FOR A NINETY-ONE DAY PERIOD
OF TIME IS APPROPRIATE?**

CONCLUSION 14

CERTIFICATE OF SERVICE 16

APPENDIX 17

APPENDIX INDEX 18

COMPLIANCE WITH RULE 9.210(a)(2) 19

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>The Florida Bar v. Cox,</u> 23 Fla. L. Weekly S521 (Fla. Oct. 1, 1998)	6, 13
<u>The Florida Bar v. Dubbeld,</u> 700 So. 2d 688 (Fla. 1997)	2, 4, 8

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on August 5, 1998, shall be referred to as "T" followed by the cited page number.

The Report of Referee dated August 10, 1998, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached. (ROR A____)

The bar's exhibits will be referred to as Bar Ex.____, followed by the exhibit number followed by the Appendix page, if appropriate (B-Ex. A____).

STATEMENT OF THE CASE

On April 27, 1998, the bar served a Petition for Order to Show Cause after receiving a letter dated March 24, 1998, from Karal B. Oberdier of Florida Lawyers Assistance, Inc., advising the bar that the respondent had not complied with his recovery contract as required by the terms of his Conditional Guilty Plea for Consent Judgment entered in The Florida Bar v. Dubbeld, 700 So. 2d 688 (Fla. 1997). On May 8, 1998, this court entered an Order to Show Cause. On July 9, 1998, this court directed the Chief Judge of the Fourth Judicial Circuit to appoint a referee to hear the matter. The referee was appointed on July 13, 1998, and the case was set for final hearing on August, 5, 1998. The notice of said hearing was mailed to the respondent by the bar on July 22, 1998. The referee entered his report on August 10, 1998, recommending that the respondent be placed on an immediate ninety-one day suspension as agreed in his Condition Guilty Plea for Consent Judgment in The Florida Bar v. Dubbeld, 700 So. 2d 688 (Fla. 1998), for having failed to comply with the terms of his Florida Lawyers Assistance, Inc., rehabilitation contract. The board considered the referee's recommendations at its October, 1998, meeting and voted not to seek an appeal. The respondent moved for a reconsideration of the report on August 14, 1998, which was denied, and

filed his Response to Report of Referee, which the clerk's office treated as a petition for review, on August 24, 1998. He filed his initial brief on October 21, 1998, which failed to comply with the Florida Rules of Appellate Procedure and he filed his amended brief on October 30, 1998. The bar would note that the respondent served neither of his briefs on bar counsel. The bar served its motion to strike or, in the alternative, motion for enlargement of time to answer the respondent's brief on October 28, 1998. On November 2, 1998, this court entered an order denying the bar's motion to strike and granting the bar until November 30, 1998, to serve its answer brief.

STATEMENT OF THE FACTS

The following facts, unless otherwise noted, are derived from the Report of Referee.

The respondent's Conditional Guilty Plea for Consent Judgement entered into in The Florida Bar v. Dubbeld, 700 So. 2d 688 (Fla. 1998), sets forth certain conditions with which the respondent was required to comply, including abiding by the terms of his recovery contract with Florida Lawyers Assistance, Inc. By letter dated March 24, 1998, Karal Oberdier of Florida Lawyers Assistance, Inc., advised the bar that the respondent was not complying with the terms of his recovery contract by failing to attend the required Alcoholics Anonymous (hereinafter referred to as "AA") and/or attorney support group meetings, admittedly imbibing alcoholic beverages on at least one occasion, having a positive drug screen for alcohol on at least one occasion, failing to follow up with recommended extended treatment, failing to arrange for his AA sponsor to contact Ms. Oberdier, failing to maintain contact with his AA sponsor, failing to send Ms. Oberdier a copy of his evaluation performed one year ago with regard to his alcoholism and drug abuse, leaving the state without notifying Florida Lawyers Assistance, Inc., failing to report for a drug screening on March 4, 1998, and

failing to attend the Florida Lawyers Assistance, Inc., convention held between July 29, 1998, and July 31, 1998. In his aforementioned Conditional Guilty Plea for Consent Judgment, the respondent agreed to an immediate ninety-one day suspension if he violated the terms of his Florida Lawyers Assistance, Inc., recovery contract.

SUMMARY OF THE ARGUMENT

In his brief, the respondent seeks to challenge the referee's findings of fact that he violated his Florida Lawyers Assistance, Inc., contract. A referee's findings of fact are presumed to be correct and this court will uphold them unless the challenging party can conclusively show the facts are not supported by the evidence or are clearly erroneous. The Florida Bar v. Cox, 23 Fla. L. Weekly S521 (Fla. October 1, 1998). The respondent shows a disturbing pattern of behavior extending over a period of many years involving alcohol abuse. All of his prior discipline involves alcohol abuse and treatment has been ordered on more than one occasion. In this instance, he was advised that he could enter into a stipulation if he so desired. He never provided either the bar or the referee with an executed copy of the stipulation prepared by the bar. (T p. 15). He never sought a continuance of the final hearing from the referee until the morning of the hearing. (ROR A2). On the morning of the hearing, the respondent telephoned the referee's office and advised the referee's judicial assistant that the final hearing could be canceled because he and the bar had "resolved the case through a plea agreement." (ROR A1; T p.p. 13-14). He advised the judicial assistant that he would not be attending the final hearing because he was out of state on a personal vacation. (T

p. 14). The respondent was put on notice of the final hearing date by notice sent to him by certified mail, return receipt requested, on July 22, 1998. Yet the respondent did not advise the referee that he could not attend on that date until the day of the hearing. The respondent's brief indicates that he does not take either his recovery or these proceedings seriously and is placing blame on Florida Lawyers Assistance, Inc., for his own refusal to comply with the terms of his recovery contract. The respondent did not violate just one term of the contract. He violated numerous provisions over a period of time. (B-Ex 2 A35; B-Ex. 3). The facts are clear. The respondent failed to comply with all the terms of his recovery contract (B-Ex. 1 A32) and his Conditional Guilty Plea for Consent Judgment (B-Ex. 5 A7) provides for an immediate ninety-one day suspension to continue until he proves rehabilitation. This is the only measure that can protect the public where a substance abusing lawyer continues to suffer from active alcoholism. Through his brief, the respondent attempts to bring forth evidence never brought forward before the referee, such as stating that the bar had reached a plea agreement with the respondent. No plea agreement ever was reached due to the respondent's refusal to agree to the residential rehabilitation clause.

ARGUMENT
**THE REFEREE'S RECOMMENDATION THE RESPONDENT
BE FOUND IN CONTEMPT AND BE SUSPENDED FOR A
NINETY-ONE DAY PERIOD OF TIME IS APPROPRIATE**

At the outset, the bar would note that Florida Lawyers Assistance, Inc., is not a party to this proceeding nor was it a party in any other disciplinary proceeding involving the respondent.

The real issue here is whether the respondent violated the terms of his probation set forth in his Conditional Guilty Plea for Consent Judgment in The Florida Bar v. Dubbeld, 700 So. 2d 688 (Fla. 1997) (hereinafter referred to as the "Consent Judgment Case"). The respondent's Conditional Guilty Plea for Consent Judgment (B-Ex. 5 A7) provided that the respondent had to attend and participate in five Alcoholics Anonymous meetings each week for six weeks, undergo a psychiatric evaluation and follow any recommended treatment program, and submit to random urinalysis on a periodic basis. The respondent agreed that if a grievance committee found probable abuse, if he defaulted in the performance of any terms and conditions of his Florida Lawyers Assistance, Inc., rehabilitation contract, or if he defaulted in the performance of any terms and conditions of his

plea agreement, it would be a violation of his probation and he agreed that he would be suspended for a period of ninety-one days. He agreed that the term "default" included his failure to attend AA meetings, fully participate in the 12 step program, use of any mood altering substances, including alcohol, failure to submit to a random urinalysis, failure to submit to the psychiatric exam, failure to undergo any recommended mental health treatment, failure to timely pay costs, and failure to abide by his rehabilitation contract with Florida Lawyers Assistance, Inc. A default would be "unilaterally determined by either bar counsel . . . or by any Florida Lawyers Assistance, Inc. representative assigned to monitor the respondent's compliance with the Florida Lawyers Assistance, Inc. contract." The bar submits that the evidence clearly and convincingly showed that the respondent failed to abide by the terms of his Conditional Guilty Plea and that the ninety-one day suspension, to which he agreed, is warranted here to protect the public from a lawyer who is still suffering from a substance abuse problem. It is interesting to note that the underlying case that gave rise to the Conditional Guilty Plea for Consent Judgment involved conduct similar to that displayed by the respondent in representing himself in this matter. In the Consent Judgment case, the facts of which are set forth more fully in the Conditional Guilty Plea for Consent

Judgment (see Appendix page A7), involved his representation of a client in federal court where he failed to attend a case management conference because he wanted to withdraw from representing the client after opposing counsel made allegations concerning the respondent's alcohol abuse. After the fact, he filed a motion seeking to withdraw and apologized to the court for not seeking prior approval to not appear at the case management conference. The court found the respondent failed to show good cause for his failure to attend the case management conference. The similarity to the respondent's failure to attend the final hearing here is disturbing.

The bar and the respondent did indeed discuss entering into a stipulation in late July, 1998. However, the bar never executed the stipulation and merely sent a copy to the respondent for review and execution if he so desired. The respondent never returned an executed copy of said stipulation to the bar. (T p. 15). The respondent advised bar counsel that the plea was unacceptable because he could not agree to the residential rehabilitation clause. The respondent never advised bar counsel that he would accept the stipulation as written. Further, it appears the respondent made travel plans without waiting to receive an order from the referee

canceling the final hearing. Even if the bar and the respondent had entered into a stipulation or agreement, this does not automatically negate the need for a hearing. The parties may request that the referee enter a report without holding a hearing, however, the referee is free to direct the parties to appear if he so chooses. The existence of a Conditional Guilty Plea for Consent Judgment is no guarantee that a referee will accept same and cancel a scheduled final hearing. The referee found it clear on the record that there was no stipulation or conditional guilty plea for consent judgment between the bar and the respondent. (T p. 15; ROR A1-2).

The respondent repeatedly failed to attend AA meetings at the Hearthstone Foundation and on one occasion he attended a meeting "smelling of alcohol." (T p. 7). His failure to attend AA meetings violated paragraph seven of his Florida Lawyers Assistance, Inc., contract (T p. 8; B-Ex. 1 A32), and the person he named as being his AA sponsor advised Ms. Oberdier that the respondent was not actively using him as a sponsor. (T p. 8). On more than one occasion, the respondent's drug screen showed that he may have been intensively using alcohol. (T p. 8). The respondent's explanation that the positive drug screen was due to his having imbibed O'Doul's beer, a nonalcoholic beer, was, in Ms. Oberdier's

professional opinion, not credible. (T. P. 7). The respondent missed one scheduled drug screen test, a violation of his Florida Lawyers Assistance, Inc., contract, (T p. 8), and when he arrived at Charter-by-the-Sea for a second evaluation, he refused to take the required tests and two employees detected the odor of alcohol on his breath. (T p. 10). Florida Lawyers Assistance, Inc.'s, medical review officer determined after his examination of the respondent that the respondent was still drinking, his current support network seemed inadequate, and that he should immediately enter into a multi-day evaluation program for further assessment. (T p. 10). The respondent did not seek the recommended extended treatment. (T p. 10). The respondent failed to attend the required conference and, when Ms. Oberdier called to remind him of the upcoming conference and his required attendance, he was unaware that his contract required him to attend.(T p.p. 10-11).

Taken separately, each of the above actions by the respondent might not indicate a continuing alcohol problem. However, when considered in conjunction with each other and in the context of his prior history, the pattern is all too clear. The respondent did not comply with the terms of his Florida Lawyers Assistance, Inc., contract and, in his Conditional Guilty Plea for Consent Judgment (B-Ex. 5 A

p. 21) he agreed to the ninety-one day suspension recommended by the referee here. The referee's findings are clearly supported by the record and should be given great weight by this court. Cox, supra. Further, the ninety-one day suspension is mandated by the respondent's previous knowing and voluntary stipulation (B-Ex. 5 A7) as well as the evidence.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation of an immediate ninety-one day period of suspension to continue until such time as the respondent can demonstrate rehabilitation and payment of costs now totaling \$1, 164.66.

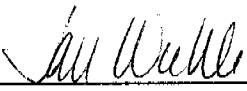
Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 253847

AND

JAN K. WICHROWSKI
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314
(407) 425-5424
ATTORNEY NO. 381586

By: 
Jan K. Wichrowski
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. Mail to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent, Paul John Dubbeld, 444 Seabreeze Boulevard, Suite 720, Daytona Beach, Florida, 32118-3953; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 24th day of November, 1998.

Respectfully submitted,



Jan K. Wichrowski
Bar Counsel