Original

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant/Appellant,

V.

ROBERT P. McKEEVER, Jr.,
Respondent/Appellee.
_____/

Case No.:94, 561
TFB File No.:99-00425-4A

ANSWER BRIEF

Robert Peter McKeever, Jr., pro se
Respondent/Appellee
J07771/M1107
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CERTIFICATE OF TYPE, SIZE AND STYLE

Undersigned Respondent/Appellee does hereby certify that the Answer Brief of the Respondent/Appellant is submitted in 12 point Courier New, a font that is not proportionately spaced.

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PRELIMINARY STATEMENT

It is not clear why the complainant has decided to refer to the Respondent as the Appellant in this proceeding. The Respondent was the prevailing party below and will be referred to as the Appellee in this brief. The Petitioner will be referred to as the Appellent or The Bar.

The Appellant's abbreviations will be adopted with the addition of references to the Requests for Admission designated by the symbol RA and the Trial Brief as TB, respectively.

References to other pleadings will be made by title.

STATEMENT OF CASE AND FACTS

The appellant stipulates to the Appellant's recitation of the Statement of the Case and Facts, supplemented as follows:

The Appellee pleaded guilty to violations of §827.03(2)(b), Aggravated Child Abuse by Malicious Punishment. The criminal charges arose out of five identical acts undertaken by the Appellee in response to criminal and other misconduct engaged in by three fifteen year old juveniles. Five years previously, one of them was matched to the Appellee through the Big Brothers Program. (RR Page 3).

It would be unfair to the Referee, whose judgment is ultimately being called into question by the Appellant, to neglect to disclose the complete record before him. This includes the underlying facts and the nature of the teenagers misconduct.

The record reflects that the teenagers, over the course of five years the Appellee mentored them, committed both criminal acts and other instances of misconduct that exceeded all grounds of acceptable teenage behavior. (TB Page 2; RA #7 Ex.A; RA #8 Ex.B).

Although the Referee had available to him the entire five year behavioral history of the teenagers, the conduct and the criminal acts which occurred during the relevant period, for which they were maliciously punished, are as follows:

(1) One teenager lied to his mother when he told her he would be spending the night with the Appellee and his wife. Early that next morning, he and his friends were arrested for ten counts of grand theft auto, breaking and entering, burglary with damages in excess of ten-thousand dollars, and the damage or destruction of seven automobiles. (RA #7, Ex.A).

(2) Two of these juveniles were apprehended by the Appellee driving his motorcycles at night without permission. It was subsequently determined and they admitted they were intoxicated by illegal narcotics and alcohol. In response to the appellee's verbal admonishment, one responded, quote "I've been driving [motorcycles] "buzzed" a thousand times and never got hurt." This statement was recorded and admitted into evidence in the case. (RA #7, Ex.A).

(3) The third teenager was refused permission, over a cell phone by his mother, to ride Appellee's motorcycle. Unknown to the Appellee, he had just that day been suspended from school. Loudly, and in front of children and other adults, he referred to his mother as a "fucking bitch". (RA #7, Ex.A).

(4) One of the juveniles admitted he consumed illegal drugs including LSD, one day after being released from a juvenile detention facility and on probation for the aforementioned felony charges. (RA #7, Ex.A).

(5) The Appelle's "little brother" exposed his genitalia to two thirteen year old girls, then mocked the victim's mother, who witnessed the incident, from the street. She had kindly agreed not to involve the police, if the Appellee took the appropriate disciplinary action against him. (RA #7, Ex.A).

(6) The Appellee's "little brother" forced another teenage boy, in front of others, to get on his knees and perform a simulated sex act on him and then forced him to kiss his bare buttocks. (RA #7, Ex.A).

(7) They bound a naked teenage boy, then videotaped the beating of his body while taunting him with racial slurs such as "I'm going to fuck this nigger up." The transcript of that videotape is part of this record. (RA #8, Ex.B).

The evidence of the above-stated episodes of misconduct is irrefutable, as it is supported by the testimony of unbiased adult witnesses or recorded. Although the appellant was served a copy of these incidents three months before the hearing, they never challenged their veracity. They called no witnesses to refute it.

There is nothing on the record whatsoever to indicate the Appellee "beat the [juveniles] about the naked body" other than being swatted on the bare buttocks, five or fewer times. The evidence in the criminal case is conclusive of this assertion.

The Appellee appears to have stipulated to this fact. (TR Page 64).

Finally, it should be noted the Referee found eight mitigating factors and two aggravating factors, the latter being substantially ameliorated by other findings in mitigation. (RR Pages 3-4).

SUMMARY OF ARGUMENT

The appellant has failed to overcome the strong presumption that the Referee's recommended discipline calling for suspension was correct. They have failed to demonstrate that the Referee's recommendation is not supported by existing case law or "clearly off the mark".

The Appellant has not cited a single case with similar circumstances in which the Supreme Court disbarred the attorney. To the contrary, those cases arguably similar resulted in the lawyer's suspension. Every case cited by the Appellant supporting disbarment is distinguishable from the instant case. Invariably, they involved multiple disciplinary offenses, were arguably related to the practice of law, or involved fraud, misrepresentation or conspiracy for the purpose of financial gain.

It was within the province of the Referee to weigh the sufficiency of the evidence in mitigation. He was in a unique position to observe the demeanor of the witnesses and evaluate the character of the Appellee. He had the opportunity to determine first-hand the potential for rehabilitation of the attorney.

Disbarment is the ultimate penalty inflicted upon a lawyer reserved for those whose character should never have permitted

them entry to the Bar, or who have a highly improbable potential for rehabilitation. The criminal acts of the Appellee were an isolated occurrence and do not reflect his true character. His potential for rehabilitation does not fit the description of highly improbable, but to the contrary, is excellent.

ARGUMENT

I. COMPLAINANT/APPELLANT HAS FAILED TO OVERCOME THE STRONG PRESUMPTION THAT THE REFEREE'S RECOMMENDATION IMPOSING SUSPENSION IS CORRECT.

The Appellant has failed to overcome the strong presumption that the Referee's recommended discipline is correct under the facts of this case. The Referee's report in an attorney disciplinary case carries a strong presumption of correctness. The Florida Bar v. Wheeler, 653 So.2d 391 (Fla. 1995). The burden is on the party seeking review to demonstrate that the report of the referee is erroneous, unlawful, or unjustified. R. Regulating Fla. Bar 3-7.7(c)(5). The referee's recommended discipline is presumptively correct and will not be disturbed absent a showing that it is clearly erroneous and not supported by the evidence. The Florida Bar v. Orta, 689 So.2d 270, 273 (Fla. 1997) citing The Florida Bar v. Niles, 644 So.2d 504, 507 (Fla. 1994).

Although the Appellant correctly points out that the Court is not bound by the referee's recommended discipline, they neglect to recite the proper standard of review. The role of the court in reviewing the referee's recommended discipline is not to second-guess his judgment. The Florida Bar v. Jordan, 705 So.2d 1387, 1391 (Fla. 1998). The referee's recommendation is presumed correct and will be followed if reasonably supported by existing case law and not "clearly off the mark" The Florida Bar v.

Fredericks, 731 So.2d 1249, 1254 (Fla. 1999), citing The Florida Bar v. Vining, 707 So.2d 670, 673 (Fla. 1998). The Court has frequently required a showing that the referee's disciplinary recommendation is in conflict with existing case law, before overturning it. The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997); The Florida Bar v. Corbin, 701 So.2d 334, 337 (Fla. 1997).

The Appellant's brief fails to cite a single case that does not support the Referee's recommendation in his report, much less one in conflict with it. To the contrary, the cases most analagous to the present fact situation appear to endorse the result reached by the referee. Appellee's research has failed to disclose any case, arguably similar to this one, in which the lawyer was disbarred for a first time felony conviction wholly and totally unrelated to the practice of law. Invariably, the court has rejected the Bar's demand for disbarment and instead, ordered suspension:

This Court refused to disbar Judge Corbin after he pled no contest to a charge involving child molestation. The Florida Bar v. Corbin, 540 So.2d 105 (Fla. 1989). The record fails to reflect the age of the child, other than she was between twelve and sixteen. He was subsequently reinstated and continues to practice law.

This Court refused to disbar James Helinger for making obscene phone calls, his second conviction for this offense. The Florida Bar v. Helinger, 620 So.2d 993 (Fla. 1993). This was not-withstanding the fact that Helinger subjected his victim to extreme psychological and emotional trauma resulting from a continuous barrage of terror lasting nearly five years. Id. at 996.

Joseph Hooper was suspended after having been convicted of indecent exposure while on probation for two previous episodes of the same criminal misconduct. The Florida Bar v. Hooper, 564 So.2d 1080 (Fla. 1990).

Finally, this Court ordered a suspension for Howard Rosen after his conviction for knowingly and intentionally possessing cocaine with the intent to distribute. The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986). This result was reached even though the Bar argued this was a serious felony. id. at 181. The Court agreed with the referee that, under the facts of that case, disbarment was too harsh. id. at 182.

The Appellant's reliance on The Florida Bar v. Bustamante, 662 So.2d 687 (Fla. 1995), The Florida Bar v. Grief, 701 So.2d 555 (Fla. 1999) and The Florida Bar v. Forbes, 596 So.2d 1051, (Fla. 1992) is misplaced. All three involved, at least arguably, the practice of law. All three involved fraud, misrepresentation

or conspiracy engaged in by the lawyer for his own financial benefit. All three utilized their status as lawyers to deceive banks or investors to enter into fraudulent financial schemes.

Bustamante embezzled funds from a client. Bustamante at 689. Grief took money from illegal aliens to file false immigration documents, presumably holding himself out as an immigration lawyer. He accompanied applicants to immigration hearings after coaching them with false answers. Grief at 555. Forbes, in addition to being charged with fraud and misrepresentation, was guilty of knowingly assisting and inducing others to engage in fraud. Forbes at 1052. These cases are clearly distinguishable from the instant case.

In the absence of any case law supporting their position, the appellant has elected to attack the Referee's findings regarding mitigation. They argue the appellee's remorse is not genuine, or they belittle his character, partially evidenced by his lengthy military career. They strain credulity by arguing the juveniles or their mothers were his clients for the purpose of these proceedings. In the pleadings, they specifically denied they were clients of the appellee. (RA #4). They allege he has inadequately proven his personal or emotional problems or has failed to document his efforts at rehabilitation.

The problem with this line of reasoning is that all these

arguments speak to the weight of the evidence in mitigation. Disbarment is appropriate only in the absence of mitigation:

"absent aggravating or mitigating circumstances, and upon the application of the factors set out in Standard 3.0, the following sanctions are generally appropriate". Fla. Stds. Imposing Law. Sanc. 5.1. There is no authority for the proposition that all the mitigating factors must be present or they be proven beyond doubt. Surely, the Appellant would acknowledge the existence of some mitigating factors.

It is within the province of the referee to assign what weight will be given to each mitigating and aggravating factor and his threshold of proof. Recognition of the existence of mitigating factors is a "finding" of the referee. These findings are presumed correct unless they are clearly erroneous. Bustamante at 698. A party contesting the findings of the referee carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record clearly contradicts the conclusions. The Florida Bar v. Laing, 695 So.2d 299, 303 (Fla. 1997).

This Court has repeatedly held that the referee occupies a favored vantage point for assessing the key considerations such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse and rehabilitation (or

potential for rehabilitation) Lecznar at 1288. The referee has an opportunity to view first-hand the forthrightness and character of the respondent. Id. at 1287.

In assigning error to the Referee's findings, the appellant is asking the Court to second-guess the Referee, who heard the testimony and observed the witnesses. This Court has invariably declined to reweigh the evidence and substitute it's judgment for that of the referee. The Florida Bar v. Bosse, 689 So.2d 268, 269 (Fla. 1997). In matters of mitigation such as remorse, character, potential for rehabilitation and personal issues, this principle appears especially sound.

Keeping these points in mind, the appellee will now address specifically some of those factors the Appellant took issue with in their brief.

The Appellant goes on at length regarding what they perceive to be a lack of remorse on the part of the Appellee. The Referee heard the same testimony and thought otherwise. Quite possibly the Appellant believes the facts of the underlying criminal case warrant no further explanation. They appear to interpret the appellee's recitation of the actual facts behind the incident as indicative of a lack of remorse. They would prefer to allow the Court to assume these acts were a mere pretense for a far more sinister motive than discipline. The Appellee will not stand idly

by without responding to that. An attorney is entitled to explain the circumstances behind the offense and offer testimony in mitigation. The Florida Bar v. Cruz, 490 So.2d 48, 49 (Fla. 1986).

It was the Appellant who elected to attach to their petition the entire sixteen count information, clearly intending to alert the referee of the unsubstantiated charges. They knew a mere copy of the judgment of conviction would not accomplish this purpose. Aggravated Child Abuse is certainly serious enough, but child sexual abuse is another matter entirely. The Appellee was not, is not, and never will be a child sexual offender.

As to the charge for which he was convicted, the facts giving rise to such encompass a broad spectrum, with varying degrees of culpability. Reasonable people may differ on what crosses the threshold into malicious punishment.

Suffice it to say that the Appellee acknowledges these juveniles were subjected to punishment that was painful and humiliating, but not injurious. In the ten years the Appellee served as a "Big Brother" mentoring two other boys, he never engaged in similar behavior. For that matter, in the five years leading up to the events of 1997, he never engaged in similar behavior with these three juveniles. It is important to recognize the teenagers never alleged they were ever sexually or physically

abused by the appellee, to include this incident.

At the risk of continuously sounding unremorseful, the Appellee would be remiss not to call attention to the fact that these juveniles were not arguably injured or harmed under any interpretation of §39.01(30)(a)(4)(a-k) Fla. Stat. (1997)(Definitions under abuse of children). They sought no medical attention as a result of these incidents. For that matter, they waited four days before they reported this allegation to the police (TB Page 3). During that period they attempted to extort the absurd sum of 12 million dollars from the Appellee. Unsucessful at that, they hired television lawyers to represent themn before they went to the police. (TB Page 4).

The pain inflicted upon them was not serious enough to prevent them from riding the Appellee's motorcycles twelve miles home, then all weekend, after they were "beaten". (TB Page 4). No party has ever claimed they suffered a mental injury within the meaning of §39.01(44) Fla. Stat. (1997). Their post-incident conduct would appear to contradict this assertion, anyway.

Addressing the bond revocation issue, the Referee appeared to give it little weight in view of the circumstances. Suffice it to say that the appellee's $150,000 bond conditions required him to have no direct contact with the alleged victims and he had no such contact. The State did not dispute the appellee never saw,

spoke to, or was seen by the juvenile. At worst, the Appellee inquired regarding his whereabouts. The trial judge subsequently recused himself due to his personal relationship with one of the witnesses. His ruling was on appeal when a plea was reached.

The Appellant claims the explanation for the manner in which the discipline was inflicted is an attempt on the part of the Appellee to justify it. It is true, the evidence discloses the teenagers and the Appellee did discuss the Michael Faye incident in Singapore. In both Singapore and Malaysia, teenage juvenile delinquents are subjected to identical discipline (albeit much harsher and for more injurious) and a record is made of that to be shown to other teenagers as a deterrent. Although this approach was overwhelming supported by the American people, it is unknown if that was due to it being inflicted at the hands of government. Under the laws of Florida, when inflicted by an individual, it was criminal and the Appellee deeply regrets it. No one disputes the fact that the Appellee developed a strong paternal bond with the teenagers, notwithstanding their behavior.

It should be noted, that although the Appellant claims the Appellee was exercising custodial authority over the juveniles, that is inaccurate. He may have been viewed as a surrogate parent, but he was not in loco parentis with the teenagers. They invariably drove their motorcycles home to their mothers after

being "beaten" and voluntarily returned when the occasion arose again. Furthermore, the Appellee does not know where the Appellant received it's information that the Appellee's acts were premeditated plans of assault, or how that assertion is supported by the record.

The Appellant challenges the sufficiency of the evidence regarding personal and emotional problems. As a practical matter, Appellee moved for a change of venue to Jacksonville (Record, Motion For Change of Venue) and filed a Motion to Transport (Record, Motion to Transport) when it appeared the hearing was to be held in absentia. The Referee never ruled on the former and the ruling on the latter was never disclosed to the Respondent, apparently for security purposes. He was transported and held incommunicado until shortly before the hearing. There was no time to summon witnesses in the traditional manner. The hearing was also only scheduled for one hour. The Appellee put on the best case he could under the limitations placed upon him.

Regarding the Appellant's argument that the juveniles were clients of the Appellee or this misconduct was somehow related to the practice of law, the evidence is to the contrary. It is true that the Appellee appeared in open court on behalf of one teenager upon his arrest for the aforementioned felony charges. The Appellee retained a criminal attorney for the teenager and

testified as a character witness for him. His mother feared he would be incarcerated due to his previous record of shooting into an occupied dwelling. The Appellee also assisted in supervising his "little brother" while he performed community service as a result of his theft arrest. It is true that the Appellee did locate out of state assets belonging to his "little brother's" deadbeat father, and asserted a lien for child support arrearages of $45,000. Upon realization and liquidation of those assets, the Appellee effected a settlement for the benefit of the teenager and his brother. The Appellee also secured medical expenses of $5,000 from the school board when another teenager was seriously injured at school. Of course, he charged no fee for this. That is the extent to which the teenagers or their mothers were clients of the Appellee.

Finally, the Appellee is offended that the Appellant has chosen to belittle his military career by describing him as a mere "helicopter pilot". There are few lawyers in this state who have answered the call to duty more often than the Appellee.

The Supreme Court has the authority to consider factors that effect an attorney's character in mitigation. The Florida Bar v. Grosso, 647 So.2d 840, 841 (Fla. 1994). Although this factor is more extensively supported in the Referee's Report and Trial Brief, the Appellee would call attention to the some of these

character traits.

The Appellee is a Lieutenant Colonel Master Army Aviator, who spent five years on active duty before a devastating helicopter wreck crushed his vertabrae. After years of recovery, he was able to be reinstated to flight status and served fifteen years with the Florida National Guard. Since being admitted to the Bar, he was called to active duty as an executive officer of a AH64A Apache helicopter battalion during Desert Storm. He was the commander of the most decorated aviation unit in the country. He was designated air mission commander for all rescue (active and reserve) helicopter support in Miami during the Hurricane Andrew relief effort. He flew Governor Chiles and his party throughout the Panhandle on a UH60 Blackhawk helicopter after Hurricane Opel. He deployed to Honduras with the 7th Special Forces Group (Green Berets) to perform aviation humanitarian relief there. Flying in 1/8th mile visibility, he spent weeks flying sixteen hour days to save the lives and property of Florida citizens during the Volusia County fires. His military awards include the Meritorious Service Medal, Florida Distinguished Service Medal (Florida's second highest award)(two awards), Army Commendation Medal, Humanitarian Service Medal, and National Defense Service Medal. Additionally, he has been awarded the State Active Duty Award three times.

He was an adjunct professor of aviation law at Embry Riddle Aeronautical University and lectured for the Florida Bar's Bridge the Gap seminar in Jacksonville. He made frequent television commercials for the Big Brothers Agency and appeared on the front page of Jacksonville's local newspaper on behalf of the program. He successfully matched numerous children with other Army pilots including one of the teenager's young sibling. A "Big Brother" for ten years, he had two previous "little brothers", one of whom testified on his behalf. The oldest is a soldier at Fort Campbell, Kentucky who offered to travel back if necessary.

The Appellant argues nothing short of disbarment will adequately serve the purpose of discipline enunciated in The Florida Bar v. Dubbeld, 594 So.2d 735, 737 (Fla. 1992).

The Referee correctly recognized that Bar discipline exists primarily to protect the public from unethical conduct that occurs in the course of an attorney's representation of a client Helinger at 995; The Florida Bar v. Krasnove, 697 So.2d 1208 (Fla. 1997). Misconduct occurring outside the practice of law or in which the attorney violates no duty to a client may be subject to lesser discipline. Helinger at 995-996. The Court in Helinger recognized that in criminal cases, discipline is administered in addition to what the criminal justice system already exacted. Id. Contrary to the Bar's reading of the case, that observation

serves as the basis to mitigate the discipline, not aggravate it.

Disbarment is an extreme form of discipline, and should be reserved only for the most egregious misconduct The Florida Bar v. Summers, 728 So.2d 739 (Fla. 1999). The extreme sanction should be imposed in those rare cases where rehabilitation is highly improbable. The Florida Bar v. Kassier, 711 So.2d 515, 517 (Fla. 1998). Rosen at 181-2. The Court considers it extreme and the ultimate penalty, akin to the death penalty in criminal proceedings. The Florida Bar v. Hirsch, 342 So.2d 970, 971 (Fla. 1977). It must be clear the lawyer is one who should never be at the Bar, otherwise suspension is preferable. The Florida Bar v. Penn, 421 So.2d 497, 501 (Fla. 1982). Finally it should never be decreed where any punishment less severe, such as suspension, would accomplish the end desired. The Florida Bar v. Blalock, 302 So.2d 758, 760 (Fla. 1974)

> "To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family" id. quoting Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646.

The appellee would submit that the service he has rendered the citizens of Florida, if considered alone, would call for substantial mitigation. Few would dispute he and his family have been punished enough for this misconduct.

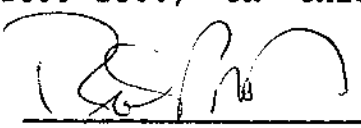
CONCLUSION

The burden falls upon the Appellant, The Florida Bar, to demonstrate to the Court the Referee's recommended discipline clearly erroneous. The standard of review requires a showing that the Referee's recommendation is unsupported by or in conflict with existing case law and clearly "off the mark". They have fallen short of supporting this argument. The cases call for the Referee's recommended discipline of suspension.

Evidence of the Appellee's character and contributions to society should weigh heavily toward mitigation of the discipline. Notwithstanding this conviction, he possesses the requisite character to remain a member of the Florida Bar. Disbarment would be exceedingly harsh under the facts of this case and serve no useful purpose. The Referee's recommendation should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No.:94, 561; TFB File No.:99-00425-4A has been mailed by regular U.S. Mail to James N. Watson, Jr., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this 6TH day of October, 1999.



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October 6 , 1999

Debbie Causseaux, Acting Clerk
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Tallahassee, Florida 32399

Re: Robert Peter McKeever, Jr., Case No.:94, 561
TFB File No.:99-00425-4A

Dear Ms. Causseaux:

Enclosed for filing in the above-referenced case, please find the Respondent/Appellee's ~~Reply~~ Answer Brief, with the appropriate copies.

Sincerely,

Robert P. McKeever

Ms. Causseaux: The 7 copies are coming under separate cover.
RM

Enclosure - Original ~~Reply~~ Answer Brief/~~copies~~

cc: James N. Watson, Jr.
Bar Counsel