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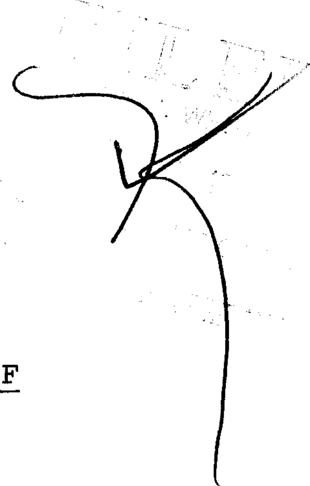
IN THE SUPREME COURT OF FLORIDA

KENNETH P. LIROFF,	)	
	)	The Florida Bar File No.
Petitioner-Appellant,	)	91-50,147 (17C)
	)	
v.	)	
	)	
THE FLORIDA BAR	)	
	)	Supreme Court Case No.
Respondent-Appellee.	)	76,460
	)	



INITIAL BRIEF OF KENNETH P. LIROFF

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STATEMENT OF THE CASE AND OF THE FACTS

Upon an Order to Show Cause, issued by the Supreme Court of Florida, Petitioner was brought to hearing on November 30, 1990. At that hearing, Respondent submitted the affidavit (Appendix 1) and minimal testimony (pp. 50-51)* of William Kilby of Florida Lawyers Assistance, Inc. to support the Rule to Show Cause and The Bar's requested in-patient therapy and indefinite suspension order (p. 5). Petitioner testified (pp. 11-49) and provided the affidavits of Susan Huart (Appendix 2), a letter, Dr. Jules Trop (Appendix 3), and the affidavit of Roger Stanway (Appendix 4), all of which were received by the Referee. The Referee then issued an oral ruling (p. 57), followed by a written REPORT OF REFEREE dated January 2, 1991 (Appendix 5). That Report recommended the discipline of suspension and in-patient drug treatment facility from which this Petition for Review is taken.

SUMMARY OF ARGUMENT

Petitioner's succinctly posed position is that the discipline imposed by the Referee is unsupported by the evidence presented by Respondent, especially in the form of opinion testi-

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*All pages noted are from the November 30, 1990, Hearing and the Transcript of Record thereof.

mony from a non-health professional, to-wit: William Kilby. Petitioner's position further is that health care professionals differ from the testimony presented by Respondent, as provided the Referee at hearing, which together with the testimony of Petitioner, a dentist himself, eviscerate any evidentiary foundation for the stringent discipline imposed.

POINT I

RESPONDENT FAILED TO PRESENT SUFFICIENT EVIDENCE TO WARRANT THE DISCIPLINE OF SUSPENSION.

A Referee's findings must be sustained if supported by competent and substantial evidence. The Florida Bar v. Hooper, 509 So.2d 289, 290 (Fla. 1987); RRFB 3-7.5(k)(1); The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978) and that evidence must be "legally sufficient." The Florida Bar v. Abramson, 199 So.2d 457, 460 (Fla. 1967). See also, The Florida Bar v. Nelly, 502 So.2d 1237 (Fla. 1987) and The Florida Bar v. Aaron, 520 So.2d 685 (Fla. 1988).

The linchpin of review, then, is that to make the Referee's findings of fact subject to attack, a Petitioner must demonstrate that they are (1) clearly erroneous, or (2) lacking in evidentiary support.

The sole evidentiary support offered by the Respondent in these proceedings was Appendix 1, is the affidavit of

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William Kilby, an admitted non-health care professional, an attorney, and not proffered as an expert in any health care related field.

On the other hand, Petitioner presented competent, reliable health care testimony by affidavit dated November 28, 1990, from Susan K. Huart that LIROFF is not currently abusing drugs, had random negative urines, as clinically judged by Ms. Huart (Appendix 2). Further, Ms. Huart opined that, because of Petitioner's growth, and the manner in which he continues to deal with these problems, including his practice of law, he is <u>not</u> an appropriate candidate for in-patient therapy.

Further, in maintaining his issues, Petitioner provided a September 14, 1990, correspondence from Dr. Jules Trop (Appendix 3), a well-recognized substance abuse physician, that Dr. Trop has interviewed and evaluated Petitioner and opines that he is not using chemicals, is not currently impaired, has an excellent home relationship and can ethically and adequately continue practicing law. Dr. Trop also took a urine sample for toxicology. That sample was later found to be negative (p. 20).

In addition, the November 29, 1990, affidavit of Roger A. Stanway (Appendix 4) was provided. Mr. Stanway is a long-time monitor and participant of the fellowship of Alcoholics Anonymous, and is an <u>F.L.A. monitor for Petitioner.</u>

He opined that Petitioner is current on all responsibilities, is dealing with his chemical dependency in a reasonable manner and has never been, nor suspected, that Petitioner was under the influence of a mind-altering drug.

Further supporting this mounting evidence in contravention to the efficacy of the sole evidence in this cause proffered to support suspension (the Kilby affidavit and his short statement at pp. 50-5), Petitioner's testimony was given, which constitutes the lion's share of the Record in this cause. In chronicling the beginning of his abuse occasioned by the tragic loss of his wife to cancer in November, 1986 (p. 13) for which he abused Hycodan to "anesthetize the pain" (p. 14), he abused for fourteen months (p. 14). He counts his drug-free date from February 1, 1988, the day he met his current wife. He admitted lapses, due to error (pp. 20-21) in taking a drug which he believed was something else (phenobarbitol) in September of 1989, and testing positive for Halcion for sleeplessness in April of 1989 (pp. 16-17); he also admitted taking Hycodan in March and April, 1990, while suffering from a heavy cold, on prescription from his cardiologist (p. 24). He testified that he was fairly certain it would be ineffective because of an oral narcotic antagonist he was taking at the same time (Narcan) (p. 24). He is also taking Trexan (p. 25), another antagonist and anti-depressants - which he will "take for the rest of my life." (p. 26)

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When urines were requested, they were given (pp. 26-27).

He currently attends 3-5 NA/AA meetings a week, and currently also maintains a rather significant litigation practice, supporting, as indicated previously, five children (pp. 29-30). No client complaints since FLA have been sent to the Bar (p. 30), and no disciplinary action undertaken during that time period (p. 30).

On balance, then, the "Kilby affidavit", although well-meaning, finds no support in fact or conclusion when matched with the competent medical and observational testimony of Petitioner's health care counsellor (Huart), a qualified physician (Trop), his actual FLA monitor (Stanway), and the credible explanations submitted during his testimony. Respondent presented no competent medical testimony to the contrary. Mr. Kilby's affidavit was dated May 15, 1990. The various affidavits submitted were dated September, 1990, November 28, 1990, and November 29, 1990, immediately prior to hearing - more recent, more clinical and closer to the problem, as it exists.

Although Petitioner is aware of the presumption of correctness accompanying the Referee's findings [The Florida Bar v. Nelly, supra, at 1238], still, that presumption is subject to dissipation unless the findings are supported by

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legally sufficient evidence. Such is not the case before this Court. Not only the greater weight, but the greater credible evidence refutes discipline in this matter, or at least, disputes the severity of discipline. No one, in a direct observational status with this Petitioner, on or about November 30, 1990, has recommended in-patient treatment or suspension. That recommendation was made by affidavit dated four and one-half months prior to hearing by a non-health care professional, on his opinion, unsupported by competent medical evaluation. On the basis of this record, and its contravening evidence, that quantum of proof simply cannot be sufficient to suspend an attorney, potentially jeopardize a number of clients' interests, and force an in-patient evaluation in a vacuum of certified need.

Petitioner is well aware of the vital need for FLA, Inc. and the zeal and genuine concern exhibited by this invaluable group of dedicated attorneys, especially William Kilby. In this matter, however, despite what Petitioner perceives as that organization's good faith beliefs, the recommendations suggested are simply unfounded in fact or qualified opinion.

CONCLUSION

As can be gleaned from the Appendices and Record, no evidence of a legally sufficient nature has been admitted to

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support suspension. The fact of no client complaints, and the Fla's own monitor have joined with other affidavits to contradict that Appellant's suggested resolution of automatic suspensions after a failed urine or a refused urine, will not adequately protect the Bar, clients, this Petitioner and society as a whole. Great care should be taken by the Court before it acts in such a severe manner, especially where that action is supported only by the weight of evidence proposed herein.

Petitioner should not be suspended nor forced into a contra-indicated drug in-patient treatment program on the basis of the record before this Court. The Referee's Report should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of April, 1991, a true and correct copy of the foregoing Initial Brief of Petitioner was furnished to:

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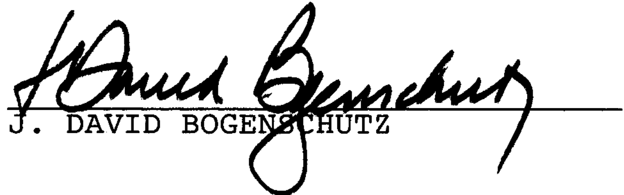

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