IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs. Case No. 70,336

DAVID A. PASCOE,

Respondent.
_____/

ANSWER BRIEF AND BRIEF IN SUPPORT OF CROSS-PETITION

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PRELIMINARY STATEMENT

The Florida Bar, Complainant below, files this Answer Brief and Brief in Support of Cross-Petition in the case against David A. Pascoe, who will be hereinafter referred to as Respondent.

References to the transcript of hearing will be (TR - page number) and references to exhibits introduced as evidence at the hearing will be (TFB Exhibit - number). References to the Referee's Report will be referred to as (Referee's Report - page number).

STATEMENT OF THE CASE AND FACTS

On April 7, 1987, The Florida Bar filed a four-count Complaint against Respondent. Each of the four counts cited multiple violations of disciplinary rules.

In Count I, Respondent was charged with placing an advertisement in a Fort Walton Beach newspaper in December of 1984. (TR-11). The advertisement suggested that individuals should buy a divorce for their spouse as a Christmas gift. (Bar Exhibit 2). Respondent received a letter from The Florida Bar advising him to cease and desist in the use of said advertisement as the advertisement was in violation of rules governing the use of advertisement by attorneys. (Bar Exhibit 3, TR-14). Respondent rejected the Bar's opinion and in response stated that the ad was not improper. (Bar Exhibit 4, TR-15). Although Respondent did not subsequently cause the advertisement to be published; prior to the hearing before the grievance committee, Respondent never indicated to The Florida Bar his intent not to make further use of the advertisement. (TR-14). Based on his rejection of the cease and desist letter, disciplinary proceedings were initiated by The Florida Bar. Respondent was charged with violation of Disciplinary Rule 2-101(C)(5) (appealing to a lay person's fear or desire for revenge) and Disciplinary Rule 2-101(C)(6) (intent to attract

clients by hucksterism) of the Code of Professional Responsibility of The Florida Bar.

Count II of the Bar's Complaint against Respondent charges him with misconduct which led to his arrest on July 27, 1984. On the day of the arrest, Respondent was observed by a Fort Walton Beach police officer smoking marijuana with several individuals in an outside area of a local bar. (Answer to Request for Admissions, paragraph E; Bar Exhibit 5; TR-23-26, 28-30). After Respondent passed an improvised "beer can pipe" containing lighted marijuana to the police officer, he was promptly arrested and charged with possession of less than twenty (20) grams of marijuana and possession of drug paraphernalia (Answer to Request for Admissions, paragraph F; Bar Exhibit 5; TR-23-26, 28-30). Respondent subsequently entered a plea of nolo contendere to the charge of possession of less than twenty (20) grams of marijuana and the possession of drug paraphernalia charge was dropped. (Bar Exhibits 6 and 7; TR-30). At the hearing before the grievance committee for The Florida Bar, Respondent stated that while he was aware of the illegality of the use of marijuana, he would continue to use it in the future. (Bar Exhibit 7). The grievance committee found probable cause and the Bar's Complaint charges Respondent with violation of article XI, Rule 11.02(3)(a) (standards of moral conduct) and Rule 11-02.(3)(b) (commission of a crime) of the Integration Rule of The Florida Bar and Disciplinary Rule

1-101(A)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude) of the Code of Professional Responsibility of The Florida Bar.

At the final hearing before the Referee, Respondent did not dispute any of the facts as set forth in the Referee's Report. (Referee's Report-1-2). Respondent freely acknowledged his continued usage of marijuana and his awareness that such usage is still in violation of the laws of the State of Florida. (TR-27, 34).

With regard to Count III of the Bar's Complaint, Respondent was charged with filing a civil suit in the United States District Court for the Northern District of Florida, Pensacola Division. The matter was assigned to be heard by the Honorable Winston Arnow of that Court. (Answer to Request for Admissions, paragraph I). Judge Arnow dismissed the case because Respondent had filed suit against the wrong parties. The defendants legal fees were assessed against Respondent in the dismissal order. (Answer to Request for Admissions, paragraph J; TR-36-40). Respondent was charged with violation of Disciplinary Rule 6-101(A)(2) (handling a legal matter without adequate preparation) of the Code of Professional Responsibility of The Florida Bar.

In testimony before the grievance committee regarding his handling of the aforementioned suit, Respondent also testified that it was his belief that Judge Arnow's actions had been influenced by earlier dealings with Respondent. (Answer to Request for Admissions, paragraph K; TR-40). Respondent further testified before the grievance committee that one of his earlier dealings with Judge Arnow dealt with a motion for reduction of sentence which he had filed on behalf of a client wherein he made statements implying that justice was for sale. (Answer to Request for Admissions, paragraph L; Bar Exhibit 8; TR-41-42). These statements were made by Respondent in an attempt to compare the sentence received by his client with that received by another individual not represented by Respondent. (TR-42-45). This comparison was made based on Respondent's limited knowledge of the other case which had been gleaned from the court file and newspaper articles. (TR-43-45).

As a result of the allegations contained within the motion for reduction of sentence, Respondent received a letter from the Honorable William Stafford, Chief Judge for the United States District Court for the Northern District of Florida, suggesting that Respondent apologize to Judge Arnow for the statements made in his motion. (TR-45; Bar Exhibit 9). In response to Judge Stafford's letter, Respondent sent a handwritten reply stating that he had no evidence to support the allegations against Judge Arnow.

However, he did not offer an apology. (TR-45-47; Bar Exhibit 10). Respondent's use of the inquisitorial allegations contained in the motion for reduction of sentence together with subsequent correspondence to Judge Stafford formed the basis for charges against him for violation of Disciplinary Rules 7-106(C)(1) (appearing in a professional capacity before a tribunal and stating or alluding to a matter which he had no reasonable basis to believe was relevant to the case or that was not supported by admissible evidence) and 7-106(C)(6) (engaging in an undignified or discourteous conduct which is degrading to a tribunal) of the Code of Professional Responsibility of The Florida Bar.

At the final hearing before the Referee, Respondent did not dispute any of the facts but stated his opinion that his use of the language contained in the motion for reduction of sentence was justified based on the disparity in sentencing between his client and the other individual. (TR-50-52).

Count IV of the Bar's Complaint charges Respondent with misconduct arising out of his handling of an appeal of a criminal matter. (Answer to Request for Admissions, paragraph O; TR-59-60). Based upon his handling of the appeal, the First District Court of Appeal issued an order dated December 4, 1985, relinquishing jurisdiction to the trial court for a period of thirty days in order to direct an inquiry to Respondent and submit

findings to the Court. The trial court was specifically directed to answer the following questions:

> 1. Whether counsel had discharged the duties assigned to him under the Court's orders;
>
> 2. Whether counsel should be discharged, and new counsel appointed to represent appellant; and
>
> 3. Whether the conduct of David Pascoe warranted the imposition of sanctions.

The trial court was further directed to report its findings to the First District Court of Appeal. (Bar Exhibit 11).

Upon receipt of the First District Court of Appeal's order, the Honorable Erwin Fleet, as trial judge, ordered Respondent to file a memorandum in answer to the three questions propounded by the District Court of Appeal. (Answer to Request for Admissions, paragraph B). Respondent filed a one-page response to Judge Fleet's order. (TR-76-77; Bar Exhibit 12). The assistant state attorney also filed a memorandum in compliance with Judge Fleet's order. (Bar Exhibit 12).

Based upon memoranda submitted by both Respondent and the assistant state attorney, together with testimony elicited at the hearing before Judge Fleet on January 31, 1986, the following chronology was developed:

On or about July 22, 1985, Respondent was appointed by the court to represent a criminal defendant, Michael B. Parker, in Case No. 84-1029. (TR-60, 75).

On August 8, 1985, eight days after the initial brief was due and seventeen days after his appointment, Respondent forwarded to the office of the state attorney, two original motions. The motions were never filed with the clerk of the court. (Answer to Request for Admissions, paragraph P; TR-63-67; Bar Exhibit 12).

One of the two motions filed by Respondent requested that the court order transcription of a plea proceeding, although the transcript had previously been filed with the clerk on May 31, 1985. (Answer to Request for Admissions, paragraph Q; Bar Exhibit 12).

The second motion filed by Respondent requested a continuance for filing the "designation" and the initial brief. However, the designation had previously been filed with the clerk on May 28, 1985. (Answer to Request for Admissions, paragraph R; Bar Exhibit 12). Because Respondent's motions were not properly filed, no extension of time was granted. (Bar Exhibit 12).

Respondent was ordered by the First District Court of Appeal to show cause why the appeal should not be dismissed. (Answer to Request for Admissions, paragraph T; TR-69). Although Respondent's improperly filed motions for extension of time requested extension for filing of the brief until October 28, 1985, he did not file the initial brief until after November 8, 1985. (Bar Exhibit 12; TR-69-70, 73).

Respondent's response to the First District Court of Appeal order to show cause was filed late and was handwritten on a five-inch by eight and one-half inch interoffice memoranda form. (Bar Exhibit 11; Answer to Request for Admissions, paragraph V; TR-71).

At the hearing held before Judge Fleet on January 31, 1986, Respondent was questioned by Judge Fleet regarding his competency to handle criminal appeals. Respondent first replied that he was not competent to handle appeals and then withdrew his comment. (Bar Exhibit 12). Respondent further advised Judge Fleet that, in his opinion, the First District Court of Appeal was "thin-skinned" because they had objected to his handwritten pleadings. (Bar Exhibit 12). Respondent further indicated to Judge Fleet that he believed handwritten pleadings to be acceptable regardless of rules of procedure to the contrary. (Bar Exhibit 12).

Based on the memoranda submitted at the hearing held January 31, 1986, Judge Fleet issued an order finding the following:

> 1) That Respondent had not discharged his duties as appellant counsel with competency normally expected of an attorney;
>
> 2) That Respondent was not competent to handle criminal appeals and his name should be removed from the list of attorneys eligible for such appointments;
>
> 3) That Respondent was not sufficiently familiar with Florida Rules of Appellate Procedure so that he could competently represent his client; and
>
> 4) That there was a serious question as to Respondent's attitude toward respect for his profession and the judicial system in general.

(Bar Exhibit 12).

Judge Fleet further found that as a result of his conduct, Respondent had violated Disciplinary Rule 6-101 and ethical considerations of Canon 6 of the Code of Professional Responsibility of The Florida Bar. (Bar Exhibit B; Answer to Request for Admissions, paragraph HH; TR-80-82).

At the final hearing in the instant case, Respondent admitted sending original motions to the state attorney's office and not taking any steps to insure that the motions were properly filed with the court. (TR-65-67). Respondent further admitted that his initial brief was not filed within the time that he had requested. (TR-69-70). Testimony at the final hearing by Respondent reveals his awareness that he was not in compliance with Rules of Appellate Procedure in his use of a handwritten reply on paper less than eight inches by eleven inches. (TR-72-73). Respondent's testimony also indicates that he intentionally filed a brief without a table of contents. (TR-73).

Respondent was charged in Count IV with violation of Disciplinary Rules 1-101(A)(1) (violation of a disciplinary rule); 1-101(A)(6) (engaging in conduct adversely reflecting on fitness to practice law); 6-101(A)(3) (neglecting a legal matter entrusted to him); 7-106(C)(6) (engaging in undignified or discourteous conduct which is degrading to a tribunal) and 7-106(C)(7) (intentionally or habitually violating established rules of procedure or evidence) of

the Code of Professional Responsibility of The Florida Bar. The Referee found Respondent guilty of all disciplinary rules charged. (Referee's Report at 6-7).

Final hearing in the instant matter was held on September 4, 1987. The Honorable William H. Anderson, Referee, heard testimony and evidence relating to the Bar's charges of misconduct in all four counts of the Bar's Complaint against Respondent. On September 24, 1987, the Referee issued a Report finding Respondent guilty of all disciplinary rules charged and recommending a public reprimand with a period of probation eighteen months in length and a requirement that Respondent successfully complete the Ethics portion of the Bar Examination.

Respondent filed a petition for review of the Referee's findings of guilt in Counts II, III, and IV, the Referee's recommendation of a public reprimand as discipline, and the assessment of costs against him.

At the meeting terminating November 13, 1987, the Board of Governors of The Florida Bar voted in favor of petitioning for review of the Referee's recommendation of discipline and directed the undersigned Bar Counsel to seek suspension ninety-one (91) days in length, together with passage of the Ethics portion of the Bar Examination.

This brief is filed in answer to Respondent's Initial Brief in support of his petition for review, and in support of the Bar's cross-petition for review.

SUMMARY OF THE ARGUMENT

1. Argument in Answer to Respondent's Initial Brief

Respondent's Initial Brief is unclear and difficult if not impossible to respond to in many respects. The Florida Bar will, however, attempt to respond to the arguments made by Respondent in his Initial Brief.

It appears that Respondent is appealing the Referee's finding of guilt in Count II as to two of the three Disciplinary Rules charged and as to findings of guilt in Counts III and IV as to all Disciplinary Rules charged. Respondent has not, however, petitioned for review of the Referee's findings of fact. Nor has Respondent argued that the record contains insufficient evidence to sustain findings of guilt.

Evidence was presented at the final hearing in the form of exhibits and testimony. This evidence constituting part of the trial record is sufficient to sustain the Referee's findings of guilt as to all Disciplinary Rules charged.

Respondent is also petitioning for review of the Referee's recommendation of a public reprimand. It appears that Respondent is requesting that the recommendation of a public reprimand be

rejected and that a finding of minor misconduct be entered by this Court. Minor misconduct is not appropriate in the instant matter, as Respondent has been found guilty of four separate instances of misconduct. The grievance committee's handling of this matter is irrelevant and Respondent's reference to alleged actions by grievance committee members dehors the record.

Finally, Respondent has appealed the assessment of costs against him and has requested an opportunity to review costs. However, the record contains no objection as to costs by Respondent or requests to review costs. There is, therefore, no basis for appeal of this issue.

2. Argument in Support of Cross-Petition

After a hearing before a judicial referee appointed by this Court, Respondent was found guilty of all disciplinary rules charged in four separate counts of misconduct. These counts include the use of improper advertising, misdemeanor possession of marijuana, the use of false and derogatory statements in a pleading, and the handling of a criminal appeal which can only be characterized as neglectful and incompetent.

The Referee's recommendation of a public reprimand is clearly not sufficient for these four instances of misconduct.

Discipline imposed against attorneys should protect members of the public and should also act as a deterrent to other attorneys who might be tempted to engage in similar misconduct. A public reprimand in the instant matter would accomplish neither of these purposes. Further, a public reprimand would not inspire the confidence of the public in the legal profession's ability to regulate its own members.

Each count of misconduct against Respondent considered by itself would justify a public reprimand. The appropriate discipline for all four counts considered together would be a suspension of ninety-one (91) days duration.

ARGUMENT

1. Argument in Answer to Respondent's Initial Brief

ISSUE I

THE REFEREE'S FINDINGS OF GUILT ARE ADEQUATELY SUPPORTED BY THE RECORD AND AS SUCH SHOULD BE UPHELD BY THIS COURT.

Respondent's brief in support of his petition for review has not challenged any of the findings of fact as contained in the Referee's Report. This Report summarizes misconduct as to each Count and makes references to the transcript of record, exhibits introduced into evidence, and Respondent's answers to the Request for Admissions propounded by The Florida Bar. Because Respondent has not challenged any of the findings of fact, this Court is left with a determination of whether the findings of guilt are supported by evidence contained in the record.

Respondent has petitioned for review of the Referee's finding of guilt in Count II as to Integration Rule 11.02(3)(a) (standards of moral conduct) and Disciplinary Rule 1-101(A)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude) of the Code of Professional Responsibility of The Florida Bar. Respondent has not petitioned for review of the Referee's finding of guilt as to article XI, Rule 11.02(3)(b) (commission of a crime) in Count II.

Respondent has also petitioned for review of the Referee's findings of guilt as to all rules cited with regard to Count II and Count IV.

Rule 3-7.6(c)(5), Rules of Discipline, specifically states that, "upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified." Further, this Court has stated that its responsibility in a disciplinary proceeding is to review the referee's report and, if the recommendations of guilt are supported by the record, to impose an appropriate penalty. The Florida Bar v. Hoffer, 386 So.2d 642 (Fla. 1982) and The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). Respondent has not sustained his burden. Instead, Respondent attempts to excuse or justify his behavior by unsupported allegations and references to facts not contained in the record.

Specifically, Respondent stated in his Initial Brief that "the act of accepting a pipe fashioned from an empty Coors beer can that contained about one/tenth of a gram of lighted marijuana from the third person that had smoked from it, taking one puff, and passing it to the next person is not an 'act contrary to good morals'." (Respondent's Initial Brief at 5).

Respondent's Attachments numbered one (1) and two (2) are both inappropriate and irrelevant. They are an attempt by Respondent to introduce new "evidence" into these proceedings and as such could be stricken sua sponte. Article XI, Rule 11.02(3)(a) states that "the commission by a lawyer of any act contrary to honesty, justice, or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline." Respondent has failed to demonstrate that his admitted commission of a misdemeanor in a public business establishment fails to constitute violation of this rule. Had Respondent presented to the Referee probative and supportive evidence that eighty-five percent of the adult population of the United States smoked marijuana, such proof would not excuse Respondent's misconduct. An analogy might be made to motorists traveling on interstate highways. The majority of motorists might be traveling at a rate of speed in excess of the legal limit. However, this would not prevent a finding of guilt against one who admitted violating the legal limit.

Respondent further argues that smoking marijuana with a group of friends in a public establishment does not constitute "moral turpitude" and cites to Black's Law Dictionary. While the definition for moral turpitude is admittedly somewhat obscure, an attorney as an officer of the court is held to a higher duty than

members of the general public. When an attorney deliberately participates in the use of illegal and controlled substances, such behavior "gravely violates moral sentiment [and] accepted moral standards of community." Black's Law Dictionary, 910 (5th Ed. 1979).

Those portions of Respondent's Initial Brief which challenge findings of guilt in Counts III and IV are simply attempts to reargue evidence already presented to the Referee at the final hearing. The Referee's Report and the record speak for themselves. Arguments presented in Respondent's Initial Brief were made to the Referee and rejected by him. A petition for review does not entitle the petitioning party to a de novo trial. The party seeking review must demonstrate that the referee's report is clearly erroneous. The findings of guilt made by the Referee in the instant case are clearly supported by the record and as such are not subject to review. A presumption of correctness attaches to a referee's findings in part because the referee has had an opportunity to personally observe the demeanor of witnesses and to assess their credibility. Respondent has failed to demonstrate that the Referee's findings are either erroneous, unlawful, or unjustified. These findings, presumed correct and adequately supported by the record, should not be overturned.

ISSUE II

DISCIPLINE LESS SEVERE THAN A PUBLIC REPRIMAND WOULD NOT BE SUFFICIENT TO EITHER PROTECT THE PUBLIC OR TO DETER OTHER ATTORNEYS FROM SIMILAR MISCONDUCT.

Respondent argues that a public reprimand is too harsh a penalty in light of the misconduct involved. He attempts to apply the standards for minor misconduct to the instant case. Assuming for the sake of argument that these criteria apply in the instant matter, Respondent fails to consider that there are four separate and distinct counts of misconduct charged against him. Findings of guilt as to multiple instances of misconduct cannot be characterized as minor misconduct.

The Florida Standards on Discipline cited to the Referee at final hearing clearly indicate that a public reprimand would be an appropriate level of discipline for each and every one of the four counts against Respondent taken by themselves. That is, had each of these counts been considered separately, public reprimand would have been justified as to each one of the counts.

The Florida Bar agrees with Respondent that a public reprimand is not an appropriate level of discipline in the instant matter. However, the appropriate level of discipline would be a ninety-one day (91) suspension rather than the private reprimand suggested by Respondent.

ISSUE III

A PETITION FOR REVIEW IS NOT AN APPROPRIATE FORUM TO ADDRESS THE ISSUE OF COSTS ASSESSED IN A DISCIPLINARY PROCEEDING.

The final hearing in these proceedings was held September 4, 1987 and a statement of costs served upon Respondent on September 23, 1987, two days after receipt of the court reporter's bill for transcription of the final hearing. This statement of costs was incorporated into the Referee's Report. An examination of the record reveals no objection by Respondent to the statement of costs or to the Referee's Report which orders payment of these costs. Had Respondent objected to any aspect of the costs statement, he had the opportunity to petition for modification or clarification of the Referee's Report and to request a hearing on said petition. Rule 3-7.5(k)(1), Rules of Discipline, sets forth certain costs which must be charged against a respondent in a disciplinary proceeding. These include administrative costs, court reporter's fees and traveling expenses of bar counsel. These costs were furnished to the Referee by The Florida Bar as required by the Rules of Discipline. Any objection to either the type or amount of costs should have been made to the Referee. Because no such objection was made, there is no factual basis in the record to support Respondent's challenge to the amounts contained in the Referee's Report.

2. Argument in Support of Cross-Petition

THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND AS DISCIPLINE IS NOT SUFFICIENT DISCIPLINE FOR RESPONDENT'S MISCONDUCT.

The Referee's Report and Recommendation contained findings of guilt against Respondent on all four counts of misconduct charged against Respondent in the Bar's Complaint. Each one of the counts contains numerous violations of disciplinary rules and Integration Rule provisions of The Florida Bar. Any one of the counts of misconduct considered separately would justify imposition of a public reprimand as discipline. Recommendation of a public reprimand for misconduct relating to all four counts is not sufficient discipline under the Florida Standards or under previous cases cited by this Court.

A. PUBLICATION OF AN ADVERTISEMENT IN VIOLATION OF DISCIPLINARY RULES OF THE FLORIDA BAR IS BY ITSELF SUFFICIENT TO JUSTIFY IMPOSITION OF A PUBLIC REPRIMAND.

The Referee's Report finds Respondent guilty of all disciplinary rules as charged in Count I of the Bar's Complaint. The advertisement in question which was placed in a Fort Walton Beach newspaper stated: "Holiday Special - Get that spouse of yours some'in' he or she's been wantin' for a long time . . . a

deeevorce . . . . . (uncontested) 150 bucks." The Referee's Report found Respondent's use of this advertisement in violation of the disciplinary rules which regulate advertising and which prohibit the use of any form of communication which appeals primarily to a lay person's fear, greed, desire for revenge, or similar emotion; and, which is intended or is likely to attract clients by use of showmanship or hucksterism, including the use of garish or sensational language. While The Florida Bar is not in a position constitutionally or otherwise, to regulate taste in advertising, this advertisement goes far beyond bad taste. The wording of the advertisement appears to promote or advocate divorce and is thus contrary to public policy. The advertisement further makes light of the judicial process and of marriage and family values.

The United States Supreme Court has in the last decade decided a number of cases wherein the use of advertisements by attorneys and other professionals has been upheld as an exercise of free speech. However, these decisions are based upon the premise that such advertisements serve a useful purpose of conveying valuable information to the public. The Supreme Court of the United States has never said that "anything goes". Useful information can be conveyed without encouraging one's perspective clients to file for divorce and without the use of language that may be perceived as tasteless or sensational by members of the public.

The Florida Standards on Disciplinary Sanctions do not specifically address the use of prohibited communications; however, Section 7.3 indicates that a public reprimand is appropriate where a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to the client, the public, or the legal system. In the instant matter, Respondent has acknowledged that his use of the advertisement was inappropriate but that at the time he caused the advertisement to be published he did not perceive the advertisement to be inappropriate. (TR-17-18). The use of this advertisement is potentially injurious to both the public and legal system in that it both promotes the break-up of families and marriages and it is demeaning to the legal profession.

There are no cases previously decided by this Court which deal with the use of advertisements similar to the one used by Respondent. It is therefore important that applicable provisions of the Florida Standards be considered in deciding an appropriate discipline for this Count of misconduct.

B. A PUBLIC REPRIMAND IS THE MINIMUM DISCIPLINE APPROPRIATE FOR AN ATTORNEY WHO KNOWINGLY ENGAGES IN CRIMINAL CONDUCT.

The Referee's Report finds Respondent guilty of all disciplinary rules charged in the Bar's Complaint for misconduct

arising out of Respondent's arrest and subsequent plea on possession of marijuana. Respondent was arrested on July 27, 1984 for smoking marijuana with a group of individuals in an outdoor area of a local bar in Fort Walton Beach, Florida. Respondent has not denied that he engaged in the misconduct with which he was charged, both in the criminal proceeding and in the instant disciplinary proceeding. This Court has before it an attorney who readily admits smoking marijuana in a public establishment in the presence of other individuals and who seeks to excuse this conduct by his opinion that "at least eighty-five percent of the adult population in the United States have taken a smoke of marijuana." (TR-31). This attorney further stated before the Referee that:

> Many times when I play nickel, dime, quarter, poker, or I go to a cocktail party or what have you, it's just a very common thing to smoke marijuana.
>
> And I would say once every so many months, I am in group talking, and somebody lights up a marijuana cigarette and just passes it around. I must admit that, generally speaking, I take a smoke out of it, or whatever you want to call it, and that is against the law.

(TR-34-35).

Attorneys, as officers of the Court, are sworn to uphold the laws of the State of Florida. They are held to higher standards than members of the public due to both their special knowledge of the laws of the State of Florida and because their violation of

these laws adversely affects the public perception of the legal profession. See The Florida Bar v. Calhoun, 102 So.2d 604 at 608 (Fla. 1958).

Section 5.12 of the Florida Standards on Disciplinary Sanctions states that suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.1 and that seriously adversely reflects on the lawyer's fitness to practice law. Standard 5.11 sets forth instances of criminal conduct wherein disbarment is the appropriate discipline. While Standard 5.11 is applicable to instances wherein the lawyer engages in the sale, distribution or importation of controlled substances, there is no standard which specifically relates to mere possession or use of controlled substances. This Court in previous cases has dealt with attorney misconduct involving both misdemeanor and felony possession of marijuana. In The Florida Bar v. Schram, 355 So.2d 788 (Fla. 1978), the attorney admitted his guilt for misdemeanor possession of drug paraphernalia and possession of a felony quantity of marijuana. Although adjudication was withheld in the criminal matters, this Court suspended Schramm for one year. In The Florida Bar v. Levine, 498 So.2d 941 (Fla. 1986), the attorney received a public reprimand for his conviction on misdemeanor personal use of cocaine.

Although Respondent has acknowledged the wrongful nature of his conduct and recognizes the illegality of same, he indicated his intent to continue to engage in recreational use of marijuana in violation of the laws of the State of Florida. Respondent is entitled to his belief that laws prohibiting personal usage of marijuana are unfair and unjust. However, attorneys have an obligation to the public and to the judicial system to encourage respect for the laws of this State. Respondent's opinion does not justify his continued violation of the law.

C. USE OF LANGUAGE IN A PLEADING WHICH CONTAINS FALSE AND UNSUBSTANTIATED CHARGES AND WHICH IS DEROGATORY TO THE TRIAL JUDGE JUSTIFIES IMPOSITION OF A PUBLIC REPRIMAND.

The misconduct charged in Count III relates to two separate instances of misconduct by Respondent. The first instance deals with Respondent's handling of a civil suit filed in federal court. Because Respondent filed suit against the wrong parties, his client's case was dismissed and the defendant's legal fees were assessed against Respondent. The Referee found this misconduct to be violative of Disciplinary Rule 6-101(A)(2) which prohibits an attorney's handling a matter without preparation adequate in the circumstances.

The second instance of misconduct contained in Count III of the Bar's Complaint deals with Respondent's filing of a motion in

federal court before the Honorable Winston Arnow. Respondent testified before the grievance committee that earlier dealings with Judge Arnow might have influenced the Judge's decision to dismiss the suit against his client. (Answer to Request for Admissions, paragraph K; TR-40). Respondent's conduct relating to the prior incident with Judge Arnow was therefore called into question and considered by the grievance committee. Respondent testified before the grievance committee and the Referee in the instant case that in 1982 he had filed a motion for reduction of sentence on behalf of a client. The motion contained a comparison of his client's sentence and the sentence received by another individual in an unrelated criminal matter. (Bar Exhibit 8; TR-41-42). Respondent's motion concluded with the following inquisitorial allegations: "is that equal justice?" and "is justice for sale?" (Bar Exhibit 8; TR-41-42). Upon questioning before the Referee, Respondent admitted that he had no knowledge regarding the other individual's case other than that gleaned from a court file and newspaper articles. (TR-44). Further, Respondent admitted that he did not have any particular information which might have justified the apparently disparate sentencing received by the other individual. (TR-45).

The Honorable William Stafford, Chief Judge for the United States District Court for the Northern District of Florida, at the time Respondent filed the motion for reduction of sentence, wrote

to Respondent suggesting that he apologize to Judge Arnow. (TR-45; Bar Exhibit 9). Respondent's reply to Judge Stafford's letter stated specifically that he had no evidence to support the allegations against Judge Arnow. (TR-46-47; Bar Exhibit 10). This second instance of misconduct in Count III of the Bar's Complaint was found by the Referee to be violative of Disciplinary Rules 7-106(C)(1) (which prohibits a lawyer from stating or alluding to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence) and 7-106(C)(6) (which prohibits a lawyer from engaging in undignified or discourteous conduct which is degrading to a tribunal).

The Florida Standards on Disciplinary Sanctions state that a public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. This section is applicable to Respondent's misconduct as set forth in Count III. Further, this Court in five separate cases has publicly reprimanded attorneys for misconduct similar to that for which Respondent has been found guilty. In 1973, this Court held that a memorandum filed with the Court containing a statement to the effect that a trial judge had avoided performance of his sworn duty warranted a public apology to the judiciary. In re Shimek, 284 So.2d 686 (Fla. 1973). In The

Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982), this Court publicly reprimanded an attorney for making statements derogatory to a trial judge in a motion to recuse and for placing client's funds in a personal account. Public statements denigrating the courts and the administration of justice followed by apologies and offers to take further action to exhibit remorse were found worthy of a public reprimand in The Florida Bar v. Weinberger, 397 So.2d 661 (Fla. 1981). A public apology was likewise required in The Florida Bar v. Stokes, 186 So.2d 499 (Fla. 1966) for disparaging and unfair comments by an attorney about a judge. In Cerf v. State, 458 So.2d 1071 (Fla. 1984), the attorney was publicly reprimanded for making false and unsubstantiated charges against a judge's integrity in legally filed papers. This Court stated in Cerf:

> It is one thing to allow an attorney his truthful criticisms against our judicial system. However, it is quite another to allow an attorney a poetic license to falsely slander a circuit judge with untrue accusations of political corruption and bribery.

Cerf at 1074.

Reasonable persons reading Respondent's motion for reduction of sentence would conclude that Respondent was implying that the disparity in the sentencing was the result of a decision or deal influenced by one defendant's apparent affluence. Respondent

admitted both to the Referee in this matter and in his letter to Judge Stafford that he had no factual basis for such a conclusion. Part of an attorney's job is to make comparisons for the court between their client's case and other cases previously decided by courts of law. Had Respondent compared the facts in his client's case to those in a previously issued opinion, his client would have been well-served and Respondent would not have been in violation of disciplinary rules. However, the use of statements which are not supportable by any kind of evidence, admissible or otherwise, and which create a slur on the judicial system and the judges involved, is violative of disciplinary rules and should be appropriately disciplined with no less than a public reprimand.

D. NEGLECT AND INCOMPETENCE IN HANDLING A CRIMINAL APPEAL WARRANTS NO LESS THAN A PUBLIC REPRIMAND AS APPROPRIATE DISCIPLINE.

Allegations contained in Count IV of the Bar's Complaint have been heard by three separate bodies. They were first heard by the Honorable Erwin Fleet as trial judge appointed by the First District Court of Appeal. Upon referral to The Florida Bar, the allegations were again heard by a grievance committee for The Florida Bar and by the judicial Referee appointed by this Court in the instant matter. These allegations deal with Respondent's neglect and mishandling of a criminal appeal. Respondent was appointed on July 22, 1985 to represent a criminal defendant in the

appeal of a criminal matter. Respondent filed a motion for extension of time for the filing of the initial brief but did not request this extension of time until eight days after the initial brief was due. Further, this motion, forwarded to the office of the state attorney, was never properly filed with the court and therefore was not granted. (Answer to Request for Admissions, paragraph P; TR-63-67; Bar Exhibit 12).

Respondent's handling of this matter reveals that he did not take the necessary steps to familiarize himself with what had previously taken place in the appeal. Respondent requested a court order for transcription of the plea proceeding although the transcript had previously been filed, and requested a continuance to file the "designation" which had also previously been filed. (Answer to Request for Admissions, paragraphs Q and R; Bar Exhibit 12). Had Respondent's motion for extension of time been properly filed and granted, Respondent would have been allowed by his own request, up until October 28, 1985 for the filing of the initial brief. However, the initial brief was not filed by Respondent until November 13, 1985. (Bar Exhibit 12; TR-69-70, 73).

The First District Court of Appeal expressed its concern over Respondent's handling of the criminal appeal by relinquishing jurisdiction to the trial court for the purpose of directing an inquiry to Respondent and reporting back to the court. The trial

judge appointed was the Honorable Erwin Fleet. Upon receipt of the First District Court of Appeal's order, Judge Fleet ordered Respondent and the state attorney to submit memoranda. (Answer to Request for Admissions, paragraph BB). A hearing was held before Judge Fleet on January 31, 1986, and Report of Findings of Fact and Recommendations was submitted to the First District Court of Appeal on February 6, 1986. A copy of this report, together with the attachments thereto, was admitted into evidence at the final hearing in this disciplinary proceeding and constitute composite Bar Exhibit #12. Among those findings of fact made by Judge Fleet and contained in his report were that Respondent had not discharged his duties with the competency normally expected of an attorney, that Respondent was not competent at that time to handle criminal appeals, that Respondent was not sufficiently familiar with Florida Rules of Appellate Procedure and had not undertaken to so familiarize himself in order to competently represent his client, that Respondent exhibited an attitude of disrespect for his profession and the judicial system, and finally, that Respondent was in violation of provisions of Disciplinary Rule 6-101 and the ethical considerations of Canon 6 of the Code of Professional Responsibility of The Florida.

Respondent's mishandling and neglect of the criminal appeal was found by the Referee to be violative of disciplinary rules charged in the Bar's Complaint. Respondent has exhibited a pattern in his

mishandling of this criminal matter which demonstrates that he is not competent to practice appellate law and that he failed to take the necessary steps to protect his client's interests.

Several sections of the Florida Standards on Disciplinary Sanctions are applicable to the misconduct set forth in Count IV. Section 4.43 states that a public reprimand is appropriate when a lawyer is negligent and does not act with the reasonable diligence in representing a client and causes injury or potential injury to a client. Likewise, Section 4.53 indicates that a public reprimand is appropriate when a lawyer demonstrates a failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client. Public reprimand is also appropriate, pursuant to Section 7.3, where a lawyer negligently engages in conduct that is in violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

In The Florida Bar v. Glick, 397 So.2d 1140 (Fla. 1981), the attorney was suspended for three months and one day for handling a legal matter which he knew or should have known he was not competent to handle, for neglecting a legal matter, for failing to carry out a contract of employment, and for prejudicing or damaging a client. Public reprimand was ordered in The Florida Bar v. Brigman, 299 So.2d 7 (Fla. 1974) for representation which

fell below the high standard required in representing clients even where the misconduct did not involve dishonesty or mishandling of funds. Likewise, in The Florida Bar v. Hotaling, 454 So.2d 555 (Fla. 1984), the attorney was publicly reprimanded for representation of clients in an incompetent manner where the conduct did not involve fraud or deceit and was not prejudicial to the clients. Based on the standards cited, together with cases previously decided by this Court, the minimum discipline appropriate for the misconduct contained in Count IV of the charges against Respondent is a public reprimand.

This Court has consistently held in other cases that the appropriate level of discipline to be imposed in a disciplinary proceeding must be determined by examining all of the facts together with consideration of any aggravating or mitigating factors. Public protection is paramount. The purposes for discipline were enunciated by this Court in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970):

> 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 the result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a 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 prone or tempted to become involved in like violations.

The existence of multiple offenses against an attorney is listed as an aggravating factor in Section 9.2 of the Florida Standards on Disciplinary Sanctions. This Court has in the past dealt more harshly with attorneys charged with multiple offenses. The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981).

Based upon the similar cases decided by this Court, and in light of applicable provisions of the Florida Standards, a suspension of ninety-one days followed by a period of probation as recommended by the Referee, would be an appropriate discipline.

In The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985), this Court stated that public reprimands should be reserved for isolated instances of neglect. The multiple instances of misconduct cited in the Referee's Report go far beyond an isolated instance of neglect. Respondent has exhibited a pattern of thumbing his nose at the judicial system, the laws of this State, the rules of procedure and the disciplinary rules. The discipline of attorneys should assure the public of the Bar's ability and willingness to discipline its own members and thereby inspire public confidence in the system. A public reprimand in the instant case would not have this desired effect. Further, a public reprimand would not accomplish the purposes of discipline as set forth in Pahules, particularly with regard to protection of the public and deterrence of other attorneys.

CONCLUSION

For the reasons cited herein, this Court should deny Respondent's Petition for Review and uphold the Referee's findings of guilt in this matter. This Court should likewise reject Petitioner's argument that the recommended penalty against him should be reduced in any manner. Costs as set forth in the Referee's Report should be upheld as no objection was made to these costs by Respondent prior to his Petition for Review.

The findings of guilt by the Referee as to all disciplinary rules charged in the four Counts of the Bar's Complaint are well-supported by the record and referenced thereto. A public reprimand, which was recommended by the Referee, is not sufficient for four separate instances of misconduct which would, if taken singularly, each warrant a public reprimand.

WHEREFORE, The Florida Bar respectfully requests that Respondent's Petition for Review be denied. The Florida Bar further requests that this Court reject the Referee's recommendation of a public reprimand and impose a discipline of at least ninety-one days with a period of probation eighteen months in length during which Respondent would be required to successfully complete the Multistate Professional Ethics Examination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been forwarded by certified mail #P 675 195 268, return receipt requested, to Respondent, DAVID A. PASCOE, ESQUIRE, at his record Bar address of 120 Wellington Road, Fort Walton Beach, Florida 32548, this 22nd day of January, 1988.

SUSAN V. BLOEMENDAAL
Bar Counsel