IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DWIGHT DANIEL MOODY,

Respondent.
_____/

Case No. 74,820
TFB File No. 90-00421-08

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, THE FLORIDA BAR, will be referred to as such or as the Bar. Appellee, the Respondent below, will be referred to as such or as Mr. Moody.

References to the transcript of final hearing will be by the symbol TR followed by the appropriate page number.

References to the Referee Report will be by the symbol RR followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Initial Brief of The Florida Bar accurately sets forth the statement of the case at bar.

While Respondent has no quarrel with the accuracy of Complainant's Initial Brief, there are facts that occurred below that should be elaborated upon.

Respondent, DANIEL D. MOODY, is a thirty-three year old lawyer who was involved in an accident at approximately 2:30 am on September 4, 1988. Respondent and his passenger, his future brother-in-law, had been watching a sporting event at a local pub during the evening preceding the accident. The driver and occupants of the other car had also been out drinking during the evening.

The accident occurred at an intersection in Sarasota, Florida. There were no objective witnesses to the incident. As is typical in such cases, the occupants of both cars claimed they had the green light. TR 197-198. Unfortunately, a passenger in the rear seat of the other car (ironically, who was seated away from the impact) was killed because he was not wearing a seat belt. TR 171. Mr. Moody's hand and foot were broken in the accident and he had severe bruises resulting in internal bleeding. TR 168.

Respondent's blood alcohol level was ultimately tested and was found to be 0.15. The driver of the other car, who had admitted to at least two beers and some wine, tested below the legal limit. TR 198. Respondent testified that his BAL

level formed the basis for his being charged in the accident some two months after it occurred. TR 198.

Notwithstanding his claim of innocence, Respondent ultimately pled nolo contendere to two felony charges: manslaughter, a second-degree felony, and leaving the scene of an accident with injuries, a third-degree felony. The Referee specifically found that Respondent's plea to the latter charge was pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) (characterized by the Referee as a "best interest plea").

Respondent was sentenced to eleven and one-half months imprisonment (suspended) and two years' community control to be followed by five years' probation. He also had to pay court costs and a fine of $500 and he must perform 500 hours of community service.

On November 16, 1989, without objection, Respondent was suspended from The Florida Bar. Respondent did request, however, that the Supreme Court appoint a referee to determine the appropriate discipline for Respondent's offenses. Subsequently, this Court appointed the referee that presided over these preceedings.

At final hearing on February 28, 1989, the referee presided over the final hearing in this matter. After hearing the testimony of the witnesses below and after reviewing the exhibits admitted into evidence, the referee recommended that Respondent be suspended from the practice of law for nine months, nunc pro tunc to November 16, 1989, the date of his

interim suspension, that Respondent pay the costs of these disciplinary proceedings, that Respondent be allowed to petition for reinstatement sixty days prior to the termination of his suspension, and finally, that the failure of Respondent to have his civil rights restored not prevent him from being reinstated. RR 3,4.

In determining the appropriate discipline to be applied, the referee considered as an aggravating factor the death of the passenger in the other motor vehicle. He found as mitigating factors the following:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) timely good faith effort to make restitution or to rectify consequences of misconduct;
(d) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(e) character or reputation;
(f) interim rehabilitation;
(g) imposition of other penalties or sanctions; and
(h) remorse.

The referee was obviously influenced by the very significant character testimony presented to the Court at Respondent's final hearing. It must also be presumed that he was greatly influenced by Respondent's attitude.

Among Respondent's sterling character witnesses were two circuit judges, J. Dale Durrance and Charles B. Curry, the State Attorney for the Tenth Judicial Circuit, Jerry Hill (for whom Respondent previously worked), the elected clerk of court for Polk County for the last twenty-two years, Ernest "Bud" Dean Dixon, and a city commissioner in Respondent's home town

of Ft. Meade, William J. Loadholtes, who has served on the city commission for twenty-three years.

In addition to the testimony of the individuals from Respondent's hometown, three lawyers in the Gainesville area, where Respondent was working at the time of his accident, testified on his behalf. They included past-presidents of the Eighth Judicial Circuit Bar, James E. Clayton and James S. Quincy. Both are named partners in Gainesville's premier law firm. Former state legislator, Eugene F. Shaw, who employed Respondent as a paralegal and law clerk after Respondent's suspension, also testified.

All of these witnesses attested to Mr. Moody's excellent reputation for honesty and good character, to his past sobriety, and to his superlative reputation as an up and coming lawyer.

Finally, Respondent's father, Dan Lee Moody, and Respondent's wife, Nancy Carl Moody, testified as to the effect that his accident and suspension have had on his life.

SUMMARY OF ARGUMENT

The net effect of suspending Respondent for nine months and then to refuse reinstatement until his probation is over is to suspend him for seven years or more. Such a suspension is two years longer than disbarment and is completely unjust. Numerous lawyers have received far less draconian punishments for offenses far more serious.

To allow a disciplinary sanction to be dependent on restoration of civil rights gives the executive branch of the government of the State of Florida control over the reinstatment of disciplined lawyers in this state. Because only the Governor can restore civil rights, the Governor would have the deciding say in the reinstatement of a lawyer such as the Respondent in the case at bar.

The withholding or imposition of adjudication of guilt should not be the primary determination in the imposition of a sanction. Such a criteria is a delegation by this Court to the Governor or the Legislature of its powers under the constitution. For example, by making it mandatory to impose adjudication of guilt in some instances, the legislature could control the duration of suspensions imposed by the Supreme Court.

When this Court adopted the new Rules Regulating The Florida Bar in 1986, it effectively dispensed with the fiction of adjudication versus withholding adjudication of guilt in felony cases. Under the old rules, a lawyer could only be

automatically suspended if he was adjudicated guilty of a felony. Under the new rules, it makes no difference. In essence, this Court recognized that the adjudication/withholding adjudication of guilt distinction in felony cases was a fiction that should be eliminated.

Similarly, the fiction between adjudication or failure to adjudicate should be eliminated in determining a lawyer's eligibility to seek reinstatement to the Bar.

A nine-month suspension from practice, coupled with proof of rehabilitation before reinstatement, will meet the three purposes of discipline. Extending that suspension by another six years solely on the issue of restoration of civil rights will in no way afford better protection to the public.

The referee's recommendation should be adopted as written.

ARGUMENT

THIS COURT SHOULD ADOPT THE REFEREE'S RECOMMENDATION THAT RESPONDENT'S REINSTATEMENT NOT BE DEPENDENT UPON THE RESTORATION OF CIVIL RIGHTS.

The real focus of the discussion in this appeal should not be an abstract dialogue about requiring nameless lawyers to have their civil rights restored before they are allowed to petition for reinstatement. The real focus of this appeal should be whether a thirty-three-year-old lawyer, with impeccable credentials and an exemplary professional record, will be suspended for seven years or longer for an offense entirely outside the practice of law, which was unintentional and which will never happen again.

The referee, after hearing the testimony of Mr. Moody's ten character witnesses and after observing Mr. Moody himself, specifically recommended that reinstatement not be conditioned upon restoration of civil rights. RR 4. The referee felt, and the Bar agrees, that a nine-month suspension, to be followed by proof of rehabilitation, was a sufficient sanction for Mr. Moody's misconduct. In specifically recommending against proof of restoration of civil rights before reinstatement, the referee was clearly stating that he objected to Dan Moody being suspended from The Florida Bar for at least seven years.

This Court has time and again emphasized that:

> bar disciplinary proceedings are remedial and are designed for the protection of the public and the

integrity of the courts. DeBock v. State, 512 So.2d 164, 166 (Fla. 1987).

Respondent respectfully submits that the protection of the public and the integrity of the courts do not demand that he be suspended from the practice of law for seven years.

This Court set forth the three purposes of discipline in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). They are:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness 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.

There is no dispute before this Court over the appropriateness of the referee's recommendation that Mr. Moody be suspended for nine months. The Florida Bar has not appealed that issue.

There is also no dispute before this Court over Mr. Moody's character, integrity, or ability. Even The Florida Bar conceded on page nine of its brief that Respondent is "a good individual" and "a good lawyer." The Bar further conceded on page six of its brief that Mr. Moody's conviction "did not involve the practice of law" and had "no negative effect" to any of his clients.

During Respondent's practice, he has never even had a complaint filed against him, let alone having a discipline imposed. TR 129.

The referee's recommendation that Respondent be suspended for nine months satisfies the first purpose of discipline as set forth in Pahules. Dan Moody has never been a threat to his clientele and never will be in the future. He is being sanctioned for misconduct outside the practice of law, which traditionally receives less severe disciplines, The Florida Bar v. Tunsil, 503 So.2d 1230, 1231 (Fla. 1986), and which will not happen again.

Protection of the public is further guaranteed when one considers that Respondent's misconduct was the result of a one-time incident of overuse of alcohol and that, as a result of his accident, he has not had any alcohol beverages since September 4, 1988 and he will never have another drink. TR 181, 187. Furthermore, he was evaluated by both a psychologist and by the Florida Lawyers Assistance program and neither evaluation indicated a need for alcohol rehabilitation. TR 180. That Respondent has no history of alcohol abuse is borne out by the testimony of witnesses that have known him all of his life as well as those that were observing him immediately prior to the accident in question.

Mr. Moody's accident occurred as a result of a single episode of watching a football game with his prospective brother-in-law at a tavern.

Respondent asks this Court to focus on the second purpose of discipline while deliberating on this appeal. Is it fair to Respondent and does it encourage rehabilitation to ignore the referee's recommendation that restoration of civil rights not be required prior to reinstatement? Requiring restoration is tantamount to a seven-year suspension -- two years longer than most disbarments. See Rule 3-5.1(f) of the Rules Regulating The Florida Bar. Respondent argues that such a result is so harsh that it is arbitrary and capricious.

While the Bar isolates the issue of restoration of civil rights from the recommended discipline, Mr. Moody submits to this Court that they are too interwoven to be viewed in isolation. A nine-month suspension is, in fact, a seven-year suspension if Mr. Moody cannot seek reinstatement until his civil rights are restored after his probation ends.

Mr. Moody was convicted of two crimes stemming from a once-in-a-lifetime incident. He does not minimize the fact that a passenger in the other car was killed in the accident. TR 170-172. Respondent regrets his actions and accepted responsibility for his role in the accident. In fact, the referee specifically listed Mr. Moody's remorse as a mitigating factor on page three of his report. (Respondent's counsel, however, would emphasize to this Court that the driver of the other car, who admitted to having at least three drinks before getting into his car, TR 198, probably should not have been driving either).

If this Court rejects the referee's recommendation that restoration of civil rights not be required before reinstatement, Dan Moody will be removed from practice longer than lawyers disbarred for stealing their clients' trust funds. See, e.g., The Florida Bar v. Diaz-Silveira, 557 So.2d 570 (Fla. 1990) and The Florida Bar v. Gustafson, 555 So.2d 853 (Fla. 1990). He will be removed from practice as long as a lawyer disbarred for his conviction for laundering drug money. The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1989). And, he will be removed from practice longer than a lawyer disbarred for an extended history of misconduct including neglect, misrepresentation, and misuse of trust funds. The Florida Bar v. Golden, 561 So.2d 1146 (Fla. 1990).

The nine-month suspension that has been recommended for Respondent by the referee is an appropriate sanction. The Board of Governors of The Florida Bar agrees. It did not appeal the referee's recommendation in that regard. A seven-year suspension for a one-time event, occurring outside the practice of law, and for a crime that does not require specific intent, is unjust.

The third purpose of discipline is deterrence. Any other lawyer looking at Dan Moody's will be deterred from drinking and driving.

Dan Moody has had his entire life savings, $20,000, wiped out by the criminal proceedings against him. TR 183. He has been sentenced to house arrest for two years and has been

ordered to perform five hundred hours of community service, which Respondent is satisfying by building houses for the needy as part of the Habitat for Humanity Program, TR 175, and he has been fined $500. Even after completing his community control, he will be on probation for five years. Dan Moody has been suspended from the practice of law and has been relegated to working as a paralegal at a net salary of $369 per week. TR 146. He has been subjected to the anguish and humiliation of criminal proceedings, the opprobrium of one convicted and suspended from the Bar, and the fear and uncertainty of being unable to support his wife and 2 1/2 year old daughter.

No lawyer viewing the above circumstances will be tempted to engage in similar misconduct.

This Court has seen fit to discipline lawyers found guilty of driving under the influence of alcoholic beverages with a public reprimand. The Florida Bar v. Milin, 517 So.2d 20 (Fla. 1987) and The Florida Bar v. Fields, 520 So.2d 272 (Fla. 1988). By virtue of those two decisions, this Court has declared that the appropriate deterrent to keep lawyers from driving under the influence is a public reprimand. Respondent's intentional miscondut, if such there be, goes no further than DUI. The fact that Respondent was involved in an accident involving a fatality obviously changes the consequences of his driving in an impaired state. But his

offense was still getting behind the wheel while impaired. That offense is the one this Court should be seeking to deter.

Deterrence is not a valid consideration when one is considering offenses that are not intentional. Respondent's conviction is for just such an offense. His manslaughter conviction is for a strict liability crime and involves no mens rea. Baker v. State, 377 So.2d 17, 19 (Fla. 1979). Deterrence is viable when discussing intentional offenses. DUI manslaughter is no such offense. (The referee found at page three that Mr. Moody's injuries and intoxication mitigate his leaving the scene of the accident).

Respondent does not minimize his role in the accident or his culpability. The fact that he feels terrible about being involved in an accident in which there was a fatality, his concern for the decedent's family, and his remorse for his actions were all related to the referee. TR 170-172.

Balanced against the fairness of the discipline to be imposed against Mr. Moody is this Court's concern, as expressed in the cases cited by The Florida Bar, about lawyers being allowed to practice when their civil rights have not been restored. Such a consideration should not be coldly and dispassionately discussed when it has such dire and unfair consequences on a young man with impeccable credentials.

Respondent would urge this Court to depart from its requirement that civil rights be restored for the reasons set forth in Justice England's dissenting opinion in the case

styled In Re: Florida Board of Bar Examiners, 341 So.2d 503 (Fla. 1976) at pages 505 through 507. The most significant portion of that dissent is Justice England's valid concern that making the privilege of practicing dependent upon the executive's decision, which is sometimes political, is abhorrent to the separation of powers clause contained in Article II, Section 3 of the Florida Constitution. His point is well-taken. As Justice England stated on page 506 of the aforementioned opinion:

> The extent to which the executive branch either has or has not exercised its discretionary power to pardon or restore civil rights has no relation to the fitness of a particular person to practice law.

In his footnote to the above quote, Justice England pointed out that:

> The pardon power is not always free from political considerations appropriate to the executive branch but wholly unsuited to the duties of the judiciary. For example, see "Pardon Is Assured for Pitts and Lee," Miami Herald, September 17, 1975, at page 1.

Furthermore, by not allowing reinstatement until the restoration of civil rights, this Court is emphasizing the dichotomy between the adjudication or withholding of adjudication of guilt in felony cases. In other words, a discipline for felonious conduct may be longer for one lawyer than for another simply because one judge withheld adjudication and another judge did not. Such inconsistency must be avoided.

That the dichotomy between adjudication and withholding adjudication can result in unfair disciplines is apparent in

the case at bar. It also shows the extent to which the legislative branch can control and jeopardize the judiciary's sole power to regulate the Bar. Specifically, if the legislature decrees that certain offenses require adjudication of guilt (as is true in the case at bar), longer disciplines must result. Mr. Moody's offense warrants a nine-month suspension. However, because he was adjudicated guilty, it will be a seven-year suspension.

There is nothing to stop the legislature from requiring adjudication of guilt for certain classes of crimes that might more frequently apply to lawyers. If so, the legislature would then have control over the discipline to be imposed.

This Court has wisely chosen to ignore the distinction between adjudication or withholding adjudication of guilt in felony cases when it pertains to the imposition of the automatic suspension for felonious conduct. Under former Integration Rule 11.07, a lawyer could only be automatically suspended upon conviction of a felony. When this Court adopted the Rules Regulating The Florida Bar, effective January 1, 1987, it made the automatic suspension applicable to both felony convictions and felony determinations (i.e., felonies where adjudiction is withheld). The Florida Bar Re: Rules Regulating The Florida Bar, 494 So.2d 977 (Fla. 1986).

It is the adjudication of a crime that causes the lawyer's loss of civil rights. It is really the only distinction between adjudication and the withholding of

adjudication of guilt of a felony. This Court eliminated that arbitrary distinction when it imposes the automatic suspension under Rule 3-7.2. Mr. Moody urges this Court to eliminate that distinction in determining reinstatement. Said another way: if adjudication of guilt is immaterial in the determination of whether a lawyer should be automatically suspended, it is immaterial in determining when he should be reinstated.

The refusal to allow one to practice law in this state before the restoration of civil rights has no connection with either that lawyer's fitness to practice or the protection of the public. It is an arbitrary distinction that is unnecessary.

The possession of civil rights is clearly not important to the Department of Professional Regulation or the Real Estate Commission. Neither of those agencies brought charges against Mr. Moody for his offense despite the fact that he holds licenses with both. TR 135, 136.

As Justice England pointed out in the above-cited dissenting opinion, the requirement of Article VI, Section 4 that a convicted felon cannot hold office or vote until restoration of civil rights is not applicable to lawyers. While lawyers are officers of the court, they are not office holders per se.

This Court should abandon the distinction between restoration of civil rights in bar reinstatement matters.

(Respondent is not arguing that this Court abandon such a distinction on admission matters. That is not the issue before the Court at this time).

Respondent urges this Court to adopt a rule that says that when, as here, a referee has specifically recommended that the restoration of civil rights not be a condition precedent to reinstatement, the referee's recommendation will be upheld. That is all the further this Court has to go.

Respondent's promising career has taken a tragic turn. To now force him to stay out of the Bar for seven years is adding insult to injury. It can only result in depriving our profession of an excellent young lawyer for a period longer than is necessary.

Dan Moody has all the "right stuff" to be a superb lawyer and an asset to our profession. His witnesses, judges, lawyers, and elected officials, all agree on that. He was a superb student in high school (president of his senior class, captain of the football team, and Boys State, TR 131) and he put himself through junior college, college, and law school by working (and living) in funeral homes. TR 133, 134, 137, 138.

When Dan Moody graduated from law school, he immediately began working for the State Attorney's Office. The State Attorney himself (who is currently serving on a grievance committee) testified at final hearing and praised Mr. Moody's work, his aptitude, and his ethics. TR 38, 39.

Suspending Mr. Moody for seven years will deprive the public of the services of one who could, someday, be one of the best lawyers in this state. Such an act is contrary to the first purpose of discipline as given in Pahules.

The protection of the public should be the polestar in this Court's deliberation. When the case at bar is viewed from that perspective, it is obvious that Respondent should be allowed to petition for reinstatement at the end of the referee's recommended nine-month suspension.

CONCLUSION

The referee's recommendation that Respondent be allowed to petition for reinstatement before his civil rights are restored, together with all of his other recommendations, should be adopted by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was mailed to JOHN V. McCARTHY, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 8th day of August, 1990.

JOHN A. WEISS
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