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IN THE
SUPREME COURT
OF FLORIDA

NO. 76,724
TFB NOS. 89-10,536 (13C)
89-11,327 (13C)

THE FLORIDA BAR,

Petitioner,

v.

G. STEWART McHENRY,

Respandent.

G. STEWART McHENRY'S BRIEF IN RESPONSE TO THE FLORIDA BAR INITIAL BRIEF AND BRIEF ON CROSS-APPEAL

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STATEMENT OF THE CASE AND THE *FACTS*

A. The Case

G. Stewart McHenry was charged by the Bar with violations of Rule 3-4.3 and 4-8.4(b) of the Rules Regulating The Florida Bar. Those Rules provide:

> **3-4.3 Misconduct and minor misconduct.**
> The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibitive acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission by a lawyer of any act which is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's 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, may constitute a cause for discipline.
>
> * * *
>
> **4-8.4 Misconduct.**
> A lawyer shall not:
> (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

The Referee recommended that Mr. McHenry be found guilty as to each count, and also recommended that he "be suspended from the practice of law for a period of twenty-four (24) months, and,

thereafter until respondent shall prove mental and ethical rehabilitation as provided in Rule 3-5.1(3), Rules of Discipline." Special probation conditions were also recommended. A copy of the Report of Referee is attached as an Appendix to this Brief,

The Board of Governors seeks review of the recommendations, asking this Court to disbar Mr. McHenry. Mr. McHenry seeks review, asking the Court to reject the recommendations as to guilt and punishment.

B. The Facts

The Initial Brief of the Florida Bar sets forth the facts which were heard by the Referee. Pursuant to Rule 9.210(c), Fla.R.App.P. the Respondent accepts the facts as set forth by The Florida Bar with the following caveat. On January 2, 1992 this Court denied Mr. McHenry's Motion to Remand for a new evidentiary hearing based upon evidence which was not presented to the Referee. That evidence casts an ominous shadow over the integrity of the two witnesses whose testimony formed the foundation for this proceeding. Since the Court has rejected McHenry's request to develop those facts, we address this case using, as we now must, only the record below.

In the argument portion of the Brief we detail aspects of the testimony which were glossed over by the Bar, but which support Mr. McHenry's position that the Referee's findings were not adequately supported by the record.

SUMMARY OF THE ARGUMENT

The Referee's Report must be rejected. Two former clients accused G. Stewart McHenry with masturbating in their presence, in his office. One saw nothing evidencing masturbation: she did not see his hand, his pants, his zipper, or his penis. The other claimed she saw McHenry's penis. The Referee found that the testimony of each was relevant in his decision that both events occurred. Considering unrelated dissimilar events to prove that both occurred violated legal and logical principles and requires rejection of the Referee's findings.

The Bar's request for disbarment is not justified, even if the Referee's Report is found to have evidentiary support. The case law, and the facts of this case, do not support disbarment, or an extended suspension of more than 90 days.

ARGUMENT

THE BAR'S DEMAND FOR DISBARMENT SHOULD BE REJECTED; THE REFEREE'S REPORT SHOULD BE REVERSED

The Florida Bar Board of Governors, contrary to the Report and Recommendation of the Referee, and contrary to the request of Bar counsel who prosecuted the case, has asked this Court to disbar G. Stewart McHenry.

There is no indication that the Board of Governors read the record in this case. Where, as here, the Bar asks this Court to reject the Referee's recommendation of punishment, this Court makes a de novo review of the record. Compare, The Florida Bar v. Burke, 578 So.2d 1099,1102 (Fla.1991) ("We have reviewed the record and agree with Burke that the record does not support.. .We find that the Bar failed to present clear and convincing evidence.") Thus we start with the "facts" as developed at the Referee Hearing. Based on those facts, and the applicable law, we respectfully contend that those facts do not support the Referee's conclusion as to the events, and even if they do, those facts do not support the Bar's demand for disbarment.

A. The "Facts"

The Referee Report referring to an affidavit of Miriam Lopez, rather than her testimony (App. 2), concluded that Mr. McHenry masturbated in her presence.

The actual testimony of Ms. Lopez was:

> A. It appeared to me that he was masturbating, so it took me a

long time just to make sure, hey, is this going on? Is this what he is doing? So I kept looking at him and changing my eyes and going back to him and seeing what was happening. And like I say, he is behind his desk so I could not see exactly. If I got up, I could have seen exactly. I just see the movement of his hand, looking at me, and trying to keep a conversation.

Q. Now, could you see his penis?

A. No. No, ma'am.

Q. Could you see his hands?

A. I can see this part of his hand. I can see this. Like I say, I'm not sitting in front of him. I'm sitting to the side is how I'm sitting. It's a big office and I'm sitting in a chair not in front of him, to the side. So that is what I'm seeing, the movement and the whole thing that is going on.

Q. Could you see the top of his pants, his belt level?

A. No, ma'am. No.

(TR 17-18).

Her testimony was riddled with doubts about the details, although she professed to be "a hundred percent sure" he was masturbating. (TR 19). Yet she said: "I'm pretty sure it was this hand, almost sure...," "wait a minute;" "Probably;" (TR 19) and:

Q. ...you couldn't see his waist?

A. No, sir.

Q. You couldn't see his pants?

A. No, sir.

> Q. You don't know whether his zipper was up or down?
>
> A. No. You're right. I don't know if his zipper was up or down.
>
> Q. You don't know whether his pants were opened or closed?
>
> A. How could I see? He is sitting behind the desk.
>
> * * *
>
> A. I didn't see what he was doing with his hand. I'm telling you exactly what I saw.
>
> * * *
>
> A. I would lie to you if I told you that I see his hand.

(TR 30-32).

The definition of masturbate is "to manipulate one's own genitals...for sexual gratification." Webster's New World Dictionary, Second College Edition (1982). How can there by clear and convincing proof of masturbation based upon Ms. Lopez' testimony that she could not see anything relevant to the act: pants, zipper, genitals, hand?

The Referee bootstrapped Ms. Lopez's testimony into a belief that Mr. McHenry masturbated before her and another client, Wanda Ferguson:

> It should be borne in mind that Miriam Lopez and Wanda Ferguson never communicated about their strikingly similar experiences. This of course adds validitv to the testimony of both witnesses. (emphasis supplied).

(App. 2). The process of using Miriam Lopez's non-existentmasturbation evidence as proof that two similar events occurred is a legal and logical fallacy.

A Williams Rule analysis makes the legal point. In Drake v. State, 400 So.2d 1217,1219 (Fla. 1981), the Court considered similarity of offenses and discussed the differences making the evidence inadmissible. Here there was no similarity because Ms. Lopez' testimony presented no facts, only opinion. Moreover, that dissimilar evidence was used to prove propensity, a use prohibited by § 90.404(2)(a) ("inadmissible when the evidence is relevant solely to prove bad character or propensity").

In the logical realm, measurement of the simultaneous occurrence of two events is the product, not the sum of their individual probabilities. For example, if A's event is 30% probable and B's is 80% probable, the chance of both having occurred is 24%. See, Hays, L., Statistics, p.45 (Holt, Rinehart & Winston 1981).

Thus the use of Ms. Lopez' testimony to prove both alleged instances was improper.

It is true that Wanda Ferguson's testimony was different from Ms. Lopez', and definite. She said she saw Mr. McHenry's penis; that he was "coupling" himself; that his zipper was down; that he was "masturbating." (TR 49-50).

Yet, Wanda Ferguson kept McHenry as her lawyer for months after the event (TR 64,67), calling him, asking him to get her a car (TR 55), and never filing a police or Bar report on the alleged incident (TR 54). Only when Mr. McHenry told her that her insurance had been canceled did she act:

> Q. So you were angry at Mr. McHenry about that?
>
> A. Yes, 1 was. I mean the other was bad enough and then that really topped if off. And then that is when I called Lawyers Referral because - -
>
> Q. Go ahead.
>
> A. You know, even if he wasn't going to be my attorney, he wasn't doing any good anyway. I mean if my insurance had been canceled, you know.

(TR 55). Her call to Lawyers' Referral led them to direct her to lawyer Rick Escobar after she, responding to questions, said of Mr. McHenry: "And I says, ok - - and I said it in anger - - all he wanted to do is stand there and fondle himself." (TR 56). Escobar called her back "and said you're never going to believe this, but I represent a lady that had a very similar problem." (TR 56-57; 73).

Thus the "fondle" remark became linked to Lopez, and grew to the dual masturbation charge and the Referee's dual masturbation finding.

The Referee's Report makes no mention that Wanda Ferguson's anger with Mr. McHenry after being told she had no insurance coverage took another form: she accused McHenry, his investigator and his Bar defense lawyers of "bribery." (TR 76-84). Even the Bar sought to distance itself from those accusations. (TR 101-102,109). There can be no doubt that Ms. Ferguson's Bar Complaint was triggered by her anger over her case, not his conduct. The Complaint read:

> Please be advised that Mr. McHenry has lied and mislead [sic] me.

> Also, his personal conduct is unforgivable. His sexuly [sic] exployeting [sic] women is also unforgivable. Please refer to **Richard** Escobar for more information.

(TFB Exhibit #3). On cross examination this colloquy occurred:

> Q. On direct examination you testified that when he told you the insurance had been canceled, you were angry. The other incident, the one that occurred in his office was bad enough. But this was too much. Is that the way you really felt?
>
> A. Exactly, that's the way I really felt.

(TR 72). Other evidence of Ferguson family efforts to "get" Mr. McHenry was also introduced (TR 76-109), leading the referee to preface his evidentiary conclusion with "while Mrs. Ferguson may have a stressful family situation."

Mr. McHenry unequivocally denied both events ever took place. (TR 112-114). As to Ms. Lopez, he explained that her misconceptionmay have been the product of mistake, explainingthat knee surgery has occasioned him rubbing his knee (TR 113), and Ms. Ferguson's story was simply untrue (TR 114).

Query One: Are the "facts" as stated by the Bar's witnesses clear and convincing evidence?

QueryTwo: Is the Referee's Report, pyram ding the Lopez and Ferguson testimony into two masturbatory events, illogical, and contrary to legal principles for weighing evidence?

Query Three: Was the Bar counsel's penalty submission reasonable in light of all the circumstances?

> The Bar is submitting then, that Mr. McHenry for this misconduct should be suspended for no less than one year, and a minimum of one year.

(TR 159).

Query Four: Was the Referee's Recommendation of a **24** month suspension reasonable, assuming arguendo his findings were not **erroneous?**[1]

Query Five: Is the Bar's demand for disbarment disproportionate punishment?

B. The Findings Of Fact Were Erroneous, Unlawful And Unjustified

"A referee's finding of fact will be upheld unless it is clearly erroneous or lacking in evidentiary support." The Florida Bar v. Scott, **566** So.2d **765,767** (Fla. 1990). That means:

> The burden is upon the party seeking judicial review to demonstrate that the referee's report is "erroneous, unlawful, or unjustified." Rule Regulating Fla. Bar **3-7.6(c)(5).**

Id. McHenry's Motion To Remand, setting forth the newly discovered evidence of deceit, disingenuousness and perjury of the Bar's witnesses, had it been favorably received by this Court, would have supported the "erroneous or unlawful" prongs of the Rule.

Notwithstanding the Court's denial of the Motion, the Referee's Report must still be rejected because it is unjustified, and therefore clearly erroneous or lacking in evidentiary support.

1/ The Referee also recommended a one year probation following suspension, with certain conditions regarding client interviews.

The linchpin of this argument is the testimony of Ms. Lopez. Her conclusion of "fact" had no foundation: she could not see Mr. McHenry's waist; she could not see even the top of his pants; she could not see the zipper to his fly; she did not know whether his pants were open or closed; she conceded "I didn't see what he was doing with his hand." (TR 32). Despite that failure of the most essential and relevant information, she concluded Mr. McHenry masturbated.

Findings of fact must be based upon the presence of underlying facts, and cannot be based solely upon conclusory opinions. Evidence, not opinions, are the sine qua non for legitimate findings of fact.

> [I]f we are going to pay more than mere lip service to the rule that before one can render an opinion he must have had sufficient opportunity to observe the subject matter about which is opinion is rendered....

Albers v. Dasho, 355 So.2d 150,153 (Fla. 4th DCA 1978). Simply put, Ms. Lopez offered no evidence which could support a finding of fact passing the clear and convincing evidence test. Therefore the Referee's finding as to Ms. Lopez was unjustified and clearly erroneous.

Ms. Ferguson's testimony, standing alone might have met that test, but the Referee's Report eroded confidence in his findings when he acknowledged Ms. Ferguson's dubious family machinations towards Mr. McHenry and his lawyers. In an understatement, he wrote:

> This court finds that while Mrs. Ferguson may have a stressful family situation, her testimony concerning the respondent's conduct is suffi-

> cient to prove Count II of the complaint by the standard of clear and convincing evidence.

(App. 2). His conclusion was admittedly the product of not just Ms. Ferguson's testimony, but his consideration of Ms. Lopez' too: "This, of course adds validity to the testimony of both witnesses." (App. 2). And the referee's extra reliance on both women to prove each's allegations because Lopez and Ferguson "never communicated" (App. 2), misses the critical point that their common link was Attorney Escobar who turned Ms. Ferguson's "fondle" remark into an occasion to inform her of a "similar" allegation against McHenry. Thus, Lopez and Ferguson had knowledge of each other's allegations (TR 56-57,73), contrary to the Referee's implication of independence.

This Court cannot overlook the flimsy framework constructed by the referee's findings. Using Ms. Lopez's barren conclusion to buttress Ms. Ferguson's questionable testimony does not provide a justifiable foundation for the referee's finding that "the respondent committed the crime of exposure of sexual organs" (App. 2) and masturbated in the presence of both women.

Ms. Lopez said she never saw such a thing; Ms. Ferguson said she did. The referee said both saw Mr. McHenry masturbate, despite the utter lack of evidence to support the Lopez conclusion. One and one make two; but zero and one cannot add up to two. The Referee's Report failed in its math, and in its misuse of the record testimony to reach an unsupported finding.

C. The Two Year Suspension Punishment Recommended By The Referee. And The Disbarment Sought By The Bar Are Both Excessive In Light Of The Facts And Analogous Legal Precedent

Assuming arguendo that the evidence supported the Referee's findings, neither the Florida cases, nor the out-of-state cases offered by the Bar support the Referee's two-year suspension recommendation, or the Bar's demand for disbarment. Taken in the light most favorable to the Bar, the evidence reflects two unprosecuted misdemeanors and crude, improper sexual conduct toward two women. Such opprobrious conduct would deserve a penalty, but not the disbarment sought by the Bar.

A comparison with other Florida lawyer misconduct cases is instructive. Joseph Hooper was suspended for "one year" (with conditions):

> Haaper has been convicted of two counts of indecent exposure.... While still on probation for these prior convictions, Hooper committed another similar offense and then repeatedly failed to appear for court appearances arising from this offense and Hooper's violation of probation.

The Florida Bar v. Hooper, 564 So.2d 1080 (Fla. 1990).

Former Circuit Judge Louis Corbin was suspended for three years:

> Respondent, while a circuit judge, pled nolo contendere to the crime of attempted sexual activity with a child twelve years of age or older but less than eighteen years of age with whom he stood in a position of familial or custodial authority.

The Florida Bar v. Corbin, 540 So.2d 105,106 (Fla. 1989). Corbin distinguished the disbarment in Florida Bar v. Hefty, 213 So.2d 422

(Fla. 1968), articulating the egregious and continuous felonious misconduct which resulted in Hefty's disbarment:

> Hefty was disbarred for engaging in sexual misconduct with his stepdaughter, which began when she was slightly more than ten years old and continued until she reached seventeen years. Hefty's misconduct included the taking of pornographic photographs and sexual abuse, resulting in pregnancy. He disregarded a court order prohibiting him from visiting his stepdaughter. In addition, Hefty was the subject of prior disciplinary proceedings which resulted in a six-month suspension of his license for unprofessional conduct. Hefty, 213 So.2d at 423-24.

Corbin, 540 So.2d at 106-07. In addition, Corbin reaffirmed the rule that "the commission of a felony does not in itself merit disbarment." Id. at 106.

The list of felony cases following that rule underscores the irrationality of seeking McHenry's disbarment on this flimsy record of alleged sexual indiscretion. See, The Florida Bar v. Caillaud, 560 So.2d 1169 (1990) (practicing medicine without a license--3 year suspension with proof of rehabilitation for reinstatement); The Florida Bar v. West, 550 So.2d 462 (1989) (possession of cocaine--18 month suspension with proof of rehabilitation); The Florida Bar v. Diamond, 548 So.2d 1107 (1989) (mail and wire fraud--3 year suspension with proof of rehabilitation); The Florida Bar v. Finkelstein, 522 So.2d 372 (1988) (felony possession of illegal drugs and driving under the influence--1 year suspension, 3 years probation, and other conditions); The Florida Bar v. Stoskopf, 513 So.2d 141 (1987) (failing to report financial interest in foreign bank account--90 day suspension, probation);

The Florida Bar v. Jahn, 509 So.2d 285 (1987) (felony drug use--3 year suspension); The Florida Bar v. Pavlick, 504 So.2d 1231 (1987) (accessory after the fact to misprision of a felony--2 year suspension, with proof of rehabilitation); The Florida Bar v. Giordano, 500 So.2d 1343 (1987) (possession of cocaine with intent to distribute--3 year suspension); The Florida Bar v. Thompson, 500 So.2d 1335 (1987) (possession of cocaine, possession of controlled substance, disorderly intoxication, and leaving the scene of an accident--91 day suspension and proof of rehabilitation); The Florida Bar v. Chosid, 500 So.2d 150 (1987) (false income tax return--3 year Suspension with proof of rehabilitation); The Florida Bar v. Rosen, 495 So.2d 180 (1986) (possession of cocaine with intent to distribute--3 year suspension); The Florida Bar v. Dietrich, 469 So.2d 1377 (1985) (unnamed felonies--2 year suspension); The Florida Bar v. Carbonaro, 464 So.2d 549 (1985) (conspiracy to possess cocaine with intent to distribute--3 year suspension); The Florida Bar v. Blankeur, 457 So.2d 476 (1984) (knowingly failing to file timely personal income tax returns--6 months suspension and proof of rehabilitation); The Florida Bar v. Kennedy, 439 So.2d 215 (1983) (devising scheme to obtain money by false and fraudulent pretenses--3 year suspension).

Even the Bar's initial brief offering of In Re: Gibson, 369 N.W.2d 695 (Wis. 1985) fails to support its position. The Florida Bar wrote: the "Wisconsin Supreme Court found that a lawyer who engaged in unsolicited sexual conversation and conduct with four women clients perverted the essence of the lawyer/client relationship, and the public should not be subjectedto unsolicited sexual conduct by attorneys in the conduct of the lawyer/client

relationship." Bar Brief, p. 15. The Bar failed to provide the result in Gibson, implying that Mr. Gibson was disbarred by the Wisconsin Supreme Court. A fair presentation would have stated that Gibson was given a ninety-day suspension by the Wisconsin Supreme Court. Gibson, supra.

We offer Gibson as more supportive of McHenry's position than the Bar's. Gibson had made sexual remarks to a female client. One night he accosted her in his office, kissing her and fondling her breasts. Four ex-clients testified that Gibson had engaged in unsolicited sexual conversation and conduct with them. A federal judge testified that Gibson was not honest and reliable. In 1971 **Gibson** had been convicted of contributing to the delinquency of a minor. This litany of evidence resulted in a 90-day suspension.

The Bar originally offered to the referee The Florida Bar v. Samaha, **557** So.2d 1349 (Fla. 1990) as an analogous case, calling for a suspension of a minimum of one year. (TR 158-59). Samaha is relevant. It involved a lawyer **who** led **a** young woman to believe that it was necessary for her to undress, both at his law office and in her apartment, where he touched her "on the back and thigh" and photographed her, in her bedroom, partially nude. **Id.** at 1349.

Samaha was charged with, and pled no contest to a battery charge. He had been previously publicly reprimanded for receiving an illegal fee. The Florida Bar v. Samaha, **407** So.2d 906 (Fla. 1981). This Court was firm in its condemnation of Samaha's sexually-exploitive conduct and suspended him for "one year...and thereafter until he has proven rehabilitation to the satisfaction of the Florida Bar." **Id.** at 1350. The Bas was mandated to "take

into account any psychological counseling Samaha voluntarily undertakes during his efforts to rehabilitate himself." Id.

If Samaha was the seminal case in the Bar's presentation to the referee, it can be no less now. Therefore, assuming arguendo the validity of the referee's report, Samaha marks the outer maximum limits of punishment in this case. For the reasons which follow, we submit that if there is to be punishment, it must be less than Samaha.

D. Let The Punishment Fit The Case

G. Stewart McHenry recognizes that if this Court concludes the Referee's factual findings pass muster on this record, he will be subjected to punishment.

The Court should consider several factors. Among them are McHenry's past disciplinary record, set forth in detail in The Florida Bar Brief, pp. 10-12. In addition, the Court should consider the detailed evidence accompanying and supporting the Motion To Remand, which, fairly read, presents serious issues regarding the credibility of the testimony in this case. Even where a lawyer has pled guilty to criminal misconduct, other relevant facts may be considered in excuse or mitigation of a penalty:

> See, The Florida Bar v. Lancaster, 448 So.2d 1019, 1022 (Fla.1984) (important factor is not whether there has been an actual adjudication of guilt but whether attorney has been given chance to explain circumstances surrounding plea of nolo contendere and otherwise contest the inference that he engaged in illegal conduct); The Florida Bar v. Fussell, 179 So.2d 852, 854 (Fla.1965) (due process requires that a lawyer be given an

> opportunity to explain the circumstances and to offer testimony in excuse or in mitigation of the penalty).

The Florida Bar v. Pavlick, 504 So.2d 1231,1234 (Fla. 1987).

We respectfully ask the Court to review that Motion. Its denial precluded an opportunity to re-try and then present the whole picture to this Court, but it does not preclude this Court from viewing the whole picture on the materials presented.

The Court should also review other cases involving "cumulative misconduct." See, The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979); The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980). Greenspahn had a prior public reprimand for a federal misdemeanor tax conviction, and his later conduct was, in effect, taking clients' monies. He received a six months suspension. Vernell's problems were similar. He too received a six months suspension.

In this case, G. Stewart McHenry suggests an appropriate punishment be no more than a 90-day suspension. The evidentiary issues, the pyramiding of conclusions, the fact that his past transgressions were alcohol related, the fact that the present circumstances did not result in criminal charges, and the relevant cases, support that request.

CONCLUSION

For the foregoing reasons G. Stewart McHenry requests the Court to reject the Referee's Report and dismiss the charges, or to suspend him for no more than 90 days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy hereof has been furnished to (1) SUSAN V. BLOEMENDAAL, Assistant Staff Counsel, The Florida Bar, Tampa Airport-Marriott Hotel, Suite C-49, Tampa, FL 33607, and (2) BARRY A. COHEN, Esquire, Suite 4000, 100 Twiggs Street, Tampa, FL 33602, by mail this 24 day of January, 1992.

BRUCE ROGOW

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