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CLERK, SUPREME COURT

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

G. STEWART MCHENRY,

Respondent.

By \_\_\_\_\_  
Chief Deputy Clerk

CASE NO. 76,724

TFB NOS. 89-10,536(13C)  
89-11,327(13C)

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INITIAL BRIEF  
OF  
THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this brief, Petitioner, The Florida Bar, will be referred to as "TFB" or "The Bar." Respondent/Cross-Petitioner, G. Stewart McHenry, will be referred to as "Respondent." "TR" will refer to the transcript of record of the Final Hearing held April 29, 1991. "RR" will refer to the Report of Referee.

STATEMENT OF THE FACTS AND THE CASE

In August of 1987, Respondent was retained by Ms. Wanda Ferguson to represent her in a personal injury lawsuit for injuries she sustained in an automobile accident that occurred on August 5, 1987. During the course of Respondent's representation of Ms. Ferguson, which lasted approximately fifteen (15) months, he met with Ms. Ferguson in his office approximately a half a dozen times. (TR39, 20-21). Ms. Ferguson's last meeting with Respondent took place sometime in August of 1988. (TR46, 10-11). On this visit to Respondent's office, Ms. Ferguson was accompanied by her then seventeen year old son, who had been injured in the same accident and who was also represented by Respondent. (TR45, 8-25, TR46, 1-20). Ms. Ferguson and her son met with Respondent and after her son had signed some papers, Respondent requested that Ms. Ferguson's son wait in the outer office while Respondent spoke with Ms. Ferguson. (TR47, 20-25, RR Attachment #2). After shutting the door to his office, Respondent picked up a folder and, holding the folder in front of his trousers, he leaned back against the front of his desk while facing Ms. Ferguson. (TR48, 1-17, RR Attachment #2). Respondent then lowered the folder and, while he spoke with Ms. Ferguson, Respondent fondled his exposed penis. (TR48, 23-25 and TR50-51). During the time that Respondent was stroking and touching his exposed genitals, his actions were in plain view of Ms. Ferguson,

who was seated directly in front of his desk. (TR51). After engaging in this conduct for a period of several minutes, Respondent walked away from Ms. Ferguson to a place behind his desk, and when she rose to leave, he walked to the door of his office, stood in front of the door, while he held the door closed. (TR51, 20-22 and TR52, 8-13). When Respondent finally opened the door, Ms. Ferguson immediately left Respondent's office, and with her son left the building. (TR54, 20-25 and TR54, 12-17). Although Ms. Ferguson was extremely upset over Respondent's behavior, she allowed Respondent to continue representing her because **she** was under the impression that she could not change attorneys at that point. (TR53, 1-11 and TR54, 23-25). Several months later, however, Ms. Ferguson terminated Respondent as her attorney because of her concerns that he was not properly representing her. (TR55, 21-25). On November 30, 1988, Ms. Ferguson filed a complaint with The Florida Bar alleging, among other things, that Respondent had sexually exploited women. (TFB Exhibit #3).

During the course of the Bar's investigation of Ms. Ferguson's Complaint, information was received indicating that another woman had witnessed similar conduct on the part of Respondent. Ms. Miriam Lopez had been involved in a minor automobile accident on October 16, 1988. (TFB Exhibit #5 and TR6, 10-11). Within a short time following her accident, Ms. Lopez received a direct mail letter from Respondent marked "Advertisement." (TFB Exhibit #4 and TR7,

9-12). Ms. Lopez made an appointment to meet with Respondent in his office concerning the accident and various problems she was experiencing with the driver's insurance company. (TR8, 2-13 and TR9, 2-9). Ms. Lopez arrived at Respondent's office at approximately 5:00 p.m. on the afternoon of her appointment. (TR20, 20-25 and RR Attachment #1). After Ms. Lopez entered Respondent's office, he closed the door and began to speak with her generally about the accident. (TR10, 19-25 and RR Attachment #1). Respondent then proceeded to question Ms. Lopez specifically about the injuries she had received in the accident. (TR11, 15-23). **As** he questioned Ms. Lopez about her injuries, Respondent stood very close to Ms. Lopez and touched her on her neck, on the sides of her neck, her back, the sides of her back, and her ribs. (TR11, 24-25, TR12, 1-20, TR14, 2-4, TR15, 4-5 and RR Attachment #1). Ms. Lopez became extremely uncomfortable due to Respondent's close proximity and the nature of his touching, and became confused over his touching her as if he were a doctor. (TR13, 13-19 and TR14, 15-25). Ms. Lopez advised Respondent that she was dizzy and needed to sit down. (TR13, 16-19 and TR15, 10-14). After Ms. Lopez sat down, Respondent turned away from Ms. Lopez and started touching his clothing in the area of his waist. (TR15, 16-25 and TR16, 1-13). Respondent then seated himself behind his desk and while attempting to engage in conversation with Ms. Lopez, began to masturbate. (TR16, 14-18 and TR17, 3-19, TR18-20). Ms.

Lopez then advised Respondent that she needed to retrieve a document from her car and immediately left Respondent's office. (TR21, 1-6 and RR Attachment #1). On April 17, 1990, the Thirteenth Judicial Grievance Committee "C" found probable cause as to the Complaint of Wanda Ferguson and as to the Respondent's conduct involving Ms. Lopez. These matters were heard before a Referee on April 29, 1991. At the conclusion of the trial, but before making a finding of guilt, the **Referee** requested argument as to the appropriate discipline. **The Bar** recommended, based on the serious nature of the charges and Respondent's extensive disciplinary record, that an appropriate discipline would be no less than a suspension in excess of one year. The Referee issued his report on May 23, 1991 and Respondent was found guilty as charged in the Bar's complaint. The Referee recommended that Respondent be suspended from the practice of law for a period of twenty-four **(24)** months and thereafter until he shall prove mental and ethical rehabilitation. The Referee recommended that Respondent serve a probationary period of one (1) year in length upon reinstatement. Conditions of probation recommended by the Referee are that Respondent receive such mental health evaluation and treatment as is necessary to assist him in overcoming his deficiencies, and additionally, that Respondent's probation be conditioned **so** that he is forbidden from being in **a** secluded relationship with a female client. The Board of Governors of The Florida Bar at



its meeting held July 30 through August 2, 1991, directed Bar counsel to appeal the Referee's recommended discipline and seek disbarment.

### SUMMARY OF ARGUMENT

Respondent, G. Stewart McHenry, was found by the Referee to have violated both criminal statutes and ethical rules. During the course of meeting in his law office with female clients, Respondent engaged in conduct characterized by the Referee as "outrageous" and "disgraceful." (RR 1 and 2). Respondent exposed his sexual organs and engaged in the act of masturbation in the presence of one female client. With another female client, Respondent suggested that his representation of her necessitated a physical examination. By conducting such an examination, Respondent committed a battery on this client. After the examination, Respondent proceeded to masturbate while the client was still in his office.

Respondent's disciplinary record indicates that twice before, in 1985 and 1988, he tendered conditional guilty pleas for numerous violations of ethical rules. These prior acts of misconduct include brandishing a gun in a disagreement with an employee and hitting that employee with a file; failure to properly handle client money or property; willful and wanton reckless driving; and, driving under the influence.

While still on disciplinary probation, Respondent continued to engage in unethical conduct.

Apparently neither discipline by this Court, nor probation are sufficient to prevent Respondent's continued

violation of criminal statutes and disciplinary rules. Respondent, having clearly demonstrated an attitude and a course of conduct wholly inconsistent with approval professional conduct, should be disbarred. A two year suspension is simply not sufficient.

ARGUMENT

**ISSUE: THE REFEREE'S RECOMMENDED DISCIPLINE OF A TWO YEAR SUSPENSION IS INAPPROPRIATE CONSIDERING THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT AND HIS EXTENSIVE DISCIPLINARY RECORD.**

After a full trial before the Referee, Respondent was found guilty of two separate counts of extremely serious misconduct involving not one, but two of Respondent's female clients. In one instance, Respondent exposed his genitals to the client while in his office conducting business with the client, and openly engaged in the act of masturbation in the client's presence, In the other instance, Respondent met in his office with another female client at approximately 5:00 p.m. This meeting took place with the door to the office closed, and during the meeting and under the guise of determining the location and extent of the woman's injuries, Respondent stood very close to her and with his hands touched the woman's neck, the sides of her neck, her back and her ribs. (TR11, 24-25, TR12, 1-20, TR14, 2-4, TR15, 4-5, and RR Attachment #1). The nature of the touching was such that the woman became extremely confused and uncomfortable. She realized that the touching was not an appropriate procedure for a lawyer, and she only allowed Respondent to touch her because of her confusion. (TR15, 3-5). After committing this battery, Respondent compounded his misconduct by masturbating while seated behind his **desk**, with the client seated directly in front of the desk.

Even though the two women never communicated with each other about their strikingly similar experiences, Respondent denied that the conduct ever occurred. (RR2, TR29,30,56 and 57).

In The Florida Bar v. Samaha, 550 So.2d 131549 (Fla. 1990), this Court considered similar misconduct. Samaha had been retained by a young woman to represent her in a personal injury matter. Under the guise that it was necessary for the preparation of the personal injury case, Mr. Samaha touched the woman on her back and thighs without her approval, and photographed her while she was partially nude. He had previously been disciplined with a public reprimand. This Court rejected the Referee's recommendation of a public reprimand, noting that Mr. Samaha's actions were highly serious, and stated:

Even the slightest hint of sexual coercion or intimidation directed at a client must be avoided at all costs. The Referee had found that Samaha went far beyond the limits of propriety. Samaha had deceived his client into believing she was obligated to partially disrobe and permit him to touch and photograph her in order to prepare an adequate case. This was a ludicrous deception that could have served no purpose other than the personal gratification of Samaha. During the process of this bizarre "examination," Samaha committed a battery upon his client. These acts constituted direct physical abuse of the client's person and of her personal rights.

Samaha at 1350. Samaha was suspended for a period of one year, with a period of probation following reinstatement.

Like Samaha, Respondent's conduct involved deliberate emotional and physical coercion of a client. Again, like Samaha, Respondent committed a battery upon his client under the guise that his bizarre examination of her was necessary to determine the location and extent of her injuries. Unlike Samaha's conduct, however, Respondent's conduct involved not one but two female clients. Respondent's misconduct was far more serious than that of Samaha. Respondent actually exposed his genitals and masturbated in the presence of one client; **and**, in addition to touching inappropriately **a** second client, he again engaged in the act of masturbation while that client was present in his office.

Respondent has previously been disciplined not once, like Samaha, but twice and for numerous instances of misconduct. In 1985, Respondent consented to a public reprimand for various disciplinary violations, including engaging in conduct prejudicial to the administration of justice, engaging in other conduct adversely reflecting on his fitness to practice law, handling a legal matter which he knew or should have known he was not competent to handle, knowingly engaging in other illegal conduct or conduct contrary to a disciplinary rule, and engaging in undignified or discourteous conduct which is degrading to **a** tribunal.

Again in 1988, Respondent tendered **a** conditional guilty plea in a **case** wherein he was charged with four separate counts of misconduct. Respondent pled guilty to Counts II

and **IV** of the Bar's Complaint, and pled no contest to Counts I and **III** of the Complaint. In Count I, Respondent was charged with brandishing a gun and hitting his paralegal in the face with a file. In Count **II** of the Complaint, Respondent was charged with failure to comply with Rules Regulating Trust Accounts. Count **III** of the Complaint charged Respondent with failure to properly handle money **or** property entrusted to him by a client. In Count **IV**, Respondent was charged with misconduct arising out of **two** separate traffic arrests. In the first arrest, in April of 1985, Respondent was arrested and charged with willful and wanton reckless driving, driving under the influence, and unlawful speed. Respondent subsequently pled no contest to willful and wanton reckless driving and the two other charges were dismissed. In November of 1985, Respondent was again arrested and charged with driving under the influence. In May of 1986, he was convicted by a jury of that charge.

Respondent's 1988 guilty plea was accompanied by evidence concerning Respondent's alcoholism and attempts at rehabilitation. Respondent agreed to submit to probation and monitoring by Florida Lawyers Assistance, Inc. In exchange for his guilty plea, Respondent was again publicly reprimanded by order of this Court, dated November 10, 1988 and placed on probation for a period of two **years** retroactive to January 1, 1988, under the terms and conditions previously agreed to by Respondent.

In the fall of 1988, while disciplinary probation, Respondent continued to engage in extremely serious misconduct. He conducted a sham examination of one client, exposed his sexual organs to another client, and masturbated in the presence of both clients. In doing so, Respondent violated criminal statutes prohibiting such conduct. (RR1-2).

No evidence was presented in these proceedings which would indicate that Respondent's behavior was in any way related to the disease of alcoholism. Nor was there any evidence that Respondent's conduct was the result of impairment or mental disability.

In considering the appropriate level of discipline, this Court has in the past considered both the cumulative nature of an attorney's misconduct and any prior breaches of professional discipline. See The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), at 476, and The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980). Likewise, the Florida Standards For Imposing Lawyer Sanctions, frequently cited in this Court's opinions, recognizes that prior disciplinary offenses, a pattern of misconduct, **and** multiple offenses, are factors which may be considered in aggravation. Sections 9.22 (a), (c), and (d), Florida Standards.

Respondent's serious misconduct in the instant case, the cumulative nature of the misconduct, and Respondent's



numerous prior breaches of professional ethics warrant disbarment. **As** this Court has recognized in the past, disbarment is an extreme measure of discipline and should be resorted to only in cases where **a** lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. The Florida Bar v. Oxford, 127 So.2d 107 (Fla. 1960). Respondent has, by his prior misconduct and by his misconduct in this case, demonstrated an attitude and **a** course of conduct which are wholly inconsistent with approved professional standards. In addition to the harm caused to Respondent's clients, the public's perception of the legal profession is severely diminished by attorneys who engage in a course of conduct such **as** Respondent's. Respondent **has** violated duties **owed** to his clients, to the public, **and** to the legal profession. No evidence which could be used in mitigation was presented to the Referee.

At the Final Hearing, Ms. Ferguson testified in response to the following question by Bar Counsel:

Q. Well, let me stop you just a minute and back you up a little bit. Why didn't you yell out to Mr. McHenry and tell him to stop what he **was** doing in his office?

A. I don't know. I don't know why I didn't. I was just -- I was shocked. That is all I can say. I was just shocked. I just -- I **couldn't** believe -- you know, I thought maybe I was seeing things. You know, it's just something you don't -- when you pour your heart out to someone and you're

hurting and you feel bad and you confide in this person **and** you expect this person is going to keep you in their confidence and to be able to trust them and you can't, you know. And I guess that is the biggest shock. I mean here is someone that you trust is doing something like that. You know, it's hard. It's a shock. (TR **52, 22-25** and **TR53, 1-11**).

A client that retains an attorney must be able to trust that attorney; when that client is a woman, it is essential that **a** bond of trust develop between the two especially since the attorney/client relationship often requires disclosure by the client of intimate details concerning the client's body, bodily functions, or sexual activities. The client not only trusts the attorney to pursue her legal rights, she trusts him to treat her professionally and with dignity.

When a lawyer engages in inappropriate sexual behavior with a client, the bond of trust is destroyed because the attorney has taken advantage of the position of trust, not to advance the client's case, but for the attorney's own personal gratification.

When the bond of trust between attorney and client is destroyed by the attorney's inappropriate sexual conduct, the client is placed in a double bind. It is certainly inconvenient, and may be economically unfeasible for a client to terminate the representation and start over again with a new attorney.

In 1985, the Wisconsin Supreme Court found that a lawyer who engaged in unsolicited sexual conversation and conduct with four women clients had perverted the essence of the lawyer/client relationship, and that the public should not be subjected to unsolicited sexual conduct by attorneys in the context of the lawyer/client relationship. The Wisconsin Court noted that the client is often in some sort of difficulty and is particularly vulnerable to improper advances made by the lawyer. The Court also recognized that the client may be reluctant to terminate the representation following a lawyer's improper conduct for fear of losing time and money. In re Gibson, 369 NW2d 695 (Wis. Sup. Ct. 1985).

In Justice Terrell's eloquent opinion in State ex rel. Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954), he discussed the two general categories for which attorneys are disciplined:

(1) Cases in which the lawyer's conduct has shown him to be one who cannot properly be trusted to advise and act for clients.

(2) Cases in which his conduct had been such that to permit him to remain a member of the profession and to appear in court, would cast a serious reflection on the dignity of the court and on the reputation of the profession.

Murrell at 224 (emphasis supplied). Respondent's misconduct falls into the second category. An attorney who exposes his sexual organs to a client, commits a battery on

a client, and masturbates in the presence of clients clearly casts a serious reflection on both the dignity of the Court and the reputation of the profession. In a profession where an individual's moral character is of paramount importance, Respondent has demonstrated an appalling lack in that regard.

The Bar respectfully urges this Court to send a message to the public and to other members of the profession, that attorneys who engage in a course of conduct such as Respondent's will no longer be permitted to practice law. It is beyond comprehension that an attorney would be permitted to practice law, but could not be trusted to meet in a secluded relationship with female clients.

This Court is not bound by the Referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So.2d 797, (Fla. 1978). In the instant case, this Court should reject the Referee's recommended discipline of a two year suspension together with probation, and instead impose a most extreme measure of discipline.

Should this Court decline to disbar Respondent, and instead impose a lengthy term of suspension, the Respondent upon reinstatement should serve a probationary period of no less than one year, and as a condition of probation receive a mental health evaluation and, if necessary, appropriate treatment.

The Florida Bar respectfully requests that this Court reject the Referee's condition of probation which would

forbid Respondent from being in a secluded relationship with a female client. Respondent should not be permitted to engage in the practice of law unless and until he has demonstrated that he is unlikely to engage in the type of conduct for which he has been found guilty in the instant case.

CONCLUSION

The seriousness of Respondent's misconduct in the instant case, considered together with Respondent's extensive disciplinary record, indicates that Referee's recommended discipline of a two year suspension is not sufficient.

WHEREFORE, The Florida Bar respectfully requests that this Court reject the Referee's recommendation of a two year suspension and instead order Respondent's immediate disbarment from the practice of law.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of The Florida Bar has been furnished G. Stewart McHenry, Esquire, Respondent, c/o Donald A. Smith, Jr., Esquire, 109 North Brush Street, Suite 150, Tampa, Florida 33602, Richard T. Earle, Jr., Esquire, 150 2nd Avenue North, Suite 1220, St. Petersburg, Florida 33701, and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Apalachee Parkway, Tallahassee, Florida 32300-2300, this 5<sup>th</sup> day of September, 1991.

  
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