IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

G. STEWART MCHENRY,

Respondent.

_____/

CASE NO. 76,724

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

REPLY BRIEF

OF

THE FLORIDA BAR

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ARGUMENT

DISBARMENT IS THE APPROPRIATE DISCIPLINE CONSIDERING THE SERIOUSNESS OF THE MISCONDUCT, RESPONDENT'S EXTENSIVE DISCIPLINARY RECORD, AND THE ABSENCE OF ANY MITIGATING FACTORS.

A. The referee's findings of fact are fully supported by the record and are neither erroneous, unlawful, nor unjustified.

In The Florida Bar v. Bajoczky, 558 So.2d 1022, 1023 (Fla. 1990), this Court restated an often cited principle:

> [T]his Court does not sit in Bar discipline hearings as a finder of fact. We have delegated this responsibility to the referees and, based on well-established principles of law, have determined that the referees' findings will be upheld unless they are without support in the evidence. (Citations omitted).

In the Bajoczky case, as in the instant case, the facts presented to the referee were in dispute, and the referee determined the witnesses' version of the facts to be truthful, thereby rejecting the Respondent's version. This Court concluded in Bajoczky that evidence in the record in the form of testimony by the witnesses constituted substantial competent evidence in support of the referee's findings. Likewise, in the case at Bar the Referee heard the testimony of both witnesses against Respondent, Wanda Ferguson and Miriam Lopez, and also heard the testimony of Respondent. Respondent's counsel cross-examined the witnesses and was provided an opportunity to point out discrepancies and issues relating to the credibility of the witnesses. As in Bojaczky, the Referee resolved the issue

of credibility against Respondent. As a matter of law, referees are "charged with the responsibility of assessing the credibility of witnesses based on their demeanor and other factors." The Florida Bar v. Hayden, 583 So.2d 1016, 1017 (Fla. 1991).

Respondent in his Answer Brief/Brief in Support of Cross-Petition, disputes the Referee's findings of fact, especially with regard to the testimony of Miriam Lopez, and concludes that there could not have been clear and convincing proof that Respondent masturbated in Ms. Lopez' presence. Respondent, however, has quoted in his Brief select portions of Ms. Lopez' testimony. A copy of relevant portions of Ms. Lopez' testimony is attached to this Brief as Appendix "A." Read in its entirety the transcript provides ample testimony from which the Referee could have concluded that Respondent engaged in the act of masturbation in the presence of Ms. Lopez. The facts which support this conclusion are briefly summarized as follows:

> 1. After inappropriately touching Ms. Lopez under guise of examination, Respondent walked away from Ms. Lopez, turned away from her so that his back was facing her, and touched his clothing at or near the area of his waist;
>
> 2. Respondent then sat behind his desk and with his hand began making steady up and down motions consistent with the act of masturbation.

3. Respondent was unable to carry on a normal conversation with Ms. Lopez during the time when he appeared to be engaging in the act of masturbation. (TR 15-20).

Although at first she could not believe that Respondent was engaging in such shockingly inappropriate behavior in her presence, Ms. Lopez testified that she was "100% sure" that Respondent was engaging in the act of masturbation. (TR 19).

The Referee found that the fact that MS. Lopez and Ms. Ferguson had never communicated with each other about their "strikingly similar experiences" added validity to the testimony of both witnesses. This comment by the Referee appears to indicate his conclusion that the testimony of two witnesses regarding Strikingly similar experiences in separate incidents involving the Respondent bolstered the credibility of their individual testimony. In each incident, the Referee had only the testimony of one woman against Respondent. The fact that two women who had never communicated with each other testified about strikingly their similar experiences certainly makes each testimony more believable. Respondent further asserts in his Brief that using a Williams Rule analysis, the fact that there were two strikingly similar incidents should not be considered. The Williams Rule has apparently never been recognized in connection with a disciplinary case. However, an application of the Williams Rule analysis to the use of Ms. Lopez' testimony would render such testimony

inadmissible only where the evidence was offered solely to prove bad character or propensity. See Section 90.404(2)(a) Fla. Stat. In the instant case, Ms. Lopez' testimony was clearly admissible to prove the substantive charges against Respondent alleged in Count I of the Bar's complaint. Further, as similar fact evidence, her testimony is relevant because it tends to demonstrate a pattern followed by the accused in committing the misconduct with which he is charged. See Williams v. State, 110 So.2d 654, 663 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). In each instance, Respondent met with the female client alone in his office and with the door closed. In each instance there was a touching of the woman which preceded the act of masturbation and the act of masturbation occurred while Respondent was in the presence of the woman and while he pretended to conduct business.

The testimony of Wanda Ferguson is clear and unequivocable. She testified that she saw Respondent's penis and his hand while he engaged in the act of masturbation in her presence. Respondent attempted to diminish Ms. Ferguson's credibility by arguing that she continued to allow Respondent to represent her after the masturbation incident occurred in his office. However, Ms. Ferguson testified to the Referee that she allowed Respondent to continue representing her because she believed that she could not change attorneys in midstream. (TR, L23-25).

Respondent also seeks to diminish Ms. Ferguson's testimony based on the fact that she finally discharged Respondent following an incident involving the cancellation of her insurance policy. In her testimony, Ms. Ferguson indicated that the cancellation of the insurance policy was the proverbial straw that broke the camel's back. (TR 55). The cancellation of her insurance, in addition to Respondent's totally inappropriate conduct in her presence, led to her discharge of him as her attorney.

The Referee's comment concerning Ms. Ferguson's "stressful family situation" does not diminish the credibility of her testimony; rather, it indicates that in spite of this, he found the testimony of Ms. Ferguson to be credible. Issues of credibility clearly were resolved against Respondent.

Respondent argues that his Motion to Remand setting forth "newly discovered evidence" would have supported a conclusion that the Referee's findings were erroneous and unlawful. The Florida Bar strongly disagrees with this conclusion. However, as Respondent pointed out in the initial paragraph of his argument, because this Court denied Respondent's request for a remand, this case must now be decided on the facts contained in the record below. Should this Court go outside that record and consider information contained in Respondent's motion, The Florida Bar submits that its response to Respondent's motion contains information that further supports the Referee's findings.

There can be no question that the record of proceedings before the Referee contains sufficient evidence for the Referee's conclusions that Respondent engaged in the act of masturbation in the presence of both Miriam Lopez and Wanda Ferguson.

Respondent has not challenged the Referee's finding concerning the battery committed on the person of Miriam Lopez. That finding alone would support a finding of guilt against Respondent in Count I of the Bar's complaint.

B. Neither the recommendation of disbarment by the Bar nor the two-year suspension recommended by the referee are excessive in light of the facts and analogous legal precedent.

In arguing that neither a two-year suspension nor a disbarment is appropriate in this matter, Respondent appears not to appreciate the significance of his extensive disciplinary record. This disciplinary record is discussed at length in the Bar's initial brief. In order to resolve any doubt as to the seriousness of Respondent's prior misconduct, a copy of relevant pleadings relating to Respondent's prior discipline is attached hereto as Appendix "B."

In support of his argument that neither a two-year suspension nor a disbarment is appropriate discipline, Respondent has cited a number of cases previously decided by this Court. The first case cited by Respondent is The Florida Bar v. Hooper, 564 So.2d 1080 (Fla. 1990), wherein the attorney, Hooper, had been convicted of several counts

of indecent exposure and had repeatedly failed to appear for court appearances relating to these offenses. The most important factor distinquishing the Hooper case from the instant **case** is the fact that Hooper's misconduct was completely unrelated to the practice of law and did not involve clients. Hooper was charged with indecent exposure after a neighbor reported that he had appeared nude on the roof of his home on a number of occasions. The same referee who heard the instant matter heard the **case** against Hooper. In the Report of Referee in Hooper **,** the referee indicated that Hooper did not appear to be a dangerous or evil person.

Respondent's misconduct, in contrast to Hooper's, involved two separate incidents involving women who were clients. The incidents took place in Respondent's office while the women were present in the office for the purpose of conducting legal business. In one case, Respondent committed a battery on the client under the guise of conducting a sham examination, then masturbated in the presence of that client. In the other case, Respondent exposed his sexual organs to the client and masturbated in her presence. These incidents are clearly of a more serious nature than the misconduct cited in Hooper. Further, Hooper had no prior disciplinary record. Respondent McHenry, however, has an extensive disciplinary history.

The second case cited by Respondent is The Florida Bar v. Corbin, 540 So.2d 105 (Fla. 1989), wherein the attorney, while a circuit judge, pled nolo contendre to the crime of

attempted sexual activity with a child. Although Corbin's conduct constituted a felony, as opposed to a misdemeanor, it was neither related to the practice of law nor to his role as a circuit judge. Further, the Court noted numerous mitigating factors in the Corbin case. Specifically, the Court recognized that "the criminal charge arose from a single incident associated with his depression and increasingly severe drinking problem," and that Corbin had no prior disciplinary record. Id. at 107. Furthermore, after the incident in question, Corbin voluntarily entered and completed a residential alcohol treatment program and, as required by the order of probation, started psycho sexual counseling. There are no such mitigating factors present in the instant case.

AS stated in the Bar's initial brief, The Florida Bar v. Samaha, 550 So.2d 131 (Fla. 1990) involved misconduct similar to the misconduct in the instant case. Respondent's position, as stated in his brief, is that the discipline imposed in Samaha should mark the outer limit of discipline for the instant case. The Florida Bar strongly disagrees with this position. For numerous reasons set forth in the Bar's initial brief, the misconduct in Samaha is not as serious as the misconduct before the Court in the instant case, nor was Samaha's prior disciplinary record as extensive of Respondent's. The one-year suspension ordered in Samaha is simply inappropriate in the instant case.

Respondent has cited numerous other cases involving felony misconduct, none of which involves misconduct of the nature found in the instant case. As this Court has noted on numerous occasions, each disciplinary case must be decided based on its own particular facts and must be viewed in light of any aggravating and mitigating factors.

Respondent has been allowed numerous opportunities to reform his conduct and has been permitted to continue in the practice of law. At some point a decision must be made as to whether an attorney has exhibited a pattern of misconduct which demonstrates that the attorney is unfit to practice law. Such a point has been reached with Respondent.

Based upon the serious nature of the Respondent's misconduct, Respondent's extensive record of serious disciplinary offenses, and the absence of any mitigating factors, The Florida Bar strongly urges this Court to reach the conclusion that disbarment is the only disciplinary sanction which "fits the case."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that and true and correct copy *of* the foregoing Reply Brief of The Florida Bar has been furnished G. Stewart McHenry, Esquire, Respondent, c/o Bruce Rogow, Esquire, 2441 S.W. 28th Avenue, Ft. Lauderdale, Florida 33312, and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Apalachee Parkway, Tallahassee, Florida 32300-2300, this 28th day *of* January, 1992.

SUSAN V. BLOEMENDAAL
(347175)