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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,

vs.

G. STEWART McHENRY,

Respondent.

G. STEWART McHENRY'S REPLY BRIEF ON CROSS-APPEAL

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SUMMARY OF THE ARGUMENT

The parties have identified a large body of case law in the prior briefs to illustrate how this Court's power to impose discipline upon members of the Florida Bar has been exercised. The Reply Brief of the Florida Bar disputes the relevance of Respondent's expose' of various reports of grave misconduct which did not result in disbarment, but fails to show a single case in which disbarment was imposed for misdemeanor acts charged by clients, but not by the criminal law system. A fair reading of both the non-disbarment cases and the disbarment cases makes it clear that the Bar's request for disbarment in this case is out of line, and should be denied.

In order to support its position, the Bar points to not only the pending charges against Respondent, but also to a "pattern of misconduct." In fact, Respondent's prior misconduct was found to be related to his now-rehabilitated disease of alcoholism, which was noted by a referee at that time to be a *mitigating* factor. It would be unfair for those same facts to be transformed into an *aggravating* factor in this proceeding, years later.

This Court should impose an appropriate discipline based solely upon these present charges, the testimony, and guiding precedent. Those factors do not justify disbarment.

ARGUMENT

THE PRESENT CHARGES DO NOT SUPPORT THE HARSH DISCIPLINE OF DISBARMENT, AND RESPONDENT'S PRIOR PROFESSIONAL MISCONDUCT, MITIGATED BY THEN-EXISTING ALCOHOLISM, SHOULD NOT BE TRANSFORMED INTO AN AGGRAVATING FACTOR IN THESE PROCEEDINGS

The Bar's Brief fails to provide any precedent which supports disbarment--the maximum discipline--of an attorney whom a referee has found guilty of uncharged misdemeanors. In order to justify its harsh recommendation, which exceeds that of the referee, the Bar has gone beyond the bounds of the disciplinary proceeding below and seeks to buttress the charges against Respondent Stewart McHenry with prior misconduct for which he has been disciplined and from which he has moved on. This Court should reject the Bar's approach and should focus on the present charges, the testimony, and the cases which compel the conclusion that disbarment is reserved for the most egregious conduct, unlike that which was "proved" in this case.

This Court ordered disbarment in The Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968), for the sordid misconduct of having sexual relations with his stepdaughter from the time she was 10 years old, including photographing their encounters. That decision does not suggest that any sexually-related charge warrants the same discipline:

> This decision is not to be stretched so that any peccadillos of a member of the Bar may result in disciplining the member, but is reached because of the enormity of

> the depravity of the man with whom we are dealing.

Id. at 424. Other disbarment cases illustrate that this penalty reflects proven, intolerable conduct, often involving fraud or dishonesty. See e.g., The Florida Bar v. Hosner, 536 So. 2d 188 (Fla. 1988) (adopting referee's recommendation of disbarment following respondent's guilty plea to charges of mail fraud); The Florida Bar v. Bussey, 529 So. 2d 1112 (Fla. 1988) (attorney acting as fiduciary for bank converted $2 million in bank funds for his own use); The Florida Bar v. Horne, 527 So. 2d 816 (Fla. 1988) (federal conviction for conspiracy to obstruct the collection of income tax, and other felonies).

The present charges against McHenry, even assuming *arguendo* that the facts as determined by the referee are accurate, are not in the same league with the sexual misconduct of Hefty or with the standard of proof available in the other cases, supra. Any discipline imposed by this Court should reflect those differences.

The Bar's Brief makes clear that its recommendation of disbarment in this case is based on an alleged "pattern of misconduct."

> 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.

(Reply Brief of Florida Bar p.9). Significantly, page 19 of the Appendix to the Bar's Brief enumerates fourteen Findings of Mitigation in McHenry's 1988 discipline, centering around the adverse effects of his prior addiction to alcohol, and noting in item (9):

> 9. Respondent's prior disciplinary record [public reprimand, No. 66,600, October 31, 1985] is consistent with conduct resulting from his disease of alcoholism.

McHenry battled alcohol and won, with the assistance of the Bar-sanctioned Florida Lawyers Assistance, Inc. The fact of that battle, and the problems it created, should not be resurrected and added to the present charges against him in order to justify disbarment, since the fact of alcoholism itself was considered a mitigating factor in 1988. See Appendix to Bar Brief p.19, items IV 1-14. The Bar's attempt to transform McHenry's past alcoholism-related misconduct into an aggravating factor in the present proceeding is inconsistent with its prior position, and unfair. The present charges in no way detract from McHenry's successful efforts at rehabilitation from the disease of alcoholism, and should stand alone when this Court decides what discipline is appropriate.

Disbarment for cumulative misconduct is not appropriate when the prior misconduct was in the form of a public reprimand, mitigated by alcohol impairment. Compare The Florida Bar v. Golden, 566 So. 2d 1286 (Fla. 1990) (disbarment ordered for cumulative misconduct when respondent received a three-year

suspension, then a referee recommendation for a consecutive two-year suspension).

The relevant cases have been cited previously in both parties' Briefs. The application of those cases to these facts simply cannot support the discipline of disbarment sought by the Bar.

CONCLUSION

For the foregoing reasons, G. Stewart McHenry requests the Court to reject both the Bar's request for disbarment and the referee's recommendation of a two-year suspension, in favor of a more lenient discipline commensurate with the facts of this case.

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, Esq., Suite 4000, 100 Twiggs Street, Tampa, FL 33602, by mail this 2nd day of March, 1992.

BRUCE S. ROGOW