IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

Supreme Court Case
No.: 76,823

ARIEL POPLACK,

Respondent.
_____/

On Petition for Review

ANSWER BRIEF OF RESPONDENT

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SUMMARY OF THE ARGUMENT

It is well settled that a referee's disciplinary recommendation will be upheld unless clearly erroneous or not supported by the evidence and that the burden is upon the party seeking review to demonstrate that a referee's report is erroneous, unlawful or unjustified. In this instance, the Florida Bar has failed to make such demonstration. Quite the contrary, in the instant case the Referee received substantial competent evidence which enabled her to formulate the appropriate recommendation. Moreover, in light of well established precedent, the enhanced penalty sought by the Florida Bar is clearly excessive, while the Referee's recommendation comports with the Court's guidelines which must be adhered to in disciplinary proceedings such as this.

ARGUMENT

THE REFEREE CORRECTLY RECOMMENDED A THIRTY-DAY SUSPENSION AND EIGHTEEN MONTHS OF PROBATION

A. *The Referee's Disciplinary Recommendation Should Not Be Disturbed.*

The Florida Bar does not dispute the Referee's findings of fact. It contends, however, that the Referee's recommendation as to the disciplinary measure is not commensurate with her determination that the Respondent violated *Section* 4-8.4(c) of the *Rules of Regulating The Florida Bar.*

We acknowledge that the scope of the Court's review of a recommended sanction is "somewhat broader" than the review of a factual finding. *The Florida Bar v. Anderson*, 538 So.2d 852, 854 (Fla. 1989). It is equally true, however, that a Referee's recommended penalty will be upheld unless it is clearly erroneous or not supported by the evidence. *The Florida Bar v. Lipman*, 497 So.2d 1165, 1168 (Fla. 1986); *The Florida Bar v. Fields, 482 So.2d 1354, 1359 (Fla. 1986); The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla. 1986). It should also be noted that in its initial brief the Florida Bar did not advise the Court as to whether its request for an enhanced penalty is founded upon a "clearly erroneous" standard, or whether it contends that the Referee's recommendation is not supported by the evidence. Had the Bar sought review under either theory, however, it would have been unable to overcome the presumption of correctness with which the Referee's recommendation is clothed.

In the course of the proceedings the Referee, the Honorable Susan Lebow, had the opportunity to consider all the evidence, to observe and evaluate the demeanor of the

Respondent, the credibility of the witnesses, and to assess the presence of any mitigating factors and to properly weigh their import. Thus, it was established that the victim of Mr. Poplack's ill-advised practical joke had received full and prompt restitution for the damage to the vehicle and was satisfied. Five members of the Florida Bar offered testimony establishing the Respondent's honesty, competence and trustworthiness as an attorney. Moreover, the Respondent's psychiatrist testified that his patient was truly remorseful and that on the night in which the incident occurred Mr. Poplack's judgment was clouded by alcohol and depression. The Referee duly noted the absence of prior disciplinary proceedings against Mr. Poplack.

In sum, the Referee received substantial competent evidence which obviously enabled her to determine that the Respondent's lapse of judgment was nothing more than an isolated incident in the life of an otherwise honest and trustworthy individual. It is therefore respectfully offered for the Court's consideration that in this instance the Florida Bar has not overcome the burden of demonstrating that the penalty recommendation is erroneous, unlawful or unjustified, in accordance with the Court's pronouncement in *The Florida Bar v. Colclough*, 561 So.2d 1147, 1150 (Fla. 1990) and with *Rule* 3-7.7(c)(5) of the *Rules Regulating the Florida Bar*. Accordingly, the Referee's report should be approved in its entirety.

B. *The Requested Ninety-One Day Penalty Is Not Supported By Relevant Precedent.*

In support of the request to increase the Respondent's suspension from the practice of law from thirty to ninety-one days, the Florida Bar cites a number of this Court's decisions in which the sanction imposed required proof of rehabilitation before

reinstatement. As we shall see, however, the violations described in the authorities cited by the Bar are of a much more serious nature than the misconduct with which the herein Respondent was charged.

Thus, in *Florida Board of Bar Examiners v. Lerner*, 250 So.2d 852 (Fla. 1971) (initial brief at 7), the Court held that an applicant for admission to the Bar who, *while under oath,* falsifies his application will not be allowed to practice law in this State. Similarly, in *The Florida Bar v. Lancaster*, 448 So.2d 1019 (Fla.1984) (initial brief at 7), the respondent was found guilty of lying *under oath* to a state attorney about his involvement in the alteration of the identification number on a boat. In *The Florida Bar v. Colclough*, 561 So.2d 1147 (Fla. 1990) (initial brief at 8), the respondent had engaged in fraudulent misrepresentations for pecuniary gain, orally and in court pleadings, to members of the Bar and to a Circuit Court Judge resulting in *fraud being perpetrated upon the Court.* And in *The Florida Bar v. Lopez*, 406 So.2d 1100 (Fla. 1982) (initial brief at 9), the respondent *attempted to perpetrate a fraud upon the court* by urging parties and witnesses to testify under oath to matters which the respondent knew or should have known were false.

In addition to the fact that in the foregoing situations the respondents either made false statements while under oath, and perpetrated or attempted to perpetrate a fraud upon the court, it is respectfully brought to the Court's attention that in each of those instances the respondents engaged in lucid, deliberate and premeditated acts in furtherance of a scheme or plan to deceive. By contrast, the instant case involves a situation where, at a time when his judgment was clouded, the Respondent gave an initial reflexive response which was retracted within minutes of being uttered.

In its initial brief, the Florida Bar did not cite any cases in which the Court deemed it appropriate to impose a ninety-one day suspension. In support of the Respondent's position that under the totality of the circumstances surrounding this case such a penalty would be unreasonably disproportionate, we respectfully offer for the Court's consideration instances in which the ninety-one day suspension was imposed.

In *The Florida Bar v. McKenzie*, 557 So.2d 31 (Fla. 1990), the Court approved the referee's recommendation of a ninety-one day suspension, where two prior disciplinary actions had been initiated against the respondent and where the respondent had been found guilty of violating no less than *seven* provisions of the former Code of Professional Responsibility, including engaging in conduct prejudicial to the administration of justice, and counseling or assisting a client in illegal or fraudulent conduct. Similarly, in *The Florida Bar v. Fischer*, 549 So.2d 1368 (Fla. 1989), the ninety-one day penalty was imposed after the respondent was found guilty of violating *eight* provisions of the Disciplinary Rules, including engaging in conduct prejudicial to the administration of justice and concealing or knowingly failing to disclose that which he was required by law to reveal. And in *The Florida Bar v. Neely*, 540 So.2d 190 (Fla. 1989), the ninety-one day suspension was deemed appropriate where the lawyer falsely advised a client that she had won a lawsuit when the claim had in fact been dismissed for the lawyer's failure to prosecute, and where the lawyer overdrew his trust account and otherwise engaged in an act contrary to honesty and justice.

Absent from the instant case is the plethora of violations noted above which would justify the harsh sanction sought by the Bar. In this case, the Respondent was found to have violated only *Section* 4-8.4(c), *Rules Regulating The Florida Bar* at a time when his

judgment was clouded. In addition, the Respondent's immediate retraction of the initial statement shows that even at a time when he did not exert his better judgment, his fundamental honesty and sincerity prevailed.

C. *The Imposed Penalty Comports With The Court's Guidelines Therefor.*

In *The Florida Bar v. Lord*, 433 so.2d 983, 986 (Fla. 1983), the Court explained that the imposition of disciplinary measures against an attorney must serve three purposes:

> [f]irst, 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 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*. [emphasis in original]

The Referee recommended a thirty-day suspension from the practice of law *and* a probationary period of eighteen months consisting of mandatory psychological counseling. Applying the principles expressed in *Lord* to the facts of the instant case, it will become apparent that the recommended penalty is well-considered and that it satisfies all three *Lord* requirements.

It should be noted initially that the utterances to Officer Swikehardt were not made in a professional capacity and were thus totally unrelated to the practice of law. The charged misconduct consisted instead of an isolated event of *less than fifteen minutes in duration,* with no injury to the public deriving from the Respondent's conduct as a lawyer. Thus, rather than serving the purpose of protecting the public from unethical conduct, the penalty sought by the Florida Bar would effectively deny the public the services of a

competent, honest and trustworthy lawyer for an indefinite period of time as, before reinstatement, Mr. Poplack would have to establish his rehabilitation. At the same time, we cannot stress strongly enough that a ninety-one day suspension would place undue hardship upon the Respondent: in practical terms, that penalty would have the effect of allowing all of this sole practitioner's efforts to build and maintain a client basis go by the wayside, probably resulting in the termination of his practice.

The Referee's recommendation is properly tailored to sanction the Respondent's misconduct and to encourage his rehabilitation. As noted in the Report, testimony showed that by the time the hearing took place the personal difficulties engendered by the dissolution of his marriage had diminished and that Mr. Poplack had begun to exert greater control over his life. Please note that the charged misconduct occurred on May 14, 1989, a few short months after the divorce decree became final.

The Referee's well-considered recommendation requires the Respondent to undergo psychological counseling for a period of eighteen months. The Referee obviously determined that, under the totality of the circumstances, the incident with Officer Swikehardt resulted from an isolated lapse of judgment, that the rehabilitative process was well under way and that continued therapy would be sufficient to ensure complete rehabilitation. By contrast, instead of encouraging rehabilitation, the penalty sought by the Florida Bar could quite possibly have the effect of negating the progress which the Referee has acknowledged that the Respondent has made thus far and would therefore be more in the nature of a punishment for punishment's sake, lacking the requirement that the penalty have a rehabilitative purpose.

The third and final purpose expressed in *Lord*, and reaffirmed more recently in *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989), consists of ensuring that the penalty be a deterrent to those who might be inclined to engage in unethical conduct . Certainly it must be recognized that, given the uniqueness of the incident involved in the instant case, the likelihood that other lawyers might be tempted to emulate the Respondent's conduct is extremely remote, or non-existent. Indeed, it is hard to fathom how the absence of a ninety-one day suspension would encourage other members of the Bar to engage in conduct as foolish as the Respondent's, which conduct resulted from an isolated lapse of judgment. It is therefore respectfully submitted that the harshness of the penalty sought by the Florida Bar would not serve the purpose of deterring other lawyers from engaging in similar violations, and that the totality of the circumstances fully supports the Referee's recommendation.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that the Referee's recommendation be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Respondent's Answer Brief were sent by Federal Express to: Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and that a true and correct copy hereof was sent by U.S. Mail to: Randi Klayman Lazarus, Esquire, The Florida Bar, 444 Brickell Avenue, Suite M -100, Miami, Florida 33131,John F. Harkness, Jr., Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and John T. Berry, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 , this 3rd day of October, 1991.

Respectfully submitted,

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RESTATEMENT OF THE CASE AND FACTS

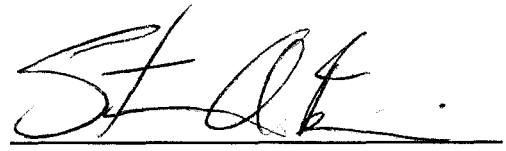
The Respondent adopts the Statement of the Case and Facts submitted by the Florida Bar, with one exception. The Respondent respectfully offers for the Court's consideration that subsequent to the arraignment which followed the initial charges, he voluntarily participated in the Pretrial Intervention Program because of his inability, at that time, to incur the expense of defending those charges.

The Respondent further states that he believed that a plea of "not guilty' was entered on his behalf at the arraignment , but has been informed that the case was deferred and that no plea was entered at arraignment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Corrected Restatement of the case and facts contained in Respondent's Answer Brief were sent by Federal Express to: Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and that a true and correct copy hereof was sent by U.S. Mail to: Randi Klayman Lazarus, Esquire, The Florida Bar, 444 Brickell Avenue, Suite M -100, Miami, Florida 33131, , this 9th day of October, 1991.

Respectfully submitted,



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