. IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant, Case No. 94,226
[TFB Case No. 1998-31,849(09B)]

v.

EVAN ROBERT WOLFE,
Respondent.
_____/

THE FLORIDA BAR'S REPLY BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the Bar."

The transcript of the final hearing held on April 5, 1999, shall be referred to as "T" followed by the cited page number in the Appendix ("T-A-").

The Report of Referee dated April 26, 1999, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____)

The Bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number and, if appropriate, the page number.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

A NINETY-DAY SUSPENSION IS OVERLY LENIENT DISCIPLINE FOR THE PERSONAL SOLICITATION OF DISASTER VICTIMS

The Bar submits that a suspension requiring proof of rehabilitation is fully warranted in a case where an attorney suffers from a severe long-term substance abuse problem and has begun rehabilitation only recently. The respondent did not seek treatment until in or around June, 1998 (ROR-A225). A three-year suspension is warranted where an attorney demonstrates that, despite his substance abuse problem, he recognized at the time he engaged in serious misconduct his actions were contrary to the Rules Regulating The Florida Bar. (T-A140). Nothing less will serve to protect the public and send a clear message to attorneys that serious misconduct will not be tolerated, especially in person solicitation following a natural disaster. Clearly the referee here was concerned about the respondent's long-term prognosis for remaining drug free because he recommended a five-year period of probation with stringent supervisory terms. (ROR-A220-221). The fact that under the rules a probation period is limited to only three years further supports the Bar's argument for a three-year suspension. A three-year suspension followed by a three-year period of probation, with the terms recommended by the referee, would come closer to comporting with the referee's original intent than a ninety-day suspension with a three-year period of probation. The referee's report makes it clear he believed the

respondent needed five years of close supervision. A ninety-day suspension and three years of probation would result in the respondent being supervised for only three years. The Bar's recommendation of a three-year suspension followed by three years of probation would result in the respondent proving complete rehabilitation before being allowed to resume the practice of law with three years of supervision thereafter. Because he most likely would continue to work in the legal field in a nonlawyer capacity during his suspension (T-A133-134), this would effectively result in the respondent being supervised for a total of six years.

Despite the testimony of the respondent's expert witness that his judgment was impaired by his cocaine addiction, even during time periods when the respondent was not under the influence of the drug (T-A-36-37, 47), the respondent testified at the final hearing that he realized at the time he was soliciting the tornado victims he knew what he was doing was wrong (T-A-140). Although the respondent's judgment may have been impaired, his sense of right and wrong clearly was not affected. Therefore, the respondent's misconduct was not causally related to his cocaine addiction. As a result, the Bar submits the respondent's drug addiction should not be weighed as a mitigating factor significant enough to warrant a suspension without proof of rehabilitation. In fact, even where it has been shown that an attorney's cocaine addiction is causally related to his subsequent misappropriation of funds, this

mitigated the discipline to a three-year suspension, the same amount of time the Bar is seeking here. The Florida Bar v. Marcus, 616 So. 2d 975 (Fla. 1993). In addition, Mr. Marcus had already been in recovery for three years at the time of the final hearing in the disciplinary proceedings. The respondent had been in recovery only since June, 1998, at the time of the final hearing in April, 1999.

The respondent's solicitation of tornado victims was not caused by his addiction to cocaine. He fully appreciated at the time that in person solicitation was prohibited. His cocaine use, however, impaired his judgment to the extent that he believed he would "get away with it." (T-A-140). He very nearly did. A ninety-day suspension is not the onerous discipline the respondent argues it is in his Answer Brief. It does not require proof of rehabilitation. R. Regulating Fla. Bar 3-5.1(e). At the end of ninety days, the attorney may resume the practice of law, subject only to the terms of any probation that this court may have imposed. The Bar submits that it would not be appropriate here to allow an attorney who admits to having suffered from a long-term, severe cocaine addiction (T-A-130-131, 135) where he has been in recovery for only a short time to resume the practice of law without requiring him to prove to a referee in a separate proceeding that he has been fully rehabilitated. To do otherwise would jeopardize the best interests of the unsuspecting public who might hire the respondent. The respondent chose to use cocaine knowing it was an

illegal act in and of itself and chose to repeatedly solicit business from tornado victims. The burden should be placed squarely on the respondent's shoulders to prove he is capable of competently and ethically practicing law.

With respect to the parents of a Hispanic client the respondent represented in a matter unrelated to the Central Florida tornados, this allegation was contained in the Bar's Complaint and was included in the Stipulation as to Facts and Rule Violations beginning at paragraph 30. It was included in the Report of Referee beginning with paragraph 28 (ROR-A216). The referee found, pursuant to the stipulation the respondent entered into with the Bar, that "Mr. and Ms. Vasquez' insurance company received no communication from the respondent regarding this matter until on or about May 23, 1998." (ROR-A216). Considering that Vasquez hired him in March, 1998, to obtain a maximum settlement from their insurance company for property damages suffered as a result of a tornado, a relatively simple matter, the Bar submits that a delay of some two months in initiating contact with the insurance company is not an example of diligent representation.

Although the respondent's counsel, in his Answer Brief, took exception to the Bar's opening argument where the respondent was likened to a looter, the Bar submits the appropriate venue to have addressed this was the final hearing, rather than raising it now on appeal. Respondent's counsel did not raise this as an objection during the

final hearing. In fact, respondent's counsel used the same term to describe the conduct of a lawyer who refuses to admit to having a substance abuse problem. (T-A33). The respondent's conduct of entering police protected neighborhoods (T-A-61, 63; B-Ex 3 p. 19) to improperly solicit victims for his own financial gain is indeed looting. Respondent's counsel did object to the Bar submitting evidence in aggravation and the referee considered his objections during the final hearing. (T-A-25-26, 51, 55-56). The referee considered respondent's counsel's arguments and found the evidence submitted by the Bar was appropriate for aggravation (T-A-54, 57-58). The Bar did not engage in any misconduct in this matter.

The Bar submits that the testimony offered by Myer Cohen, the Executive Director of Florida Lawyers Assistance, Inc., should be given great weight. Respondent's counsel did not object during the hearing to Mr. Cohen's testimony concerning the respondent's personality disorders. In fact, respondent's counsel elicited Mr. Cohen's opinion as to the respondent's prognosis for recovery and Mr. Cohen discussed the effect the respondent's personal problems would have on his recovery. (T-A-107). Mr. Cohen testified as the respondent's witness, not the Bar's. He is well recognized by the Bar and this court for his years of experience in working with addicted lawyers. His opinions were based on years of experience as the Executive Director of Florida Lawyers Assistance, Inc., and his personal dealings

with the respondent here. Unlike the respondent's paid expert witness, Mr. Cohen had no incentive to provide testimony that was either favorable or unfavorable to the respondent. The respondent's expert witness, Dr. Evan James Zimmerman, met with the respondent only two times (T-A-39, 43), with the first time being in 1995. (T-A-42). Mr. Cohen testified that he saw the respondent at weekly meetings (T-A-105) and was aware of the respondent's progress. (T-A-105). The respondent did not present his current treating psychiatrist, Dr. Carlos Gonzalez. (T-A174).

Most importantly, the respondent's solicitation of a number of tornado victims was not the only act of misconduct with which he was charged. He was also charged with violating the Rules Regulating The Florida Bar with respect to his advertising literature which he had used for a considerable period of time. Therefore, there is not a single, isolated incident involved here. The respondent engaged in several different acts of misconduct which violated a number of rules. Multiple acts of misconduct constitute cumulative misconduct which warrants the imposition of a harsher sanction than might be called for if the attorney had engaged in only one act of misconduct. The Florida Bar v. Williams, 604 So. 2d 447 (Fla. 1992). The respondent's drug addiction is not sufficient mitigation to outweigh the seriousness of his misconduct so as to warrant a short term suspension without proof of rehabilitation. The Florida Bar v. Davis, 657 So. 2d 1135, 1137 (Fla. 1995). A three-year suspension will offer

the greatest amount of protection to the public because it will assure that the respondent is in full recovery before he applies for reinstatement. A ninety-day suspension would allow him to resume the practice of law automatically early next year, allowing him only an approximate one and one-half years of recovery from a profound, thirteen-year (T-A130-131, 139-140) drug addiction problem and from numerous personal problems. A three-year suspension will achieve this court's objectives of protecting the public, encouraging the respondent to achieve rehabilitation, and deterring others from engaging in similar misconduct. The Florida Bar v. Cibula, 725 So. 2d 360, 363 (Fla. 1998).

While it is accepted that interim rehabilitation is a mitigating factor, the Bar urges this court not to allow drug rehabilitation efforts commenced only after disciplinary proceedings are brought to become a convenient excuse an accused attorney can call upon to avoid serious discipline for egregious misconduct. The Florida Bar v. Weinstein, 624 So. 2d 261 (Fla. 1993).

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation of a ninety-day suspension followed by a five-year period of conditional probation and instead impose suspension of not less than three years followed by a three-year period of probation with the conditions set forth in the Report of Referee and payment of costs now totaling $5,301.12.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Reply Brief have been sent by regular U.S. Mail to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to counsel for the respondent, Richard B. Marx, Counsel for Respondent, 66 West Flagler Street, Miami, Florida, 33130; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this _____ day of September, 1999.

Respectfully submitted,

_____
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