IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ALAN R. HOCHMAN,

Respondent.
_____/

Supreme Court Case
No. SC00-100

ON PETITION FOR REVIEW

ANSWER BRIEF OF THE FLORIDA BAR

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INTRODUCTION

For the purpose of this brief, The Florida Bar will be referred to as "The

Florida Bar", "the Bar" or "Florida Bar". Alan R. Hochman will be referred to as "respondent", "Alan Hochman" or "Mr. Hochman".

Abbreviations utilized in this brief are as follows: (Tr.) - for the transcript of proceedings held August 1, 2000; followed by the appropriate page number. (Report) - for the Report of Referee; followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

The Bar would submit that respondent's Statement of the Case and Facts requires some clarification. Specifically, the procedural posture of this case needs to be placed in perspective.

The hearing before the referee was conducted on the basis of Rule 3-7.2. Subsection (e) which provides, in part:

> **Suspension by Judgment of Guilt (Felonies)**. Upon receiving notice that a member of the bar has been determined or adjudicated guilty of a felony, branch staff counsel will file a "Notice of Determination or Judgment of Guilt" in the Supreme Court of Florida.

The Bar acted in accordance with the rule.

Subsection (f) provides for a Petition to Modify or Terminate Suspension. Respondent filed a petition as authorized by that subsection. The Bar submitted a response pursuant to subsection (f).

Subsection (h)(1) mandates a specific period of suspension. It states:

> **Term of Suspension**.
> (1) Maximum Term of Suspension. Unless the Supreme Court of Florida permits an earlier application for reinstatement, the suspension imposed on the determination or judgment of guilt shall remain in effect for three (3) years and thereafter until civil rights have been restored and until the respondent is reinstated under Rule 3-7.10 hereof.

Though there had been a prior suspension of the respondent, due to a Consent Judgment, the agreement contained no reference to a Notice of Judgment of Guilt pursuant to Rule 3-7.2. Furthermore, the Rule violations cited in that agreement did not include the violation pertaining to a criminal act designated in Rule 4-8.4(b). (Tr. 32).

Additional procedural and/or factual distinctions will be made in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

The Florida Bar sought respondent's felony suspension pursuant to Rule 3-7.2(e). The respondent complained since he had previously agreed to a three (3) year suspension as a result of the underlying misconduct which ultimately gave rise to criminal charges. In an unusual action by the Florida Supreme Court a referee was appointed, took testimony, and heard argument. The referee recommended that the respondent should be suspended for three (3) years. It is the position of The Florida Bar that the respondent's consent judgment did not include the criminal charges, as the consent preceded them. Additionally, the respondent's argument that he is entitled to a hearing in mitigation is without any support under the rules or the existing case law.

ISSUES ON APPEAL

A.

WHETHER THE RESPONDENT HAS FAILED TO ESTABLISH THAT HE HAS RECEIVED A SUSPENSION VIOLATIVE OF THE RULES (Rephrasing Respondent's Issue A)

B.

WHETHER THE RESPONDENT HAS NOT ESTABLISHED ANY ERROR REGARDING THE "PENALTY PHASE" OF THE HEARING (Rephrasing Respondent's Issue B)

C.

WHETHER THE RESPONDENT HAS ESTABLISHED NO BASIS OF ERROR REGARDING THE ALLEGED HARSHNESS OF CONSECUTIVE SUSPENSION (Rephrasing Respondent's Issue C)

ARGUMENT

A.
THE RESPONDENT HAS FAILED TO ESTABLISH THAT HE HAS RECEIVED A SUSPENSION VIOLATIVE OF THE RULES
(Rephrasing Respondent's Issue A)

Respondent argues that he has received a suspension in excess of three (3) years. In fact, he has received one (1) suspension in this case which is being appealed which does not exceed three (3) years. The single suspension is a "maximum term of suspension" as provided by Rule 3-7.2(h)(1). The provision states:

> **Term of Suspension**.
> (1) Maximum Term of Suspension. Unless the Supreme Court of Florida permits an earlier application for reinstatement, the suspension imposed on the determination or judgment of guilt shall remain in effect for three (3) years and thereafter until civil rights have been restored and until the respondent is reinstated under Rule 3-7.10 hereof.

Respondent has the burden of establishing error. The Florida Bar v. Miele, 605 So.2d 866 (Fla. 1992). No error can be attributed to following the rule.

The more legitimate question to be considered is whether pursuant to the Rules Regulating The Florida Bar an attorney can be subjected to more than one suspension. First, no rule prohibits it, and there are innumerable cases wherein a

suspension or disbarment followed an earlier suspension. Second, the referee is instructed by the governing provision of Rule 3-7.2, quoted above, to impose a suspension of a maximum of three (3) years. There is no exception for individuals who were previously suspended. Third, as applied to the facts of this case, two suspensions are entirely appropriate.

Respondent's first suspension was not based upon Rule 3-7.2. That rule provides in part:

> **Suspension by Judgment of Guilt (Felonies)**. Upon receiving notice that a member of the bar has been determined or adjudicated guilty of a felony, branch staff counsel will file a "Notice of Determination or Judgment of Guilt" in the Supreme Court of Florida. A copy of the judgment shall be attached tot the notice. Upon the filing with the Supreme Court of Florida by The Florida Bar and service upon the respondent of a notice of determination or judgment of guilt for offenses that are felonies under applicable law, the respondent shall stand suspended as a member of The Florida Bar on the eleventh day after filing of the notice of determination or judgment of guilt unless the respondent shall, on or before the tenth day after filing of such notice, file a petition to terminate or modify such suspension.

Bar counsel complied with the mandate of the rule by filing, on January 11, 2000, a Notice of Judgment of Guilt. After hearing the matter, the referee simply complied with the prescription of Rule 3-7.2 regarding punishment, namely (h)(1) quoted above. Both the Bar and the referee acted in accordance with the Rules.

The respondent suggests, however, some sort of error because of a prior consent order consummated between respondent and the Bar. It is undisputed that the consent agreement was negotiated prior to the filing of criminal charges. There was reference to violations of several rules, but the consent agreement included no reference to criminal charges. (T. 32) There was no reference to Rule 3-7.2 in the consent agreement. No portion of the agreement addressed the issue of further punishment based upon criminal charges and pleas.

The consent judgment was based upon a number of existing complaints. No rule requires that the Bar wait indefinitely to determine whether any particular victim will pursue criminal charges. Nor can the Bar wait indefinitely to learn whether the State Attorney considers the case to be civil rather than criminal, or whether the case can be proved.

What the respondent ignores by suggesting that the two suspensions are "improper" or not "fair", is that the earlier consent agreement for a three (3) year suspension nunc pro tunc to 1997 would have never existed if the criminal justice system had concluded its work prior to the consent judgment. If that was the case, the likelihood is that disbarment would have been the agreed discipline.

Respondent was represented by counsel. Respondent now suggests that everyone knew that criminal charges were probable at the time the agreement was

concluded. If such was the case, respondent, a lawyer, or his counsel could have advocated the addition of a clause which would address that eventuality.

Respondent asserts that several cases establish that a three (3) year suspension is not required after a Determination of Guilt. The cases cited have absolutely no relationship to the explicit requirement of a suspension of a maximum of three (3) years under Rule 3-7.2(h).

In The Florida Bar v. Finkelstein, 522 So. 2d 372 (Fla. 1988) the respondent entered a guilty plea pursuant to Rule 3-7.8 and negotiated a one (1) year suspension with the Bar. No similar circumstance is involved herein, and those facts do not apply to Rule 3-7.2(h).

In The Florida Bar v. Spiegel, 384 So. 2d 1287 (Fla. 1980) respondent was suspended for a felony conviction and was eventually found not guilty after an appeal. When a new matter arose a grievance committee found probable cause and the Bar agreed to a public reprimand as a minimal discipline in view of respondent's prior three (3) year suspension for a crime of which he was not guilty. The discipline imposed did not negate the mandate of 3-7.2(h).

In The Florida Bar v. Blankner, 457 So. 2d 476 (Fla. 1984) a formal complaint was filed pursuant to 11.02 (3)(a) and (b) of the former Integration Rule. The six (6) month suspension received by the respondent did not emanate from a

provision equivalent to the one applicable herein. The above provisions of the Integration Rule are merely comparable to current Rules 3-4.3 and 3-4.4, and not Rule 3-7.2(h).

The Florida Bar v. Arnold, 767 So. 2d 438 (Fla. 2000) fails to support the respondent's position, but supports the Bar, since Arnold did receive a suspension as required by Rule 3-7.2. Arnold was subsequently the respondent in regard to a complaint filed by the Bar pertaining to the underlying conduct. The significant question was what penalty should be applied after Arnold had received the three (3) year suspension required by Rule 3-7.2. Arnold did receive discipline for the underlying conduct.

Respondent also seeks to distinguish two (2) cases cited in the referee's report. The referee cited two (2) cases in the report to support the conclusion that "a respondent can be sanctioned when convicted of a felony despite the existence of discipline on the underlying conduct." (Report p.5). Those cases are The Florida Bar v. Marcus, 616 So. 2d 975 (Fla. 1993) and The Florida Bar v. Korones, 752 So. 2d 586 (Fla. 2000).

Respondent suggests that there are factual and/or procedural differences. However, respondent does not explain how the alleged differences negate the principle for which the cases are offered. He merely offers the argument that those

cases do not involve collateral estoppel. That is exactly the point, insofar as these cases demonstrate that collateral estoppel is not applicable to these circumstances.

B.

RESPONDENT HAS NOT ESTABLISHED ANY ERROR REGARDING THE "PENALTY PHASE" OF THE HEARING
(Rephrasing Respondent's Issue B)

Respondent has cited no portion of Rule 3-7.2 or any other rule or any case which authorizes a "penalty phase" as part of a proceeding pursuant to that rule. Again, the rule is clear insofar as subsection (h)(1) states that "the suspension imposed on the determination or judgment of guilt shall remain in effect for three (3) years and thereafter until civil rights have been restored and until the respondent is reinstated..."

Rule 3-7.2(i)(1) is the authority for "a separate disciplinary action." There is a proper time for everything. Mitigation evidence would clearly be proper at the separate disciplinary action. Rule 3-7.6 (k)(1)(c).

Respondent could also have presented a basis for a reduced suspension and related mitigating evidence in his Petition to Terminate or Modify Suspension. However, he based his petition upon the argument that collateral estoppel barred further discipline. Respondent did not present the issue of potential justification of a reduced discipline and, therefore, has waived it. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981).

C.

RESPONDENT HAS ESTABLISHED NO BASIS OF ERROR REGARDING THE ALLEGED HARSHNESS OF CONSECUTIVE SUSPENSION (Rephrasing Respondent's Issue C)

First, respondent has not presented this issue to the referee and therefore, has waived it. The Florida Bar v. Nunes, 734 So.2d 393 (Fla. 1999). Assuming arguendo that this court would consider this matter nevertheless, the argument lacks merit. Respondent plead nolo to two felonies.

Respondent admitted to misappropriation of two hundred and fifty thousand ($250,000.00) dollars of his clients' funds, the conduct which constituted the felonies. That is one of the most serious ethical violations that an attorney can commit and disbarment is the applicable discipline for misappropriation. The Florida Bar v. Porter, 684 So. 2d 810 (Fla. 1996). In the instant case respondent had a three (3) year suspension pursuant to a consent judgment and he is now confronted with a maximum of three (3) additional years.

There are three (3) purposes for discipline:

> First, 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 the 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.
>
> Florida Bar v. Cibula, 725 So.2d 360, 363 (Fla. 1998)(quoting Florida Bar v. Reed, 644 So. 2d 1357 [Fla. 1994]

This court has the ultimate responsibility for determining the proper discipline. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989).

While addiction may be offered as mitigation, this court has been properly reluctant to reduce the discipline for misappropriation. The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986); The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989).

If this respondent's new discipline remains a suspension for three (3) years, that is similar to a five (5) year disbarment when added to his previous consent agreement.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's report should be approved.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's answer brief was forwarded via Airborne Express (Airbill #3370023123) to **Thomas D. Hall**, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to respondent's attorney, **RICHARD B. MARX**, 66 West Flagler Street, Second Floor, Miami, Florida 33130, on this _____ day of November, 2000.

_____
RANDI KLAYMAN LAZARUS
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

_____
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