IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant.

Supreme Court
Case NO.: SC00-100

v.

ALAN R. HOCHMAN,

Respondent.

_____/

RESPONDENT'S INITIAL 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 August 1, 2000, shall be referred to as "T" followed by the cited number in the Appendix ("T-A-").

The Report of Referee dated August 18, 2000, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____).

STATEMENT OF THE CASE AND THE FACTS

Respondent suffered from drug addiction and alcoholism from 1992 through 1997. Respondent voluntarily notified The Florida Bar in July 1997, prior to going into treatment, and prior to any complaints being filed against him, of his addiction, and the fact that he had misappropriated client funds.

In July 1997, Respondent checked himself in, on an inpatient basis, at Hazelden Treatment Center in West Palm Beach, Florida for the treatment of his drug addiction and alcoholism.

After negotiations with The Florida Bar, through his attorney, Neal Roth, Esq., Respondent entered into a Guilty Plea and Consent Judgment for Discipline, whereby he received a three year suspension (final 5/98, retroactive to 7/97), with a provision that he make restitution to the victims.

The Bar, as well as the designated reviewer, and the Board of Governors were in possession of all of this information regarding the criminal implications of Respondent's conduct when they approved the

Guilty Plea and Consent Judgment, and were aware of the possibility of criminal charges that had been discussed with Bar Counsel, Elena Evans.

The Guilty Plea and Consent Judgment for Discipline was approved by The Florida Bar Board of Governors, through the designated reviewer and then was forwarded to this Court, which approved it in May 1998 (Supreme Court Case No. 92,462). Pursuant to said Guilty Plea and Consent Judgment for Discipline, Respondent agreed to the following:

a. An emergency suspension and probation, effective July 28, 1997.
b. A three year disciplinary suspension with reinstatement occurring upon appropriate application with a determination being made by a duly appointed Referee.
c. Ongoing participation in an appropriate directed rehabilitation program.
d. A reasonable plan for restitution to be made to the affected clients. The specific terms of the restitution plan will be made upon the Respondent securing any and all appropriate sources of income.
e. Respondent agrees to make restitution under the supervision of a member of The Florida Bar in good standing. This monitor shall be in place for five (5) years or until restitution is completed to the affected parties.

Respondent has complied with all of the terms of the Consent Judgment and has successfully completed the probationary period. Respondent is also under a rehabilitation contract with Florida Lawyers Assistance, Inc., and attends their regular weekly support meeting. He is a member of Alcoholics Anonymous, regularly attends several meetings a week, and he also attends weekly aftercare meetings at South Miami Hospital.

On July 28, 1999, Respondent was charged criminally with Grand Theft Second Degree, and Grand Theft Third Degree (Case Nos. F99-023105, F99-023106) as a result of the very same trust account violations he voluntarily disclosed to The Florida Bar, and which formed the basis of the Guilty Plea and Consent Judgment.

On October 7, 1999, these cases were resolved with Respondent entering a plea of *nolo contendre*, and receiving a withhold of adjudication and sentence of community control with the special condition of restitution. The community control has since been reduced to probation, and Respondent has completed the restitution payments, with assistance from The Florida Bar Security Fund.

On January 11, 2000, The Florida Bar filed a Notice of Determination of Guilt, pursuant to Rule 3-7.2(e) based upon Respondent's October 7,

1999 plea. On January 20, 2000, Respondent filed a Petition to Terminate or Modify Suspension in Response to The Florida Bar's Notice of Determination of Guilt. A hearing was held on August 1, 2000 before a Referee, and on August 18, 2000 the Referee issued her Report and Recommendations, which recommended that Respondent's Petition to Terminate or Modify Suspension be denied and that he be suspended for an additional three years.

At the beginning of the hearing on August 1, 2000, counsel for Respondent, in an abundance of caution, inquired whether the hearing would have a penalty phase so as to be able to show mitigation, and was advised it was only to decide whether to grant or deny the petition. The only thing before the Referee was Respondent's Petition to Modify or Terminate Suspension. This understanding was confirmed and agreed to by Bar Counsel, and the Referee at the beginning of the hearing. (T-A 15-16).

Despite this understanding by all parties at the inception of the August 1, 2000 hearing, the Referee issued "Recommendations as to Disciplinary Measures to be Applied", to wit: an additional three year suspension. (ROR 6).

SUMMARY OF THE ARGUMENT

The Rules Regulating The Florida Bar prohibit suspensions in excess of three years, accordingly to suspend Respondent for an additional three year for the same misconduct would be violative of this Court's rules. The uncontroverted testimony of Respondent's former counsel, Neal Roth, establishing that he had in fact discussed the possibility of future criminal prosecution in arriving at a negotiated consent judgment for discipline, and the Bar failed to put on any testimony from the Board of Governors as to what exactly was discussed when it approved the consent judgment. Additionally, case law does not support the proposition that the appropriate suspension for a Determination of Guilt is an automatic three year suspension

Respondent was denied a hearing on the penalty phase of his case and denied the opportunity to put on mitigation testimony. These issues were in fact preserved by Respondent's counsel at the beginning of the hearing, with the consent of the Referee and Bar Counsel as well.

The two suspensions, running consecutively, imposed upon Respondent a harsh and callous punishment, which is counterproductive to recovery from drug addiction. To allow these two suspensions to be tacked

on in such a way would be to give the Rules Regulating The Florida Bar a draconian interpretation, which this Court, based upon its traditional province in disciplinary proceedings, never intended them to have.

ARGUMENT

A. Whether a suspension in excess of three years is improper and fair.

Rule 3-5.1 (e) makes it clear that, "No suspension shall be ordered for a specific period of time in excess of 3 years". Rule 3-7.2 (h) regarding the suspension imposed on the determination of judgment of guilt shall be for a maximum term of three years. Accordingly, no matter which rule one considers, an attorney can not be suspended for a period longer than three years.

The Respondent's three year suspension, pursuant to the Guilty Plea and Consent Judgment for Discipline which was approved by this Court in May, 1998, and made retroactive to July 1997, has already been served by the Respondent. Now he is being given an additional three year suspension, albeit pursuant to Rule 3-7.2(h)(1), to run consecutively (not concurrently) from the previous disciplinary suspension.

The tacking of this suspension to run consecutively to the prior suspension is unfair to the Respondent, in addition to which, in light of the fact that he was precluded from having a penalty phase to his hearing he was denied the opportunity to put on mitigation testimony.

While the Bar argued that they must seek the felony suspension because the rules mandate it, this appears to be an argument favoring form

over substance. They do not have to file the Notice of Determination of Guilt. Additionally the legal authority cited by the Bar[1]is not applicable here because those cases are confined to their individuals facts, and factually ar dissimilar to the case at bar.

The undisputed testimony at the hearing was clear that at the time the Consent Judgment was negotiated, all parties contemplated that there might be a criminal case down the road. *See* Pages 22 through 29 of the hearing transcript.

The Referee reasons that the Bar's filing of their Notice of Determination of Guilt and opposition to the Respondent's petition was correct and mandated by the Rules. The Referee supports this position by citing the cases of The Florida Bar v. Marcus, 616 So.2d 975 (Fla. 1993), and The Florida Bar v. Korones, 752 So.2d 586 (Fla. 2000).

The cases of Marcus and Korones are distinguishable from the case at bar.

[1] The Bar relies upon the cases of The Florida Bar v. Marcus, 616 So.2d 975 (Fla. 1993), and The Florida Bar v. Korones, 752 So.2d 586 (Fla. 2000). In Marcus the respondent sought remand to the referee for an evidentiary hearing because the Unconditional Guilty Plea and Consent Judgment entered into did had not presented mitigating evidence. This court remanded the case to the referee for an evidentiary hearing and the referee then filed an amended report and the referee recommended eighteen months suspension. The Bar then sought review arguing that the appropriate sanction for respondent should be disbarment. This court suspended respondent for 3 years instead of disbarring him. Krones involved the Bar's petition for review of the referee's report in the underlying case imposing 90 day suspension, and then a subsequent felony conviction during the pendency of the appeal. This court disbarred Korones.

In Marcus the respondent sought remand to the referee for an evidentiary hearing because the Unconditional Guilty Plea and Consent Judgment entered into did had not presented mitigating evidence. This court remanded the case to the referee for an evidentiary hearing and the referee then filed an amended report and the referee recommended eighteen months suspension. The Bar then sought review arguing that the appropriate sanction for respondent should be disbarment and not an eighteen month suspension. This court then suspended respondent for three years instead of disbarring him. Marcus did not involve issues of collateral estoppel.

Korones involved the Bar petition for review of the referee's report in the underlying case imposing a ninety (90) suspension, and then a subsequent felony conviction during the pendency of the appeal. This court disbarred Korones. Again, Korones did not deal with the issue of collateral estoppel.

It appears that the Referee, in determining that, "a respondent can be sanctioned when convicted of a felony despite the existence of discipline on the underlying misconduct", failed to distinguish the factual basis for the cases upon which she relies.

Although the Referee acknowledges that The Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995) stands for the proposition that collateral

estoppel can be asserted only when the identical issue has been litigated between the same parties, she distinguishes Clement from the case at bar by finding that, "the identical issues are not currently being litigated." The Referee makes this assertion despite the fact the she asserts in her findings of fact that, "Respondent's criminal matters were based upon the same incidents resulting in the Consent Judgment".

The uncontroverted testimony of Respondent's former counsel, Neal Roth, showed that he had in fact discussed the possibility of future criminal prosecution in arriving at the negotiated consent judgment for discipline. The Bar failed to put on any testimony from the Board of Governors as to what exactly was discussed when it approved this consent judgment. The testimony of Bar Counsel is not a substitute for the testimony of the client, which in this case is the Board of Governor, through the person with the most knowledge regarding this transaction, which in this case would be the Designated Reviewer in this case, which was never done.

Tod Aronovitz, Esq., Respondent's Designated Reviewer of the Board of Governors should have testified as to the Bar's understanding of the underlying facts of Mr. Hochman's Consent Judgment. Mr. Aronovitz' testimony will be proffered at a rehearing, if granted.

Additionally, case law does not support the proposition that the appropriate suspension for a Determination of Guilt is an automatic three year suspension. There are numerous cases to the contrary. *See* The Florida Bar v. Finkelstein, 522 So.2d 372 (Fla. 1988) (one year suspension after felony conviction); The Florida Bar v. Speigel, 384 So.2d 1287 (Fla. 1980) (public reprimand in exchange for prior three year suspension served and conditional guilty plea); The Florida Bar v. Blankner, 457 So.2d 476 (Fla. 1984) (six months suspension).

Recently, in the case of The Florida Bar v. Arnold, 2000 WL 1205918; 25 Fla. L. Weekly S636 (Aug. 24, 2000), this court construed the issue of punishment for a determination of guilt. In that case, Arnold was convicted in federal court in March 1993 of various charges and sentenced to federal prison. Arnold entered into a stipulation with The Florida Bar in July 1993, wherein he was suspended and the suspension would continue until the final disposition of the criminal matter. On July 25, 1997, Arnold's convictions were reversed and the cases remanded for a new trial. Arnorld then received a letter from The Florida Bar dated January 5, 1998, stating that he had been reinstated effective December 1997. On March 26, 1998, Arnold entered a plea of guilty to Count II of the original indictment, was adjudicated guilty and sentenced to time served. Arnold notified the Bar of

the March 26, 1998 conviction. On November 12, 1998, the Bar notified Arnold that his reinstatement was in error, and on January 20, 1999 filed a complaint against Arnold based on the March 26, 1998 conviction. The Referee recommended a suspension of sixty days, *nunc pro tunc,* with automatic reinstatement. The Bar sought review and argued for a three-year suspension as the appropriate discipline based on Arnold's March 26, 1998 felony conviction. This court affirmed the Referee's recommendation of a sixty day suspension, *nunc pro tunc*, and stated that, "As to attorney discipline, it is ultimately this Court's task to determine the appropriate sanction. Id. at 2 *citing* Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla. 1989).

B. Whether Respondent has been denied a hearing on the penalty phase, and the opportunity to put on mitigation testimony.

The Referee committed error when she issued Recommendations as to Disciplinary Measures to be Applied, when it was agreed by all parties beforehand, including the Referee, that the hearing would not encompass the penalty phase, and in fact no testimony as to mitigation was presented. (T-A-15-16).

Respondent's counsel made it clear that the purpose of the August 1, 2000 hearing was not to determine the penalty, nor to consider mitigation. The purpose of the hearing was to grant or deny respondent's Petition to Modify or Terminate Suspension, as set forth in this court's order of April 27, 2000, which states that, "The referee shall hear, conduct, try and determine all matters presented in the Petition to Terminate or Modify Suspension or such other relief as may be proper…". Additionally, the Bar has not even filed a formal complaint against Respondent, but merely a Notice of Determination of Guilt.

By issuing this Report, the Referee has denied Respondent a hearing on the penalty phase, and has denied him the opportunity to put on mitigation testimony. This is not only violative of the parties' agreement

before the hearing, but it is also in contravention of this Court's own rules.

This Court has recognized that addiction and recovery from addiction is a mitigating factor. In accordance with the Florida Standards for Imposing Lawyer Sanctions 11.1, "ongoing supervised rehabilitation by the attorney, through F.L.A., Inc., and any treatment program(s) approved by F.L.A., Inc….may be considered as mitigation". This opportunity to present mitigating testimony was denied to Respondent at the hearing.

It is crystal clear that the Respondent's problems arose from his addiction, and as such, the rules of this court very clearly recognize addiction as a mitigating factor in determining appropriate punishment. *See* Florida Standards for Imposing Lawyer Sanctions 11.1.

C. Whether the two suspensions running consecutively create a harsh punishment.

These two suspensions create a harsh and callous punishment which is counterproductive to recovery from drug addiction. By denying Respondent a hearing on the penalty phase, no mitigation testimony was presented.

To allow these two suspensions to be tacked on in such a way would be to give the Rules Regulating The Florida Bar a Draconian interpretation which this Court, based upon its traditional province in disciplinary proceedings, never intended them to have.

The final disposition of the criminal case does not mandate the additional suspension. Common sense and logic might argue to the contrary. It would appear that in its position of enforcing the Rules Regulating The Florida Bar, that very organization must seek fairness in its approach to disciplinary matters, and not punish needlessly lawyers who have erred in their ways, but are truly trying to straighten out their lives and become productive members of society and productive and honorable members of the Bar. The profession might be better served with the Bar using a compassionate approach rather than a punitive one.

In fact, this Court has recognized that, "…harsh and indurate punishments are self-defeating in many cases and that a large number of the

convicted can be trusted even after conviction not to be a present danger to the public if they are extended rehabilitative assistance and humane treatment and are not pushed to the point of no return for re-entry into a sober law abiding productive life." *See* The Florida Bar v. Smith, 301 So.2d 768-771 (Fla. 1974).

In the Arnold case this court was confronted with facts very similar to the case at bar. Arnold served a suspension of some five years and after his conviction was reversed and the case remanded for a new trial, he then plead guilty to Count II of the original indictment. This court recognized that the period of past suspension was for the same conduct. Id. at 2. Likewise, Respondent's suspension served here was for the same conduct which the Bar seeks to punish him again. This Court in Arnold rejected the Bar's argument that after serving that suspension that he should serve an additional three year suspension.

The underlying factor contributing to Respondent's misconduct was his drug addiction. Today addiction is generally viewed as a disease and recovery is widely seen as a mitigating factor in disciplinary proceedings. Given a proper showing of rehabilitation and restitution, addiction will be accepted as evidence in mitigation of improper behavior. Raymond P. O'Keefe, *The Cocaine Addicted Lawyer and the Disciplinary System,* 6 St.

Thomas L. Rev. 220 (1992). However, in the instance case, Respondent was precluded from making such a showing.

CONCLUSION

Based upon the foregoing arguments and authority, Referee's Report and recommendation should not be approved by this Court, or in the alternative impose ***nunc pro tunc*** to the date of the prior suspension, a short term suspension, or this matter should be sent back to the Referee for an evidentiary hearing on the issue of mitigation and appropriate punishment.

REQUEST FOR ORAL ARGUMENT

Respondent hereby requests oral argument before this Court, and submits that oral argument will assist the Court in its decision making process.

Respectfully submitted,

_____

RICHARD B. MARX
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven(7) copies of the foregoing motion have been sent via Federal Express, overnight delivery to Thomas D. Hall, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy of the foregoing was sent and regular U.S. Mail to: copy of the foregoing was sent and regular U.S. Mail to: Randi Klayman Lazarus, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131; John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this____day of October, 2000.

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APPENDIX TO RESPONDENT'S INITIAL BRIEF

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COMPLIANCE WITH RULE 9.210(a)(2)

The undersigned hereby certifies that the foregoing brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 14 point Times New Roman.

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