IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant.

v.

ALAN R. HOCHMAN,

Respondent.

_____/

Supreme Court
Case NO.: SC00-100

RESPONDENT'S REPLY BRIEF

RICHARD B. MARX
Attorney for Respondent
66 West Flagler Street
Second Floor
Miami, Florida 33130
(305)579-9060
Fax (305) 377-0503
Florida Bar No.: 051075

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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 page number in the Appendix("T-A-").

RULES LIMIT SUSPENSION TO THREE YEARS

Respondent maintains that the three year suspension issued by the Referee in addition to and running consecutively with the 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, is improper and in violation of the Florida Standards for Imposing Lawyer Sanctions, which provides that, "No suspension shall be ordered for a specific period of time in excess of three (3) years". See Standard 2.3. Both suspensions basically punish the same misconduct. The Bar seems to argue that an attorney can be subjected to more than one suspension for the same act. The Bar attempts to support this position by stating that, "no rule prohibits it", and that "there are innumerable cases wherein a suspension or disbarment followed an earlier suspension", although it fails to cite even one of these "innumerable cases". Moreover, the Bar fails to point to any case were this court issued a suspension followed by an earlier suspension, based on the same misconduct, and running consecutively, instead of concurrently or *nunc pro tunc.*

The Bar ignores the issue that both suspensions are based on the same event, but instead concentrates on the rules violation, arguing that the Referee issued her suspension based on Rule 3-7.2, and that the suspension pursuant to the Consent Judgment cited other rules violations. Accordingly,

the Bar argues that these two suspensions are somehow different and, that one has nothing to do with the other. This argument is not entirely true and omits all discussions had between Respondent's prior counsel (Neal Roth, Esq.) and the Bar regarding possible future criminal charges being brought against Respondent. It is interesting to note that while Bar Counsel who negotiated the plea, Elena Evans, Esq., could not recall the discussions with Respondent's counsel regarding possible future criminal charges, she never stated "no we did not have those discussions". Neal Roth's testimony that he had discussions with Bar Counsel about possible future criminal charges being brought against Respondent went unrebutted. Instead, the Bar puts heavy emphasis on the fact that since there was no reference made in the Consent Judgment to possible future criminal charges then it could not have been discussed. It appears that the Bar is attempting to avail itself of the latin maxim *expressio unius est exclusio alterius* (if it is not included its exclusion can be inferred), but the Bar ignores the unrebutted testimony at trial to the contrary. *Infra.* No matter what the Bar argues, any fair and objective review of the facts clearly must lead to the inescapable conclusion that Respondent is being punished twice for the same offense. It is disingenuous to suggest the contrary.

Neal Roth testified that "[possible criminal prosecution] was discussed with Elena and when I was told that the Bar had no intentions of proceeding with any kind of criminal matter, going to the state Attorney's Office or anything of that nature, I trusted that." T. 32. Elena Evans testimony, on the other hand, as to the events surrounding the drafting of the Consent Judgment was vague. In fact, she could not even remember why specific rules were cited in the Consent Judgment, and others were not. T. 45.

The Bar discards the cases cited by Respondent for the proposition that case law does not support the proposition that the appropriate suspension for a Determination of Guilt is an automatic three year suspension. The Bar merely states that these cases "have absolutely no relationship to the explicit requirement of a suspension of a maximum of three (3) years under Rule 3-7.2(h)", without doing any type of analysis.

The Bar attempts to distinguishes The Florida Bar v. Arnold, 767 So.2d 438 (Fla. 2000) by stating that Arnold did receive a three year suspension pursuant to Rule 3-7.2, but the Bar misses the point here. Arnold was convicted in federal court in March of 1993 and entered into a stipulation with the Bar in July 1993 and was suspended. Later on July 25, 1997 his conviction was reversed and a new trial ordered. The Bar then

reinstated him effective December 1997. However, on March 26, 1998 respondent entered a plea of guilty as to Count II of the indictment, and was sentenced to time served. Respondent notified the Bar of the March 26, 1998 conviction and the Bar filed a complaint pursuant to Rule 3-7.2(h) based upon the March 26, 1998 conviction, and sought another three year suspension. This court considered the fact that suspending the respondent again for the same misconduct would be unfair and improper. This court affirmed the Referee's recommendation of a sixty day suspension *nunc pro tunc* to the prior suspension. Similarly, in the instant case, Respondent has already served a three-year suspension for the identical misconduct. If we follow the lead in Arnold, Respondent's suspension, regardless of the length of the suspension, should be *nunc pro tunc* to July 1997 (the beginning of the first suspension). In Arnold this Court reasoned that, "Arnold was in fact suspended from July 1993 to December 1997, and then again from November 1998 until the present, resulting in a total suspension in excess of five years. ***These periods of past suspension for this same conduct together with the extensive mitigation found to exist by the referee provide a basis for us to approve the referee's recommended discipline***." Id. at 2 (Emphasis added). In Arnold the Referee considered twelve separate mitigating factors, but in the instant case, the Referee ignored all mitigating

factors and denied Respondent the opportunity to present evidence and testimony in mitigation. Respondent was denied the opportunity to present mitigation despite the fact that the Bar, the Referee, and Respondent's counsel stipulated at the beginning of the final hearing that consideration of mitigation would take place at another time.

In the case at bar, if the Referee's Report is allowed to stand Respondent will stand suspended in excess of five years for the same conduct. This result is certainly unfair, and improper. This Court has repeatedly elucidated the three purposes of attorney discipline to be fairness to society, fairness to respondent, and to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Cibula, 725 So.2d 360, 363 (Fla. 1998) (quoting The Florida Bar v. Reed, 644 So.2d 1357 (Fla. 1994). The Referee's report is unfair, because it serves no purpose in punishing twice for the same conduct and also denying Respondent a mitigation defense, and it will not be a deterrent, because it will only serve to drive attorneys who are impaired underground and will not encourage them to seek treatment and to re-enter society as productive members.

It is noteworthy that Respondent never lost his civil rights in the criminal matter. Accordingly the provision of Rule 3-7.2(h)(1), which

provides that, "…the suspension imposed…shall remain in effect…until civil rights have been restored…", is inapplicable here.

A closer analysis of Arnold shows that it in fact supports Respondent's position and makes the Bar's position untenable. The holding in Arnold clearly stands for the proposition that a felony conviction need not result in a three year suspension.

In summary, the Bar argues that it can do what it has done because of the rule involving a determination of guilt being filed. There is not argument that the rule does not exist but to apply it where it is based 100% on the underlying conduct which lead to the prior suspension is pure sophistry, illogical and contrary to well reasoned opinions on lawyer discipline.

RESPONDENT HAS BEEN DENIED A HEARING AS TO THE APPROPRIATE PENALTY, AND THE OPPORTUNITY TO PRODUCE MITIGATION TESTIMONY

The Bar maintains that Respondent has cited no portion of Rule 3-7.2 nor any other rule or any case which authorize a "penalty phase" as part of a proceeding pursuant to that rule, and that he has waived the right to present mitigation. This myopic view ignores that the Standards set forth by this Court for imposing Lawyer Discipline and the actual proceedings at trial where Bar Counsel stipulated that Respondent's counsel was reserving his right to present mitigation.

The purpose of the Florida Standards for Imposing Lawyer Sanctions very clearly state that, "These standards are designed for use in imposing a sanction or sanctions ***following*** a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Rules Regulating The Florida Bar." *See* Standard 1.3. (Emphasis added) These Standards which have been adopted by the Board of Governors of The Florida Bar and are part of the Rules Regulating The Florida Bar, approved by this Court, clearly delineate a bifurcated procedure for lawyer

disciplinary proceedings where the first prong is designed for the determination of violation of the rules by clear and convincing evidence. The second prong is reserved for the imposition of sanctions based upon a consideration of several factors set out in the Standards.

Standard 3.0 addresses the second prong. It provides that, "…after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." It is crystal clear, that the Referee did not follow this analysis in rendering her report and therefore her report should not be approved.

The case cited by the Bar for the proposition that Respondent waived the right to present mitigating factors is inapplicable to this case. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981) deals with the issue of whether an appellant on appeal from summary judgment may raise for the first time an affirmative defense to the statute of limitations and have the appellate court remand to the trial court for repleading of the newly asserted defense. That is not the situation here. Respondent did not fail to raise mitigation. In fact there was a stipulation before the trial by the parties that mitigation would be heard at a later hearing. (T.-16). Assuming *arguendo* that Respondent never

preserved the issue of mitigation, the rules still require the referee to consider mitigating factors.

In reviewing a referee's recommendation of discipline, it is ultimately this Court's responsibility to order an appropriate discipline. Therefore it has a broader scope of review for discipline than for findings of fact. *See* The Florida Bar v. Korones, 752 So.2d 586, 589 (Fla. 2000) *citing* The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla. 1989). How then can this Court exercise its responsibility for discipline in this case, when the Referee has denied Respondent the opportunity to present mitigating factors for this court to review?

This Court has always taken this responsibility very seriously. In fact in the case of The Florida Bar v. Marcus, 616 So.2d 975 (Fla. 1993), upon which the Bar relies, this Court remanded the cause to the referee "for the taking of additional evidence relative to the issue of mitigation". Id. at 976. Accordingly, the Bar's argument that Respondent has waived his right to present evidence relative to mitigation is simply not supported by this Court's rules nor by the case law.

TWO SUSPENSIONS RUNNING CONSEQUTIVELY CREATE A HARSH PUNISHMENT

As to this issue the Bar resurrects again its waiver argument, claiming that Respondent waived it because it was not presented to the Referee. Additionally, the Bar asserts that this argument lacks merit because Respondent "plead nolo to two felonies."

The Bar's waiver argument lacks any basis in law or fact. Throughout the opening statement at final hearing Respondent's counsel argued that Hochman had received a three-year suspension pursuant to the Consent Judgment, and to suspend him again for another three years for the same misconduct is unfair. (T.-13-17). Additionally, how could Respondent argue against two consecutive three year suspensions at the final hearing when Respondent did not become aware of the Referee's decision until after the hearing. Accordingly, the issue as to the harshness of the penalty was not waived.

The issue of determining proper discipline can never be waived. While the referee's recommendation for attorney discipline is persuasive, ultimately, it is this Court's responsibility for determining the proper discipline. The Florida Bar v Reed, 644 So.2d 1355, 1357 (Fla. 1994) *citing* The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla. 1989).

The Bar also argues that this punishment was not harsh or unfair because the respondent misappropriated client funds and since this is one of the most serious ethical violations that an attorney can commit, disbarment is the applicable discipline. *Citing* The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). This statement is inaccurate. The position that this Court has traditionally maintained is that misappropriation of client funds creates a presumption of disbarment. This is a rebuttable presumption that can be overcome with evidence of mitigation, something which the Respondent was denied in the case at Bar. The Supreme Court has recognized on numerous occasions that this presumption can be rebutted by various acts of mitigation. *See* The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989); and The Florida Bar v. Condon, 632 So.2d 70 (Fla. 1994).

The Bar then ends its brief with a non-sequitur by stating that if the "new discipline remains for three (3) years, that is similar to a five (5) year disbarment when added to his previous consent agreement." This statement defies logic, as well as the Florida Standards for Imposing Lawyer Sanctions. See Standards 2.2 and 2.3. It appears that the Bar is trying to back itself into some sort of rationale for the two consecutive three (3) years suspension by intimating that since misappropriation of client funds mandates disbarment (incorrect statement of the law) then we should simply

look at the two three (3) year consecutive suspensions as a five year disbarment, and thus ignore the rule which states that, "No suspension shall be ordered for a specific period of time in excess of three (3) years". See Standard 2.3.

By raising the issue of disbarment in its brief it can be inferred that the Bar now wishes to go behind the original suspension and turn it into a disbarment contrary to what they originally agreed.

CONCLUSION

Based upon the forgoing reasons and citations of authority,

Respondent submits that the Referee's report should not be approved.

Respectfully submitted,

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RICHARD B. MARX
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the Respondent's Reply Brief has been sent by regular U.S. Mail to Thomas D. Hall, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by 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 December, 2000.

RICHARD B. MARX
Attorney for Respondent
66 West Flagler Street
Second Floor
Miami, Florida 33130
Tel. (305) 579-9060
Fax (305) 377-0503
FBN 051075