IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC04-1019
[TFB Case No. 2004-31,883(19B)(CFC)]

v.

MARC B. COHEN,

Respondent.
_____/

THE FLORIDA BAR'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 hearing held on January 21, 2005, shall be referred to as "T" followed by the cited page number.

The Report of Referee dated March 3, 2005, 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 "B-Ex." followed by the exhibit number.

STATEMENT OF THE CASE

On June 21, 2004, The Florida Bar filed its Notice of Determination or Judgment of Guilt citing respondent's May 19, 2004 plea to a felony marijuana possession charge and five misdemeanor counts of driving under the influence, possession of drug paraphernalia, fleeing and eluding officers, resisting arrest without violence and reckless driving.

On June 29, 2004, respondent filed a Petition to Stay Felony Suspension and Motion to Appoint Referee. The Bar filed its response on July 12, 2004. On September 10, 2004, this Court issued an order referring this matter to a referee for hearing. On September 17, 2004, The Honorable Brandt C. Downey, III was appointed as referee, and he conducted a hearing on January 21, 2005.

The referee entered his report on March 3, 2005, finding that pursuant to Rule Regulating The Florida Bar 3-7.2(b), the judgment pertaining to respondent's felony plea is "conclusive proof of guilt of the criminal offense(s) charged for the purposes of [the disciplinary] rules." The referee recommended that respondent be placed on probation for a period of three years during which respondent shall remain in compliance with his Florida Lawyers Assistance, Inc. contract, he shall completely abstain from alcohol and be tested for alcohol as well as any other controlled substance not otherwise prescribed, and he shall be required to make 12

speaking engagements per year of probation with regard to his mental health, substance abuse and criminal acts.

The Board of Governors of The Florida Bar considered the report of referee at its April 2005 meeting and voted to seek enhancement of the discipline to a 90-day suspension (with credit for 30 days that respondent served in jail) and a three year period of probation. The Bar then filed its Petition for Review on April 14, 2005.

STATEMENT OF THE FACTS

On August 11, 2002, respondent was arrested in Martin County, Florida, and he was subsequently charged with felony counts of fleeing and eluding police, leaving the scene of an accident with injuries, resisting arrest with violence, and possession of a controlled substance (B-Ex. 2). Respondent was also charged with misdemeanor counts of reckless driving, driving while under the influence of alcohol, two counts of causing property damage while under the influence, and possession of drug paraphernalia (B-Ex. 2).

Prior to his arrest, respondent was driving in the wrong direction on Interstate 95 at 90 miles an hour (T p. 140, B-Ex. 2). The trooper activated his blue lights and sirens and attempted to overtake respondent's vehicle (T p. 140, B-Ex. 2). Respondent continued driving, and an oncoming car was forced to swerve to avoid being hit (T p. 141, B-Ex. 2). The oncoming car struck another vehicle, and then hit a cement barrier (T p. 141, B-Ex. 2). After respondent came to a stop and exited his vehicle, he failed to respond to the trooper's repeated commands to stop or turn around (T p. 142, B-Ex. 2). The trooper drew his gun when he noticed respondent reaching into his pocket (T p. 142, B-Ex. 2). Respondent had to be forcefully restrained, and he refused to take a breath test (T pp. 142, 144, B-Ex. 2). A search of respondent's vehicle revealed 71 grams of marijuana, a pipe, and an extensive

amount of drug paraphernalia (T pp. 136, 143, B-Ex. 2). The drug paraphernalia included about 30 packs of rolling papers, several pipes, screens, pipe cleaners, film cases with seeds in them, rolling machines, more than 50 empty plastic bags, and the plastic bags containing marijuana (T p. 145).

On May 19, 2004, respondent entered a plea of nolo contendere to a felony marijuana possession charge and five misdemeanor counts of driving under the influence, possession of drug paraphernalia, fleeing and eluding officers, resisting arrest without violence, and reckless driving (ROR p. A1, T p. 7). On May 24, 2004, the Honorable Burton C. Conner entered an order adjudging respondent guilty of driving under the influence and withholding adjudication on the remaining charges including the felony charge of possessing more than 20 grams of marijuana (ROR p. A2, T p. 7). Judge Conner sentenced respondent to 30 days in jail and 1 year drug offender probation followed by 2 years of probation (ROR p. A2, T p. 8). Respondent was also required to perform 100 hours of free legal services, 50 hours of community service, pay fines, and relinquish his driver's license for six months (ROR p. A2, T p. 8). Respondent entered into a contract with Florida Lawyers Assistance, Inc. shortly after his arrest, and he has been in compliance (ROR p. A2, T p. 62).

SUMMARY OF THE ARGUMENT

The discipline recommended by the referee, a three year period of probation, is insufficient considering the serious nature of respondent's misconduct. There is no relevant case law to support less than a 90-day suspension when an attorney has pled to any crime or offense that is a felony. The cases cited by the referee to support his recommendation of probation involve misdemeanor criminal conduct, and these cases are not applicable to respondent's fact pattern. Furthermore, the Standards for Imposing Lawyer Sanctions in Drug Cases support a 90-day suspension and a three year period of probation to resolve this matter.

Respondent's criminal conduct did not simply involve the personal use of illegal substances. Respondent also fled from the police, he caused a serious car accident involving injuries, and he resisted arrest. Prior to his arrest, respondent was intoxicated and driving in the wrong direction on Interstate 95 at 90 miles an hour. In its previous decisions, this Court has suspended attorneys for similar criminal misconduct and has held that attorneys are required to conduct themselves in accordance with the law. Respondent's misconduct reflects negatively on the reputation and dignity of the legal profession, and no less than a 90-day suspension would be appropriate to impress respondent with the seriousness of his misconduct and fulfill the goals of discipline.

ARGUMENT

THE REFEREE'S RECOMMENDED DISCIPLINE, A THREE YEAR PERIOD OF PROBATION, IS INSUFFICIENT CONSIDERING THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT. CASES PREVIOUSLY DECIDED BY THIS COURT TOGETHER WITH THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS, SUPPORT THE IMPOSITION OF A 90-DAY SUSPENSION AND A THREE YEAR PERIOD OF PROBATION.

"When reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order an appropriate sanction." The Florida Bar v. Spear, 887 So.2d 1242, 1246 (Fla. 2004). As a general rule, the Court will not second-guess a referee's recommendation of discipline as long as the discipline is authorized under the Florida Standards for Imposing Lawyer Sanctions and has a reasonable basis in existing case law. Id. at 1246. The Bar maintains that the discipline recommended by the referee, a three year period of probation, is not supported by the existing case law or the Florida Standards for Imposing Lawyer Sanctions.

A three year probationary term, without suspension, is not consistent with the disposition of other similar cases, especially considering the egregious circumstances concerning respondent's criminal misconduct. A judgment must be fair to society, fair to the respondent, and severe enough to deter others who may be

tempted to become involved in like violations. Spear 887 So.2d at 1246, citing The Florida Bar v. Lord, 433 So.2d. 983, 986 (Fla. 1983). A suspension of no less than 90-days would sufficiently address respondent's misconduct and act as an effective deterrent.

In The Florida Bar v. Weintraub, 528 So.2d 367 (Fla. 1988), an attorney received a 90-day suspension and a two year period of probation for illegal possession and delivery of cocaine. The attorney pled nolo contendere to a charge of delivery of cocaine, and adjudication of guilt was withheld. The referee rejected Weintraub's recommendation that he receive a private reprimand coupled with a period of probation for the following reasons: 1) such a disciplinary measure was "far too lenient for a knowing and intentional commission of a crime by an officer of the court;" 2) Weintraub "took no steps to disengage himself from illegal drugs until after his apprehension;" and 3) such a disciplinary measure would not serve as an adequate deterrent to other members of the Bar from "engaging in or contemplating engaging in illegal drug activities." Id. at 369. This Court approved the referee's report and recommendation as to the appropriate discipline. The referee's reasoning in Weintraub proves particularly instructive to the instant case, and this Court should likewise recommend that respondent receive a 90-day suspension.

Similarly, in The Florida Bar v. Temmer, 632 So.2d 1359 (Fla. 1994), an attorney received a 90-day suspension for possession of cocaine. Like respondent and the attorney in Weintraub, Temmer had no prior disciplinary record, she sought professional assistance for her drug use, and her competence to practice law was not at issue.

In his report, the referee cites several cases which are readily distinguishable from respondent's fact pattern. The drug and alcohol abuse in The Florida Bar v. Blau, 630 So.2d 1085 (Fla. 1994), The Florida Bar v. Dubbeld, 594 So.2d 735 (Fla. 1992), The Florida Bar v. Allen, 518 So.2d 916 (Fla. 1988), and The Florida Bar v. Fields, 520 So.2d 272 (Fla. 1988) did not result in felony charges, and the criminal misconduct detailed in the aforementioned cases was far less egregious than respondent's conduct. In the instant matter, respondent was charged with multiple felony and misdemeanor counts (B-Ex. 2). Respondent was driving under the influence of alcohol, he fled from the police, he caused a serious car accident involving injuries, he resisted arrest, and he possessed over twenty grams of marijuana and an extensive amount of drug paraphernalia (T pp. 133, 140-145, B-Ex. 2).

It should not be ignored that this Court has approved discipline greater than a 90-day suspension for criminal behavior similar to respondent's misconduct. In

The Florida Bar v. Thompson, 500 So.2d 1335 (Fla. 1987), an attorney was suspended for 91-days after pleading no contest to possession of cocaine, possession of a controlled substance, disorderly intoxication, and leaving the scene of an accident. Like respondent, Thompson was implicated in an automobile accident. A search of his car revealed a small glass vial containing cocaine, a spoon, and a pill bottle containing Darvon, a controlled substance. Rather than resisting arrest as respondent did, Thompson apparently feigned unconsciousness in order to be taken to the hospital rather than to jail. Id. at 1335.

In The Florida Bar v. Finkelstein, 522 So.2d 372 (Fla. 1988), this Court accepted the attorney's consent judgment for a one-year suspension after he pled nolo contendere to felony charges of possession of illegal drugs and the misdemeanor of driving under the influence. Adjudication of guilt was withheld on the felony charges, and Finkelstein was placed on probation for five years. This Court also accepted a consent judgment for a one-year suspension in The Florida Bar v. Schram, 355 So.2d 788 (Fla. 1978). Schram admitted being adjudicated guilty of misdemeanor possession of drug paraphernalia and admitted guilt to a felony quantity of marijuana, for which adjudication was withheld.

Since the referee found that respondent has proven rehabilitation (ROR p. A9), a suspension exceeding 90 days may not be necessary in this matter. Despite

the evidence of rehabilitation, there is still no reasonable basis in existing case law to support less than a 90-day suspension for respondent's criminal misconduct.

A 90-day suspension with a three year period of probation is also supported by the Florida Standards for Imposing Lawyer Sanctions in Drug Cases, as outlined by the referee. In his report, the referee considered Standard 10.3, which provides:

> **10.3** Absent the existence of aggravating factors, the appropriate discipline for an attorney found guilty of felonious conduct as defined by Florida state law involving the personal use and/or possession of a controlled substance who has sought and obtained assistance from F.L.A., Inc., or a treatment program approved by F.L.A., Inc., as described in paragraph one above, would be as follows:
>
> a. A suspension from the practice of law for a period of 91 days or 90 days if rehabilitation has been proven; and
>
> b. A three-year period of probation, subject to possible early termination or extension of said probation, with a condition that the attorney enter into a rehabilitation contract with F.L.A., Inc. prior to reinstatement.
>
> (Fla. Stds. Imposing Law. Sancs. 10.3, ROR pp. A8-A9).

The referee determined that since respondent has established rehabilitation, the presumptive sanction is a 90-day suspension (ROR p. A9). However, the referee found that "the extraordinary showing of mitigating circumstances and the absence of any aggravating factors, justifies a reduction of this sanction" (ROR p. A9). Although the referee found no aggravation, the Standards for Imposing

Lawyer Sanctions in Drug Cases specifically provide that a 90-day suspension is appropriate "*absent the existence of aggravating factors*." (emphasis added) Fla. Stds. Imposing Law. Sancs. 10.3.

Furthermore, the Bar is not disputing the referee's finding that respondent has shown rehabilitation. The Bar is challenging the referee's recommendation that respondent's misconduct merely warrants probation, even though the Standards for Imposing Lawyer Sanctions in Drug Cases expressly call for a 90-day suspension. When approving a 90-day suspension for drug related misconduct in Temmer, this Court specifically considered Standard 10.3(a) (suspension for 90 days if rehabilitation has been proven). 632 So.2d at 1360.

In mitigation, the referee found that "Respondent's disciplinary proceeding concerns Respondent's criminal conduct and does not relate to the practice of law" (ROR p. A6). The Bar contends that respondent's actions do not comport with the high standard of conduct of those who have the privilege of holding a bar license and who have sworn, as members of the Bar, to uphold the law. In Weintraub, this Court approved the referee's report which noted that "[a]ttorneys are officers of the court and as such are expected by the bar, the bench and public to conduct themselves in accordance with the law." 528 So.2d at 369.

In recommending the disciplinary sanction of probation, the referee stated:

> We could, I guess, go through the charade in my opinion of saying that he's suspended for 30 days and give him credit for the 30 days he spent in jail, but in my mind it is just that. He did the time. Nobody - - you know, it's not contested that he spent, you know, 28 days in jail and then sat in his office for another three without practicing. Yes. You know his name is on the letterhead and his name was on the door, and his name was still on the bank accounts, but, you know, I'm not going to particularly worry about that. I think that three years of continued supervision by the Bar in my mind will be sufficient for him (T p. 167).

The Bar recognizes that respondent spent 30 days in jail in regard to his criminal case; however, "[d]isciplinary proceedings are not concerned with the issues addressed in criminal or civil proceedings. Rather disciplinary proceedings are concerned with violations of ethical responsibilities imposed on an attorney as a member of The Florida Bar." The Florida Bar v. Garland, 651 So.2d 1182, 1183 (Fla. 1995), citing The Florida Bar v. Swickle, 589 So.2d 901, 905 (Fla. 1991). The Bar submits that the Rules Regulating The Florida Bar allow an attorney to be disciplined for criminal conduct regardless of whether the act was committed in the course of the attorney's relations as an attorney (Rule 3-4.3) and regardless of whether the attorney has been tried, acquitted, or convicted in a court for the alleged criminal offense (Rule 3-4.4). Indeed, this Court stated that "[i]n a case resulting from a criminal conviction, discipline is imposed in addition to the criminal penalty already exacted in the criminal case." The Florida Bar v. Hellinger, 620 So.2d 993,

996 (Fla. 1993).

Although bar disciplinary proceedings may share some of the same goals as criminal proceedings (punishment, deterrence, protection of society), they do so in the context of enforcing the higher standard of duty and conduct required of those who exercise the privilege of practicing law. The Florida Bar v. Musleh, 453 So.2d 794, 796 (Fla. 1984). The practice of law is a privilege, not a right, and is revocable for cause. Petition of Wolf, 257 So.2d 547, 548 (Fla. 1972). Even when not acting as an attorney, attorneys must "avoid tarnishing the professional image or damaging the public." The Florida Bar v. Della-Donna, 583 So.2d 307, 310 (Fla. 1991), quoting The Florida Bar v. Bennett, 276 So.2d 481, 482 (Fla. 1973). In addition to damaging the professional image of attorneys, respondent's misconduct actually harmed members of the public. While respondent was fleeing from the trooper, an oncoming car was forced to swerve to avoid being hit (T p. 141, B-Ex. 2). The oncoming car struck another vehicle, and then hit a cement barrier (T p. 141, B-Ex. 2). As a result of the crash, both vehicles sustained substantial property damage (B-Ex. 2). Both drivers were subsequently taken to the emergency room (T p. 133). In his testimony, respondent admitted that he had not contacted either victim to apologize for his wrongdoing (T p. 133).

When choosing to increase discipline recommended by a referee, this Court

has stated that "if the discipline does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it." The Florida Bar v. Wilson, 425 So.2d 2, 4 (Fla. 1983). The referee's recommendation of a three year period of probation is disproportionate to the level of respondent's egregious criminal misconduct. The nature of respondent's misconduct reflects adversely on the reputation and dignity of the legal profession and merits no less than a 90-day suspension and a three year period of probation.

CONCLUSION

WHEREFORE, The Florida Bar submits that respondent should be sanctioned to a 90-day suspension (with credit for 30 days that respondent served in jail), a three year period of probation as outlined by the referee, and payment of costs now totaling $1,680.07.

Respectfully submitted,

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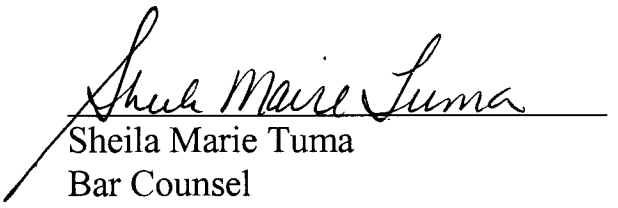

Sheila Marie Tuma
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by First Class Mail to the Clerk of the Court, 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 electronic filing to the Clerk of the Court; a copy of the foregoing has been furnished by First Class Mail to Scott Kevork Tozian, Counsel for Respondent, 109 North Brush Street, Suite 200, Tampa, Florida 33602-4163; and a copy of the foregoing has been furnished by First Class Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this 6th day of May, 2005.

Respectfully submitted,

Sheila Marie Tuma

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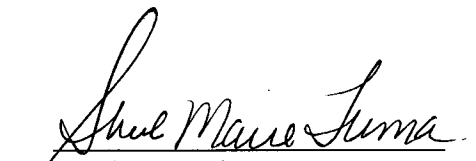
CERTIFICATE OF TYPE, SIZE AND STYLE

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font.



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APPENDIX TO COMPLAINANT'S BRIEF

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