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 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 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 to the Initial Brief, (ROR-A____)

The Bar's exhibits will be referred to as "B-Ex." followed by the exhibit number.

The Respondent's Answer Brief shall be referred to as "A.B." followed by the cited page number.

ARGUMENT

I.

RESPONDENT'S MITIGATION DOES NOT OVERCOME THE IMPOSITION OF AT LEAST A 90-DAY SUSPENSION AND A THREE YEAR PERIOD OF PROBATION.

While the Bar has considered the mitigating circumstances, it must also consider the totality of the case. Respondent's mitigation does not completely overcome the serious nature of his criminal conduct. In his Answer Brief, respondent states that the Bar is placing too much emphasis on respondent's determination of guilt (A.B. p. 23). Respondent also asserts that the "distinction between felony drug possession and misdemeanor drug possession can be artificial if both involve personal use" (A.B. p. 24). Despite evidence that respondent's misconduct is decidedly mitigated, the complete record should not be ignored. The record shows that respondent entered a nolo contendere felony plea to possession of more than 20 grams of marijuana, and a search of respondent's vehicle revealed 71 grams of marijuana (ROR p. A1, T pp. 7, 136, B-Ex. 2). Seventy-one grams of marijuana is more than triple the amount of marijuana required for a misdemeanor possession charge. The Bar submits that respondent's felony plea should be given significant consideration in determining the appropriate discipline.

In assessing his disciplinary recommendation of probation, the referee relied

on Standard 10.3 of the Florida Standards for Imposing Lawyer Sanctions in Drug Cases (ROR pp. A8-A9). As respondent states in his Answer Brief, Standard 10.0 recognizes that the sanction for felony personal drug use depends on the application of mitigating and aggravating circumstances (A.B. p. 20). The commentary to Standard 10.0 also states, "[a] lawyer engaging in misdemeanor or felonious conduct, involving controlled substances, *will be suspended from the practice of law. The length of the suspension may be influenced by mitigating and/or aggravating factors*." (emphasis added) The Florida Bar, Florida Standards for Imposing Lawyer Sanctions, Aug. 2001 at 53. Despite the mitigating factors present in this case, the Bar maintains that a suspension is warranted when a lawyer engages in felonious conduct involving controlled substances. Moreover, a suspension in the present case provides uniformity with the Standards and case law. The Standards are designed to promote "consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions." Fla. Stds. Imposing Law. Sancs. 1.3.

In his Answer Brief, respondent mistakenly asserts that The Florida Bar is urging this Court to "simply ignore the mitigating circumstances and automatically impose a ninety day suspension, with credit for Respondent's thirty day jail sentence" (A.B. p. 22). Instead, it is precisely the consideration of respondent's

mitigation that motivates the Bar to recommend a departure from the three year period of suspension normally prescribed upon a determination of guilt. See R. Regulating The Fla. Bar 3-7.2(h)(1); and The Florida Bar v. Hochman, 815 So.2d 624 (Fla. 2002). Although the Bar considers respondent's conduct to be egregious, bar counsel did emphasize to the referee that the Florida Standards for Imposing Lawyer Sanctions allow the court to consider mitigation for downward departure (T p. 162). Rather than disregarding the mitigating factors, the Bar has fully considered the mitigating circumstances in making its disciplinary recommendation.

Along with his argument focusing on the existence of substantial mitigation, respondent repeatedly states in his Answer Brief that no further suspension is warranted (A.B. pp. 10, 13, 14, 15, 26, 35, 38, 40). Respondent implies that his jail term effectively suspended him since he was precluded from practicing law; however, it is important to note that respondent's 30-day jail sentence was not a suspension from the practice of law. While respondent was incarcerated, he remained on his cases as attorney of record, his name remained on his law firm letterhead, an associate signed pleadings on respondent's behalf, and respondent's clients were billed for his legal work (T pp. 88-91). In addition, respondent avoided the suspension prescribed by Rule 3-7.2 with his filing of a Petition to Stay Felony Suspension and Motion to Appoint Referee.

Respondent also argues that his misconduct requires a more lenient sanction because it was directly related to his severe chemical dependency. This Court has held that "while a substance abuse problem may explain misconduct, it does not excuse it." The Florida Bar v. Wolfe, 759 So.2d 639, 644 (Fla. 2000), citing The Florida Bar v. Golub, 550 So.2d 455, 456 (Fla. 1989). The existence of multiple mitigating factors does not excuse respondent's criminal misconduct, and the Bar would be seeking a more severe sanction absent respondent's mitigation. Furthermore, the referee's recommended sanction of probation does not comply with the Florida Standards for Imposing Lawyer Sanctions, and it should not be established as precedent in any case involving felony criminal conduct.

II.

THE CASE LAW DOES NOT SUPPORT PROBATION ALONE.

Despite arguing that the referee's recommended sanction has a reasonable basis in existing case law, respondent has failed to cite any cases that support less than a 90-day suspension when an attorney has pled to any crime or offense that is a felony. Rather, respondent cites cases which are readily distinguishable from his fact pattern.

Respondent discusses several cases in which this Court imposed public reprimands for misdemeanor criminal conduct. The drug and alcohol abuse

detailed in The Florida Bar v. Fields, 520 So.2d 272 (Fla. 1988), The Florida Bar v. Allen, 518 So.2d 916 (Fla. 1988), The Florida Bar v. Dubbeld, 594 So.2d 735 (Fla. 1992), and The Florida Bar v. Pascoe, 526 So.2d 912 (Fla. 1988), did not result in any felony charges. The criminal misconduct detailed in the aforementioned cases was also far less egregious than respondent's conduct, as previously discussed in the Bar's Initial Brief. Even though respondent's felony criminal conduct is more egregious than the conduct detailed in Fields, Allen, Dubbeld, and Pascoe, the attorneys in these cases each received a greater disciplinary sanction than the referee has recommended for respondent in this matter.

In support of the referee's recommendation of probation, respondent also discusses The Florida Bar v. Gaines, Case No. SC03-790 and The Florida Bar v. McLennon, Case No. SC04-521. These cases were settled through consent judgments, and respondent contends that they may provide persuasive authority in assigning an appropriate sanction.

In Gaines, the attorney received a 60-day suspension and a three year period of probation after stipulating to possessing a misdemeanor amount of marijuana and possession of heroin (ROR p. A12). Unlike respondent, Gaines's drug charges were dismissed following a successful motion to suppress, and Gaines was not charged with a felony (ROR p. A12). Gaines was suspended from the practice of

law despite his proof of rehabilitation and lack of disciplinary history or criminal history (ROR p. A12).

In McLennon, the attorney received a 30-day suspension followed by a two year period of conditional probation (ROR p. A12). McLennon was arrested and charged with driving under the influence, possession of a misdemeanor amount of marijuana, possession of drug paraphernalia, and a second driving under the influence with property damage (ROR p. A12). As in Gaines, McLennon was suspended for engaging in misdemeanor criminal conduct.

Unlike Fields, Allen, Dubbeld, Pascoe, Gaines, and McLennon, respondent was charged with multiple felony and misdemeanor counts, and he 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). Respondent's criminal misconduct is more serious than the conduct detailed in the foregoing cases, and the case law dictates that respondent should be suspended from the practice of law.

The bar concedes to the absence of case law directly on point but maintains that The Florida Bar v. Weintraub, 528 So.2d 367 (Fla. 1988) and The Florida Bar v. Temmer, 632 So.2d 1359 (Fla. 1994) are instructive in this matter. Weintraub

and Temmer both received 90-day suspensions for drug related misconduct. In Weintraub, the attorney pled nolo contendere to a felony charge of delivery of cocaine, and adjudication of guilt was withheld. When approving the 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. Similar to respondent, Weintraub and Temmer had no prior disciplinary records, they sought professional assistance for their drug use, and their competence to practice law was not at issue.

There is simply 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. Even considering respondent's mitigating factors, the referee's recommended sanction of probation is not supported by the existing case law. More importantly, probation alone is "susceptible of being viewed by the public as a slap on the wrist when the gravity of the offense calls out for a more severe discipline." The Florida Bar v. Wilson, 425 So.2d 2, 3 (Fla. 1983). 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.

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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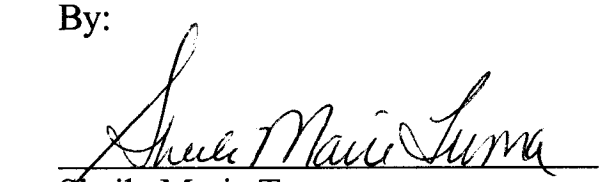

Sheila Marie Tuma
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Reply Brief 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 14th day of July, 2005.

Respectfully submitted,

Sheila Marie Tuma

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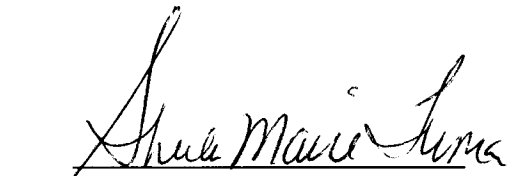
CERTIFICATE OF TYPE, SIZE AND STYLE

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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