IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

NOAH DANIEL LIBERMAN,

Respondent.
_____/

Supreme Court Case
No. SC06-1874

The Florida Bar File
No. 2007-70,245(11N)

THE FLORIDA BAR'S AMENDED ANSWER BRIEF and INITIAL BRIEF ON CROSS APPEAL

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

OTHER AUTHORITIES:

Rules Regulating The Florida Bar:

Florida Standards for Imposing Lawyer Sanctions:

SYMBOLS AND REFERENCES

For the purpose of this brief, Noah Daniel Liberman will be referred to as "Respondent", The Florida Bar will be referred to as "The Florida Bar" or the "Bar" and, the referee will be referred to as the "Referee". Additionally, the Rules Regulating The Florida Bar will be referred to as the "Rules" and the Florida Standards for Imposing Lawyer Sanctions will be referred to as the "Standards".

References to the Initial Report of Referee will be by the symbol "ROR" and the Supplemental Report of Referee will be by the symbol **"**SROR**"** followed by the corresponding page number(s). References to the transcript of the hearing held on January 10, 2008 will be by the symbol "HSROR" followed by the corresponding page number(s). Finally, any references to Respondent's Second Amended Initial Brief on Appeal will be by the symbol "RIB**"** followed by the corresponding page number(s).

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar accepts the Respondent's statement of the case and of the facts with the following additions or modifications.

The Bar filed its Complaint on September 22, 2006 **(SROR pg. 1)**.

As to the first full paragraph on the third page, the Bar would agree that the Referee found this Court's December 21, 2007, order to be tersely worded, however, the remainder of that paragraph would constitute argument and is not appropriate for this section (**RIB pg. 3**).

As to the first full paragraph on the fourth page, the only evidence placed into the record by the Bar was Respondent's judgment and conviction for drug trafficking (**RIB pg. 4; HSROR pgs. 12-13, lines 22-25 and 1-9, respectively**).

Testimony of Respondent

Respondent testified that he thought he first began using drugs when he was 13 or 14 (**HSROR pg. 16, lines 9-10**). Respondent did not testify as to his use of LSD (**RIB pg. 5; HSROR pgs. 15-46**). He testified that, "[T]he four months before I got arrested, I was using crystal meth every day." (**HSROR pg. 20, lines 16-18**). He did not testify that he used said drug multiple times a day. (**RIB pg. 5; HSROR pgs. 15-46**).

Also, Respondent did not testify that,

It was the police, through the confidential informants, who requested

> the amount of drugs that pushed this case into a trafficking volume and, but for the requests of the confidential informant and the Respondent's seriously impaired condition, the Respondent would not have had a trafficking amount of drugs in his possession at the time of the arrest (**RIB pg. 5; HSROR pgs. 15-46**).

Although the record contains testimony from Respondent as to the circumstances leading up to his arrest, the interpretation of said testimony constitutes argument and should not properly be included in this section.

Respondent did testify that, "[I] was selling drugs to friends in college." (**HSROR pg. 42, line 22)**. Furthermore, he admitted that he did not disclose his drug addiction during the admission process to the Bar (**HSROR pg. 44, lines 1-6**).[1]

Testimony of Lisa Lehner, Esq.

In regards to Respondent's past behavior, while Ms. Lehner was clearly supportive of Respondent, she did not testify that, "[T]hese acts could never happen again." nor did she testify that, "[S]he would hire the Respondent if, or when, his license is reinstated." (**RIB pgs. 6-7; HSROR pgs. 54-66)**.

Testimony of Andres Rivero, Esq.

In regards to Respondent's past behavior, while Mr. Rivero was clearly supportive of Respondent, he did not testify that he "[D]oes not believe that this

[1] Beyond Respondent's testimony on pages 15-46 of the HSROR, he also made statements on the record on the following pages: 3, 59, 67, 103, 112, 122-123, 136-138, 141, 171, 175-180.

could ever happen again…" (**RIB pg. 7; HSROR pgs. 68-81)**.

Testimony of John Eustace, M.D.

As to the effects that ecstasy and methamphetamine have on the brain, Dr. Eustace testified:

> In addition to the systemic physical effects of cardiovascular vasal constriction, our primary interest in that drug as all the mood-altering drugs is the effect of the brain, and there are five major functions that methamphetamine particularly, but others including alcohol, can affect, and number one is judgment, especially in the young brain; second is affect, the mood of the person; memory, especially for harmful effects; orientation meaning the goal and pathway of the patient's life becomes diverted; and I think that the final one is the loss of a value system (**HSROR pgs. 86-87, lines 21-25 and 1-9, respectively)**.

Dr. Eustace diagnosed Respondent as being methamphetamine dependent (**HSROR pgs. 91-92, lines 19-25 and 1-6, respectively**).

While Dr. Eustace did testify that Respondent's prognosis is excellent he did not introduce any documents from Florida Lawyers Assistance, Inc. ("FLA") verifying Respondent's compliance with his FLA contract. Additionally, he did not testify that Respondent has tested negative for drugs at all times nor did he testify, that within a reasonable degree of medical certainty, Respondent will not use drugs again and will never repeat these acts. Finally, Dr. Eustace did not testify that Respondent has 3 years and 9 months of sobriety and is in full remission (**RIB pgs. 7-8; HSROR pgs. 81-103**). Dr. Eustace did testify that the Bar, the Court, and the

public can have some comfort that Respondent won't repeat his behavior (**HSROR pg. 95, lines 22-25**).

Testimony of Ronald Lowy, Esq.

In regards to Respondent's past behavior, while Mr. Lowy was clearly supportive of Respondent, he did not testify that Respondent would never engage in such behavior again (**RIB pg. 9; HSROR pgs. 113-122)**.

Myer J. Cohen – Affidavit

Respondent moved the affidavit of Myer J. Cohen, the Executive Director for FLA (dated August 31, 2007), into evidence (**HSROR pgs. 122-123, lines 18-25 and lines 1-4, respectively**). Mr. Cohen stated that:

> [M]r. Liberman first contacted FLA in 2004 after his arrest . . . Since his initial contact, Mr. Liberman has been candid and willing to follow FLA suggestions and recommendations. He self-reported his arrest to The Florida Bar, despite the fact that bar rules only required reporting upon *conviction* of a felony at that time . . . .
>
> Since entering into the FLA contract, Mr. Liberman's compliance has been exemplary. He has attended the meetings called for in the contract, has met with his monitor as often or more than required, has appeared for all random tests . . . within the requisite time period with all results being negative for controlled substances, and successfully completed The Village outpatient program as called for.
>
> Based on the above, it is the opinion of Florida Lawyers Assistance, Inc. that Mr. Liberman has addressed the behavior which led to his arrest, and that so long as he maintains the recovery and support system he has instituted, he is unlikely to repeat any similar behavior…..

Testimony of Guelsy Herrera

Ms. Herrera has been a community control officer for nine years (**HSROR pgs. 124 and 136, lines 17–19 and lines 9-11, respectively**).

Testimony of Jane Gross

While supportive of Respondent, Ms. Gross did not testify as to whether she believed that Respondent would ever use drugs again (**RIB pgs. 9-10; HSROR pgs. 138-145**).

Additionally, Respondent placed a composite exhibit, referred to as the mitigation package, into evidence (**HSROR pgs. 145-147)**.

Also, the following discussion was had on the record as to documents copied from the file of the Miami-Dade State Attorney's Office in relation to their investigation of Respondent's criminal case:

> The Court: Does anyone have a copy of the arrest affidavit or the arrest warrant?
> Bar counsel: I think I have it, your Honor. I have the State Attorney's file here.
> The Court: Okay. The old A-form? This is as illegible as they always were. Okay. I'm going to take this in also and make it a composite just so the record is complete if there's a question later. Okay. Mr. Baron?
> (**HSROR pg. 14, lines 4-13**).

There was no testimony taken as to Respondent's position in relation to the allegations contained in the state attorney's file (**HSROR pgs. 15-46**).

Finally, footnote number 3 (**RIB pg. 10**) and the second full paragraph on the last page of the statement of the case and of the facts (**RIB pg. 11**) are purely argument and do not belong in this section.

SUMMARY OF THE ARGUMENT

After a thorough review of the facts and mitigation in the underlying case, as well as relevant case law, The Florida Bar and Respondent entered into a consent judgment and submitted it to the Referee. The Referee accepted the consent judgment for a three year suspension and filed her ROR on October 1, 2007. Subsequently, this Court entered its order of December 21, 2007, remanding the case back to the Referee for further proceedings and also requesting a supplemental report. On January 10, 2008, the Referee held a hearing and on February 25, 2008, filed her SROR recommending that this Court accept the consent judgment, but nonetheless disbar Respondent.

The findings of fact in the SROR constitute a violation of Respondent's due process rights as they contained findings that included uncharged conduct that was not within the scope of the Bar's allegations. Said findings should not have been considered for the purposes of finding either a rule violation or for the purposes of aggravation as Respondent was never given an opportunity to respond to said findings. As a result of the violation of Respondent's due process rights, the Referee found 9.22(d) from the Standards in aggravation which contributed to her recommendation of disbarment.

The Referee's SROR is in violation of rule 3-7.9 of the Rules as it both recommends acceptance of the consent judgment while also changing the

disciplinary terms of said document.

Finally, the Referee erred in her recommendation of disbarment. Respondent's felony conviction (which did not involve the practice of law) was a result of his severe drug addiction. Although disbarment is the presumed penalty for a felony conviction, a three year suspension is appropriate here due to the overwhelming applicable mitigating factors (including cooperative behavior throughout his criminal proceedings and bar proceedings) and the limited aggravating factors.

ARGUMENT I

THE FINDINGS OF FACT IN THE SUPPLEMENTAL REPORT OF REFEREE CONSTITUTE A VIOLATION OF RESPONDENT'S DUE PROCESS RIGHTS AS THEY CONTAINED FINDINGS THAT INCLUDED UNCHARGED CONDUCT THAT WAS NOT WITHIN THE SCOPE OF THE BAR'S ALLEGATIONS. SAID FINDINGS SHOULD NOT HAVE BEEN CONSIDERED FOR THE PURPOSES OF FINDING EITHER A RULE VIOLATION OR FOR THE PURPOSES OF AGGRAVATION AS RESPONDENT WAS NEVER GIVEN AN OPPORTUNITY TO RESPOND TO SAID FINDINGS.

The Bar adopts Respondent's arguments related to due process (**RIB pgs. 13-22**) with the following additions or modifications.

Respondent contends that the state attorney's file was not listed or provided to Respondent before the hearing in discovery. It should be noted that Respondent did not make any discovery requests of the Bar during these proceedings. It is likely that Respondent did not make such requests since it was always his intention to resolve this matter prior to a final hearing.

Additionally, Respondent contends that the contents of the state attorney's file could not be admissible in a bar proceeding. While this point is not relevant due to the clear due process violations contained herein, the Bar would note that the contents of said file may have been admissible. "[A] referee has wide latitude to admit or exclude evidence . . . and may consider any relevant evidence, including hearsay . . . . " The Florida Bar v. Tobkin, 944 So.2d 219, 224 (Fla. 2006) (citations

omitted). Accordingly, if a respondent is given due process, it is not essential for the Bar or the respondent to admit evidence into the record for a referee to consider information in his/her decision. Therefore, in general, the Bar is not in agreement that a state attorney's file (related to a Bar proceeding based on a criminal matter) would be wholly unreliable and inadmissible.

Respondent notes that the parties were not advised that the January 10, 2008 hearing was to be a trial/final hearing. While the Bar was also under the belief that pursuant to this Court's December 21, 2007, order said hearing was strictly for the purposes of providing evidence to support the consent judgment, the notice for this hearing was entitled "Notice of Final Hearing".

Respondent notes that the Referee improperly made a reference in the findings of fact to his importation of drugs from New York. Actually, Respondent testified to said importation at the January 10, 2008, hearing (**HSROR pg. 44, lines 7-15**). Therefore, Respondent was given an opportunity to be heard as to this particular finding by the Referee.

Finally, the Bar would note that it is not inherently improper for a referee to consider uncharged misconduct. "[S]pecific findings of uncharged conduct and violations of rules not charged in the complaint are permitted where the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint." The Florida Bar v. Fredericks, 731 So.2d 1249, 1253

(Fla. 1999). Additionally, in The Florida Bar v. Batista, 846 So.2d 479 (Fla. 2003), the referee properly refused to consider allegations that were not set forth in the Bar's complaint in finding a new rule violation, but properly considered said information for the purposes of aggravation. Batista can be distinguished from the case at hand since Batista was confronted with the uncharged conduct during the hearing whereas Respondent was not. Therefore, in this case, it was improper for the Referee to consider the uncharged conduct for the purposes of a new rule violation or for the purposes of aggravation.

ARGUMENT II

THE SUPPLEMENTAL REPORT OF REFEREE IS IN VIOLATION OF RULE 3-7.9 OF THE RULES REGULATING THE FLORIDA BAR AS IT BOTH RECOMMENDS ACCEPTANCE OF THE CONSENT JUDGMENT WHILE ALSO CHANGING THE DISCIPLINARY TERMS OF SAID DOCUMENT.

The Bar adopts Respondent's argument related to the Referee's failure to comply with rule 3-7.9 of the Rules (**RIB pgs. 23-25**) in its entirety.

ARGUMENT III

REFEREE'S FINDING OF 9.22(D) OF THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS WAS CLEARLY ERRONEOUS

As to Respondent's argument that the Referee erred in finding aggravating factors 9.22(b), 9.22(d), and 9.22(g) from the Standards (**RIB pgs. 26-31**), the Bar's

position is noted below.

"A referee's findings of mitigation and aggravation are . . . presumptively correct and are upheld unless clearly erroneous or without support in the record." The Florida Bar v. Del Pino, 955 So.2d 556, 560 (Fla. 2007) (citation omitted).

AGGRAVATING FACTORS

In aggravation, the Referee found the following factors from the Standards to be applicable: 9.22(b) (dishonest or selfish motive), 9.22(c) (a pattern of misconduct), 9.22(d) (multiple offenses), and 9.22(g) (refusal to acknowledge wrongful nature of conduct). Respondent contends that the Referee erred in finding 9.22(b), 9.22(d), and 9.22(g). Therefore, only these particular factors are at issue.

While the Bar recognizes that there is some support in the record for 9.22(b), the Bar would note that under the particular circumstances of this case, Respondent's severe drug addiction would serve as an overriding mitigating factor.[2] Additionally, as to 9.22(g), the Bar would acknowledge that there is some support in the record for this finding as well.[3] However, the record also contains ample evidence that Respondent took responsibility for his misdeeds by entering into a

2 Respondent testified that he got drugs for free and liked to be the "center of the party" (**HSROR pgs. 22 and 29, lines 4-19 and lines 4-17, respectively**).

3 Respondent testified that he did not believe that he was a drug trafficker (**HSROR pgs. 22, 34 and 35, lines 16-17, 23-25 and 24-25, respectively**).

plea with the state attorney's office, entering into a consent judgment with the Bar, and by acknowledging responsibility for his misdeeds at the January 10, 2008, hearing.[4]

On the other hand, the Referee's finding of 9.22(d) as an aggravating factor was clearly erroneous. Respondent was only charged with drug trafficking. However, the Referee considered information that was not charged in the Bar proceeding and failed to provide Respondent with due process to address this information. While uncharged information can be considered in aggravation, it could not in this instance as Respondent was not provided with the opportunity to respond to such information in violation of his rights of due process. Accordingly, this led to her clearly erroneous finding of 9.22(d) as an aggravating factor.

ARGUMENT IV

ALTHOUGH DISBARMENT IS THE PRESUMED PENALTY FOR A FELONY CONVICTION, REFEREE ERRED IN RECOMMENDING DISBARMENT RATHER THAN A THREE YEAR SUSPENSION SINCE RESPONDENT OVERCAME PRESUMPTION THROUGH OVERWHELMING MITIGATION EVIDENCE.

The Bar adopts Respondent's arguments that a three year suspension rather

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[4] Respondent testified that he was guilty of selling drugs, and that by statute, he was guilty of drug trafficking (**HSROR pgs. 35 and 36, lines 23-25 and 1-4, respectively**).

than disbarment is the appropriate sanction (**RIB pgs. 32-43**) with the following additions or modifications.

Generally, "[T]his Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions." The Florida Bar v. Greene, 926 So.2d 1195, 1200-1201 (Fla. 2006). Additionally, "[A] referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence." The Florida Bar v. Niles, 644 So.2d 504, 506-507 (Fla. 1994). But, "[U]nlike the referee's findings of fact and conclusions as to guilt, the determination of the appropriate discipline is peculiarly in the province of this Court's authority." The Florida Bar v. O'Connor, 945 So.2d 1113, 1120 (Fla. 2006).

Respondent states that when substantial mitigation is present, a suspension is appropriate for a bar matter based on a felony conviction. It is the Bar's position that a suspension may be appropriate in such a situation, but it depends on the particular circumstances of the case. In the case at hand, the Bar agrees that Respondent's extensive mitigation should overcome the presumption of disbarment. Additionally, the Bar cannot agree with Respondent's generalization that the misappropriation of client funds is more severe misconduct than drug trafficking. Once again, it depends on the particular circumstances of the case.

In Respondent's footnote no. 10, he states that the Bar was particularly persuaded by the state prosecutor and the testimony of Dr. Eustace in its decision that Respondent's mitigation overcame the presumption of disbarment. While the Bar agrees that the prosecutor's deposition testimony was particularly persuasive, that would not also apply to Dr. Eustace. The reason being is that the Bar had not taken Dr. Eustace's deposition prior to the hearing of January 10, 2008. Therefore, the Bar had already agreed to extend its offer of a three year suspension prior to Dr. Eustace's appearance at said hearing.

In support of Respondent's position, the Bar would agree that this Court has made a distinction regarding cases where there are convictions for felony drug offenses involving clients as opposed to those (like that of Respondent) where there is no client involvement.[5]

MITIGATING FACTORS

In mitigation, the Referee found the following factors from the Standards to be applicable: 9.32(d) (timely good faith effort to make restitution or to rectify consequences of misconduct), 9.32(g) (character or reputation), 9.32(h) (physical or mental disability or impairment), 9.32(j) (interim rehabilitation), 9.32(k)

[5] The Florida Bar v. Beasley, 351 So.2d. 959 (Fla. 1977); The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983); The Florida Bar v. Marks, 492 So.2d 1327, (Fla. 1986).

(imposition of other penalties or sanctions), 9.32(l) (remorse), and 11.1 (ongoing supervised rehabilitation by the attorney…).[6] Respondent contends that the Referee erred by not including 9.32(a) (absence of a prior disciplinary record), 9.32(b) (absence of a dishonest or selfish motive), 9.32(e) (full and free disclosure to disciplinary board and cooperative attitude towards proceeding), and 9.32(f) (inexperience in the practice of law). Therefore, only these particular factors are at issue.

In regard to 9.32(a), the Referee acknowledged that Respondent did not have a prior disciplinary record. However, she did not give this factor much weight since Respondent had only been admitted for a brief period of time at the time of his arrest. As the Referee has acknowledged this mitigating factor, it is certainly within her discretion to give it the weight she deems appropriate and her finding is not clearly erroneous.

The Referee's failure to find 9.32(b) as a mitigating factor relates back to her finding of 9.22(b) as an aggravating factor. Since there is some support in the record for the Referee's finding of 9.22(b), it appears that her failure to include 9.32(b) as a mitigating factor would not be clearly erroneous.

As to 9.32(f), the Referee found this inapplicable since Respondent's violation had nothing to do with the practice of law. Once again, while one could

6 The SROR and RIB improperly referenced 9.32(h) (physical or mental disability or impairment) as 9.32(g) (**SROR pg. 11 and RIB pg. 42-43**).

argue that this is an appropriate mitigating factor, it certainly was within the Referee's discretion to disregard this factor as the behavior had no connection with the practice of law. Therefore, the Referee's failure to include 9.32(f) is not clearly erroneous.

On the other hand, the Bar agrees that the Referee erred by not including 9.32(e) as a mitigating factor. From the outset, Respondent was cooperative and candidly disclosed his arrest to the Bar (**HSROR pg. 36, lines 14-24**). On or about October 1, 2007, Respondent entered into a consent judgment in an attempt to resolve these proceedings without the necessity of a final hearing. As an aside, Respondent exhibited a cooperative attitude with the state attorney's office from the commencement of the criminal prosecution and entered a guilty plea to the drug trafficking charge (**HSROR pgs. 104 and 106, lines 11-14 and lines 6-10, respectively**). Additionally, Respondent was willing to provide substantial assistance to the state and did make financial contributions to the arresting agency (**HSROR pgs. 109-110, lines 22-25 and 1-5, respectively**). Every step taken by Respondent during the criminal and bar proceedings evidenced his cooperation.

ARGUMENT V

RESPONDENT'S ADMISSION TO UNCHARGED MISCONDUCT DOES NOT NEGATE SIGNIFICANT EVIDENCE OF MITIGATION.

Respondent's final argument is that his admissions to the Referee of

unknown, uncharged, and undiscoverable acts evidenced his progress in treatment, and therefore, he should not be disbarred (**RIB pgs. 44-45**). In fact, the Referee makes reference to this evidence in context of aggravating factor 9.22(c) (a pattern of misconduct); an aggravator neither Respondent nor the Bar has appealed. Despite the presence of this aggravator, the Bar submits that under the particular circumstances of this case, including the overwhelming mitigation, a three year suspension is the appropriate disposition.

CONCLUSION

In consideration of this Court's broad discretion as to discipline, based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court disregard the Supplemental Report of Referee (filed on February 25, 2008) recommending disbarment and accept the original Report of Referee (filed on October 1, 2007) recommending a three year suspension.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Amended Answer Brief and Initial Brief on Cross Appeal was sent via Federal Express **(tracking no. 809685806266)** to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399; and a true and correct copy was sent via regular U.S. mail to Noah Daniel Liberman, Respondent, c/o Richard Baron, Attorney for Respondent, at 501 Northeast First Avenue, Suite 201, Miami, Florida 33132; and a true and correct copy was sent regular mail to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399; on this _____ day of _____, 2008.

_____

WILLIAM MULLIGAN
Bar Counsel

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

I hereby certify that the Amended 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.

_____

WILLIAM MULLIGAN
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