**IN THE SUPREME COURT OF FLORIDA**
**(Before a Referee)**

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| **THE FLORIDA BAR,** | **SUPREME COURT CASE No.: SC06-1874** |
| **Complainant,** | |
| **v.** | **THE FLORIDA BAR FILE No.: 2007 -70,245 (11N)** |
| **NOAH DANIEL LIBERMAN** | |
| **Respondent,** | |

**__________________________/**

**SUPPLEMENTAL REPORT OF REFEREE**

## I. SUMMARY OF PROCEEDINGS:

The Florida Bar's formal complaint in this cause was filed on or about September 22, 2006. Thereafter, the undersigned was appointed to preside as referee in this proceeding by order of the Chief Judge of the Eleventh Judicial Circuit. During the course of these proceedings, respondent was represented by Richard Baron, Esq. and the Florida Bar was represented by William Mulligan, Esq.

On or about October 1, 2007, pursuant to agreement of the Respondent and the Florida Bar the undersigned referee submitted to this Honorable Court the Unconditional Guilty Plea And Consent Judgment For Discipline, Petition For Approval Of Unconditional Guilty Plea And Consent Judgment For Discipline,

together with miscellaneous pleadings via mail filing, email and diskette. ("Consent Judgment"). The unconditional guilty plea was entered to the complaint as written which charged the Respondent as follows:

> l. Respondent, NOAH DANIEL LIBERMAN, is and at all times hereinafter mentioned, a member of The Florida Bar, albeit suspended from the practice of law by order of the Supreme Court of Florida dated June 2, 2006, and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.
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> 2. On or about March 30, 2006, Respondent was adjudicated guilty of one felony count of Phenethylamine/Ecstasy/Trafficking of 10 Grams or more but less than 200 Grams. (A certified copy of the Judgment and Orders of Supervision in the State of Florida v. Liberman, case no. F04-010724 in the Eleventh Judicial Circuit Court, in and for Miami-Dade County is attached as Composite Exhibit "A").
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> 3. By reason of the foregoing, Respondent violated Rule 3-4.3 (Misconduct and Minor Misconduct) of the Rules of Discipline and Rule 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) of the Rules of Professional Conduct.

In response to the submitted Consent Judgment to the Complaint as written, on December 21, 2007 this Honorable Court responded as follows:

> “Upon consideration of the referee's report and the Unconditional Guilty Plea and Consent Judgment for Discipline filed in the above-styled cause, the case is remanded back to the referee for further proceedings. The referee is to provide a supplemental report that contains factual findings elaborating on Respondent's underlying criminal activities and disciplinary misconduct. The referee should explain why she found trafficking in illegal drugs to be "minor misconduct," and she should provide an analysis as to how a three-year suspension, rather than disbarment, is an appropriate discipline for a felony conviction of illegal drug trafficking. The referee is allowed to and including February 19, 2008, in which to submit a supplemental report consistent with this order.”

In compliance with the mandate the undersigned Referee ordered that a full evidentiary hearing be conducted on January 10, 2008. A transcript of the hearing will be forwarded upon its completion. At the hearing the Referee rescinded the ratification of the agreement between the Florida Bar and the Respondent, and held a hearing ab initio, as though no agreement had been reached between the parties.

The Referee took testimony and evidence, heard argument and reached her own conclusion as to the appropriate discipline to be imposed for the case at hand.

The undersigned referee additionally wishes to clarify at this stage that at no time did the undersigned make any finding of "trafficking in illegal drugs to be 'minor misconduct' ". As stated, the Consent Judgment was submitted pursuant to an unconditional plea of guilty to the Complaint filed by the Florida Bar as written which alleged a violation of Rule 3-4.3 (Misconduct and Minor Misconduct) of the Rules of Discipline, and Rule 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) of the Rules of Professional Conduct. So the record is clear, the undersigned did not, and does not, find the misconduct to be minor, but rather major, and notes that it does violate Rule 3-4.3 which addresses both misconduct and minor misconduct.[1]

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[1] Further, the undersigned Referee could not consider any rule violations not charged. As a new rule violation cannot be considered without adequate notice and attorneys must be given reasonable notice of the charges they face before the referee's hearing on those charges, *a priori*, this Court could not find that the Respondent violated a Rule not charged in the Complaint. See *In re Ruffalo*, 390 U.S. 544 (1968); see also *Florida Bar v. Price*, 478 So. 2d 812 (Fla. 1985) (rejecting, based on due process concerns, a referee's finding that attorney committed perjury during disciplinary proceedings because the conduct was not charged); *Florida Bar v. Vernell*, 721 So. 2d at 705 (Fla. 1998) (similar); *Florida Bar v. Stillman*, 401 So. 2d 1306 (Fla. 1981) (similar). *The Florida Bar v. Batista*, 2003 WL 1883661 (Fla. 2003.)

The pleadings, and all other papers previously filed in this cause which were forwarded to the Supreme Court of Florida and this supplemental report, constitute the entire record.

## II. FINDINGS OF FACT:

**A.** Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of the Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

**B.** Narrative Summary of Case.

On February 16, 2004, Respondent sold 1 gram of methamphetamine in a hand-to-hand sale to a confidential informant (CI) who was working with the Coral Gables Police Department in conjunction with the Miami Beach Police department and the Drug Enforcement Administration (DEA).

On February 24, 2004 the Respondent sold two grams of methamphetamine and 2 M.D.M.A. Ecstasy pills to the same CI in a hand-to-hand transaction.

On March 9, 2004 the Respondent sold 1 gram of Methamphetamine to the same CI in a hand-to-hand sale.

On April 5, 2004 the Respondent sold 2 grams of Methamphetamine to the same CI in a hand-to-hand sale.

All these purchases were made following established police procedures, using marked police department funds. The narcotics all tested positive.

Based on the four sales, a search warrant was obtained for the Respondent's home, and on April 6, 2004, the warrant was executed.

The following items were recovered in the Respondent's home:

Marked U.S. currency in the amount of $300.00.

Unmarked U.S. currency totaling $140.00.

10.9 grams of marijuana.

270 Ecstasy pills, totaling 37.7 grams.

3.3 grams of Crystal Methamphetamine.

1.2 grams of cocaine.

33.5 grams of GHB (date rape drug).

Drug residue, pipes and lighters.

Miscellaneous paperwork and receipts.

Respondent was charged with:

Money Laundering

Possession of Marijuana

Possession of drug paraphernalia

Possession of Ketermine

Trafficking in M.D.M.A. (Ecstasy)

Multiple Counts of drug sales covering the four sales.

On March 30, 2006 Respondent plead guilty to one count of Trafficking in M.D.M.A. (Ecstasy), a felony of the First Degree. He was adjudicated guilty, and sentenced to 90 days jail to be served on weekends, one year of Community Control, followed by four years of probation, which he is currently serving. He was fined $50,000.00, paid to the arresting agency, court costs and 500 hours of community service.

Respondent entered into addiction treatment and counseling and has sought help from Florida Lawyers Assistance, Inc.

## III. <u>REFEREE'S RECOMMENDATION AS TO GUILT</u>

The following recommendation as to guilt is set forth accordingly.

The Respondent has entered a plea of guilty and has therefore admitted his guilt. As such this Referee recommends that the Respondent be found guilty on all counts. By the conduct set forth and the Respondent's plea, the undersigned Referee finds that respondent violated Rule 3-4.3 (Misconduct) of the Rules of Discipline, and Rule 4-8.4(b) (A lawyer shall not commit a criminal act that

reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) of the Rules of Professional Conduct.

## IV. <u>RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED</u>

For the reasons stated herein, the undersigned Referee recommends that the Consent Judgment be accepted and that the following disciplinary measures be accepted:

a.) That Respondent be disbarred from the further practice of law, nunc pro tunc to June 2, 2006, the date of his suspension from the Florida Bar.

b.) That the Respondent shall pay the Florida Bar's costs in these proceedings.

## V. <u>PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS</u>

Prior to recommending discipline, pursuant to Rule 3-7.6(k) (1), the following was considered:

### A. PERSONAL HISTORY OF THE RESPONDENT

Age: 31 years old

Date Admitted to the Bar: October 7, 2002

Prior Disciplinary Record: Suspended June 2, 2006, on this case, no other discipline.

**B. AGGRAVATING FACTORS**

In reviewing the Florida Standards for Imposing Lawyer Sanctions, there exists evidence supporting a finding of the following four factors in aggravation. All references are to Florida Standards for Imposing Lawyer Sanctions, Standard 9.22:

**9.22(b) Dishonest or selfish motive**.

Respondent was insistent throughout the proceedings that he sold drugs only to friends, and not to others. He did not sell drugs in order to support himself. When questioned by the referee, he stated that while he made no money, there was a profit made, which he turned into free drugs for his own use. Thus he got a direct financial benefit from his illegal activities.

Respondent also testified that he sold drugs to his circle of friends because he needed attention, "to be the center of the party" in his own words. Thus his motive was also a selfish desire for popularity and peer approval.

**9.22(c) Pattern of misconduct.**

Both the Respondent and former prosecutor Eduardo Martinez (by deposition) testified that Mr. Liberman sold drugs in college and in law school at

the University of Florida. This deposition and testimony were not provided to the referee until after this cause was remanded for hearings. The sales and possession of illegal substances that led to Respondent's arrest and conviction were part of a pattern of activity that went on for years prior to his admission to the Bar, and which if known to the Bar, would have precluded him from being admitted.

**9.22(d). Multiple Offenses**.

The arrest affidavit, search warrant and subsequent charging document filed against Respondent reveal four separate and distinct sales of illegal substances made to a CI over a period of six weeks.

**9.22(g). Refusal to Acknowledge Wrongful Nature of Conduct.**

Repeatedly throughout his testimony, the Respondent denied that he was a "drug trafficker", despite his plea of guilt to that very offense. He insisted that it was only a technical charge because the weight of the drugs reached a certain level.

What Respondent conveniently fails to acknowledge is how the 270 Ecstasy pills were to be divided up. Respondent was to keep 70 pills, for personal use and sale to friends. One hundred pills each were to be sold to two buyers, for personal used and sale or distribution. So, in effect, the Respondent was ready, willing, and able to supply two other drug dealers.

Notably, Respondent's testimony also revealed that Respondent was able to

import these pills without any difficulty from New York, as they were not easy to obtain in Florida. Importing this large quantity of drugs places Respondent much further up the chain of drug trafficking than just a "technical" violation.

## C. MITIGATING FACTORS

**9.32(d) - timely good faith effort to rectify consequences of misconduct**;

Here the evidence is undisputed that the Respondent cooperated with authorities and assisted in the police investigation after his arrest.

**9.32(g) - otherwise good reputation and character**;

The evidence presented through the testimony of family, friends and co-workers that Respondent is of otherwise good character and reputation. While several of these witnesses were aware of his drug problem, none professed knowledge of his drug dealing.

**9.32(g) - mental impairment (addiction)**

Here the evidence is undisputed that the Respondent suffered from a serious addiction that caused mental impairment. The testimony Dr. Eustace, his treating doctor, indicated that his addiction caused severe mental impairment and bad judgment.

**9.32(j) - interim rehabilitation**.

Here the evidence establishes that the Respondent voluntarily entered into addiction treatment and counseling and has also sought addiction counseling from Florida Lawyers Assistance, Inc., ("F.L.A.").

**9.32(k) - imposition of other penalties and sanctions.**

The Respondent was charged and entered into a plea to a first degree felony, was adjudicated guilty, fined, incarcerated and placed on extended probation.

**9.32(1) - remorse.**

Respondent stated that he was remorseful for his actions, and expressed regret for the pain he caused his family to suffer.

**11.1 Additional factors not enumerated.**

Additionally, under Standards for Imposing Lawyer Sanctions 11.1, the Respondent is entitled to the Mitigating Factor (in addition to those enumerated in 9.32) of ongoing supervision under FLA.

There were several mitigating factors argued by Respondent which the Referee did not find to be persuasive after careful review. One is the absence of a prior disciplinary record. The Respondent had only been practicing law for eighteen months when he was arrested. He is not a long time practitioner with a spotless disciplinary record; therefore he should not get enhanced consideration for mitigation based upon the lack of prior discipline.

The other factor argued was inexperience in the practice of law. This is not

a case where inexperience in practice led to a legal mistake that harmed a client. Inexperience in the practice of law has nothing to do with drug trafficking; therefore it does not serve as a mitigating factor in this case.

The undersigned Referee acknowledges that when an attorney has been convicted of a felony, disbarment is the presumptively correct discipline, *Fla. Std. Imposing Law. Sancs.* 5.11, and that the burden is upon the attorney to prove that something less than disbarment is warranted by the circumstances. When *substantial* mitigation is presented, a suspension is could nonetheless be an appropriate discipline on a felony conviction. In this case, suspension is not an appropriate sanction. While there are seven mitigating factors found in this case, they are not so conclusively credible as to overcome the presumption of disbarment for a first degree felony conviction of Trafficking in Ecstasy, in conjunction with the four aggravating factors discussed above.

For the forgoing reasons the undersigned Referee recommends that the Supreme Court accept the consent judgment as previously submitted in its entirety, and disbar the Respondent from the further practice of law.

## VI. STATEMENT OF COSTS AND RECOMMENDATION AS TO THE MANNER IN WHICH COSTS SHOULD BE TAXED:

The following costs were incurred by The Florida Bar in this proceeding:

Administrative fee Rule 3-7(o) (1) (I)….. $ 1,250.00

Staff Investigator's costs……………… $ 608.22

**TOTAL $ 1858.22**

It is recommended that costs in the amount of $1,858.22 be assessed against Respondent. It is further recommended that execution issue with interest at the prevailing statutory rate to accrue on all costs not paid within 30 days of the entry of the Supreme Court's final order, unless time for payment is extended be the Board of Governors of The Florida Bar.

**The Undersigned Referee hereby certifies that she has reviewed the Bar Referee material provided by The Supreme Court.**

Dated this 14th day of February, 2008.

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CATHERINE M. POOLER, REFEREE

Copies furnished to:

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