IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARIO A. RUIZ DE LA TORRE,

Respondent.
_____/

Supreme Court Case
No. SC07-1633

The Florida Bar File
2008-70,010(11H-MFC)

RESPONDENT'S ANSWER BRIEF
and
INITIAL BRIEF ON CROSS APPEAL

KEVIN P. TYNAN, #710822
RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

TABLE OF CONTENTS

Page(s)

TABLE OF CASES AND CITATIONS

Cases Page(s)

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Mario A. Ruiz de la Torre, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __. Finally, the Florida Standards for Imposing Lawyer Sanctions will be referred to as Standard __.

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent was admitted to the Florida Bar on October 10, 1986, and has practiced law, solely in the State of Florida, for about 22 years, until he was suspended by Order of this court dated October 8, 2007. Prior to this case, the Respondent had no prior disciplinary record imposed by the Florida Bar. RR 4

The Respondent's was married in April 1974, attended college and law school with minor children at home, and subsequently moved back to South Florida to be close to family, friends, his community, and to practice law. TT 77, 78. The Respondent grew up in South Florida and has been very involved in doing charitable work and providing free or low cost legal representation to his community since he returned from attending law school. TT 37,62,63,99. The Respondent has also served his community as a professor at Miami-Dade Community College, teaching business law and management courses. TT 118. His children all excelled and graduated from the performing arts, nationally recognized, public high school (NWSA), went on to college, and currently the two oldest children are practicing law in the states of New York and New Mexico, respectively. TT 63,70-74. The Respondent was separated from his wife around March, 1999, when he was disabled in a wheelchair as result of an accident which occurred in November, 1998. TT 64, 80, 81, 82, 97. The Respondent was having serious financial and family problems during November, 1999, at the time of the

incident which led to his arrest. TT 64,80,81. Due to his financial problems the Respondent was represented by the Dade County Public Defender's office and shortly thereafter represented himself in his divorce proceedings. TT 83,91-94.

On March 10, 2000, the Respondent entered a plea of nolo contendere to one felony count of battery on a law enforcement officer, one misdemeanor count of resisting an officer without violence, one felony count of possession of cocaine/ residue, one misdemeanor count of unlawful possession of cannabis, and one count of possession of drug paraphernalia. RR-2. At the hearing held in this case, the disposition/docket sheet was introduced into evidence, and this showed that the Respondent had been in court on numerous occasions from January 5, 2000 until March 10, 2000 to discuss a plea agreement from the case styled *Sate of Florida v. Mario Costa*, designated by the Circuit Court of the 11th Judicial Circuit as Case #F99-38473. TT92,93. See docket sheet attached to Bar's initial pleading. Adjudication of guilt was withheld as to all charges and the Respondent was placed on eighteen months of probation with the conditions set forth in the disposition/docket sheet. RR 2.

Please note that while the style of the criminal case misidentifies the Respondent, the disposition/docket sheet clearly reflects that the Respondent informed the court at his first hearing that he was misidentified in the pleadings and the court ordered the style of the case needed to be corrected, but apparently it

was not changed. TT90. See the docket sheet attached to the Bar's initial pleading. The Respondent testified at the hearing that in fact, he notified the correction officers at the jail that he was not Mario Costa and was told that he should advise the court at his initial appearance, which in fact, he did. TT 89, 90.

Further the Respondent testified that he never told any officer that he was Mario Costa and the arresting officer, who was not presented by the Bar to testify at the hearing, apparently mistook the information from a computer printout of his brother in law's driving record, which was on the front seat of the car. TT 90,121. The Respondent had resolved a traffic matter for Mr. Costa and that is the reason why he had a copy of his ex-brother in law's driving record. TT 121. Both the Respondent and his brother in law share the same name, Mario. There is no evidence that the Respondent was aware of the existence of any bench warrant for traffic citation(s) at the time of his arrest and the Respondent testified that he was not aware of any bench warrant at the time of his arrest. TT108,109. The Respondent, in fact, notified his wife's family of the situation and this is why Mr. Mario Costa was able to contact the police department as to the use of his name. Further, there is no evidence that the Respondent was not subsequently charged by the Dade County State Attorney's office with any traffic violations or of providing false information, obstruction by disguised person, or any related charges. TT117.

Further, there was no evidence presented by the Florida Bar that the Respondent had ever represented himself as Mario Costa at any other time. The Referee's finding that the Respondent may have used the name Mario Costa to hide his true identity is illogical and contradicted by the evidence. Clearly the Respondent identified himself to the court during his initial appearance and was not trying to hide his true identity from the court or the Florida Bar. TT90. See docket sheet attached to the Bar's initial pleading.

Although Respondent received a withhold of adjudication, for purposes of this brief, his determination of guilt will be considered as a conviction. Since proof of the conviction of a felony is conclusive proof of that felony, the focus of the Respondent's presentation at the hearing was on the mitigating factors that are present in this case. [1] See R. Regulating Fla. Bar 3-7.2(b).

---

[1] The Respondent testified at the hearing that he had considered filing a motion to set a side his plea to the felonies since it was his understanding at the time that he entered his plea, he was pleading no contest to only the misdemeanor charges, based on his various discussions with the Dade County Public Defender's Office. TT 95-97, 126, 127. It is important to note that the Bar rule in effect at the time the Respondent entered his plea, did not require him to report misdemeanor arrests or pleas of no contest to misdemeanor arrests. The Respondent did not become aware that he had possibly pleaded to the felony charges until approximately June, 2007, and shortly thereafter in July received the letter of inquiry from the Bar. The Respondent, reviewed the court file, and after finally locating the court reporter, requested the court transcript, consulted with criminal counsel and the undersigned attorney. The Respondent decided that he could not set aside the plea to the felony and subsequently reported the felony plea to the Bar through correspondence from the undersigned counsel on or about August, 2007. TT 48,49,95,103,104.

While R. Regulating Fla. Bar 3-7.2(b) prevents a lawyer from going behind the felony conviction to prove that the felony did not occur, the lawyer is still able to discuss the facts of the case for a Referee to properly gage the severity of the conduct. The Respondent's testimony and the documentary evidence that was presented at the hearing leads to the conclusion that the battery in question was one of a more technical nature (a push or pulling of the police officers hand away from the Respondent's pocket) and was not an incident wherein the police officer nor the Respondent were injured in any manner. The Respondent was charged with resisting arrest without violence which is in direct conflict with a charge of battery and also it is interesting to note that there is a November 15, 1999 entry in the file that Judge Jerald Klein, who presided at the bond hearing, found "no probable cause for Battery on" a police officer. TT 87, 137,138.[2]

At his hearing, the Respondent presented several witnesses who spoke of their personal or professional relationships with the Respondent and that they collectively agreed that the Respondent is a valued member of the community and legal profession and that there is no need for further rehabilitation from the events that occurred eight years ago. The following witnesses were presented by the

---

[2] It appears that the actual document may not have been introduced into evidence but it is included in the record as part of the Respondent's response to the Bar's Request for Production and documents attached to Respondent's reply letter to the Bar in August, 2007.

Respondent: Manuel Diaz, Esquire (the mayor of Miami), Bruce Reich, Esquire, Manuel Applebaum, Esquire, Harvey Rogers, Esquire, Nick Mancini, Esquire, Juan Gonzalez, Esquire, Carlos Casas and Manuel Minagorri. These witnesses included three individuals who have maintained a personal friendship with the Respondent since childhood. The attorneys, some who only have a professional relationship with the Respondent, spoke of the Respondent's high moral character and professionalism as an attorney and in some cases, as opposing counsel.

Manuel Diaz, Esquire, Mayor of the City of Miami, and practicing attorney in the State of Florida for 27 years, testified that he has known the Respondent over 40 years, and regarding his opinion of the Respondent's character, he testified, among other things as follows:

> He's a tremendous human being. He's got as big a heart as you can have. He's been a good friend. He's been a good son and a good brother, a good father, just a great human being. I'm proud to be his friend. TT 11.

Mayor Diaz, further testified that the Respondent was going thru a very difficult time with his separation and ultimate divorce from his high school sweetheart at the time of the incident which led to his arrest. It was Mayor Diaz' belief that the incident was totally out of a character for the Respondent. TT 12.

Bruce Reich, Esquire, who has known the Respondent on a professional basis for approximately 20 years, testified that he has no reservations concerning the Respondent's honesty and truthfulness. Mr. Reich believes that the

Respondent is a competent, humble, honest, and decent type of person and that he felt very comfortable working with him and sitting down with a client and going over the case with them. Further, he believed that the Respondent was very knowledgeable and efficient in terms of the area of law that he handled. TT 16, 17. Mr. Reich further testified:

> That the Respondent would never let a client down nor be dishonest vis-à-vis a client. I would believe that his arrest is an anomaly, this type of behavior, and not a – it's a very unusual out of character episode, from what I can understand. TT 18.

Manuel Epelbaum, Esquire, testified that he has known the Respondent professionally for over 22 years and represented him in the accident which occurred around the time of the Respondent's arrest, and which resulted in the Respondent's temporary disability. Mr. Epelbaum testified that the Respondent suffered a severe injury to his ankle which resulted in the Respondent being in a wheelchair for several months; then went to a walker; eventually crutches; then a cane; and then was ambulatory. TT 23. The injury affected the Respondent's legal practice and his marriage. TT 23, 24. Mr. Epelbaum further stated that the Respondent was professional in his practice; would place his client's interest above his personal interest; and was a very dedicated father.

Nicolas Manzini, Esquire, a former partner of Burton Young, Esq., and a member of the Florida Board of Bar Examiners for five years and Bar Examiner

Emeritus for two years thereafter, testified that he met the Respondent approximately one year ago as opposing counsel. He further testified that the Respondent possessed excellent character, and in litigation the Respondent was most professional; a calm, soothing influence upon both parties, in a very challenging estate dispute. TT 30, 31, 32.

Harvey Rogers, Esquire, who has been practicing law for 33 years, testified that he knew the Respondent for quite a while, but professionally about 2 years, and that as opposing counsel, he and Mr. Rogers were very professional and cooperative, in order to save the respective clients time and effort. He further testified, that once the Respondent's license to practice law was suspended by this court, he has met with quite a few of the Respondent's clients and regarding the Respondent's relationship with his clients he stated as follows:

> He is more conscientious for the client than he is for himself. It's rare that you see an attorney that doesn't care about the dollars and cares more about the sense of the client and the stability of the client. Many of the clients that he was representing, he was not representing them pro bono, but he wasn't getting paid because many of them couldn't afford to pay him or could only pay him a small amount and he did the work nevertheless, and his professional work was exceptional. TT 37.

Further, in response to the Bar's question of whether knowing what you now know about the Respondent's arrest and the subsequent disposition in that case, does that change your opinion of him? Mr. Rogers stated as follows:

> Well, you see the person after the many years that he's had this problem and you see that he's solid, you see that he's trustworthy, you see that he's honest, and he takes a step beyond. It's hard to even understand how he was involved in those issues because it's outside the scope of the character; and I've known him, spoken to him, in the past year and a half almost on a weekly basis. TT 38, 39.

Juan Jesus Gonzalez, Esquire, a criminal attorney who was also a character witness for the Respondent, testified that the Respondent has retained him to determine whether the plea to the felony could be set aside and he advised the Respondent that he was prevented from reopening the case due to the statute of limitations. TT 44, 45.

Following the hearing held November 9, 2007, the Referee issued his report and the Respondent agrees with his report that jurisdiction is proper and the factual findings he made are accurate, however the Respondent objects to his interpretation and conclusions in assessing credibility and the existence of aggravating factors, based on the facts he adopted and the evidence presented at the hearing, as will be further discussed in argument in this Answer Brief and Initial Brief on Cross Appeal.

Although the Respondent requested a 60 days suspension, based upon all of his factual findings, the Referee recommended that Respondent be suspended from the practice of law for a period of 90 days followed by 3 years of probation with an evaluation by Florida Lawyer's Assistance, Inc. (hereinafter, "FLA") and enter into

a contract with FLA if necessary. RR 3-4. The Respondent filed a motion to expedite this appeal which was denied and subsequently filed a motion to be reinstated pending this appeal which has not been ruled upon by this court. Based on the 90 days suspension recommended by the Referee, the Respondent could have been reinstated to practice law on or about January 4, 2008. The Respondent, in effect, has not been allowed to practice law for a period of time well in excess of the Referee's recommendation and if the Respondent has to apply for reinstatement, based on a suspension over 90 days, a considerable time will be added to his suspension.

SUMMARY OF THE ARGUMENT

In this case The Florida Bar seeks to overturn a Referee's finding that an eight year old criminal conviction should only result in a ninety day suspension from the practice of law coupled with a three year probationary period, with the special requirement that the Respondent be evaluated by Florida Lawyers Assistance Inc. In its presentation to the Court, the Bar argues that a one year suspension is the appropriate sanction. However, this argument is devoid of any support in relevant precedent. Furthermore, the Standards for Imposing Lawyer Sanctions and the case law related to same, clearly indicate that this case requires a ninety day suspension and the Bar has presented no new compelling argument not already rejected by the Referee.

During the final hearing the Respondent presented compelling mitigating evidence, inclusive of heartfelt character testimony from lifetime friends, who are prominent members of the community, and in some cases, members of the Bar. The Respondent even produced the testimony of opposing counsel that further indicated that the Respondent is a good, decent man, and a very good attorney, who has never previously been disciplined by this Court. The Bar would have you ignore the magnitude of mitigation and only consider the aggravation found by the Referee, some of which, a careful review of the record will reveal, should not have been deemed aggravating factors by the Referee. The Referee's recommended

discipline has a reasonable basis in existing case law and is therefore afforded a presumption of correctness. Therefore, the Referee's sanction recommendation is not clearly erroneous and is supported by the evidence.

ARGUMENT

I. BASED ON THE TOTALITY OF THE CIRCUMSTANCES, INCLUDING THE OVERWHELMING EVIDENCE OF MITIGATION PRESENTED BY THE RESPONDENT, THE REFEREE'S SANCTION RECOMMENDATION SHOULD BE AFFIRMED.

Generally, "this 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).

Conviction of a felony does not automatically require disbarment as the Supreme Court continues to analyze each lawyer discipline case on their individual merits. *The Florida Bar v. Jahn*, 509 So. 2d 285 (Fla. 1987). In this case, both sides argue for the imposition of a suspension, but differ on how long that suspension should be.

The Supreme Court in *The Florida Bar v. Pahules*, 233 So. 2d 130 (Fla. 1970), stated that in selecting an appropriate discipline certain precepts should be followed. They are:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the

> same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. *Id.*

It is undisputed that the Respondent's conduct did not directly result in any harm to his clients or the public and he has demonstrated his service to his clients, community, and society for over 20 years; thus the Referee's recommendation of a 90 day suspension, followed by 3 years of probation, is fair to the Respondent, and sufficiently punishes and encourages reformation/rehabilitation. Further, as to the third precept, each case should be based on its facts as to the legal precedent it may set. While at first impression it may appear that a 90 days suspension, followed by a 3 years probation, would not be sufficient determent to others, it is highly unlikely that any other attorney would be able to show the facts, circumstances, and magnitude of mitigation which the Respondent has demonstrated in this case.

The true facts in this case are reflected by the following mitigation factors present, which support the Referee's recommended sanction:

1. Standard 9.32(a) – absence of a prior disciplinary record;

2. Standard 9.32(b) – absence of a dishonest or selfish motive;

The Respondent testified that it was his understanding that he was pleading only to the misdemeanors charges and that based on the Bar Rule in effect at the

time of his pleading he was not required to report the same. The record is clear that the Respondent did not practice criminal law and was relying on the Public Defender's office for representation. TT79,83,91-94. The testimony and the docket/disposition sheet show that the Respondent had been in court on numerous occasions trying to resolve a plea, and that on the date of the plea, he was represented by a new public defender, who apparently was not fully informed of prior plea negotiations. TT91-94. Indeed, the transcript of the plea hearing shows that the hearing was chaotic, and that the main focus of discussion was whether there would be an adjudication withheld on the charges. TT49,91-94. At no time was there a discussion with the court, where the term misdemeanors or felony was used. TT50,91-94. It does not make any sense that the Respondent would be pleading to a battery charge, which directly conflicts with resisting arrest without violence charge, and which Judge Klein, who presided at the bond hearing, had determined no probable cause existed.

3. Standard 9.32(c) – personal or emotional problems:

Just prior to the events in question, the Respondent had recently recovered from a serious ankle injury that left him out of work and in a wheel chair for more than five months, and also during this time frame, was separated from his wife of over 25 years and she began divorce proceedings shortly thereafter. TT 64,80,81,97.

4. Standard 9.32(e) – full cooperation with the Bar;

On July 26, 2007, the Respondent requested a brief extension to reply to the Bar's inquiry letter in order to obtain the transcript of the plea agreement and hire an attorney, if necessary, and the Bar consented to such extension. The undersigned attorney was retained and submitted a timely response to the Bar, on or about August 23, 2007, acknowledging the felony conviction and presenting the Respondent's position on this matter.

5. Standard 9.32(g) – otherwise good character and reputation;

6. Standard 9.32(j) – interim rehabilitation [exemplary record since his arrest];

7. Standard 9.32(k) – imposition of other penalties [criminal sanctions];

8. Standard 9.32(l) – remorse.

The Respondent accepted the responsibility for his conduct and is truly sorry for the wrongful nature of his conduct. He has admitted to his involvement and was candid with the Referee in his testimony as to what occurred on the date he was arrested.

The Respondent did not employ legal tactics which may have resulted in the charges being dismissed or to set aside his plea to the felony charges and was willing to accept legal responsibility for the acts to which he was guilty. The

Respondent testified as to his remorse, consequences of his actions, embarrassment suffered, and the lessons he had learned from his actions. TT 100,101,125

The Referee's report found the existence of a number of aggravating factors, which the evidences shows are not applicable in this case:

1. Standard 9.22(b)-Dishonest or selfish motive:

See discussion on Standard 9.32(b)-absence of a dishonest or selfish motive, Supra.

2. Standard 9.22(c)-Pattern of Misconduct:

In order for this factor to be established there must be a "pattern" of misconduct, to wit: at least more than one. The Bar inappropriately persuaded the Referee to find a pattern, although the record is clear that the Respondent acknowledged the felony conviction promptly after conducting his investigation into the plea, approximately 30 days from receipt of the Bar's letter, dated July 12, 2007. See detailed discussion on Standard 9.32(e) - full cooperation with the Bar – Supra**.** The Respondent did not become aware that he had possibly pleaded to the felony charges until approximately June, 2007, and shortly thereafter in July, received the letter of inquiry from the Bar. The Respondent after reviewing the court file, and finally locating the court reporter, requested the court transcript, consulted with criminal counsel and the undersigned attorney. The Respondent decided that he could not set aside the plea to the felony and subsequently reported

the felony plea to the Bar through correspondence from the undersigned counsel on or about August, 2007. TT 48,49,95,103,104.

3. Standard 9.22(e)-Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the discipline agency:

There is no factual basis for this factor. See discussion on Standard 9.32(e) full cooperation with the Bar. Supra. The Bar's argument is limited to the fact that the Respondent did not report his felony conviction in a timely fashion. While the Respondent has freely admitted that he now understands that his plea and resulting sentence needed to be reported to the Bar, at the time of the plea he did not believe he had a reporting obligation and his failure to report was clearly not willful nor intentional. TT 95.

4. Standard 9.22(f)-Submission of false evidence, false statements, or other deceptive practices during the disciplinary process:

There is no factual basis for this factor. The Referee made reference to the fact that the "Respondent may have given a false name to the police when being arrested." Clearly, even if considered true, which the Respondent denies, this statement did not occur during the disciplinary process.

5. Standard 9.22(g)-Refusal to acknowledge wrongful nature of conduct:

See the discussion on Standard 9.32(l)-remorse. Supra.

The Bar reliance on *Fortunato and Arango* is not appropriate since the Referee's findings and conclusion do not deal with false testimony or fabricated evidence. Clearly a Referee's determination of credibility does not equate with providing false testimony or fabricating evidence. Nevertheless the respondent in *Fortunato* received a 90 days suspension and the Respondent in *Arango* only received a 30 days suspension, despite more egregious ethical violations. See *Florida Bar v. Fortunato*, 788 So. 2d 201 (Fla. 2001), *Florida Bar v. Arango* , 720 So. 2d (Fla. 1998).

The facts in this case do not sustain the level of proof necessary for this Court to find that the above stated aggravating factors exist. Further, the Respondent acknowledges the applicability of Standard 9.22(1), as the Respondent has experience in the practice of law, however the overwhelming evidence of mitigating factors presented by the Respondent should be afforded much greater weight based on the facts of this case.

In summary, the Respondent testified at the hearing that, in fact, he notified the correction officers at the jail that he was not Mario Costa and was told that he should advise the court at his initial appearance, which, in fact, he did. TT 89, 90.

Further, the Respondent testified that he never told any officer that he was Mario Costa and the arresting officer**,** who was not presented by the Bar to testify at the hearing, apparently mistook the information from a computer printout of his

brother in law's driving record, which was on the front seat of the car. TT 90. Both the Respondent and his brother in law share the same name, Mario. The Referee specifically stated during the trial that there was no evidence that the Respondent was aware of the existence of any bench warrant for traffic citation(s) at the time of his arrest and the Respondent testified that he was not aware of any bench warrant at the time of his arrest. TT 108,109. The Respondent, in fact, notified his wife's family of the situation and this is why Mr. Mario Costa was able to contact the police department as to the use of his name. If the Respondent had not contacted his ex-wife, the Respondent's ex-brother in law would not have been able to contact the police department immediately to address the misidentification. The Respondent testified that he did not want to create more conflict with his ex wife's family, whom he was very close with, as they had met while in high school, married, and had 3 children who were close to their mother's family, including their uncle. TT 90,98.

Although the Bar's Exhibit B to their Appendix insinuated the same, the Respondent was not subsequently charged by the Dade County State Attorney's office with any traffic violations, or of providing false information, obstruction by disguised person, or any other related charges. Further the narrative in said exhibit, even if taken as factually correct which the Respondent disputes, does not indicate that the Respondent verbally provided false information to the officer and further

demonstrates that the Respondent admitted to being Mr. De La Torre. Note that bench warrants were apparently from 1996 and the arrest at issue was more than three years later, and neither the officer nor the Respondent's ex-brother in law were called by the Bar to testify at the hearing.

Further, there was no evidence presented by the Florida Bar that the Respondent had ever represented himself as Mario Costa at any other time. Thus**,** the Referee's finding that the Respondent may have used the name Mario Costa to hide his true identity is illogical and contradicted by the evidence. Clearly the Respondent identified himself to the court during his initial appearance and was not trying to hide his true identity. TT90. See docket sheet attached to the Bar's initial pleading.

The Respondent testified at the hearing that he had considered filing a motion to set a side his plea to the felonies, since it was his understanding at the time that he entered his plea, he was pleading no contest to only the misdemeanor charges based on his discussion with the Dade County Public Defender's Office. TT 95-97,113,114, 126, 127. It is important to note that the Bar rule in effect at the time the Respondent entered his plea, did not require him to report misdemeanor arrests or pleas of no contest to misdemeanor arrests. As was stated above the Respondent did not become aware that he had possibly pleaded to the felony charges until approximately June, 2007, and shortly thereafter in July

received the letter of inquiry from the Bar. The Respondent, after reviewing the court file and finally locating the court reporter, requested the court transcript, consulted with criminal counsel and the undersigned attorney. The Respondent decided that he could not set aside the plea to the felony and subsequently reported the felony plea to the Bar through correspondence from the undersigned counsel on or about August, 2007. TT 48,49,95,103,104.

Also of importance to the resolution of this case is the age of the felony suspension. This is not the first time that an older felony case was prosecuted by the Bar. In fact, on at least two known occasions, the Court considered the age of the conviction in reducing the sanction that might otherwise have been imposed. See *The Florida Bar v. Meyer*, 194 So. 2d 255 (Fla. 1967) [Thirty day suspension for federal felony of making false statements to a governmental agency five years prior to sanction.]; *The Florida Bar v. Fertig*, 551 So. 2d 1213 (Fla. 1989) [Ninety day suspension when two years had passed from felonious acts.]

While R. Regulating Fla. Bar 3-7.2(b) prevents a lawyer from going behind the felony conviction to prove that the felony did not occur, the lawyer is still able to discuss the facts of the case for a Referee to properly gage the severity of the conduct. The Respondent's testimony and the documentary evidence that was presented at the hearing leads to the conclusion that the battery in question was one of a more technical nature (a push or pulling of the police officers hand away from

the Respondent's pocket) and was not an incident wherein the police officer was injured in any manner. The Respondent was charged with resisting arrest without violence which is in direct conflict with a charge of battery and also it is interesting to note that there is a November 15, 1999 entry in the file that Judge Jerald Klein, who presided at the bond hearing, found "no probable cause for Battery on" a police officer.

During the trial there were two lines of cases presented for consideration. First the parties discussed case law wherein lawyers were sanctioned for felony drug possessions and the second area concerned sanctions for lawyers convicted of battery or assault. In this appeal, the Bar only makes mention of those cases dealing with possession.[3] While informative, the majority of the cases are not close

---

[3] The Bar's statement that the Respondent attempts to refer to the battery as *de minimus* should be disregarded is misplaced. The argument advanced by the Respondent has always been that the actual offensive touching (the battery) did not cause any harm to the police officer, warranting the imposition of a sterner sanction such as that found in other cases. For example a lawyer was disbarred for severely beating a police officer, inclusive of body slamming the officer to the pavement. *The Florida Bar v. Kandekore*, 766 So. 2d 1004 (Fla. 2000). In *The Florida Bar v. Schreiber*, 631 So. 2d 1081 (Fla. 1994), a lawyer was suspended for 120 days for beating up his girlfriend. Unlike the Respondent, Mr. Schreiber did not appear in court for the disciplinary proceedings, did not present any evidences in mitigation, and the Bar presented testimony from the victim, her brother-in-law, and an assistant state attorney. In this case, the Bar did not present any live testimony from the victim/officer, the Respondent's ex-brother-in-law, or any assistant state attorney. Also see, *Florida Bar v. Bartholf*, 775 So. 2d 957 (Fla. 2000), this court affirmed the Referee's recommendation of a public reprimand, along with a 1 year probationary period, where the Respondent was charged with aggravated assault for assaulting an individual with a golf cart and golf club. The

factually. There has been no evidence that the Respondent has or had an addiction and the assault in this case does not compare in severity to those found in the cases submitted by the either party to this appeal.

Recent case law and the Court's adoption of the Florida Standards for Imposing Lawyer Sanctions in Drug Cases suggest the appropriate length of suspension. Standard 10.3 and the recent case law create a presumption that a 90 or 91 day suspension is appropriate for criminal possession of a controlled substance. The deciding factor on choosing between a 90 or a 91 day suspension is the status of the lawyer's recovery from addiction and following Standard 10.3, the Respondent should be suspended for 90 days.

The Referee in this case specifically found interim rehabilitation as a mitigating factor, which finding is squarely based upon the uncontradicted testimony at trial concerning the Respondent's recovery and lack of a drug addiction. RR 3. The Bar, in its Answer Brief, does not contest this finding.

The Bar, in its Initial Brief, fails to make mention of *The Florida Bar v. Cohen*, 919 So. 2d 384 (Fla. 2006). In *Cohen* the lawyer was convicted, among other things, of felony possession of marijuana, driving under the influence causing injury to others and resisting arrest without violence. The Supreme Court reviewed

---

Respondent pled guilty to the offense of battery, and was placed on probation. Unlike the case at hand, the Respondent's actions which led to the battery charge were of a violent nature and no mitigating factors appeared to be present.

applicable case law and Standard 10.3 and found that a ninety day suspension coupled with three years of FLA probation was warranted as the lawyer in *Cohen* had demonstrated that he was on the road to recovery because he sought assistance from FLA, began treatment and participated actively in his recovery program. Therefore, *Cohen* appears to present the appropriate road map for resolution of this case.

Of significance in C*ohen,* was the Supreme Court finding that the recommended 30 day suspension did not have a reasonable basis in "existing case law and the Florida Standards for Imposing Lawyer Sanctions." *Id.* at 386. After making this statement, the Court then discussed Standard 10.3 and highlighted certain language from the Standard. In particular the Court noted that ". . . 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 . . .*" *Id*. at 386 (Emphasis in original form). Of particular interest is the Court's next comment:

> The cases upon which the referee relied as support from the downward deviation from the *presumptively correct suspension of ninety or ninety-one days*[4] do not address standard 10.3 and felonies. *Id*. (Emphasis supplied).

[4] This reference to a presumed suspension based upon Standard 10.3 appears to undermine, *in toto,* the Bar's position in this appeal.

The Court then proceeds to distinguish the case law relied upon by the Referee as not having been related to a felony conviction such as that found in *Cohen*. The Court does cite to two other cases that are factually similar to the facts of *Cohen* and to the case at hand. The first reference is to *The Florida Bar v. Temmer*, 753 So. 2d 555 (Fla. 1999) where the attorney had engaged in felonious conduct but was able to have the charges dismissed on a technicality and was suspended for 91 days. In the second case referenced by the Court, the lawyer pled to a felony of delivery of half a gram of cocaine[5] and received a 90 day suspension. *The Florida Bar v. Weintraub,* 528 So. 2d 367 (Fla. 1988). Ultimately, the Court rejected the proposed 30 day suspension and imposed a 90 day suspension, as the Court was satisfied with the Respondent's recovery. *Id.* at 388. The Court should do likewise in this case**.** See also *The Florida Bar v. Blau, 630 So. 2d 1085 (1994*).

The one and only contested case[6] advanced by the Bar at trial for its suggestion of a one year suspension was resolved prior to the Supreme Court's

---

[5] The case at hand is a possession and use case not a delivery case that is outside the scope of Standard 10.3.

[6] Two cases advanced by the Bar were merely approval of settlements that had been negotiated between a lawyer and the Bar. In *The Florida Bar v. Schram*, 355 So. 2d 788 (Fla. 1978) the court approved a settlement for one year suspension for felony possession of marijuana and possession of drug paraphernalia. Similarly, in *The Florida Bar v. Finkelstein*, 522 So. 2d 372 (Fla. 1988), the Court approved another settlement for a one year suspension when the lawyer was

adoption of the Standards and therefore is not dispositive of this case. See *The Florida Bar v. West*, 550 So. 2d 462 (Fla. 1989). Further, in *West,* the Respondent did not present any evidence of mitigation, probation was for only 2 years, and there is no mention of any involvement with FLA, although there is a passing reference to completion of a "drug treatment program" and participation in "alcohol counseling" both of which appear to be the direct result of his criminal sentence. In the case at hand there is direct uncontradicted testimony concerning the lack of a drug addiction and the Respondent presented vast and significant evidence of mitigation.[7] Accordingly, a 90 day suspension, followed by 3 years probation with an FLA evaluation, is the appropriate sanction in this case.

The Respondent filed a motion to expedite this appeal which was denied and subsequently filed a motion to be reinstated pending this appeal which has not been ruled upon by this court. The Report of Referee in this case was filed with the Court on December 17, 2007, with the Referee recommending a 90 day suspension nunc pro tunc to the effective date of the automatic felony suspension. Based on the 90 days suspension recommended by the Referee, the Respondent could have been reinstated to practice law on or about January 4, 2008. The

---

convicted of felony possession of illegal drugs and a misdemeanor DUI. Both cases were resolved prior to the adoption of Standard 10.3.

[7] In fact it appears that the Referee, while not believing that there was a current addiction, is requiring an FLA evaluation to take place to ensure that there is no need for FLA probation.

Florida Bar, by taking almost the maximum 60 days to file a petition for review and another 30 days to file its initial brief has added another approximately 90 days to the effective length of the Respondent's suspension, no matter the outcome of this appeal. The Respondent, in effect, has not been allowed to practice law for a period of time well in excess of the Referee's recommendation and if the Respondent has to apply for reinstatement, based on a ruling of a suspension of over 90 days, a considerable time will be added to his suspension.

CONCLUSION

The Respondent has demonstrated that the recommended sanction in this case does have "a reasonable basis in existing case law." *The Florida Bar v. Laing*, 695 So. 2d 299, 304 (Fla. 1997). Accordingly, the Referee should be affirmed as to his sanction recommendation, but reversed as to the aggravating factors found in his Report that have no factual basis.

WHEREFORE the Respondent, Mario A. Ruiz de la Torre, respectfully requests (1) that the Referee's recommended sanction be adopted; (2) that the Court impose a suspension no greater than ninety (90) days, coupled with a three year probation, a referral for evaluation to the Florida Lawyer Assistance, Inc., program probationary period and payment of the Bar's costs; (3) with said suspension to be nunc pro tunc the effective date of the Respondent's felony

suspension with automatic reinstatement upon the rendition of any Court Order in this case and (4) grant any other relief the Court deems reasonable and just.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this ____ day of March, 2008 to Barnaby Lee Min, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 and to Kenneth Marvin, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief or the e-mail forwarded to the Court has been scanned and found to be free of viruses, by McAfee.

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

By: _____
KEVIN P. TYNAN, ESQ.
TFB No. 710822