IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARIO A. RUIZ DE LA TORRE,
a/k/a MARIO COSTA

Respondent.
_____/

Supreme Court Case
No. SC07-1633

The Florida Bar File No.
2008-70,010(11H-MFC)

REPLY BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

For the purpose of this brief, The Florida Bar will be referred to as "The Bar." Mario A. Ruiz de la Torre will be referred to as "Respondent." References to the transcript of the Final Hearing held on November 9, 2007 will be referred to as "TR" followed by the referenced page number(s). References to the Report of Referee will be referred to as "ROR" followed by the page number.

ARGUMENT I

THE REFEREE ERRED BY FAILING TO RECOMMEND A ONE-YEAR SUSPENSION BASED ON RESPONDENT'S MISCONDUCT AS WELL AS THE AGGRAVATING FACTORS.

The Referee's recommended discipline fails to provide a sanction that is commensurate with Respondent's misconduct as well as the numerous aggravating factors. The evidence of record and relevant case law fully supports a one-year suspension. Despite Respondent's assertions to the contrary, the aggravating factors found undeniably outweigh the mitigating factors. This Court should, therefore, reject the Referee's recommended discipline and impose a one-year suspension.

Following Respondent's arrest, a court of competent jurisdiction found a factual basis to accept Respondent's plea to two felonies—one count of Battery on a Law Enforcement Officer and one count of Possession of Cocaine. (ROR 2). Refusing to properly notify The Bar of his felony convictions, as required under Rule 3-7.2 of the Rules Discipline, Respondent continued to practice law for a period of seven years. (ROR 5-6). Respondent finally reported his convictions to The Bar after another attorney had informed The Bar of Respondent's conduct. (ROR 5).

Although the Referee found a number of aggravating factors, he failed to give them adequate weight when he determined his recommended discipline.

(ROR 5-6). In Respondent's brief, Respondent challenges the existence of all the aggravating factors found by the Referee except the finding that Respondent had Substantial Experience in the Practice of Law. "A referee's findings of . . . 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). As there is record evidence which supports the Referee's finding that Respondent had substantial experience in the practice of law as well as record evidence that supports the other aggravating factors found by the Referee, those findings should not be disturbed on review.

Specifically, in his report, the Referee found that Respondent provided untruthful testimony about his confusion to the charges he pleaded to and about his obligation to report his convictions to The Bar. (ROR 5). At the final hearing, Respondent testified that he did not know or think that he had to report his conduct to The Florida Bar. (ROR 5). The Referee found that Respondent's testimony lacked credibility. (ROR 5). Moreover, the Referee found Respondent's assertion that he believed he was pleading only to misdemeanors to be incredible largely because the transcript of the plea indicated that the presiding judge had informed Respondent that both charges carried a maximum of 5 years imprisonment. (ROR 5). The Referee further found that Respondent should have known he had to report his felony convictions to The Bar and that his reliance on an Assistant Public

Defender's advice that he would not have to report such conduct to The Bar was misguided, particularly given that Rule 3-4.1 charged him with notice and knowledge of the Rules Regulating The Florida Bar. (ROR 5). The Referee's finding that Respondent acted with a selfish or dishonest motive is amply supported by record evidence. In his brief, Respondent continues to argue to this Court what he argued to the Referee. That is, Respondent argues that he did not know he was pleading to felonies. The Referee specifically found this testimony incredible. "Because the referee is in the best position to judge the credibility of the witnesses," this Court should defer to the Referee's factual finding. The Florida Bar v. Batista, 846 So. 2d 479, 483 (Fla. 2003) (citations omitted).

Additionally, the Referee found that Respondent engaged in a pattern of misconduct and committed a bad faith obstruction of the disciplinary proceeding. (ROR 5-6). The facts indicate that Respondent failed to comply with the Rules of Discipline. (ROR 5-6). Respondent had a number of opportunities to report his felony convictions to The Bar during the seven-year period that began after his arrest and the criminal court's acceptance of his plea to the felony charges. (ROR 5). Even after the felony conviction was brought to Respondent's attention by his opposing counsel seven years later, the Referee found that Respondent continued to hide his conduct from The Bar. (ROR 5). Further, Respondent refused to inform The Bar of his misconduct even after The Bar informed him that the matter had

been brought to The Bar's attention. (ROR 6). In short, the Referee's findings are adequately supported by record evidence and Respondent's argument that he has fully cooperated with The Bar is without merit.

The Referee further found that Respondent refused to acknowledge the wrongful nature of his conduct. (ROR 6). Specifically, the Referee found that Respondent attempted to marginalize the events that led to his arrest and that he refused to acknowledge the seriousness of the charges to which he pleaded. (ROR 6). To support this finding, the Referee noted that Respondent continually referred to the battery on a police officer as merely a technical battery. (ROR 6). Additionally, the Referee found that Respondent's explanation as to how the bag of cocaine ended up in Respondent's pocket lacked plausibility. (ROR 6). Even in his brief to this Court, Respondent continues to marginalize the seriousness of the conduct. Specifically, Respondent argues that at the first appearance, there was a finding of no probable cause but fails to accept the fact that probable cause was subsequently found by the trial court when a criminal information was filed. Respondent further fails to accept that the trial court found a factual basis (i.e. proof beyond and to the exclusion of every reasonable doubt) that Respondent committed the criminal conduct to which he pleaded. See generally Dydek v. State, 400 So. 2d 1255, 1258 (Fla. 1981) (stating that where there was insufficient evidence to support a conviction, trial court erred in accepting defendant's plea of

nolo contendere). Respondent also asserts in his brief that the charges of Battery on a Law Enforcement Officer and Resisting Arrest Without Violence are inconsistent with each other but fails to accept that the charges are for two different acts. To sum up, the Referee's finding that Respondent has failed to acknowledge the wrongful nature of his conduct is not only properly supported by record evidence, but also supported by Respondent's brief submitted to this Court. Further, the Referee's finding that there was no evidence of remorse is supported by the record evidence.

The Referee also found that Respondent gave a false name to the police when he was arrested and concluded that Respondent submitted false evidence, false statements, or other deceptive practices during the disciplinary process. (ROR 6). The evidence at the final hearing supports the Referee's finding as the police arrested Respondent under Respondent's former brother-in-law's name. (TR 90, 121). Respondent's explanation for being arrested under the name Mario Costa made no sense at all and required one to make a host of assumptions and logical leaps which the Referee refused to make. Respondent claimed that the arresting officer must have assumed that his name was Mario Costa simply because he had Mr. Costa's driving record in his car on the night of his arrest. The evidence presented at the final hearing, however, revealed that Respondent had a suspended driver's license and two outstanding bench warrants for his arrest when the officer

pulled him over. (TR 106). Again, as stated above, the Referee rejected Respondent's argument and found Respondent's explanation incredible. Respondent further argues that his false statement did not occur during the disciplinary process. Respondent, however, fails to recognize that his false name to the police led to an incorrect criminal case style which made it difficult to determine that it was Respondent who was convicted of the felony and not Mario Costa and further delayed the instant disciplinary process. Because of Respondent's false name, Respondent began and continued the process of attempting to hide his criminal conviction from The Florida Bar. To conclude, the factual finding of the Referee is supported by record evidence.

Respondent argues in his brief that he presented compelling character evidence at the final hearing which justifies the Referee's recommendation of a 90-day suspension. Respondent called eight character witnesses to testify on his behalf. (ROR 7; TR 7-68). The Referee found that Respondent had presented considerable evidence of his "present good character and reputation." (ROR 7). Although The Bar does not dispute the Referee's finding of Respondent's present good character and reputation, The Bar does assert that Respondent's conduct at the time of his arrest and his course of action after his arrest are entirely inconsistent with the testimony of his character witnesses. No matter how much Respondent has bolstered his character, the facts remain the same: Respondent was

convicted of two felonies and he subsequently attempted to hide his convictions from The Bar to avoid being disciplined for his misconduct. Respondent's attempt to conceal his arrest and convictions from The Bar directly conflicts with the actions of a person who has good character. Thus, Respondent's character evidence was not nearly as compelling as Respondent claims.

The case law cited by The Florida Bar, together with the numerous aggravating circumstances, supports a disciplinary sanction that provides for a longer and more appropriate suspension. Despite Respondent's contentions, The Florida Bar v. Finkelstein, 522 So. 2d 372 (Fla. 1988) and The Florida Bar v. Schram, 355 So. 2d 788 (Fla. 1978) do provide this Court with guidance as to the proper discipline in the case at bar. While Respondent is correct in stating that both cases were consent judgments, Respondent fails to recognize that this Court is ultimately responsible for determining the appropriate sanction. See The Florida Bar v. Brown, 905 So. 2d 76, 83 (Fla. 2005) (citations omitted). Accordingly, in Finkelstein and Schram, this Court approved the consent judgments and deemed the discipline suggested in the consent judgments were appropriate. These cases, therefore, do have precedential value.

Respondent cites to The Florida Bar v. Cohen, 919 So. 2d 384 (Fla. 2005), in support of his position that a 90-day suspension is the appropriate discipline. In Cohen, the attorney pleaded nolo contendere to only one felony count of

possession of marijuana and five misdemeanor counts. See id. at 385. In Cohen, this Court found no aggravating factors but ten mitigating factors. See id. at 385-86. In the case at bar, however, there are substantially more aggravating factors than mitigating factors. Accordingly, Cohen should not be used as a road map for the resolution of this case as Respondent argues.

Respondent further argues that because of The Florida Bar v. Weintraub, 528 So. 2d 367 (Fla. 1988), this Court should approve the Referee's recommendation. In Weintraub, this Court imposed a 90-day suspension for the attorney's plea of nolo contendere to delivery of approximately one-half gram of cocaine. See id. at 368. Again, Weintraub is distinguishable from the case at bar in that there is no indication of any aggravating factors. See id. at 369. As discussed above and in The Florida Bar's initial brief, the Referee in the case at bar found six separate aggravating factors. Additionally, in Weintraub, after the attorney's arrest, the attorney began to take significant remedial steps to correct his past behavior, actions that are completely antithetical to those exhibited by Respondent following his arrest and felony convictions in the present case. See id. There are, accordingly, few similarities between Weintraub and Respondent's case.

Respondent also cites to The Florida Bar v. Blau, 630 So. 2d 1085 (Fla. 1994) to support his argument that the Referee's recommended sanction should be affirmed. In Blau, after the attorney was apprehended for marijuana possession, he

provided assistance to the police and, consequently, he avoided prosecution. See id. at 1086. In the case at bar, there has been no cooperation with any authorities (law enforcement or The Bar) and a full criminal prosecution resulted in criminal sanctions. Accordingly, the facts of Blau are quite different from the instant case.

Respondent also cites The Florida Bar v. Temmer, 753 So. 2d 555 (Fla. 1999), as a case in support of the Referee's recommendation of a 90-day suspension. Although the attorney in Temmer was charged with possession of marijuana, cocaine, valium, and drug paraphernalia, she prevailed on a suppression motion and had the charges dismissed, so she was not found guilty of any criminal conduct. See id. at 557-61. The Bar, however, pursued a disciplinary case against her, and the Court suspended her for 91 days. See id. Unlike Respondent's case, Temmer had substantial mitigation, almost no aggravation (one previous discipline), and the misconduct was primarily drug-related. See id. at 555, 57, 62. Further, the attorney in Temmer had voluntarily submitted herself to Florida Lawyer's Assistance, Inc., (hereinafter, "FLA") for evaluation, and during this evaluation, a psychiatrist determined that she was suffering from a long-term pre-existing psychological condition. See id. at 557. The substantial mitigation in Temmer makes that case distinguishable from the case at bar and, accordingly, sheds little guidance as to how Respondent's case should be decided.

Respondent references this Court's decisions in The Florida Bar v. Meyer,

194 So. 2d 255 (Fla. 1967) and The Florida Bar v. Fertig, 551 So. 2d 1213 (Fla. 1989) to bolster his position that the Court generally considers the age of a conviction to reduce the sanction that might otherwise be imposed. In Fertig, 551 So. 2d at 1213, the reduction in discipline imposed appears to be attributable to the substantial mitigation rather than any delay in prosecution of the case. See id. In Meyer, 194 So. 2d at 255, The Bar unduly delayed prosecution of the matter. See id. Unlike both of these cases cited by Respondent, The Bar was unaware of Respondent's felony convictions because Respondent had taken affirmative steps to conceal them from The Bar for a period of seven years. Consequently, a reduction in the length of suspension is inapplicable here, since The Bar's prosecution of the case was delayed by Respondent's concealment of his felony convictions, not The Bar's inattention to the matter. Had Respondent met his obligation and informed The Bar of his felony convictions, as required by the Rules of Discipline, the convictions would not have been seven years old at the time of the final hearing.

Respondent also argues that the felony battery he committed did not cause any harm to the police officer and, consequently, should not merit the imposition of a harsher sanction as found in other cases. Respondent cites to The Florida Bar v. Schreiber, 631 So. 2d 1081 (Fla. 1994) and The Florida Bar v. Bartholf, 775 So. 2d 957 (Fla. 2000) to support his position. In Schreiber, 631 So. 2d at 1081, the

attorney beat up his girlfriend and was charged with misdemeanor battery. See id. Respondent's conviction in the case at bar, however, is for a felony battery, not misdemeanor. Thus, the facts of Schreiber are distinguishable from the instant case.

In Bartholf, 775 So. 2d at 957, the Court did affirm the referee's recommendation of a public reprimand, along with a one-year probationary period, where the attorney pleaded guilty to a battery for assaulting an individual with a golf cart and golf club. See id. Despite the limited aggravating factors, this Court found a significant number of mitigating factors. See id. at 958. In the case at bar, however, there are substantially more aggravating factors and less mitigating factors. Accordingly, it is the cases proffered by The Florida Bar which are more appropriate and relevant for the Court's consideration in determining the appropriate sanction.

CONCLUSION

While Respondent states that it is undisputed that his conduct did not result in any harm to his clients or the public, this statement is not true. Respondent's clients may not have been harmed directly; however, they received representation and legal advice from an attorney who had two felony convictions and who should not have been practicing law, given that such conduct would have surely resulted in a suspension had this Court known about it at the time that it occurred. Further,

the legal profession was harmed by Respondent's conduct in that he continued to practice law, misrepresenting himself as a lawyer who had not committed any crimes and who should be viewed as a member in good standing with The Florida Bar.

The Florida Bar has shown that the aggravating factors found by the Referee are not clearly erroneous, but instead, they are supported by record evidence, and they should be given the appropriate weight in determining the proper sanction. Considering the egregiousness of Respondent's conduct as well as the aggravating factors, a one-year suspension is the appropriate sanction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Reply Brief of The Florida Bar were forwarded via Federal Express Mail, Tracking No. 809685806472, to the Honorable Thomas Dale Hall, Clerk, at the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399; and a true and correct copy was mailed to Kevin P. Tynan, Attorney for the Respondent, at 8142 North University Drive, Tamarac, Florida 33321; and to Kenneth Lawrence Marvin, Staff Counsel, at The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this _____ day of March, 2008.

_____
BARNABY LEE MIN
Bar Counsel

CERTIFICATE OF TYPE, SIZE, AND STYLE

I hereby certify that the Reply Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

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Bar Counsel