IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	**Supreme Court Case Nos. SC08-1375, SC08-1552 SC08-1891, SC08-2398**
Complainant,	
v.	**The Florida Bar Files Nos. 2008-70,457(17H) 2008-31,259(17H) 2008-70,993(17H) 2006-50,753(17H)FCC 2008-50,133(17H) 2009-70,113(17H) 2009-70,204(17H)**
PHILIP DAVID IRISH,	
Respondent.	
_____/	

THE FLORIDA BAR'S ANSWER BRIEF

JUAN CARLOS ARIAS
Attorney No. 0076414
Bar Counsel
The Florida Bar
Lake Shore Plaza II
Sunrise, Florida 33323
(954) 835-0233

KENNETH LAWRENCE MARVIN
Attorney No. 200999
Staff Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR.
Attorney No. 123390
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Florida Bar Cases

R. Regulating Fla. Bar

The Florida Standards for Imposing Lawyer Sanctions

PRELIMINARY STATEMENT

Throughout this Answer Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR ____ (indicating the referenced page number). The transcript of the final hearing held on May 6, 2009, will be designated as TT ____ (indicating the referenced page number). The Respondent's Initial Brief will be designated as IB ____ (indicating the referenced page number). The Florida Bar will be referred to as "the bar." Philip Daniel Irish will be referred to as "respondent." Exhibits introduced by The Florida Bar at the final hearing will be designated as TFB Ex.____.

STATEMENT OF THE CASE AND OF THE FACTS

In the interest of accuracy, and to ensure the record is complete, The Florida Bar offers the following supplement to respondent's statement of the case and facts.

Neither party challenges the referee's findings of facts for the 4 Supreme Court Cases containing a total of 7 independent complaints. The referee specifically found that in those cases respondent violated R. Regulating Fla. Bar 3-4.2, 3-4.3, 4-1.1, 4-1.3, 4-1.4(a), 4-1.4(b), 4-1.5(a)(1), 4-3.2, 4-8.1(b), 4-8.4(b), 4-8.4(c), and 4-8.4(g). Of particular importance to this case is respondent's violation of R. Regulating Fla. Bar 4-8.4(b), which relates to his conviction for the following felony charges: 1) Trafficking in gamma butyrolactone; 2) Possession of a controlled substance without a prescription; 3) Possession of a controlled substance without a prescription; 4) Possession of cocaine; 5) Possession, sale, delivery of methenolone; and 6) Possession, sale, delivery of mesterolone.

The core facts of this case are not in dispute and can be found in the parties' Joint Stipulation. Since The Florida Standards for Imposing Lawyer Sanctions 4.11(a), 4.41(a), 5.11(a), and 7.1 would each be individually sufficient to justify disbarment, and since disbarment is the presumed sanction for a felony conviction, the final hearing focused on respondent's

attempt to demonstrate addiction and interim rehabilitation in order to rebut the presumption of disbarment. However, the case law and the Florida Standards for Imposing Lawyer Sanctions provide a reasonable basis for the referee's recommendation of disbarment.

The referee found that respondent presented sufficient evidence of his addiction to gamma butyrolactone (also known as "GHB") and cocaine, but specifically found that "respondent failed to present any evidence of drug addiction to the steroids methenolone and mesterolone, the other 2 controlled substances that he also pled guilty to possessing, selling and delivering." [RR 20]

As to interim rehabilitation, the referee found that "respondent failed to demonstrate interim rehabilitation" because the respondent's psychiatric and addiction expert's opinion on respondent's recovery were "based primarily upon 3 hours of telephonic conversations 10 days prior to the final hearing." [RR 21] The referee specifically found that the respondent's psychiatric and addiction expert failed "to discuss respondent's recovery with his treating professionals in prison and did not obtain copies of his treatment file from prison." [RR 22] The referee concluded that the "respondent failed to show current and reliable evidence of respondent's rehabilitation program, addiction treatment, and progress." [RR 22]

The referee also found that the respondent failed to show sufficient evidence of his good character and reputation finding the testimony from respondent's father and former girlfriend, the only 2 character witnesses who testified at the final hearing, "insufficient in light of the severity, nature and duration of the misconduct." [RR 23]

The bar requested and the referee recommended disbarment. Respondent challenges this sanction as being too severe, yet there is ample support in the record of the proceedings to uphold this recommendation.

SUMMARY OF THE ARGUMENT

Respondent violated 12 Rules Regulating Florida Bar, and the case law and the Florida Standards for Imposing Lawyer Sanctions provide a reasonable basis for the referee's recommendation of disbarment. At the final hearing, the bar was able to show that the psychiatric and addiction expert simply did not have current and reliable evidence to show respondent's rehabilitation by clear and convincing evidence. Furthermore, the respondent focused all testimony regarding addiction on 2 of the 4 controlled substances he was convicted of possessing. Even though respondent failed to present any evidence that his addiction was the proximate cause of his illegal possession of steroids, he now argues that respondent's possession of methenolone and mesterolone (commonly referred to as "steroids") "is completely irrelevant" [IB 11] and "totally misses the point." [IB 12] Respondent argues that the referee's recommended discipline is excessive.

This Court has held a bar disciplinary action must serve 3 purposes: the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently deter other attorneys from similar misconduct. Furthermore, the discipline must have a reasonable basis in existing case law or The Florida Standards for Imposing Lawyer Sanctions. The

recommendation by the referee in this case adheres to the purpose of lawyer discipline because it is fair to society, it is fair to respondent, and it would deter other attorneys from engaging in similar conduct. Given this respondent's criminal and professional misconduct, the aggravating factors found by the referee, the discipline given in similar cases, and The Florida Standards for Imposing Lawyer Sanctions, the referee's recommendation is appropriate.

ARGUMENT

THE REFEREE CORRECTLY CONCLUDED THAT RESPONDENT FAILED TO PRESENT ANY EVIDENCE OF DRUG ADDICTION TO THE CONTROLLED SUBSTANCES METHENOLONE AND MESTEROLONE THAT HE PLED GUILTY TO POSSESSING, SELLING AND DELIVERING

When reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact. The Florida Bar v. McFall, 863 So.2d 303, 307 (Fla. 2003). In The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), this Court held that 3 purposes must be held in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter other attorneys from similar conduct. This Court has further stated that a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. The Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997). The Court will not second–guess a referee's recommended discipline "as long as that discipline has a reasonable basis in existing case law." The Florida Bar v. Laing, 695 So.2d 299, 304 (Fla. 1997).

The case law is clear that disbarment is the appropriate discipline for an attorney convicted of a felony. In The Florida Bar v. Wilson, II, 643

So.2d 1063 (Fla. 1994), this Court held that disbarment was appropriate for an attorney convicted of two felonies because he used his position as an attorney to defraud clients of their money for a drug venture; in The Florida Bar v. Martinez-Genova, 959 So.2d 241 (Fla. 2007), this Court held that disbarment was appropriate for an attorney who misappropriated client funds and was arrested for cocaine possession; in The Florida Bar v. Palmer, 588 So.2d 234 (Fla. 1992), an attorney was disbarred for felony convictions for unlawful possession of cocaine and for receiving payments for legal acts never performed; and in The Florida Bar v. Insua, 609 So.2d 1313 (Fla. 1992), this Court found that disbarment was appropriate for an attorney convicted of a felony for a drug importation scheme.

In addition to the case law, The Florida Standards for Imposing Lawyer Sanctions 4.11(a), 4.41(a), 5.11(a) and 7.1 which individually would be sufficient to justify disbarment, also provide a reasonable basis for the referee's recommendation of disbarment for the respondent.

When considering the discipline delineated in The Florida Standards for Imposing Lawyer Sanctions, any applicable mitigating or aggravating factors must be considered. This Court has held that addiction and subsequent rehabilitation will be considered as a mitigating circumstance in

determining the appropriate sanction to be imposed. The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987).

In an effort to rebut the presumption of disbarment in this case involving criminal convictions and professional misconduct, respondent argues that he "was suffering from an addiction to GHB and cocaine." However, he fails to establish an addiction to the illegal steroids methenolone and mesterolone, the other 2 controlled substances that he also pled guilty to possessing, selling and delivering. Respondent's position is that "it is not necessary to prove addiction to a substance or a criminal event once it is established that he is suffering from addition to various substances." [IB 8]

According to respondent, showing evidence of addiction to some controlled substances is sufficient to establish addiction to all other controlled substances. Respondent's argument that showing an addiction to some illegal substances is a *de facto* excuse to all criminal and professional misconduct is not supported by case law. Therefore, the referee correctly found that the respondent failed to prove by clear and convincing evidence that respondent, a body-builder, was addicted to the illegal steroids methenolone and mesterolone.

At the final hearing, respondent's psychiatric and addiction expert,

Dr. Richard B. Seely, focused his direct examination testimony exclusively on respondent's addiction to GHB and cocaine, ignoring the illegal steroids methenolone and mesterolone, the 2 other controlled substances respondent was convicted of possessing, selling, and delivering. During cross examination, Dr. Seely admitted not being certain as to what kind of substances mesmethenolone and mesterolone were and admitted that he did not specifically discuss the use of these steroids during the 3 hours of his telephonic interview with the respondent. Dr. Seely provided the following testimony during the final hearing:

> Mr. Arias: Okay. But there are other charges that deal with other drugs. For example, can you tell us what Methenolone is, M-E-T-H-E-N-O-L-O-N-E?
>
> Dr. Seely: Methenolone?.
>
> Mr. Arias: Methenolone.
>
> Dr. Seely: I'm not certain what that was used for at the time.
>
> Mr. Arias: Okay. And of course, you didn't consider that kind of substance, illegal substance, in your analysis and it didn't come up in your conversation with him ten days ago.
>
> Dr. Seely: No. And I think part of the overall picture is the overwhelming portion of his addiction and compromise of his ability to navigate reality at the point in his life was due to the GHB and cocaine. (Excerpt) [TT 31-32]

At the Final Hearing, Dr. Seely also provided the following testimony during cross examination:

> Mr. Arias: Okay. Well, let me ask you one more thing, and I understand that, again, you have considered several things. I just want to make sure that we understand what you haven't considered, because I think that is very important. Let me ask you: What is Mesterolone, M-E-S-T-E-R-O-L-O-N-E?
>
> Dr. Seely: I'm not certain whether that is. (Excerpt) [TT 32-33]

It is clear from Dr. Seely's testimony that the respondent only focused on establishing that his addiction to 2 of the 4 controlled substances that he pled guilty to possessing was the cause of his illegal conduct. Respondent, a body-builder, failed to present any evidence to establish that he was addicted to the 2 illegal steroids. In fact, the bar even asked respondent in cross examination about his possession and use of the illegal steroids and respondent did not state that he was addicted to them. Respondent provided the following testimony during the final hearing:

> Mr. Arias: The question is: Why were you using these two steroids that were illegal?
>
> Respondent: I was using them because I had a definite self-image problem and I found that they made me – just as the GHB made me feel, they made me as far as physically, physically appear or feel to be a stronger person or a better person that would be accepted by others.

It is also clear from the testimony of Dr. Seely and the respondent, that they failed to present any evidence that respondent was addicted to the 2 illegal steroids and that the criminal conduct he pled to (possession, sale, delivery of methenolone and mesterolone) was a consequence of his

addiction. There is simply no authority to support respondent's contention that "It does not matter whether or not Respondent was addicted to steroids so long as he was addicted to some drug."[IB 11]

However, respondent clearly stated at the final hearing that he used the illegal steroids methenolone and mesterolone as part of his body-building routine clearly, a lifestyle choice. Respondent provided the following testimony during the final hearing:

> And I had several – I had several steroids in my possession when Fort Lauderdale police came into my home, had all my steroids together in a lock box and – but particularly, two steroids I had more than others. That would include one of the charges, which was the possession, sale and delivery of Methenolone. Methenolone is a chemical name for what is widely known as Primabolan. Methenolone being the chemical name, Primabolan being the common name used in the industry for this particular steroid. I had approximately six – six, maybe, to eight vials which would – which I intended on using for a period over eight weeks, so it was going to last me one cycle.
>
> Also along with that, the State Attorney deemed it fit as a possession to sell to sell and delivery was a large quantity of the Mesterolone. Mesterolone is the chemical name for the common name of Proviron, which Proviron is not a very strong steroid, but it's a steroid used by a body-builder when they're actually not taking steroids because it helps produce natural testosterone. So I intended on using that at the end of that Cycle, which is the reason I had – the reason why I had these two drugs in my possession. But I had approximately six to eight other steroids that maybe there was a half a bottle of this or a half you know, a half bottle of that and whatnot. [TT 76-77]

It is clear from respondent's testimony, that he was using the illegal

steroids as part of his body-building regime, and that his illegal possession and use of methenolone and mesterolone was not related to his confessed addiction to GHB and cocaine. Therefore, his possession and use of these illegal steroids was not the result of an addiction that impaired his ability to function, but instead, a rational, intentional and calculated decision to enhance his body. The evidence clearly shows that respondent's use of methenolone and mesterolone was a lifestyle choice. Respondent's argument that the referee should assume that respondent's addiction to GHB and cocaine caused respondent to order, possess and use the illegal steroids methenolone and mesterolone is without merit and would set a bad precedent.

Even if this Court rejects the bar's argument and finds that respondent's addiction was the cause of all his criminal and professional misconduct, the referee correctly found that respondent failed to demonstrate interim rehabilitation by clear and convincing evidence.

RESPONDENT FAILED TO REBUT THE PRESUMPTION OF DISBARMENT

The referee, after a final hearing in the instant case, found in aggravation, pursuant to Florida Standards for Imposing Lawyer Sanctions 9.22(b), (c), (d) and (e), a dishonest or selfish motive, a pattern of misconduct, multiple offenses, and bad faith obstruction of the disciplinary

proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. In mitigation, the referee found, pursuant to Florida Standards for Imposing Lawyer Sanctions 9.32(a), (f), (h), (k), and (l), absence of a prior disciplinary record, inexperience in the practice of law, physical or mental disability or impairment, imposition of other penalties or sanctions and remorse.

As stated before, rehabilitation will be considered by this Court as a mitigating circumstance in determining the appropriate sanction to be imposed. In this case, the referee made the following specific findings as to respondent's rehabilitation:

> I specifically find that respondent failed to demonstrate rehabilitation. I have considered the opinions of Respondent's psychiatric and addiction expert, Doctor Richard B. Seely, but I find that his opinions relating to respondent's recovery are based primarily upon only 3 hours of telephonic conversations 10 days prior to the final hearing. Dr. Seely did not discuss respondent's recovery with his treating professionals in prison and did not obtain copies of his treatment file from prison. In other words, respondent failed to show current and reliable evidence of respondent's rehabilitation program, addiction treatment, and progress. [RR 21-22]

The referee also made the following specific findings as to respondent's potential rehabilitation:

> Moreover, I remain concerned about Respondent's propensity to abuse substances in the future. Respondent began his abuse of GHB, steroids and cocaine when he was fully aware of the illegality of those substances. In fact, most of his

> use of those substances occurred after he was already enrolled in law school or had been admitted to the Florida Bar. In addition after his arrest in 2005, on the felony charges of which he was eventually convicted, he continued to use and abuse steroids, GHB and cocaine. Between the time of his arrest and his eventual conviction in 2008, Respondent completed at least one drug rehab program in California and, according to the testimony of his ex girl friend Ms Carmona, two such programs locally. After each of those programs Respondent resumed abusing all three substances within a short period of time. It is entirely conceivable that he may resume that pattern of behavior upon his release from prison. [RR 22]

The referee also found extremely persuasive this Court's recent analysis in The Florida Bar v. Valentine-Miller, 974 So.2d 333 (Fla. 2008). The referee made the following comparison in his report:

> "I find that the Supreme Court's analysis contained in The Florida Bar v. Valentine-Miller, 974 So.2d 333 (Fla. 2008) is particularly apropos in this case. In Valentine-Miller the respondent had converted client funds and sought to avoid disbarment on the basis that "She [was] a fundamentally honest person who lost control of her life and her practice during a period of personal crisis" that included alcohol abuse. In rejecting this argument the Supreme Court noted:
>
> "While we sympathize with the problems respondent had in her personal life, and understand the problems associated with substance abuse and what it can do to a person's life, we cannot condone respondent's behavior. We have a responsibility to the citizens of this state. There is never a valid reason for taking client funds held in trust or for completely abandoning clients. Lawyers are required to have high ethical standards because members of the public are asked to trust lawyers in their greatest hours of need. Without such standards, the entire legal profession would be in jeopardy as public trust would dissipate."

> "Respondent should have recognized her own failings and her downward spiral from 2004 through 2006 and taken measures to correct matters before the Bar had to step in."
>
> "Although the referee found mitigating factors of substance abuse, personal problems, and rehabilitation, these factors do no overcome the presumption of disbarment here. Respondent intentionally misappropriated client funds and abandoned her entire practice. This Court has disbarred attorneys who misappropriated funds or abandoned their clients, despite the referee's findings of substance abuse and rehabilitation, concluding that the mitigation was insufficient to overcome the seriousness of the misconduct."
>
> Just like Ms. Valentine-Miller, Mr. Irish should have recognized his downward spiral and taken steps to correct the problem before the Bar was forced to step in. This is particularly true where, as here, Mr. Irish was arrested and charged with the 5 felony counts over 2 years before he finally plead guilty to the charges and was incarcerated. [RR 25-26]

In this case, the referee's report supports a recommendation of disbarment. His recommendation for disbarment is clearly not excessive in light of the severity, nature and duration of the misconduct. Therefore, the Court should rely on the referee's recommendation for discipline and adopt his recommendation for disbarment. The referee properly weighed the testimony and evidence presented at the final hearing and had a reasonable basis in existing case law and The Florida Standards Imposing Lawyer Sanctions.

CONCLUSION

This Court should approve all the findings of fact and conclusions of guilt within the referee's report and adopt the referee's recommendation of discipline. Respondent has failed to meet his burden of proof or to provide any specific relevant evidence within the final hearing transcripts or any other evidence introduced at the referee level that calls into question the referee's findings and recommended discipline in this case.

The recommendation of disbarment is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions.

Respectfully submitted,

JUAN CARLOS ARIAS #0076414
Bar Counsel
The Florida Bar
Lake Shore Plaza II
1300 Concord Terrace, Suite 130
Sunrise, FL 33323
(954) 835-0233

CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original and 7 copies of The Florida Bar's Answer Brief has been furnished via regular U.S. mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 and has been electronically filed; true and correct copies have been furnished by regular U.S. mail to Respondent's counsel, Richard B. Marx, respondent's counsel, at his record bar address of 66 West Flagler St., 2nd Floor, Miami, FL 33130and to Kenneth Marvin, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this _____ day of _____, 2009.

_____

JUAN CARLOS ARIAS

CERTIFICATE OF TYPE, SIZE STYLE AND ANTI-VIRUS SCAN

Undersigned counsel hereby certifies The Florida Bar's Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

_____

JUAN CARLOS ARIAS