IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

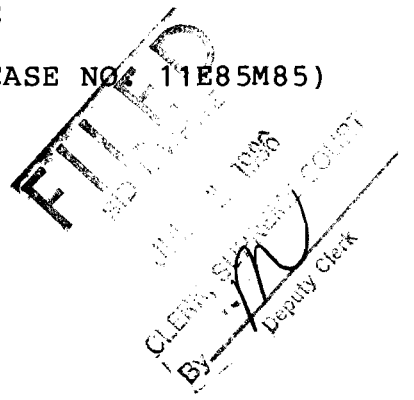
v.

HOWARD D. ROSEN,

Respondent.
_____/

SUPREME COURT CASE NO. 67,442

(TFB CASE NO. 11E85M85)



COMPLAINANT'S ANSWER BRIEF
TO BRIEF OF RESPONDENT/CROSS-COMPLAINANT

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INTRODUCTION

The Florida Bar, Complainant, will be referred to as "The Florida Bar", "the Bar" or "complainant".

Howard D. Rosen will be referred to as "Mr. Rosen" or the "respondent".

Abbreviations:

T = Transcript of proceedings before the referee on September 11, 1985.

RR = Report of Referee dated March 24, 1986.

RRA = Response to Request for Admissions dated August 26, 1985.

R Ex = Respondent's Exhibit

Bar Ex = Florida Bar's Exhibit

SUMMARY OF ARGUMENT

The respondent contends that The Florida Bar may not initiate disciplinary action, if the respondent has been suspended due to a felony conviction. He states The Florida Bar has a choice of either seeking suspension under the "felony conviction rule" (Fla. Bar Integr. Rule, art. XI, Rule 11.07), or seeking disbarment. He contends that since respondent has been suspended due to his felony conviction, he cannot now be disbarred.

The Florida Bar submits that a suspension due to a felony conviction does not prevent the Bar from initiating disciplinary proceedings and seeking disbarment, as was done in the case of The Florida Bar v. Cruz, No. 67,309 (Fla. June 26, 1986).

The Florida Bar does not have a choice of initiating action for a felony suspension under Rule 11.07 or seeking disciplinary action. If a lawyer should be convicted of a felony, the judge or clerk of the court is required to notify the Supreme Court and the suspension becomes automatic. The Florida Bar may nevertheless initiate disciplinary action and seek disbarment.

Disbarment is more appropriate than suspension in cases involving drug trafficking. The offense of drug trafficking is extremely serious and suspension does not have the deterrent effect of disbarment.

ARGUMENT

I.

DISBARMENT IS MORE APPROPRIATE THAN SUSPENSION IN CASES INVOLVING DRUG TRAFFICKING

On April 30, 1984, Mr. Rosen was suspended by this court because of a federal felony conviction concerning drug trafficking (T 6, 7 Bar Ex 1). According to Rule 11.07(4), of The Florida Bar Integration Rule, the suspension shall "remain in effect for three years and thereafter until civil rights have been restored and until the convicted attorney is reinstated . . ." (underscoring supplied).

The referee recommended, inter alia, that Mr. Rosen "be suspended for a period of three years, to run concurrently, nunc pro tunc, with the suspension which was imposed upon him under Florida Bar Integration Rule 11.07(3), effective April 30, 1984" (RR IV).

Accordingly, in order for Mr. Rosen to return to the Bar, he would have to wait three years, regardless of whether this court accepts the recommendation of the referee or The Florida Bar, provided the disbarment be nunc pro tunc, with the date of Rosen's suspension effective April 30, 1984.

This court might ask, why is The Florida Bar requesting disbarment, when Mr. Rosen will not be permitted to apply for admission to the Bar for three years, whether there be disbarment or approval of the Report of Referee.

This court discussed the differences between suspension and disbarment in The Florida Bar v. Wilson, 425

So2d 2 (Fla 1983), and we would like to apply the matter discussed in that case to the case at hand.

In The Florida Bar v. Murrell, 74 So2d 221 (Fla 1954) and in The Florida Bar v. Wilson, Id, this court reasoned that any discipline imposed on an attorney must be:

(1) fair to the attorney;

(2) just to the public;

(3) designed to correct anti-social tendencies on the part of the convicted attorney; and

(4) severe enough to deter similar conduct by others.

In the Wilson case, supra, this court discussed the four factors mentioned above.

First, this court stated in Wilson, Id, "disbarment of an attorney after he has been adjudged guilty of two felonies cannot be interpreted as being unfair to him". (Rosen was convicted of two felonies [T 21, 31, R Ex F].)

Second, in the Wilson case, Id, this court stated:

> mere suspension would not be just to the public. In the case of a conviction of two felonies, the ultimate penalty, disbarment, should be imposed to insure that an attorney convicted of engaging in illegal conduct involving moral turpitude, who has violated his oath and flagrantly breached the confidence reposed in him as an officer of the court, can no longer enjoy the privilege of being a member of the

> bar. A suspension, with continued membership in the bar, albeit without the privilege of practicing, is susceptible of being viewed by the public as a slap on the wrist when the gravity of the offense calls out for a more severe discipline.

Third, in the Wilson case, Id, this court stated:

> suspension and disbarment may very well have a similar effect toward the correction of a convicted attorney's anti-social behavior, but disbarment insures that respondent could only be admitted again upon full compliance with the rules and regulations governing admission to the Bar. Fla. Bar Integr. Rule, art. XI, Rule 11.10(5). In the case of a felony conviction, this additional requirement is significant, as it would better encourage reformation and rehabilitation.
>
> Finally, if the discipline does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it. Disbarment as a result of the coviction of felonies is a message loud and clear to the members of The Florida Bar that this Court will not countenance or permit the conduct for which respondent was convicted. In our view, a suspension does not have the deterrent effect of disbarment. (The Florida Bar v. Wilson, Id)

The Florida Bar respectfully submits that the matters discussed in The Florida Bar v. Wilson, Id, are applicable to the case at hand. Although Mr. Rosen says that his former drug addiction should be a mitigating matter, the Bar contends that drug trafficking by an officer of the court is so serious, that it cannot be tolerated and that drug

addiction should not be an excuse. Moreover, a message should be sent to all members of The Florida Bar that a conviction of drug trafficking will not be tolerated and will result in disbarment.

Although disbarment is a harsh form of discipline, it does not forever bar the person concerned from practicing law. If Mr. Rosen should be disbarred, he could, nevertheless, apply for readmission to The Florida Bar in accordance with Rule 11.10(5), of The Florida Bar Integration Rule.

Although Mr. Rosen believes his prior drug addiction should excuse him from disbarment, it is the Bar's view that drug trafficking is so heinous a crime, that a disbarment is warranted. Moreover, as this Court stated in The Florida Bar v. Wilson, Id, "suspension does not have the deterrent effect of disbarment". The Bar contends that a very strong deterrent is required to discourage other lawyers from being tempted to become drug dealers.

II

THE FLORIDA BAR MAY INITIATE DISCIPLINARY ACTION AGAINST AN ATTORNEY, EVEN THOUGH THE ATTORNEY HAD PREVIOUSLY BEEN SUSPENDED DUE TO A FELONY CONVICTION.

Mr. Rosen contends that in cases where an attorney is convicted of a felony, The Florida Bar must either seek suspension under Fla. Bar Integr. Rule, art. XI, Rule 11.07 or it may initiate disciplinary action. He further states:

> Since The Florida Bar sought automatic suspension as the alternative of choice in this matter, the instant disciplinary proceedings should be dismissed for lack of jurisdiction.
> Brief of Resp/Cross-Complaint, pages 18-19

Mr. Rosen mistakenly believes that The Florida Bar is prohibited from seeking disbarment in those cases where an attorney is convicted of a felony and is suspended under Fla. Bar Integr. Rule, art. XI, Rule 11.07. He apparently believes The Florida Bar has a choice, either initiate disciplinary action or seek suspension under Rule 11.07.

According to Fla. Bar Integr. Rule, art. XI, Rule 11.07(1), the judge or clerk of the court shall transmit a certified copy of the adjudication of guilt to the Clerk of the Supreme Court of Florida. If any such determination or judgment of guilt is entered by any court other than a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the eleventh day

following the filing with the Clerk of the Supreme Court of a certified copy of such determination or judgment, accompanied by proof of service. Fla. Bar Integr. Rule, art. XI, Rule 11.07(3).

It is the position of The Florida Bar that whenever an attorney is convicted of a felony, a certified copy of the determination or judgment of guilt must be sent to the Supreme Court and that Rule 11.07 of The Florida Bar Integration Rule is applicable in all such cases. The Florida Bar does not have a choice. Furthermore, if the conviction is in Florida, it is not The Florida Bar, but the judge or clerk of the court that is directed to notify the Supreme Court of the felony conviction. Fla. Bar Integr. Rule, art. XI, Rule 11.07(1).

The Florida Bar submits that it may initiate disciplinary action and seek disbarment, even though the attorney concerned had been previously suspended because of a felony conviction.

In The Florida Bar v. Hecker, 475 So2d 1240 (Fla 1985), Mr. Hecker was suspended because of a felony conviction. Nevertheless, The Florida Bar filed a complaint and requested that Mr. Hecker be disbarred. The Supreme Court of Florida did disbar Mr. Hecker, despite the fact that Mr. Hecker had been previously suspended due to his felony conviction. Therefore, it is apparent that an attorney may

be disbarred because of a felony conviction, even though the attorney had been previously suspended because of the same felony conviction under Florida Bar Integration Rule 11.07. In addition, in the case of The Florida Bar v. Cruz, No. 67,309 (Fla. June 26, 1986), this Court disbarred Mr. Cruz, even though he had been previously suspended due to a felony conviction.

The felony conviction rule (Fla. Bar Integr. Rule, art. XI, Rule 11.07) calls for an automatic suspension of lawyers who are convicted of one or more felonies. This rule calls for immediate action.

In The Florida Bar v. Prior, 330 So2d 697, 702 (Fla. 1976) this court stated:

> The immediate suspension procedure set forth in our rules is designed to remove from public counseling and from the court system as promptly as possible, but not irrevocably, individuals who stand convicted of a felony offense.

Mr. Rosen contends that a lawyer who has been suspended because of a felony conviction (Fla. Bar Integr. Rule, art. XI, Rule 11.07), cannot later be disciplined. He submits that The Florida Bar has the choice of the automatic suspension under Rule 11.07 or disciplinary proceedings. The Bar disagrees, as the suspension under Rule 11.07 is automatic and it is not for The Florida Bar to decide whether

to proceed or not to proceed under Rule 11.07. Nevertheless, "The Florida Bar may, at any time after final conviction, initiate disciplinary action against the convicted attorney if deemed advisable". Fla. Bar Integr. Rule, art. XI, Rule 11.07(4).

There are times when the nature of the offense might not warrant more than a three year suspension. In such cases, the Bar may not seek disciplinary action. However, there are times when the Bar might seek disbarment, because of the serious nature of the offense of which the attorney was convicted.

In The Florida Bar v. Wilson, 425 So2d 2, 3, (Fla. 1983), this court described the differences between suspension and disbarment. Accordingly, there are times when the Bar would believe that disbarment is more appropriate than a three year suspension, and in such cases, The Florida Bar would seek disbarment, even though the attorney had previously been suspended under Rule 11.07 of The Florida Bar Integration Rule.

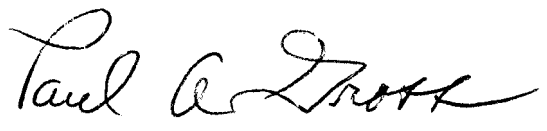
The Florida Bar respectfully submits that it may initiate disciplinary action and seek disbarment of an attorney who had been previously suspended because of his felony conviction under Rule 11.07 of The Florida Bar Integration Rule. Since Mr. Rosen was convicted on two occasions for offenses involving drug trafficking, The Florida Bar believes it was

justified in seeking disbarment, (T 7, 8, 21, 31), even though Mr. Rosen had previously been suspended because of one of his felony convictions (T 6, 7, Bax Ex. 1).

CONCLUSION

Based upon the foregoing reasons and authorities, The Florida Bar submits that it was authorized to initiate disciplinary proceedings and that disbarment is more appropriate than suspension in this case. Since Mr. Rosen was twice convicted of felonies involving illegal distribution of cocaine, he should be disbarred and be required to pay the costs of these proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Complainant's Answer Brief to Brief of Respondent/Cross-Complainant was furnished by mail to respondent's attorney, Laurel White Marc-Charles, 2455 East Sunrise Boulevard, Suite 805, Fort Lauderdale, Florida, 33304, on this 30th day of June, 1986.

Paul A. Gross

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Bar Counsel