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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Cross-Respondent

v.

HOWARD D. ROSEN,

Respondent/Cross-Complainant.

SUPREME COURT CASE NO. 67,442
(TFB CASE NO.11E85M85)

BRIEF OF RESPONDENT/CROSS-COMPLAINANT

LAUREL WHITE MARC-CHARLES, ESQ.
Suite 805
2455 East Sunrise Boulevard
Fort Lauderdale, FL 33304
(305) 566-6224

Attorney for Respondent/
Cross-Complainant.

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INTRODUCTION

The Respondent, Howard D. Rosen, hereby adopts the references and abbreviations set forth in the Introduction to Complainant's Brief.

STATEMENT OF THE CASE

On March 31, 1983, Mr. Rosen was adjudicated guilty, pursuant to his plea of guilty, of knowingly and intentionally possessing, with intent to distribute a quantity of cocaine.[1] Mr. Rosen was initially sentenced to a term of imprisonment of one year and a day. By Order dated August 22, 1983, this sentence was reduced to six months. REx. Composite A (subdenominated Exhibit C)

Prior to his sentencing in this federal case, but after his plea of guilty, Mr. Rosen advised the U. S. Probation Office that the result of his plea was the automatic suspension of his bar license, pursuant to Rule 11.07(3), Integration Rules of the Florida Bar; and, although the Integration Rules imposed no affirmative duty upon him, that he felt that "the purpose and policy of the Florida Bar implicitly imposes upon him a duty, as a member to advise the District Court of its duty to transmit a certified copy of its Judgment and Commitment Order to the Clerk of the Supreme Court of Florida," to begin these automatic suspension proceedings. REx Composite A (subdenominated Exhibit B)

As a result of the District Court's transmittal of its Judgment and Commitment Order, at Mr. Rosen's request, this Court entered its Order, dated April 5, 1984, suspending Mr. Rosen from the practice of law, effective April 30, 1984. The Florida Bar v.

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[1] The geniuneness of the Judgment and Commitment Order reflecting this adjudication in federal court was admitted by Mr. Rosen's Response to Request for Admissions and Answers (T 7, 8), and is not contested herein.

Howard D. Rosen, Case No. 65,032. See REx. Composite A (subdenominated Exhibit E)

On or about August 5, 1985, the Florida Bar filed a Complaint herein, seeking Mr. Rosen's disbarment, solely based upon the fact of his conviction in United States v. Rosen, Case No. 83-699-Cr-SMA, which had already resulted in his automatic suspension, as set forth above.

On August 12, 1985, the Chief Justice of the Supreme Court of Florida designated the Honorable Robert C. Scott, Circuit Judge for the Seventeenth Judicial Circuit in and for Broward County, to serve as referee herein.

The final hearing in this case was held on September 11, 1985. The Florida Bar offered no witnesses, and instead elected to rely solely upon the uncontested fact of Mr. Rosen's conviction for possessing cocaine, in seeking the sanction of disbarment. (Tr 8, 9). The Respondent offered the sworn testimony of one witness, Mr. Joseph Klock -- personal friend, professional associate and member of the Florida Bar -- (Tr 24-30) and a variety of Exhibits, denominated Respondent's Composite Exhibit A (Tr. 12-13), which included a variety of factual matters in mitigation.

On or about September 25, 1986, pursuant to the Referee's permission to file further legal memoranda herein (Tr 36-37), Mr. Rosen filed with the Referee his "Motion to Dismiss For Lack of Jurisdiction and Incorporated Memorandum of Law." The Florida Bar thereafter responded thereto on or about October 4, 1986, (see "Response to Motion to Dismiss for Lack of Jurisdiction") and Mr.

Rosen filed a "Reply to Complainant's Response to Motion to Dismiss for Lack of Jurisdiction," on October 18, 1985. This motion was denied, sub silentio, by the Referee's issuance of his Report herein.

The Report of Referee was issued and filed with this Court on March 26, 1986. Although recommending that the Respondent be found guilty as charged in The Florida Bar's Complaint (RR 2), the Referee also factually found that:

> [T]he respondent's involvement in the crime for which he pleaded and was adjudicated guilty was as a result of his own addiction to cocaine at the time. I further find that it affirmatively appears that, since the time of his arrest and conviction in early 1983, Mr. Rosen has overcome his addiction, and no longer engages in illegal drug use.

(RR 2)

The Referee also remarked that he was "impressed with Mr. Rosen's previous outstanding record as an attorney, and believe that he has an excellent chance of being a great asset to the Bar of this State." (Id.) As a result the Referee rejected the recommendation of the Florida Bar for disbarment "since such a punishment appears not only too harsh in the circumstances, but may well deprive the legal community of the benefit of Mr. Rosen's participation as an attorney in the future, should be be found rehabilitated and reinstated after the suspension period." (Id.) Based upon these findings, the Referee recommended that the appropriate discipline to be imposed should be as follows:

> (1) Suspension from the practice of law 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 p.3)

(2) That Mr. Rosen "be ordered to provide 200 hours of community service to the Florida Bar's Special Committee on Alcohol Abuse, or to any entity that committee may establish to carry out its mandate."

On or about May 28, 1986, the Florida Bar served its Petition for Review of the Referee's Report. Since this Petition was served some 63 days after the Report of Referee was filed with this Court, Mr. Rosen moved this Court to strike the Petition of the Complainant as untimely. See "Motion to Strike Complainant's Petition for Review," filed with this Court on or about June 9, 1986. In addition, Mr. Rosen lodged a "Conditional Cross-Petition for Review, conditioned upon this Court's denial of Respondent's Motion to strike Complaint's petition for Review."[2] On information and belief, this Court denied Mr. Rosen's "Motion to Strike" by order dated June 19, 1986. As a result, Mr. Rosen now also addresses the issue raised in his Cross Petition herein, pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure.

The instant Answering Brief is filed within 20 days of service of the Florida Bar's Petition for Review, as required by

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[2] Although Respondent avers that the filing of the Motion to Strike -- which, if granted, would have mooted the instant proceedings -- should have tolled the time for further proceedings herein, Respondent filed his "Conditional Cross-Petition for Review" within the ten-day period for doing so, to assure that it preserved his jurisdictional right to seek review also of the jurisdictional question raised before the Referee.

Rule 11.09(3)(c), Integration Rules of the Florida Bar,[3] and is thus timely.

[3] Since the rule requires that the Answering Brief be filed within 20 days of "service," Rule 9.420(d), Florida Rules of Appellate Procedure, permits that "five days be added to the prescribed period." This rule is applicable to the instant proceedings, pursuant to Rule 11.09(6), Integration Rules.

STATEMENT OF FACTS

From 1969 through 1981, Mr. Rosen was a well-respected lawyer specializing in tax. Having graduated second in his class at the University of Miami School of Law, and already licensed as a Certified Public Accountant, Mr. Rosen quickly achieved wide recognition for his work in tax law. He is the author of several articles and has authoried one book on the subject. In addition, he frequently lectured for CLE programs, for the Bar and Certified Public Accountants groups, in the area of tax management. (RRE Composite A, subdenominated Exhibit A, p. 2)

In 1980, however, Mr. Rosen was struck by a variety of personal tragedies, which eventually led to his use and addiction to cocaine. In 1980, his mother was stricken with cancer, and during the next year or so, died a slow and painful death from starvation. Mr. Rosen's marriage crumbled during this trying time; and, by the time his mother -- his only remaining family member -- died, his marriage had ended and divorce proceedings had begun. (RRE Composite A, subdenominated Exhibit A, p. 2-3).

Finding himself alone, Mr. Rosen began to consume cocaine, and by June, 1982 (the date of the events which led to his conviction) he was an habitual free-base cocaine user. (Id., p. 3)

By this time, Mr. Rosen no longer actively practiced law. His mother had left him a rather substantial amount of money upon her death; and, recognizing that his use of cocaine was threatening to affect his competency to effectively serve his clients, he quietly wound up his practice at the end of 1981.

(REx Composite A, subdenominated Respondent's Exhibit D). Mr. Klock, a personal friend, former fellow law student and professional associate, also testified to these problems, at the final hearing herein (Tr. 25-26):

> Howard [Rosen] did find, Judge, that a couple things went wrong in his life. One, he had a divorce, and the other thing, was his mother, who he was very close to, became ill and died a very long and painful death of cancer.
>
> At about the same time, he became involved with cocaine, and that is really when things spiraled down for him.
>
> I've had, unfortunately, a number of experiences now, professionally, Your Honor, with people involved with cocaine. I, at the time that Howard was going through this, did not recognize the symptoms for what they are. Since that time, since it's closer to home, I've become painfully familiar with them.
>
> Howard began to pay no attention to a whole number of things. He did, however, at the point in time he felt he wasn't competent to practice law, stopped practicing law, well in advance of any problems that arose. He closed his office.
>
> He had been handling matters for me as a CPA. He asked me to secure someone else to handle the matters. He didn't explain why. He told me he had personal problems, and he did not feel that he was qualified at that point to continue.
>
> . . . Howard's problems, I am certain, is directly attached to this cocaine problem he had; it is a disease. I think, Your Honor, he was someone who had it very very badly. And he just became very very withdrawn. And basically, he was simply camping out, living in his house, Your Honor, almost like a hermit.

Mr. Klock also testified that Mr. Rosen is no longer imbibing in cocaine, and that he believed that Mr. Rosen should not be disbarred as he "can make a valuable contribution to the profession."

Mr. Rosen further acknowledged that the incident which led to his conviction in federal court in Florida[4] also generated his being charged as a peripheral defendant in a rather complex conspiracy count in the United States District Court for the Eastern District of Michigan, Case No. 83-60550. See REx. Composite A (subdenominated Respodnent's Exhibit F).[5]

It is upon these facts that the Referee herein found that the criminal behavior in which Mr. Rosen had engaged was "as a result of his own addiction to cocaine at the time;" and, as a result of this significant mitigating factor -- as well as his outstanding record as an attorney -- that disbarment should not be imposed, and that a suspension, concurrent with the one already imposed upon Mr. Rosen, was an appropriate punishment herein.

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[4] This is the conviction which resulted in Mr. Rosen's present suspension, see The Florida Bar v. Howard Rosen, Case No. 65,032, which related to the sale of cocaine on June 17, 1982.

[5] Mr. Rosen's only alleged involvement in that conspiracy was set forth in Overt Acts 73 and 77. Overt Act 73 charges from Rosen with the very charge to which he pleaded guilty in his previous case in the Southern District of Florida, the conviction of which is what underlies this instant disciplinary proceeding.

SUMMARY OF ARGUMENT

Disbarment is an inappropriate form of discipline where the facts are unrefuted that the respondent was addicted to cocaine, and the Referee finds that the criminal behavior, the conviction of which is the basis for the institution of these proceedings by the Florida Bar, is the direct result of this addiction.

Furthermore, the fact that two separate convictions result from the same criminal activity, is insufficient to constitute cumulative conduct which would support disbarment.

Disbarment is an extreme sanction; and should not be imposed, except "in those rare cases where rehabilitation is highly improbable." The Florida Bar v. Davis, 361 so.2d 159, 162 (Fla. 1976). Since there is a factual finding already demonstrating that Mr. Rosen is no longer a cocaine user, and that he would be an asset, not detriment, to the Florida Bar, the Referee's recommendation of suspension -- not disbarment -- should be adopted.

In addition, the Referee was in error in denying, sub silentio, Mr. Rosen's "Motion to Dismiss for Lack of Jurisdiction and Incorporated Memorandum of Law."

Rule 11.07(4), Integration Rules of the Florida Bar, contains two disciplinary alternatives when seeking redress for the conviction of a crime by one of its members: 1) automatic suspension, and 2) further disciplinary proceedings.

Since the Florida Bar sought automatic suspension against Mr. Rosen, as a result of his conviction for possession of cocaine (REx Composite A, subdenominated Exhibit e), it is now barred from

seeking further disciplinary action, solely as a result of the conviction.

ARGUMENT

I.

THE REFEREE'S REPORT OUGHT TO BE ADOPTED, AS IT IS SUPPORTED BY THE FACTS AND THE LAW

The Florida Bar has petitioned this Court to review and reject the recommendations of the Referee herein, with regard to the discipline to be imposed upon the Respondent.

The Report of Referee and his recommendation that Mr. Rosen ought to be suspended, not disbarred, are based upon factual findings which "should be upheld unless clearly erroneous or without support in the evidence." The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978). Accord, The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla. 1978); The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968).

Without assailing these substantial factual findings -- all of which relate to mitigating circumstances and mandate leniency -- The Florida Bar seemingly asks this Court to reject the Referee's well-reasoned Report, solely because the defendant's conduct involved illegal drug possession and generated two separate, but identical, convictions.[6] These factors -- which the Florida Bar alleges solely from the fact that Mr. Rosen concedes both convictions, not upon the underlying facts of the

[6] That Mr. Rosen ultimately pleaded guilty to two federal felonies, in two separate Districts, does not alter the fact that both felonies encompassed the same illegal act; albeit the one in Florida was a substantive possession charge and the one in Detroit was a conspiracy charge.

charges themselves -- are simply not enough to demand disbarment as a sanction.

Specifically, we acknowledge that this Court has expressed that it will deal "more severely with cumulative misconduct than with isolated misconduct." The Florida Bar v. Vernell, 374 So.2d 473, 476 (Fla. 1979). Cf., The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983). The cumulative conduct referred to in these cases, however, relate to repeated reprimands of the same attorney or more than one incidences of separate and different acts of criminality or misconduct.

The fact that Mr. Rosen's criminal possession of cocaine resulted in not one, but two convictions is not what can be considered "cumulative misconduct," and the case the Florida Bar cites for that proposition does not say otherwise. In The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983), did not announce that the violation of two counts of criminal activity from the same transaction should be considered cumulative. Compare with The Florida Bar v. Carter, supra, 429 So.2d at 4 (distinquishing separate conduct which will be considered cumulative as that which occurs after a previous disciplinary case, or that which should have deterred the attorney's conduct but which did not). Instead, the Wilson case involved an order of disbarrment of an attorney who solicited his own client to engage in criminal activity, was convicted after a jury trial of two separate charges, maintained his innocence even though convicted, and who offered no evidence in mitigation. Indeed, this Court specifically recognized the

lack of mitigating circumstances as contributive to its determination in that case:

> If substantial and convincing evidence of mitigating circumstances had been presented, the complexion of the case may very well have been different. But no evidence in mitigation has been proferred by respondent. His claims of innocence and lack of knOWeldge are belied by the jury verdict and the specific finding by the trial judge in an order denying a motion to vacate sentence that respondent had the requisite knowledge that the package contained cocaine. The only mitigating circumstances that could be relevant is the fact that respondent had no prior disciplinary record. However, since respondent had only been a member of the bar for approximately six months prior to his arrest, this evidence is of little value.

Here, not only were substantial mitigating factors presented to and relied upon by the Referee, but also the misconduct complained of 1) had no effect upon Mr. Rosen's conduct as a lawyer, as he -- quite laudably -- had closed his law practice before the event which led to his eventual arrest had occurred; 2) occured to an individual, who not only had no prior disciplinary record, but was an outstanding member of the Bar, who had contributed to society not only by his outstanding ability as a tax lawyer, but also contributed to the Bar and professional community itself by giving of his time and talent to CLE functions and professional publications.

The first of these mitigating factors -- addiction -- has always substantiated the rejection of the severe sanction of disbarment. See The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982); The Florida Bar v. Ullensvang, 400 So.2d 969 (Fla. 1981); The Florida Bar v. Perri, 435 So.2d 827 (Fla. 1983).

In Larkin, supra, this Court acknowledged that "[i]n those cases where alcoholism is the underlying cause of professional

misconduct and the individual attorney is willing to cooperate in seeking alcoholism rehabilitation, we should take these circumstances into account in determining the appropriate discipline." Since this Court found that "Mr. Larkin's professional misconduct stems totally from the effects of alcohol abuse," it ruled that he be suspended for ninety-one days, even though he had previously been found guilty by this Court of similar misconduct in 1979, and the misconduct complained of gravely affected the practice of law and the rights of one of his clients.

Similarly, in Ullensvang, supra, the Referee's Report was adopted, thereby suspending the respondent for three years rather than disbarring him, because of his alcoholism was a contributing factor resulting in his misconduct. The referee quite appropriately commented that the misconduct therein (repeated and various abuses of a client's trust funds) should normally lead to disbarment; but refused to order such a severe sanction because the attorney "merits a change to redeem himself" by conquering his alcoholism. See also The Florida Bar v. Perri, supra, (attorney suspended for improper use and conversion of funds in trust accounts, because it appeared that the respondent suffered from emotional disorders, a mitigating factor warranting suspension rather than disbarment).

As this Court has expressed often, the "ultimate judgment as to the disciplinary penalty to be imposed must not only be just to the public but also must be fair to the accused." The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978). See also The Florida Bar v.

Wilson, 425 So.2d 2, 3 (Fla. 1983); State v. Bass, 106 So.2d 77 (Fla. 1958); State ex rel. The Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954).

Here the facts found in mitigation mandate a rejection of the severe sanction of disbarment. The record herein demonstrates that 1) Mr. Rosen's misconduct was the result of his addiction of cocaine; 2) that Mr. Rosen has overcome is addiction and no longer engages in illegal drug use; 3) that Mr. Rosen closed his office, when it appeared that his drug use might effect his ability to effectively represent his clients, thus avoiding any adverse impact upon the practice of law in this State as a result of his misconduct; 4) that he has never had any previous disciplinary problems as an attorney; 5) that he has instead been a productive, indeed exemplary, member of the Bar prior to his problems with drug use; and 6) now appears to be rehabilitated.

The severe sanction of disbarment "is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable." The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1976). See also In Re LaMotte, 342 So.2d 513 (Fla. 1977). There are simply no facts in this record to support this extreme penalty here. Indeed, given the admitted cocaine addiction which led Mr. Rosen to the crime for which he pleaded guilty, has been convicted and has now served time, there is no significant reason to believe that his rehabilitation -- by remaining drug free -- has not already been accomplished.

As the Referee stated herein: "I must reject the recommendation of the Florida Bar that he be disbarred, since such

a punishment appears not only too harsh in the circumstances, but may well deprive the legal community of the benefit of Mr. Rosen's participation as an attorney in the future, should he be found rehabilitated and reinstated after the suspension period." RR, 3. We urge this Court to adopt the Referee's recommendations as the facts and the law require it.

II.

THE FLORIDA BAR LACKED JURISDICTION TO INSTITUTE THE INSTANT DISCIPLINARY PROCEEDINGS, AND THEY SHOULD NOW BE DISMISSED

Upon conviction, Rule 11.07(4) provides that the Florida Bar may take two mutually exclusive disciplinary actions:

> (4) Disciplinary judgment after conviction. If a . . . judgment of guilty of a felony is entered against a member of the Florida Bar . . . such judgment shall be conclusive proof of the guilt of the offense charged. Unless the Supreme Court permits an earlier application for reinstatement, the suspension imposed on the conviction shall, after final conviction, remain in effect for three years and thereafter until civil rights have been restored and until the convicted attorney is reinstated under the rule herein provided for reinstatement, or The Florida Bar may, at any time after final conviction, initiate a disciplinary action against the convicted attorney if deemed advisable.

The use of the word "or" to separate these two methods of seeking disciplinary action after conviction, makes each method -- the three-year suspension "or" the initiation of a disciplinary action -- mutually exclusive of another. Pompano Horse Club, Inc. v. State, 93 Fla. 415, 111 So. 801 (Fla. 1927); Pinellas County v. Woolley, 189 So.2d 217 (Fla. 2d DCA 1966); Dotty v. State, 197 So.2d 315 (Fla. 4th DCA 1967). As set forth in 49 Fla.Jur.2d Section 137:

> Employed between two terms that describe subjects of a power, the word "or" usually implies a discretion when it occurs in a directory provision and a choice between two alterantives when it occurs in a permissive provision.

Given the discretionary language by which the Florida Bar "may" seek to initiate disciplinary action against a convicted attorney "if deemed advisable," it appears that Section 11.07(4) is a permissive provision, and that it grants power to the Florida Bar to choose one of the two alternatives. It does not, under any

appropriate rule of construction, however, permit the Florida Bar to choose both.

On April 5, 1984, pursuant to Rule 11.07(4), Integration Rules of the Florida Bar, the Supreme Court, in Case No. 65,032, suspended Mr. Rosen's bar license for a period of three years "and thereafter until civil rights have been restored."

The instant action has been brought by the Florida Bar, in order to additionally seek disbarment against the respondent solely as a result of this conviction. See Complaint, filed here in on or about August 5, 1986. Since the Florida Bar has already elected and imposed the first of the two alternatives in Rule 11.07(4), viz., the three year suspension, it lacks jurisdiction to now seek to pursue the other of these alternatives; viz., the initiation of separate disciplinary action.

The only case the Florida Bar cited before the Referee, in support of their position that they could pursue both of the alternatives in Section 11.07(4) was The Florida Bar v. Heckler, ____So.2d ___, Case No. 65,563 (Fla. 9/19/85)[7] where this Court imposed the sanction of disbarment after a bar member had already been automatically suspended pursuant to Florida Bar Integration Rule 11.07. A review of that opinion discloses that the Court's jurisdiction to so impose this sanction under these circumstances,

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[7] We note that the Florida Bar can find but one case -- only recently decided -- wherein it sought both disciplinary actions permitted under Rule 11.07; that is, both automatic suspension and disbarment. It appears, therefore, that seeking this double penalty is rare indeed, and explains why this Court has yet had a fair opportunity to pass on the legal question of jurisdiction in this regard.

was never raised by the Complainant nor sua sponte addressed by the Court. As such, it has absolutely no precedential value on the issue raised by this Cross-Petition. See Hagans v. Lavone, 415 U.S. 518, 533 n.5, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974):

> [W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.

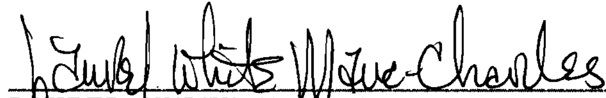
Accord, Penhurst State School and Hosp. v. Halderman, ________ U.S. ____, 79 L.Ed.2d 67, 91 (1984). See also United States v. Miller, 208 U.S. 32, 28 S.Ct. 199, 52 L.Ed.376 (a court opinion is not authority for a point neither made, discussed, nor directly decided therein); Webster v. Fall, 266 U.S. 507, 45 S.Ct. 148, 69 L.Ed. 411 (questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as constituting precedent); Cross v. Burke, 146 U.S. 82, 13 S.Ct. 11, 36 L.Ed. 896 (where point was not contested in former decision, court is not bound by any views expressed therein); United States v. Bank of United States, 56 How 382, 12 L.Ed. 199 (court can legitimately revise only questions of law raised and decided in that court); Re City Bank of New Orleans, 3 How. 292, 11 L.Ed. 603 (opinion of court cannot be relied upon as binding auithority, unless case called for its expression).

Since the Florida Bar has already sought automatic suspension as the alternative of choice in this matter, the instant disciplinary proceedings should be dismissed for lack of jurisdiction.

CONCLUSION

For all the above and foregoing reasons, Mr. Rosen prays this Court reject The Florida Bar's request that disbarment be imposed, and instead adopt the Referee's recommendation that the just discipline herein be suspension, concurrent, nunc pro tunc, with that already imposed upon the Respondent, and 200 hours of community service to the Florida Bar's Special Committee on Alcohol Abuse.

Respectfully submitted,



LAUREL WHITE MARC-CHARLES, ESQ.
Suite 805
2455 East Sunrise Boulevard
Fort Lauderdale, FL 33304
(305) 566-6224

Attorney for Respondent, ROSEN

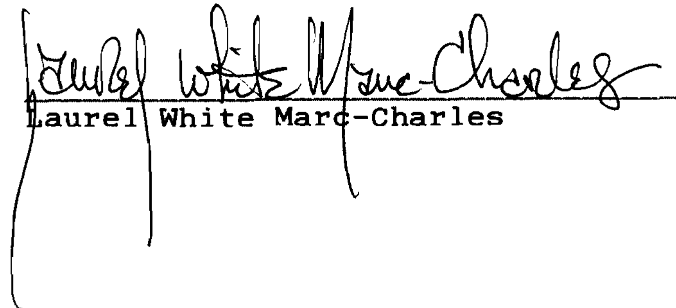
CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused a copy of the above and foregoing to be served, by mail, this 20th day of June, 1986, upon the following:

Paul A. Gross
Branch Staff Counsel
The Florida Bar
444 Brickell Avenue
Miami, FL 333131

John T. Berry
Staff Counsel
The Florida Bar
Tallahassee, FL 32301

John F. Harkness
Executive Director
The Florida Bar
Tallahassee, Florida 32301



Laurel White Marc-Charles