IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STEVEN M. GREENBERG,

Respondent.

CASE NO. 69,987

RESPONDENT'S ANSWER BRIEF AND INITAL BRIEF

ON CROSS-PETITION FOR REVIEW

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INTRODUCTION

Respondent in these proceedings will be referred to as such or as "Mr. Greenberg." Complainant will be referred to as "The Florida Bar" or as "the Bar."

References to the Bar's exhibits shall be by the designation "Bar Ex." followed by the appropriate number, and references to Respondent's exhibits shall be by "R. Ex." and followed by the exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

On February 3, 1987, The Florida Bar filed its formal complaint, charging Respondent with violating various provisions of the Code of Professional Responsibility as a result of his conviction, on June 25, 1985, on two counts of felonious conduct. As a result of Respondent's conviction, he was automatically suspended from the practice of law for a period of not less than three years, effective July 23, 1985. The Florida Bar v. Greenberg, 480 So.2d 1284 (Fla. 1985).

Final hearing on the Bar's case was held on June 26, 1987. The referee's report, dated October 16, 1987, was duly filed in this Court.

The Florida Bar has appealed that portion of the referee's report in which he recommended that Petitioner be disbarred for three years nunc pro tunc July 23, 1985. Respondent cross-appeals and asks the Court to suspend Respondent for three years nunc pro tunc July 23, 1985.

Respondent has no quarrel with the accuracy of the statement of facts included in the Bar's brief. However, because that statement of facts did not include the substantial mitigating evidence presented to the referee, Respondent hereby supplements the statement of facts filed by the Bar.

At final hearing, Respondent presented six witnesses who testified on his behalf as to his character and as to the substantial amount of time that Respondent has spent doing work for the good of his community. Respondent also testified in his own behalf.

The first witness to testify for Respondent was Joni Goodman, the Circuit Director of the State of Florida Guardian Ad Litem program in the Eleventh Judicial Circuit (hereinafter referred to as the "GAL" program.)

Ms. Goodman testified as to Respondent's substantial work for the GAL program on a pro bono basis. She described in detail one of the more complex cases that respondent took in which she guessed that he spent 50 or 60 hours time securing financial support for a severely retarded child in state custody (TR 19-20). She also pointed out that, unlike most lawyers, when Respondent was wrapping up one of his GAL cases, he would approach her and ask for a new one (TR 20). She pointed out that Respondent had a "strong social conscience" (TR 21), and that she believed he was capable of rehabilitating himself and once again becoming an asset to the Bar (TR 21).

Ms. Goodman also pointed out that Respondent had also taken steps to begin working for the GAL program as a lay volunteer. The program accepted Respondent as a volunteer after Ms. Goodman cleared his participation with the supervisor of the program, Judge Gladstone. Ms. Goodman testified that Judge Gladstone stated that he would be "delighted" to have Respondent working for the program (TR 22).

The second witness to testify on Respondent's behalf was Harris K. Solomon, a practicing lawyer in Fort Lauderdale. Mr. Solomon is a past staff counsel to The Florida Bar, has chaired the Broward County Bar Association's Legal Ethics

Committee, and is currently on the Grievance Committee. Mr. Solomon testified that Respondent

> was both a good lawyer and had a reputation for being truthful and fair—dealing without exception. (TR 27)

When asked if he thought that Respondent was capable of rehabilitating himself and resuming the practice of law as an asset to the Bar, Mr. Solomon replied

> I think that Steve Greenberg should be able to practice law even now. (TR 28, 29).

Respondent's former partner, Leonard Pertnoy, also testified on Respondent's behalf. Mr. Pertnoy is currently an assistant dean and law professor at St. Thomas School of Law. He has been a member of the Bar since 1969 and was Respondent's partner from approximately 1971 until August 1984.

Mr. Pertnoy related to the referee Respondent's pro bono activities over the years. Initially, Respondent "was the founder and certainly the motivator" behind Switchboard of Miami, one of the first 24-hour action lines in the country (TR 33). Eventually, Respondent became an associate in Mr. Pertnoy's firm and, ultimately, became a partner. Even after becoming a member of Mr. Pertnoy's firm, Respondent used his own time and ability to further Switchboard's causes (TR 35).

Throughout Respondent's partnership with Mr. Pertnoy, Respondent devoted 10 to 15 percent of his time to pro bono causes (TR 36).

Despite his conviction, Mr. Pertnoy described Respondent as an honest person and one with whom Mr. Pertnoy "had a partnership on a handshake for the better part of 15 years . . ." (TR 39).

When asked if Respondent was capable of rehabilitating himself, Mr. Pertnoy replied that "I strongly believe he is rehabilitated" (TR 40).

Stephen Raskin, a member of the Bar since 1970, was Respondent's fourth witness.

Mr. Raskin met Respondent at the annual ACLU banquet in the early 1970s. At that time Respondent "was the moving force" behind Switchboard (TR 43). Part of Respondent's duties at Switchboard was to refer individuals with criminal problems to a panel of lawyers who would represent them at a fee substantially less than commonly charged in the community (TR 43). Mr. Raskin pointed out that Respondent made sure that the lawyers handling the referral cases were doing a good job, and that the fees that were charged the clients were within the range that they could afford as well as being below the going rate in the community (TR 43).

Mr. Raskin testified that Respondent participated in ACLU matters even after he joined his law firm (TR 44).

Currently, Respondent is doing legal research for Mr. Raskin. He testified that Respondent adheres strictly to the Bar's ruling regarding clerking by suspended lawyers (TR 46, 47), and that Respondent was an excellent lawyer prior to this suspension.

Mr. Raskin believes that Respondents is "enormously honest" (TR 49).

He stated that after Respondent's convictions, despite the fact that he was going through a "horrendous time," Respondent took the position that he was just going to accept his conviction and go forward with his life (TR 50).

When asked if he thought that Respondent was capable of rehabilitation and becoming a lawyer again, Mr. Raskin replied

> I don't think there is any question about it. (TR 50)

The lawyer that defended Respondent in his criminal proceedings, Edwin Marger, a member of The Florida Bar since 1953, and, until recently, a member of the Board of Governors of The Florida Bar, also testified in Respondent's behalf.

Mr. Marger stated that he believes Respondent has tremendous ability in the field of criminal law, and that

> he is the kind of lawyer that is an asset to the Bar and to the public. (TR 57)

Despite his conviction, Mr. Marger thinks that Respondent is a person of good moral character and integrity, and that he is completely honest. Mr. Marger then volunteered that he thought that Respondent

> got into a situation where he made a serious mistake, but I think that he has shown that he has been tremendously rehabilitated. (TR 57)

Mr. Marger reiterated his opinion of Respondent's rehabilitation later in his testimony (TR 59).

When asked what he thought the primary purpose of disciplinary proceedings was, Mr. Marger replied:

> Absolutely to protect the public.
>
> I think that in the protection of the public, you also have to attempt to retain attorneys who are especially good, who have the ability to be lawyers to protect the public. (TR 59).

After acknowledging that he knew that Respondent had done a great deal of work keeping people from becoming involved in drugs, and a tremendous amount of pro bono work, Mr. Marger opined that Respondent was "the kind of person that will continue to help the public."

Respondent's last witness was Mary Crawford Kiley, currently a Miami businesswoman, but formerly the Deputy Director of the National Drug Abuse Training for the Resource and Development Center in Washington, D.C., an HEW program. Prior to that, she was Deputy Director of the Dade County Comprehensive Drug Program and that county's addiction treatment agency (TR 72, 73).

Most of Ms. Kiley's career has been devoted to dealing with substance abuse (TR 73).

She testified that she met Respondent in approximately 1970 when she was the Deputy Director of the Comprehensive Drug Program. Respondent at the time was the Director of Switchboard. She testified that Respondent devoted all of his time to Switchboard without any salary (TR 75, 76).

Ms. Kiley worked with Respondent for three to four years (TR 78), and during that time he was active on numerous boards.

During that time, Respondent attempted to get things accomplished for the good of the community, not for his individual benefit (TR 77, 78).

Ms. Kiley also attested to Respondent's whole-hearted participation in the treatment alternatives to street crime (TASC) program in Miami. Respondent worked for TASC for free and did not stop his work when it appeared that he might not receive any remuneration for his efforts (TR 82).

When asked if she thought Respondent's actions reflected favorably on The Florida Bar, Ms. Kiley replied:

> Absolutely. He was totally committed and dedicated.
>
> Isn't that what you are all about? (TR 82)

Respondent testified on his own behalf at the final hearing. He acknowledged that he has been suspended from the Bar since July 1985, and that he was convicted of conspiracy to possess with intent to distribution marijuana and conspiracy to import marijuana. Those are the only crimes for which he has ever been charged, and he has never been disciplined by The Florida Bar (TR 85).

Respondent's participation in the conspiracy was from November 1979 through March 1980 (TR 85). He was indicted in July 1983 and convicted after jury trial in Hammond, Indiana, in March 1984 (TR 86).

Fourteen months after his conviction, the trial judge denied his motion for a new trial. Ultimately, in June 1985, Respondent

was sentenced to two concurrent two-year sentences. His judgment and commitment order was initially dated June 25, 1985--and led to the Bar's automatic suspension one month later (TR 88).

After serving 53 weeks at Eglin Air Force Base, Respondent spent five months in a halfway house in Miami (TR 90). His sentence has been completed and his civil rights were restored March 6, 1987 (TR 90; R. Ex. 1).

Respondent's cooperation with the federal prosecution of one of his co-defendants, without the benefit of any "deals," and his cooperation with the Florida statewide grand jury, led to letters of thanks from two federal prosecutors (R. Ex. 2, 3; TR 91, 94) and a letter of thanks from the chief prosecutor of the Florida statewide grand jury (R. Ex. 4; TR 95, 96).

Respondent testified extensively about his volunteer work with Switchboard of Miami. One of the reasons for his devoting his efforts to Switchboard was an event that he and his wife experienced in approximately 1970. While standing in line to enter a folk music house, Respondent and his wife saw a girl "who had apparently taken acid" fall over (TR 100). She was lying on her back with her eyes open and "twitching." Respondent then began to devote his full time efforts to Switchboard.

At the time that Respondent began working for Switchboard, it "was virtually a non-organization" with a budget of $35 per month (TR 99). The organization, after Respondent's efforts, grew to the point where it referred people to other community programs that could assist them, worked to improve those

programs, and developed a line where individuals could call in to discuss their problems anonymously (TR 102). Eventually, Switchboard operated four drug rescue vehicles (TR 102) and operated a runaway house where people could stay for periods ranging from one day to a week (TR 103).

Respondent developed the Switchboard program in stages. His first task was to get the telephone lines open and to have somebody there 24 hours per day. Respondent was on call 24 hours per day, seven days a week for about five years with Switchboard (TR 105), and initially devoted about 75 hours per week to Switchboard when he started working for them in 1970 (TR 107). He earned no money during his first two years with the program, electing instead to live off his wife's salary. Eventually, in 1972, the program received federal funding and Respondent received a salary of $100 per week for his work (TR 109).

In addition to Respondent's pro bono work with Switchboard, he was involved in numerous other programs that benefited the community. Among them was his membership on the Board of Directors of the Children's Psychiatric Center, his work with ACLU, and his membership on the Dade County Youth Relations Board. Respondent's work with the Youth Relations Board led to his almost single-handedly avoiding an armed conflict between the Miami police and young people in a park in Miami in February 1971 (TR 111, 112; R. Ex. 6).

Respondent also was very active in TASC, an organization that was formed in the mid-70s (TR 113).

Eventually, Respondent's pro bono work evolved into his efforts on behalf of the GAL program. Respondent testified that his interest in this program in part arose as his representation of a police officer charged with sexually molesting his daughter over a three to four-year period. The girl was 13 at the time of Respondent's representation.

Respondent took the police officer's case on for free (TR 22).

Respondent attested to his high ethical standards when he told the referee that he did not feel it was proper for him to represent the father in both the criminal proceedings as well as representing his interest in the juvenile proceedings. Accordingly, he secured another lawyer to represent the police officer in the criminal case for free (TR 118, 119). Respondent and the other lawyer then worked to get counseling for the family as well as for the girl. Ultimately, the family got back together (TR 119). Ms. Goodman testified that she was "very impressed" with the way Respondent handled the police officer's case, and she believed that Respondent

> played a big role in assisting his client to recognize that he had a problem, and that treatment was indicated. (TR 17)

She stated that the family was successfully reunited, that the child is no longer at risk for sexual abuse, although she is once again living with her father, and that Respondent's manner of handling the case contributed to the successful outcome (TR 17).

Ms. Goodman testified that after seeing Respondent's work with the police officer's case, she asked him to continue taking GAL cases on a pro bono basis. Of course, Respondent complied (TR 19).

Respondent also discussed another GAL case where he represented a profoundly mentally retarded child whose parents, despite their substantial assets, were not paying for the child's treatment. Respondent's efforts resulted in the parents being forced to pay a substantial settlement to HRS and to continue support for the child (TR 121).

Respondent testified that his efforts on behalf of the retarded child probably totaled more than 40 hours (TR 122).

As a result of his efforts on behalf of the retarded child, on May 7, 1985 (after his conviction but before his suspension), Respondent received a letter of commendation from the District Administrator of the Florida Department of HRS (R. Ex. 8). Respondent also received an award from the Public Interest Law Bank of the Dade County Bar Association, dated May 22, 1985 (R. Ex. 7).

Respondent estimated that he handled approximately 10 to 12 cases per year where he entered an appearance as counsel of record for juveniles on a pro bono basis (TR 125). When asked if he enjoyed doing pro bono work, Respondent candidly stated:

> I sometimes enjoyed it. It is a heart-breaking thing, like the practice of law is sometimes heart-breaking.
>
> I felt a lot better when I did it. I felt like I was doing something. (TR 129)

Respondent testified that he misses being a lawyer, and he misses being a pro bono lawyer (TR 130).

Even before his sentencing, Respondent was taking steps to continue his participation in the GAL program. Towards this end, he wrote the Honorable William E. Gladstone, the judge in charge of the juvenile division and, concomitantly, a moving force in the GAL program. In responding to Respondent's overtures by letter dated March 20, 1985 (R. Ex. 9), Judge Gladstone stated the following:

> For many years you have been a valuable officer of this court and a blessing to the children you have served. I recall that you have served, often without fee, as guardian ad litem for neglected and abused children--even years before our formal guardian ad litem program was established. Now that we can, and so successfully do, use lay persons as guardians ad litem in neglect and abuse cases, I hope you will be able to serve even if you are unable to practice law.

Respondent has now undergone the lay guardian ad litem training and looks forward to going to work for the program (TR 131, 132).

Respondent also taught, as a volunteer, at Nova College of Law, from 1983 to 1985 (TR 132, 133).

Partially as a result of his criminal trial, Respondent and his wife separated the week before his trial in February 1983. That separation led to a divorce.

Despite his incarceration, Respondent was able to meet his obligation of $1200 per month child support for two children, plus all medical and dental bills, half of summer camp, and health insurance (TR 134). Respondent was able to accomplish

this monumental task by turning over his savings account, with $7,000 in it, and by assigning to his wife the $1,000 per month fee payments that he is receiving from a past client whose case was completed (TR 134).

Respondent currently does paralegal work for lawyers.

POINTS ON APPEAL

POINT I

THE EXTENSIVE MITIGATION PRESENTED AT FINAL HEARING, WHEN COUPLED WITH RESPONDENT'S LIMITED ROLE IN THE CRIMINAL CONSPIRACY, REDUCES THE APPROPRIATE SANCTION FOR RESPONDENT'S MISCONDUCT TO THREE YEARS SUSPENSION, EFFECTIVE JULY 23, 1985.

POINT II

(Answering the Bar's Point on Appeal)
THE REFEREE HAD THE AUTHORITY TO IMPOSE DISBARMENT FOR THREE YEARS.

SUMMARY OF ARGUMENT

The referee improperly disregarded Respondent's substantial evidence in mitigation.

Through his own testimony, and that of his six witnesses, Respondent presented persuasive evidence in mitigation of discipline, the most significant of which was his long-standing and extensive pro bono work as a lawyer.

Respondent's pro bono work, his superb reputation for honesty and legal ability, his demonstrated rehabilitation, his prior clean disciplinary record, and the brief period of time in which he participated in the conspiracy (four months in late 1979 and early 1980) constitute such mitigation that the sanction meted out in this case should be reduced from disbarment to the three year suspension currently in effect.

This Court has already determined that disbarment under the Integration Rule (i.e., a minimum of three years) is appropriate for disciplinary cases that began before January 1, 1987 (the effective date of the new Rules of Discipline). The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987).

Even if Newman is not dispositive of the issue, the Bar is prohibited by the doctrine of laches from arguing the new rules apply because of the Bar's untimely processing of the case. The Bar did not file its formal complaint until 17 months after Respondent's automatic suspension--and one month after the new rules took effect.

Finally, the application of the new Rules of Discipline to Respondent's case would be an improper *ex post facto* application of the new disciplinary rules.

POINT I

THE EXTENSIVE MITIGATION PRESENTED AT FINAL HEARING, WHEN COUPLED WITH RESPONDENT'S LIMITED ROLE IN THE CRIMINAL CONSPIRACY, REDUCES THE APPROPRIATE SANCTION FOR RESPONDENT'S MISCONDUCT TO THREE YEARS SUSPENSION, EFFECTIVE JULY 23, 1985.

In recommending that Respondent be disbarred, the referee clearly disregarded the substantial evidence presented on Respondent's behalf in mitigation of discipline. By relying on the quotation on page 3 of his report from The Florida Bar v. Prior, 330 So.2d 697, 702 (Fla. 1976), to the effect that a felony conviction overwhelms all mitigation, the referee disregarded Respondent's evidence in mitigation in contravention of Florida disciplinary jurisprudence.

Despite the language quoted in the 1976 Prior case, this Court has frequently considered evidence in mitigation of discipline before imposing a sanction after a felony conviction. See, e.g., The Florida Bar v. Giordano, 500 So.2d 1343 (Fla. 1987); The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986); and The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987). In fact, this Court has stated that due process requires that the Respondent have the opportunity to present evidence in mitigation. State ex rel. Florida Bar v. Evans, 94 So.2d 730 (Fla. 1957).

Mitigation is also an essential element to be considered in all disciplines imposed under the Bar's newly adopted Florida Standards for Imposing Lawyer Sanctions (hereinafter, the Standards). Rule 3.0(d) of those standards mandates the court's consideration of mitigation in imposing a sanction.

Considering mitigation is consistent with this Court's philosophy of deciding disciplinary matters on a case by case basis. The Bar's demand that automatic disbarment be imposed for felony cases has been rejected, in part, just so that mitigation can be brought to the Court's attention. Pavlick, supra, at 1235.

The mitigation presented at final hearing in Respondent's case, when properly weighed, reduces the appropriate sanction for his misconduct to the three year suspension already in effect.

The most impressive mitigation presented by Respondent is his long standing dedication to pro bono work. Respondent's partner, Leonard Pertnoy, estimated that throughout their 15-year partnership Respondent devoted 10 percent to 15 percent of his time to pro bono matters (TR 36).

The most significant of Respondent's social work was his efforts in organizing and developing Switchboard of Miami, one of the nation's first drug hotlines for young people.

Respondent's witnesses variously described his role in Switchboard as the "motivator" of the organization (TR 33), the "one that made everything happen" (TR 43), and "the person who organized it" (TR 75).

Respondent took over Switchboard in 1970 when it had a budget of $35 per month and was about to be expelled from its premises because "they just couldn't get the program together" (TR 99). Although he was already a member of The Florida Bar, Respondent elected to work for Switchboard for no salary (TR

108). Two years later, in 1972, when federal funding was received, Respondent received a salary of $100 per week (TR 108).

Respondent worked 75 hours per week for Switchboard (TR 107), and was on call all day long every day of the week (TR 105).

Respondent's good works did not go unnoticed. On September 6, 1970, an article in the Miami Beach Sun (R. Ex. 5) praised Respondent's efforts at Switchboard.

Respondent's first task at Switchboard was to get the hotline working (TR 105). The purposes of the program were to refer individuals seeking help to the appropriate program, to improve those programs, and to have a line where young people could anonymously discuss their problems (TR 102). Ultimately, through Respondent's efforts, the program obtained four drug rescue vehicles, operated a home for runaways and trained hospital personnel in the treatment of individuals suffering from drug overdoses (TR 102, 103, 106).

Steve Raskin, who testified at final hearing, pointed out that one of Respondent's projects involved operating a referral panel of lawyers who would represent at a substantially reduced fee persons referred to them by Switchboard. Respondent made sure the lawyers were doing a good job at a fee the client could afford, and at a rate below the community standard (TR 43).

While working at Switchboard, Respondent was also active in numerous other community projects. He was on the Dade County Youth Relations Board, the Board of Directors of the Children's

Psychiatric Center, and worked with the ACLU. As Respondent testified, "Where people asked me to work, I just went" (TR 110).

In February and March 1971, Respondent personally intervened in a confrontation between police and young people in Miami. His actions defused a situation that law enforcement officials were prepared to use gunfire to resolve (TR 111, 112). Respondent's actions received favorable press coverage from the Miami Herald (R. Ex. 6).

Eventually, Respondent entered the practice of law full time. But his work for the good of the community did not stop, it just changed.

Respondent was instrumental in getting the TASC (Treatment Alternatives to Street Crime) program in Miami off the ground in the mid-1970s (TR 114, 122). He set up the legal services component of the program and ultimately he and his partners were in court for TASC daily (TR 121-123).

Mary Crawford Kiley, a non-lawyer and one of Respondent's witnesses before the referee, described Respondent's efforts in setting up TASC (TR 80-82). He established TASC's legal services advocacy program and initially represented TASC's clients for free. Ms. Kiley testified that:

> Steve did it for free and didn't stop--this is where the honesty comes in. You asked me about honesty.
>
> Some people could have said, "I am not going to provide the service now because the funds aren't there any longer."
>
> But he didn't. He did what he said he was going to do, even if he didn't get any money for it. (TR 82)

When asked if his actions reflected favorably on The Florida Bar, Ms. Kiley replied:

> Absolutely. He was totally committed and dedicated.
>
> Isn't that what you are all about?

Respondent's <u>pro bono</u> work by the early to mid-1980s had gravitated towards representing young people for free in juvenile court. Respondent estimated that he handled as attorney of record 10 to 12 juvenile cases per year for no fee (TR 125). When asked how many cases he handled for free when no appearance was necessary, Respondent answered:

> I don't think I can answer that question. I just always have done it. I have never stopped doing it. (TR 126)

Respondent was doing Guardian Ad Litem (GAL) work long before that program was established. But his good works in this area came to the attention of the GAL program personnel in approximately 1984 when he represented, for free, a policeman charged with sexually molesting his 13 year old daughter (TR 117, 118).

Initially, Respondent represented the officer both in juvenile court and in criminal court. After a time, however, because the issues in the two cases "were so intertwined, and sometimes at odds with each other" (TR 118), Respondent withdrew from the criminal case and secured a new lawyer for the officer. The replacement lawyer also agreed to represent the policeman for free (TR 119).

Respondent's efforts resulted in the officer's family being reunited (TR 119, 17).

Respondent estimated he expended 10 to 12 hours per week for six weeks on the policeman's case (TR 119).

Ms. Joni Goodman, the Circuit Director for the Miami GAL program, noticed Respondent's efforts in the police officer's case. She testified at final hearing that she was "very impressed" with Respondent's handling of the matter and that "he played a big role" in helping his client get treatment for his problem (TR 16, 17).

After noting Respondent's impressive work, Ms. Goodman asked him to take on some GAL cases for free (TR 19). One of those cases involved a retarded child in state custody whose parents could afford to contribute to her care but chose not to do so. Respondent's efforts resulted in the family supporting the child (TR 19).

Ms. Goodman estimated Respondent put in 50 to 60 hours on the retarded child's case (TR 20). Respondent estimated that he put in over 40 hours on the case (TR 122).

Not only did Respondent never express reluctance about accepting GAL cases, he would ask Ms. Goodman to assign him new ones (TR 20).

As was true with his work with the youth of Miami in the 1970s, Respondent's work with young people in the 1980s did not go unnoticed. On May 22, 1985, Respondent was honored by the Public Interest Law Bank of the Dade County Bar Association for:

> providing _pro bono_ services in the finest tradition of the legal profession. (R. Ex. 7)

Several weeks prior to his award, Respondent received a letter of commendation from the District Administrator of Florida HRS praising his efforts to secure financial assistance from the parents of disadvantaged children (R. Ex. 8).

During direct examination at final hearing, the following dialogue took place between Respondent and his lawyer:

> Q. Do you enjoy doing _pro bono_ work?
>
> A. I sometimes enjoyed it. It is a heartbreaking thing, like the practice of law is sometimes heartbreaking.
>
> I felt a lot better when I did it. I felt like I was doing something.
>
> * * * *
>
> Somebody asks you for help and you help them. Sometimes, it's enjoyable and sometimes, it is intensely painful. But, overall, I feel that I am better for it.
>
> Q. Is it important to you?
>
> A. Yes, it has always been an important part of my life. It still is.
>
> Q. Do you miss being a _pro bono_ lawyer?
>
> A. I miss being a lawyer and I miss being a _pro bono_ lawyer. (TR 129, 130)

Even before Respondent reported for his incarceration in July 1985, he was trying to get permission to continue his GAL work as a lay worker. Towards that end he contacted Ms. Goodman and Judge Gladstone, the judge in charge of the program (TR 130). In response to Respondent's inquiry, Judge Gladstone wrote on March 30, 1985:

> For many years you have been a valuable officer of this Court and a blessing to the children you have served. I recall that you have served, often without fee, as guardian ad litem for neglected and abused children--even years before our formal Guardian ad Litem Program was established. Now that we can, and so successfully do, use lay persons as guardians ad litem in neglect and abuse cases, I hope you will be able to serve even if you are unable to practice law. (R. Ex. 9)

At final hearing on June 26, 1987, Ms. Goodman testified that Respondent would soon be taking cases as a lay volunteer (TR 22). Respondent has undergone lay GAL training (TR 132).

Respondent's eagerness to return to pro bono work, even as a non-lawyer, is consistent with Ms. Goodman's observation that he "has a strong social conscience" (TR 21) and with former Board of Governors member Edwin Marger's testimony that Respondent "is the kind of person that will continue to help the public" (TR 61).

Respondent's pro bono work alone, which lasted from 1970 until virtually the day before he reported to the U.S. Marshal in July 1985, should constitute sufficient mitigation to remove his case from the realm of disbarment. However, there are numerous other factors to consider also.

Rule 9.32 of the Florida Standards for Imposing Lawyer Sanctions lists 13 factors constituting mitigation. Among those factors are: 9.32(a) no prior disciplinary; 9.32(g) character or reputation; 9.32(j) interim rehabilitation; and 9.32(k) imposition of other penalties or sanctions. Not listed in the Standards, but of equal import is Respondent's relatively brief participation in the criminal conspiracy.

Prior to his suspension in July 1985, Respondent had no disciplinary history with The Florida Bar (TR 85).

Until his conviction Respondent had a sterling reputation, and one which has not been significantly diminished as a result of that conviction. All six of Respondent's witnesses attested to his integrity, character, and reputation.

Ms. Goodman testified that Respondent was an excellent advocate (TR 16) and that he was a particularly good attorney (TR 21).

Harris Solomon, a former Bar counsel and current member of a grievance committee, testified that Respondent was

> a good lawyer and had a reputation for being truthful and fair-dealing, without exception. (TR 27)

Mr. Solomon considers Respondent "as highly ethical as anybody I know" (TR 27).

Respondent's former partner, Leonard Pertnoy, described Respondent as "a quality lawyer," "a fine trial lawyer," and an "extremely" honest person (TR 38). The two "had a partnership on a handshake" for almost 15 years (TR 39).

Stephen Raskin testified that Respondent is an "excellent" lawyer (TR 48) and is "enormously honest" (TR 49).

Former Board of Governors member Edwin Marger considers Respondent "the kind of lawyer that is an asset to the Bar" (TR 56) and that he is "completely honest" (TR 57).

Ms. Kiley pointed out that Respondent was more concerned with doing things for the good of the community than in obtaining

personal gain (TR 77). She was so impressed with Respondent that she sent her mother to Respondent when she needed a lawyer. Ms. Kiley said that her mother was "totally" satisfied with Respondent's legal services (TR 78, 79).

Clearly, Respondent's reputation and character was impeccable prior to his conviction. His esteem in the eyes of his peers seems little reduced now.

Rule 9.32(j) of the Standards suggests that the Court consider interim rehabilitation in its deliberations. This is consistent with this Court's declaration in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) at 132, that the three goals of a disciplinary sanction are (1) protection of the public, (2) a discipline that is fair to the accused, i.e., encouraging reformation and rehabilitation while simultaneously disciplining him, and (3) deterring other lawyers.

Respondent's witnesses and his own actions prove positively that he is well down the road towards rehabilitation. Since the jury found him guilty in April 1984, Respondent has led an exemplary life. He has handled pro bono cases for the GAL program, resulting in an award (R. Ex. 7) and a letter of commendation (R. Ex. 8). Upon his release from prison, he had his civil rights restored on March 6, 1987 (R. Ex. 1) and he is now ready to continue his GAL work. He was a model prisoner (R. Exs. 10, 11).

The most important factor to consider in Respondent's rehabilitation, however, are his own acts towards getting his life in order.

Steve Raskin testified that despite Respondent's marriage breaking up and his criminal conviction, Respondent had an attitude of

> "Okay, this is what has happened. I accept it. Now I am going forward."
>
> He always seemed to have that ability to accept the bad things that were happening and then turn it around, turn his life around or change it and go forward from there. (TR 51).

Mr. Raskin doesn't "think there is any question about" Respondent's ability to rehabilitate himself (TR 50). Joni Goodman testified that Respondent is an asset to the Bar now (TR 21). When asked if Respondent was capable of rehabilitating himself and resuming the practice of law, former Bar counsel Harris Solomon said:

> I think Steve Greenberg should be able to practice law even now. (TR 29)

Leonard Pertnoy testified about Respondent that "I strongly believe he is rehabilitated" TR 40). Former Board of Governors member Edwin Marger stated:

> I would trust Steve with anything. I think that he is completely honest.
>
> I think that he got into a situation where he made a serious mistake, but I think that he has shown that he has been tremendously rehabilitated. (TR 57)

Another factor showing Respondent's rehabilitation is the exemplary manner that he handled his child support during his incarceration. Respondent and his wife separated the week before his trial in February 1984 (TR 133). By the time he reported to

Eglin he was divorced and obligated to pay support for two children in the amount of $1,200 per month, plus health insurance, half of summer camp, and all uninsured medical and dental bills (TR 134).

Respondent met his support obligations by turning over to his ex-wife his $7,000 savings account and by assigning to her a past fee that was being paid at the rate of $1,000 per month (TR 134).

Respondent has never been in arrears on his child support (TR 134).

Because disbarment is an appropriate discipline only in those rare cases where rehabilitation is highly unlikely, The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978), interim rehabilitation is a doubly important factor to consider in felony conviction cases.

As was true with the accused lawyer in The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986), Respondent should not be disbarred because he "has an excellent chance of being a great asset to the Bar of this state."

Last among the Standards is the imposition of other penalties. Simply put, Respondent has been severely punished already. He was imprisoned for almost 18 months (TR 90) and was under the cloud of criminal proceedings from his indictment in July 1983 until his civil rights were restored almost four years later. His prison term and suspension has knocked out 60 to 80 percent of his income.

In deciding whether to impose disbarment, this Court should also consider the time frame of Respondent's misconduct. His participation in the conspiracy lasted only four months, from November 1979 through March 1980 (TR 85). Respondent's role was brief, of little consequence, and occurred over seven years ago. He practiced over five years after his misconduct without harm to the public or the Bar.

Respondent submits that, even if the Court feels that his conviction standing alone might warrant disbarment, the mitigating factors presented to the referee militate against the ultimate sanction. The goal of effective discipline

> is primarily to protect the public from incompetent and unethical practitioners and only secondarily to punish the offender and to act as a deterrent to others.

The Florida Bar v. Pinkus, 300 So.2d 16 (Fla. 1974).

Suspending Respondent for three years for his felony conviction will not be an abdication by this Court of its primary responsibility in grievance matters, i.e., protecting the public. Respondent will still have to prove rehabilitation before he can be reinstated. More important, however, is the fact that there is no showing that Respondent's conduct was anything but an isolated act that occurred eight years ago and is unlikely to be repeated.

Clearly, the appropriate sanction for lawyers convicted of a felony is a difficult determination to make. Disciplines range, over the recent past, from two years suspension to disbarment.

Mitigation is an important factor in choosing a discipline. In The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983), a lawyer was disbarred for pressuring a client in jail to deliver to the lawyer 1-1/2 pounds of cocaine. In the order of disbarment, the Court noted that:

> 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 proffered by Respondent.

In the case at Bar, Respondent's offense was not nearly as serious as Wilson's. Even without mitigation, he should not receive the same discipline. When Respondent's mitigation is factored in, however, it becomes obvious that his sanction should be a notch below Wilson's.

Numerous lawyers have been convicted of crimes more serious than Respondent's but who, for various reasons, have not been disbarred. For example:

a. The Florida Bar V. Carbonaro, 464 So.2d 549 (Fla. 1985). Three year suspension for conviction of conspiracy to distribute cocaine.

b. The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986). Three year suspension for possession of cocaine with intent to distribute.

c. The Florida Bar v. Stahl, 500 So.2d 540 (Fla. 1987). Three year suspension for conviction of obstruction of justice by submitting false records to a grand jury.

d. The Florida Bar v. Giordano, 500 So.2d 1343 (Fla. 1987). Three year suspension for conviction of one count of possession with intent to distribute cocaine and three counts of distribution of marijuana.

e. The Florida Bar v. Chosid, 500 So.2d 150 (Fla. 1987). Three year suspension for filing a false tax return. (The dissent noted that the accused was a participant in a drug distribution scheme.)

In each of the five cases cited above, the misconduct was more egregious than that committed by Respondent. Respondent did not participate in anything involving cocaine, nor is there evidence that he stood to gain materially from his wrongdoing. Even more important, however, is the fact that Respondent's evidence in mitigation was as strong, if not stronger, than any of the above. Yet, none of those lawyers were disbarred.

Respondent has been an exemplary lawyer for all but four months of his career since his admission to the Bar 18 years ago. His pro bono record alone is a model that all lawyers should strive to attain. He has brought much credit to the Bar over a 15 year period and the testimony is unequivocal that he will do so again.

Respondent's good works, and his steps towards rehabilitation, should mitigate the punishment that he receives. A three year suspension, nunc pro tunc, to July 23, 1985, is a sufficient discipline to protect the public.

POINT II

(Answering the Bar's Point on Appeal)
THE REFEREE HAD THE AUTHORITY TO IMPOSE DISBARMENT FOR THREE YEARS.

In The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987), this Court disbarred the accused lawyer for three years. The Court so ordered despite the fact that the case was clearly ongoing when the new rules were adopted on January 1, 1987. Respondent in the case at Bar submits the same rationale applies to his case and that the referee's recommendation of a three year disbarment should be upheld.

A. The Bar is Guilty of Laches and Should Be Estopped From Objecting to the Referee's Recommended Discipline.

In the summer of 1985, the Bar filed its Notice of Felony Conviction in this Court asking for Respondent's immediate suspension. In November 1985, this Court granted the Bar's request.

Seventeen months after Respondent's suspension was effective, on February 3, 1987, the Bar filed its formal complaint in this matter. The complaint, consisting of seven paragraphs, was a simple pleading and was easy to draft.

However, by waiting 17 months to file its complaint, the Bar put itself in the position to argue that the new Rules of Discipline, effective just 33 days before the Bar's Complaint was filed, would apply to the action. Of course, the significant aspect of waiting until after January 1, 1987 to file the

Complaint was the extension of the minimum period of disbarment from three years to five years.

The Bar had almost 18 months after Respondent's conviction to file its formal complaint under the Integration Rule. Instead, it waited 19 months and filed under the new rules.

The Bar should not be able to penalize Respondent by its tardy filing of its Complaint.

The referee clearly rejected the Bar's demand for a five year disbarment on page 6 of his report. His reason was specific and well taken:

> This disciplinary proceeding was pending long before [January 1, 1987].

The referee then recommended

> that the Court reject the Bar's position that the increased penalty (of a five-year disbarment instead of a three-year disbarment under the former rules) is merely "procedural" and does not violate ex post facto principles.

Respondent submits that the doctrine of laches prevents the Bar from arguing that its failure to promptly file the Complaint in this case results in an additional two years disbarment.

This Court recognized the equitable doctrine of laches as it pertains to Bar proceedings in The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). In that decision, the test for laches was set forth:

> (1) Conduct on the part of the defendant . . . giving rise to the situation of which complaint is raised; (2) delay in asserting the claimant's rights . . .; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit;

> and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant."

361 So.2d at 705.

The doctrine of laches applies to this case.

First, Respondent's conduct was the felony conviction in June 1985. Second, the Bar was aware of the conduct because the automatic suspension was triggered by the Bar's notice to the Court. Third, Respondent had no notice of the Bar's intentions during the 17 months that elapsed before the formal complaint was filed (a time frame that would lead the reasonable person to believe that the action was not forthcoming). Finally, the Respondent is prejudiced by the enactment of Rule 3-5.1(f) and its increase in the minimum period of disbarment.

The public policy is now and has been to discourage the dilatory by placing sanctions upon undue delay. Those sanctions are generally the loss of a cause of action through the passing of the statute of limitations. In such cases where a limitation sanction is not appropriate, the doctrine of laches is used.

Respondent asserts that the case at bar is appropriate for the imposition of the doctrine of laches. The Bar has been dilatory in pursuing its action by allowing 17 months to pass before filing. During the passing of the time the Bar has enacted changes in the proceedings which adversely affect the Respondent.

The Florida Bar's actions are a systematic derogation of the principles of fundamental fairness inherent to the democratic

system. Such acts must not be encouraged. They should be discouraged through the impositions of sanctions such as the doctrine of laches.

B. Administrative Regulations Concerning Licensing Procedures and Discipline are Substantive and are to be Applied Prospectively.

1. Substantial Rights

This Court has established affirmatively that enacted statutes will be viewed as to application to determine if the statute is either procedural or substantive.

When a new statute is found to be totally procedural, having no effect on substantial rights, then the statute may be applied, at the discretion of the Court, retroactively. However, if it is found that the application of the statute will in any way have an adverse effect on any substantial right, then such must be applied prospectively. Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978).

Substantial rights are generally defined as those rights afforded protection by the Constitution of the United States.

Inclusive in such protected rights is the right to pursue a desired occupation and hold a license to conduct such occupation. These rights have been construed to be valid property rights. Board of Regents v. Roth, 408 U.S. 564 (1971), Fleury v. Clayton, 664 F.Supp. 1224 (C.D. Ill. 1987). These cases involved disciplinary procedures concerning tenured professors and physicians, respectively.

Although this Court has not granted the status of fundamental right upon the license to practice law, there are those who have responded to the growing trend to do so. DeBock v. State, 512 So.2d 164 (Fla. 1987) (Barkett, J. dissenting). Justice Barkett, citing Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985), commented on the Court's recognition of the lawyer's role being viewed as fundamental, stating,

> [Decision] has cast considerable doubt on this Court's prior statements that the opportunity to practice law is not a right protected by the constitution.

512 So.2d at 169.

To adopt the position advocated by Justice Barkett would not be contrary to the position of the Court in similar situated matters, the license of an architect or dentist, Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla. 1952); Lurie v. Florida State Board of Dentistry, 288 So.2d 223 (Fla. 1969). Though the precedential value of these decisions has been diminished, the Court should recognize that the residual grant of substantial right remains.

2. Ex Post Facto

To apply a statute to an event that occurred prior to the enacting of such statute is to do so ex post facto, and is in derogation of Art. I, sec. 9 of the constitution. Further, it is an abridgment of due process of law by failing to give fair and reasonable notice. The Supreme Court stated in Railroad

Retirement Board v. Alton, 295 U.S. 300 (1935), in dealing with property rights and economic interests,

> [Such a] measure [ex post facto application] violated the due process clause . . . because it is not only retroactive in that it resurrects for new burdens transactions long since past and closed but to some . . . constitutes a naked appropriation of private property.

295 U.S. at 350.

Describing Bar proceedings as civil rather than penal does not remove the prohibition of ex post facto application. This Court reviewed a similar application in York v. State, 10 So.2d 813 (Fla. 1943). the case dealt with retrospective application of licensing procedures for a dentist. The court said,

> Administrative regulations are binding on those affected by them only when promulgated in due course. They will not be permitted to be used in an ex post facto manner. . . . Fairness to the individual is the sine quo non of all legal procedure in a democracy like ours.

10 So.2d at 815.

The sentencing regulation of the case at Bar is not asserted to be criminal, however, it is closely analogous to a procedure held to be unconstitutional in Miller v. Florida, _____ U.S. _____, 96 L.Ed.2d 351 (1987). Miller, id., enunciated the test for an ex post facto law,

> Our test for determining whether a law is ex post facto derives from these principles . . . two critical elements must be present: first, the law must be retrospective, that is, it must apply to events occurring before its enactment; and second, it must disadvantage the offender affected by it.

To apply the test, first, Respondent was convicted in June 1985, while Rule 3-5.1(f) did not become effective until January 1987. Clearly, application is retroactive. Second, Rule 3-5.1(f) calls for a disbarment period of five years while Rule 11.10(5) mandated three years: a clear disadvantage to respondent. The test fits the facts of the case at bar as if it had been proscribed. The argument that the sentence to be imposed is no more onerous than that which could have been imposed by discretion is not valid,

> [One] is not barred from challenging a change . . . on ex post facto grounds imply because the sentence he received under the new law was not more onerous than that which he might have received under the old.

Dobbert v. Florida, 432 U.S. 282, 300 (1977), citing Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797 (1937).

CONCLUSION

Respondent presented substantial evidence in mitigation of discipline to the referee at final hearing. The referee clearly disregarded that evidence and recommended that Respondent be disbarred for three years retroactive to July 23, 1985.

Respondent argues that his mitigating evidence should reduce his discipline to the next most serious discipline, i.e., a three year suspension, nunc pro tunc July 23, 1985, and continuing thereafter until he proves reinstatement.

Should this Court reject Respondent's plea to reduce the sanction to be imposed to a suspension, this Court should adopt the referee's recommendation of disbarment for three years, effective July 23, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was mailed to Randi Klayman Lazarus, Bar Counsel, The Florida Bar, Suite 211, Rivergate Plaza, 444 Brickell Avenue, Miami, FL 33131, on this ~~23rd~~ 24th day of February, 1988.

JOHN A. WEISS