IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STEVEN M. GREENBERG,

Respondent.

Supreme Court Case
No. 69,987



# Complainant's Reply Brief

and

# Answer Brief on Cross-Petition

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## INTRODUCTION

The Florida Bar, Complainant, will be referred to as "the Bar" or "The Florida Bar". Steven M. Greenberg, Respondent, will be referred to as "Mr. Greenberg" or "the Respondent". The Code of Professional Responsibility effective prior to January 1, 1987 may be referred to as "the old rules". The Rules Regulating The Florida Bar effective January 1, 1987 may be referred to as "the new rules". All emphasis has been added.

## POINTS ON APPEAL

POINT I
WHETHER THE REFEREE'S IMPOSITION OF A THREE YEAR DISBARMENT WAS ERRONEOUS?

POINT II
(ANSWERING CROSS-PETITION)
WHETHER DISBARMENT IS THE APPROPRIATE SANCTION IN THIS INSTANCE?

## SUMMARY OF ARGUMENT

It is The Florida Bar's position that the imposition of a three year disbarment, rather than a five year disbarment was clearly erroneous. The rules of statutory construction provide that procedural or remedial changes in the law must be immediately applied to pending cases. Since Mr. Greenberg's case was pending when the Rules Regulating The Florida Bar became effective and the length of a disbarment is both procedural and remedial, a five year disbarment must be imposed.

The Florida Bar is not prevented from seeking a five year disbarment due to laches as the time period between the unethical act and the filing of the complaint is not unreasonable.

It is also important to note that the retroactive application of Rule 3-5.1(f) of the Rules Regulating The Florida Bar is not violative of the ex post facto clause as Bar proceedings are remedial and not criminal. The Respondent was also on notice that under the old rules a disbarment of over three years was possible.

Lastly, disbarment is the appropriate sanction and not a three year suspension even in light of the mitigation present in this case. The Referee found that even though the Respondent had come forward with mitigating evidence, it was not enough to overcome the serious nature of his crimes.

## ARGUMENT

### I

### THE REFEREE'S IMPOSITION OF A THREE YEAR DISBARMENT WAS ERRONEOUS

Respondent was found guilty of the criminal acts charged on June 24, 1985, when the Code of Professional Responsibility was in effect. The Bar's complaint was filed on February 3, 1987. The final hearing before a referee occurred on June 26, 1987, when the Rules Regulating The Florida Bar were effective. Under the rules effective January 1, 1987, Rule 3-5.1(f) provides that a disbarred attorney may seek readmission to the Bar after five years have expired. The explanatory note which accompanies the Rules Regulating The Florida Bar provide:

> All disciplinary cases pending as of 12:01 a.m., January 1, 1987, shall thereafter be processed in accordance with the procedures set forth in the Rules Regulating The Florida Bar.

It is clear from the foregoing note that the Florida Supreme Court intended that procedures contained in the new rules be applied to pending cases. The Florida Bar v. Bryan, 506 So.2d 395, 397 (Fla. 1987). Consequently, since Respondent's case was pending subsequent to January 1, 1987, the new rules apply and a five year disbarment would be mandated.

The Respondent relies on The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987), for the proposition that the disbarment in this instance should be only for three years. This reliance is misplaced as footnote 1 to this opinion clearly states that the case was initiated under the former Bar rules and the case sub judice was initiated under the present Bar rules. Id.

In a case initiated prior to the adoption of the present Rules but decided after the adoption of these rules, this Honorable Court disbarred the Respondent for five years and cited Rule 3-7.9 of the Rules Regulating The Florida Bar as applicable precedent. Bryan at 397. Therefore, cases that were pending subsequent to January 1, 1987 are subject to the new rules as well as the five year disbarment under Rules Regulating The Florida Bar, Rule 3-7.9.

A) LACHES DOES NOT PREVENT THE FLORIDA BAR FROM OBJECTING TO REFEREE'S RECOMMENDATION OF A THREE YEAR DISBARMENT.

This Honorable Court has noted that:

> A suit is held to be barred on the ground of laches where, and only where, the following appear: (1) Conduct on the part of the defendant, or one under whom he claims, giving rise to the situation of which complaint is raised; (2) delay in asserting the claimant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute the suit; (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. All these elements are necessary to establish laches as a bar relief.

The Florida Bar v. McCain, 361 So.2d 700, 705 (Fla. 1978) (Emphais suplied).

The Respondent argues that the case at hand is barred under the above criterea. However, it is clear upon evaluation of the facts that this is not the case.

The operative facts are as follows: On June 24, 1985 the Respondent was convicted of a felony.

This Honorable Court suspended the Respondent for this felony conviction on July 23, 1985. A complaint was filed by the Bar on February 23, 1987.[1]

The time period between the felony suspension and the filing of the complaint is approximately a year and a half.[2] This Court has already ruled that a two year period between a criminal conviction and the filing of a complaint is not unreasonable. The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986). It is also important to note that this court refused to dismiss a disciplinary action even though ten years had passed between the unethical conduct and final action by the Board of Governors. The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970).

It is the Respondent's argument that this year and a half delay is unreasonable and that during this delay the Respondent was lulled into a false sense of security that The Florida Bar would not seek to discipline the Respondent for his criminal acts. As explained above the delay was not unreasonable and therefore the Respondent unjustifiably relied upon this delay for the proposition that the Bar would not seek further discipline. The Respondent had full knowledge and notice that the Bar could institute further disciplinary proceedings. This point shows that the third element of the test for laches, Defendant's lack

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[1] The Bar takes issue with the Respondent's characterization of the bar's Complaint as a simple easy to draft pleading. Whether the pleading is simple or easy to draft has no bearing on the issue of laches

[2] During this year and a half the Respondent unsuccessfully appealed his conviction. The complaint was filed after Respondent's appeal had run it's course.

of knowledge or notice has not been met by the Respondent. McCain at 705. As all of the elements expanded upon in McCain must be met the Respondent's laches argument fails. Therefore, laches does not prevent The Florida Bar from seeking a five year disbarment.

B) THE LENGTH OF TIME ONE MUST WAIT TO REAPPLY FOR ADMISSION TO THE BAR, AFTER A DISBARMENT IS PROCEDURAL AND NOT SUBSTANTIVE THUS A CHANGING THE LENGTH OF THIS PERIOD CAN BE APPLIED RETROACTIVELY.

In Tel Service Co., v. General Capital Corp., 227 So.2d 667 (Fla. 1969), the court held that the measure of damages for vindication of substantive act was inherently procedural. It was further held that alteration of such measure of damages did not work any modification of fundamental substantive rights, Id; Walker and LaBerge, Inc., v. Halligan, 344 So.2d 239 (Fla. 1977). The same analysis should be applied to the length of time of a disbarment. First, Bar proceedings have been held not to be penal and therefore fall within the sphere of civil law, rather than criminal law. DeBock v. State, 512 So.2d 164 (Fla. 1987); The Florida Bar v. Massfeller, 170 So.2d 834 (Fla. 1964). Second, disciplinary proceedings are governed by The Rules of Civil Procedure, rather than The Rules of Criminal Procedure which lends support to the previous statement. Rule 3-7.5(3)(1) of the Rules Regulating The Florida Bar. Third, the substantive act before this court is disbarment, which is vindicated by the length of time it is imposed.

In DeBock, supra, this Court upheld its earlier finding that Bar disciplinary proceedings are remedial, and are designed for

the protection of the public and the integrity of the courts. Therefore, "[B]ar discipline exists to protect the public and not to punish the lawyer." DeBock, at 167. Since disciplinary proceedings in general are remedial, the rule of statutory construction which provides that where there are statutory changes in the law, remedial changes are to be immediately applied to pending cases is also applicable. Heilman v. State, 310 So.2d 376 (Fla. 2nd DCA 1975).

Additionally, both the old rule and new rule provide that a disbarment may be for "[S]uch longer period as the Court might determine in the disbarment order". There have been disbarments exceeding three years under the old Integration Rule 11.10(5). In The Florida Bar v. Anderson, 482 So.2d 1 (Fla. 1986) a five year disbarment was imposed. Thus, an argument can be raised that a procedural right has not been modified, since under the old rules it was always possible to be disbarred for a period in excess of three years.

The Respondent wants to label the privilege to practice law as a substantial right. The Respondent argues further that if the privilege to practice law is a substantive right then Rule 3-5.1(f) of the Rules Regulating The Florida Bar must be applied prospectively and not retrospectively.

The Respondent, rests this argument on Justice Barkett's comment in her dissenting opinion in DeBock v. State that Supreme Court of New Hampshire v. Piper, may have "cast considerable doubt on this Court's prior statements that the opportunity to

practice law is not a right protected by the constitution." DeBock v. State, 512 So.2d 164, 169 (Fla. 1987) (Barkett; J. dissenting) Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

Contrary to the Respondent's position the majority of the DeBock court found that the : "license to practice law confers no vested right to the holder thereof, but it is a conditional privilege which is revocable for cause." DeBock at 168. As this honorable court has expressly ruled that the license to practice law is a privilege and not a substantive right; the Respondent's argument based on substantive rights and prospectivety must fail.

C) RETROACTIVE APPLICATION OF RULE 3-5.1(f) IS CONSTITUTIONAL AS IT IS NOT AN EX POST FACTO LAW.

In order for a statute to be an invalid expost facto law, the law first must be a criminal law. Dobbert v. Florida, 432 U.S. 282 reh'g denied, 434 U.S. 882 (1977); Seaboard System R.R. Inc., v. Clemente, 467 So.2d 348 (Fla. 3rd DCA. 1985). As Bar proceedings are not criminal they do not fall within the prohibition against expost facto laws. Id; DeBock at 166.

The Respondent attempts to argue that Miller v. Florida, __U.S.__, 96 L.Ed. 2d 351 (1987) controls in this instance. Miller involves criminal sentencing guidelines; a change in which the Supreme Court found to be an expost facto law. Id.

This reliance on Miller is unwarranted as Miller involves a criminal proceeding and it already has been established that Bar proceedings are remedial and not penal. Id. DeBock at 166. Therefore, Miller is not dispositive of this matter. Id.

## II

**(ANSWERING THE RESPONDENT'S POINT ON APPEAL)**
**DISBARMENT IS THE APPROPRIATE SANCTION IN THIS INSTANCE**

The Respondent argues that the correct sanction in the case at hand is a three year suspension effective July 23, 1985. The Respondent contends that disbarment is inappropriate due to the mitigation evidence presented to the Referee during the final hearing.

Basically, the Respondent is stating that the Referee incorrectly weighed the mitigation in this case. It is important to note at this junction that the Referee's findings are presumed correct. The Florida Bar v. Neely, 502 So.2d 1237, 1238 (Fla. 1987). These findings will not be reversed unless they are clearly erroneous or fully lacking in evidentiary support. The Florida Bar v. Hooper, 507 So.2d 1078, 1079 (Fla. 1987); The Florida Bar v. Golden, 502 So.2d 891, 892 (Fla. 1987). An application of this standard of review to the Respondent's contention clearly shows that the Respondent's request for a three year suspension should denied.

Disbarment is the appropriate disciplinary measure in the case at hand even though there was mitigation present. The Florida Bar v. Sheppard, 518 So.2d 250 (Fla. 1988). In Sheppard this Honorable Court noted that an attorney who illegally sells drugs should be dealt with severely. Id. The attorney in Sheppard was disbarred for this type of activity and the Respondent in this instance should also be disbarred for his similar conduct. Id.

The Bar does not dispute the fact that mitigation can be taken under consideration when imposing discipline on an attorney Rule 3.0(d), Florida Standards for Imposing Lawyer Sanctions. The Referee in this case did in fact take the Respondent's mitigating evidence into account prior to imposing a disbarment. The Referee's report at page 3 reflects that the Referee felt that this mitigating evidence was neutralized by the Respondents unethical conduct. The Referee also noted that the mitigation presented at the final hearing indicated that the Respondent committed the very same act he attempted to discourage in others. The Referee then found that disbarment was appropriate.

Respondent points to the Referee's comment on The Florida Bar v. Prior, 330 So.2d 697, 702 (Fla. 1976) as grounds for the proposition that the Referee should not be upheld on the disbarment. However, the Referee indicated that the felony conviction in this instance overwhelmed the mitigation that Respondent presented as the felony conviction showed he disregarded that which he knew about drugs and the drug culture through his work with the Switch Board of Miami and others.

The Respondent attempts to claim that his involvement with the elicit importation of marijuana should be treated differently than those disciplinary cases dealing with cocaine. The Respondent failed to take notice of the fact that: "(d)isbarment is the appropriate sanction for a serious drug offense such as trafficking in marijuana. "The Florida Bar v. Nahoom, __So.2d__ 13 F.L.W. 82, 83 (Fla. 1988). Also see The Florida Bar v. Lopez-Castro, 508 So.2d 10, 11 (Fla. 1987) In fact investing

proceeds from a marijuana smuggling operation, an act similar to the Respondent's, warrants disbarment. Id.

Lastly, the Respondent contends that a three year suspension is warranted and not a disbarment based upon certain other disciplinary cases. Respondent contends that a lesser sanction was handed down by the Supreme Court in these cases with less mitigation than is present in the case at hand.

Some of these cases do not really apply to the case at Bar because they do not deal with the elicit drug trade. The Florida Bar v. Stahl, 500 So.2d 540 (Fla. 1987); The Florida Bar v. Chosid, 500 So.2d 150 (Fla. 1987).

The Respondent first relies upon The Florida Bar v. Giordano, 500 So.2d 1343 (Fla. 1987). In Giordano the court does not explain what aggravating or mitigating circumstances were present to warrant a three year suspension and therefore it is not possible to compare or contrast Giordano to the case at hand. Id.

The Respondent next refers to The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986). In Rosen a three year suspension was handed down when the attorney documented that the root of his problems was his drug addiction. The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla. 1985) presents a similar circumstance as the accused attorney had a psychiatric problem at the time he committed the crime for which he was suspended for three years.

The later two cases show substantially more mitigation than the case at hand because both of the accused attorneys had clouded minds, one due to a psychiatric condition and the other

due to drugs, when they committed the crime in question. Carbonaro at 550; Rosen at 181. The Respondent in this case had an unclouded mind when given the opportunity to commit a crime and therefore he should be disbarred and not suspended for three years.

## CONCLUSION

Based upon the foregoing reasons and citations of authority. The Florida Bar respectfully submits that the Referee erroneously imposed a three year disbarment, and would urge this court to amend the Report of Referee and impose a five year disbarment.

Additionally, The Florida Bar respectfully requests that the Respondent be disbarred and not suspended for three years nunc pro tunc July 23, 1985 based upon the above mentioned reasons and authorities.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Answer Brief on Cross-Petition, Answer Brief of Complainant was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to John A. Weiss, Attorney for Respondent, 101 North Gadsden Street, Tallahassee, Florida 32301, this 11th day of March, 1988.

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