IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v. CASE NO. 69,987

STEVEN M. GREENBERG,

Respondent.
_____/

RESPONDENT'S REPLY BRIEF

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POINT I

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

One of the problems with this Court's rule forbidding a respondent "to go behind" his conviction is that it frequently denies the Court access to all the facts behind the conviction. Respondent does not challenge this rule. It does, however, limit his ability to reply to erroneous assertions in the Bar's Answer Brief while staying within the record. The primary record source of the facts behind Respondent's conviction can be found in Bar's Exhibit 2, the opinion of the Seventh Circuit Court of Appeals upholding Respondent's convictions.

The jury in Hammond, Indiana, chose to disbelieve Respondent, a Miami lawyer, and chose to believe Tony Hicks, a habitual cocaine user, a professional drug smuggler, and pilot for a smuggling ring. The government immunized, placed in the witness protection program, and paid a stipend and living allowance to Mr. Hicks (Bar Ex. 2, pp. 4, 6, 7).

(One of Respondent's points on appeal to the U.S. Court of Appeals was that the prosecutor denied due process by withholding information that would have undermined Hicks' credibility. The Court held the undisclosed information "should have been provided" to Respondent, but that the undisclosed evidence did

not meet the "reasonable probability" test necessary to reverse the conviction [Bar Ex. 2, pp. 4, 6]).

In upholding the conviction, the Circuit Court stated:

> The jury could not have found that he organized Marlowe Corp., through which Markowski and his henchmen rented an airplane to carry drugs, and that Greenberg also alerted members of the gang when they were too "hot" to visit the Bahamas. (Bar Ex. 2, p.2).

Respondent ultimately was convicted of conspiring to import and distribute marijuana.

On page 9 of its brief, while discussing The Florida Bar v. Sheppard, 518 So.2d 250 (Fla. 1988), the Bar erroneously states that Respondent's conviction was similar to Sheppard's, i.e., the illegal sale of drugs. That simply is not true.

Dennis Sheppard was caught with 298 grams of marijuana in his possession. He admitted to the sale of $25,000 worth of marijuana. This Court disbarred Sheppard for his dealing in illegal drugs for profit.

Respondent in the case at bar was not charged with the sale of illegal drugs. He was not charged with trafficking. And, he should receive a lighter discipline than that imposed in Sheppard.

Is is noteworthy that the Board of Governors in Sheppard felt an 18-month suspension was appropriate, while in the instant case they argue that the referee's recommendation of a three-year disbarment is too lenient.

Respondent's misconduct lasted less than five months--from

November 1979 to March 1980. There was no allegation before the referee that he profited from his misconduct or that he did anything that smacks of the sale of drugs.

Respondent's role in the conspiracy is, to some degree, illuminated by the arguments on appeal in Bar's Exhibit 2, pages 12 through 16, relating to the judge's instructions to the jury.

The Circuit Court held that the "ostrich" instruction used by the trial judge was permissible even though it had previously "urged district judges to choose better language,..." (Bar Ex. 2, p.12). Likewise, the Circuit Court held that Respondent's requested instructions that "mere presence" was not conspiracy and "mere association" with criminals is not improper were "good" instructions, but their omission was not plain error. Finally, the Circuit Court held the trial judge "should have" given an instruction defining in detail "willfully" (Bar Ex. 2, p.15).

Respondent points out the above arguments not in an attempt to negate his conviction--the rule is clear that he is guilty of the crime for which he was adjudged guilty--but to rebut any inference that his role involved the affirmative importation or sale of drugs. Respondent's offense, albeit serious, was conspiracy, not trafficking, possession, or sale.

Respondent should not receive the same discipline meted out in Sheppard, supra.

Respondent's conduct was not, contrary to the Bar's position, similar to that described in The Florida Bar v. Lopez-Castro, 508 So.2d 10 (Fla. 1987). Lopez-Castro was convicted of

11 counts of criminal conduct including racketeering and money laundering. He also pled guilty to another count of conspiracy to obstruct justice. The referee found that Lopez-Castro:

> knowingly invested the illicit profits of a marijuana smuggling syndicate and acquired and maintained assets through Panamanian corporations established for the sole purpose of concealing the identity of the other named defendants in the acquisition, maintenance and desposition of illicit assets.

The Court disbarred Lopez-Castro (without specifying if it was for three or five years.)

Respondent argues that his offenses do not fall into the same category as do those of Lopez-Castro. Furthermore, Respondent's mitigation is overwhelming while Lopez-Castro presented no mitigation--in fact, he did not even appear.

If Lopez-Castro's offenses warrant disbarment, Respondent's warrant suspension.

Finally, the Bar points to the disbarment of unspecified duration imposed in The Florida Bar v. Nahoom, ____ So.2d ___, 13 FLW 82 (Fla. 1988) to support its argument that Respondent should be disbarred. The major distinction between Respondent's case and the Nahoom decision is that the latter lists no mitigating circumstances. Respondent's mitigation completely removes his case from those requiring disbarment.

Respondent's pro bono work was amply described in his initial brief. Respondent urges this Court to consider his good works in determining his discipline. This is a proper

consideration in any disciplinary case. The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986).

Even if the referee correctly believes that Respondent's public service before his conviction is overwhelmed by his midconduct, his pro bono work since March 1980, the end of his brief period of wrongdoing, should be acknowledged and should mitigate the penalty to be imposed.

After his conviction Respondent expended in excess of 60 hours representing a policeman in juvenile court for no fee (TR 119). Later, at the request of the GAL program, Respondent expended from 40 to 60 hours representing a retarded child and HRS (TR 20, 122). He continually asked the GAL program to give him new cases when he wrapped up the old ones (TR 20).

Upon his restoration of civil rights, Respondent took steps to resume his work for the GAL program (TR 22, 132).

Throughout his career, Respondent has devoted a large part of his time and effort to pro bono work in a manner that, were itnot for a five-month period eight years ago, might have resulted in his being awarded the Tobias Simon award. Repondent's charitable efforts began years before his convictions and are continuing today.

It is ironic that the Board of Governors argues that Respondent's appeal of the referee's recommended discipline should be denied because the referee's findings are presumed correct while, at the same time, the Board appeals the referee's recommended discipline claiming it is incorrect.

In actuality, the Bar's argument that a referee's findings are presumed correct is appropriate only when applied to challenges of the referee's factual findings--not his recommended discipline. The appropriate discipline for unethical conduct "is the sole province and responsibility" of the Supreme Court. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

> While the findings of fact by the referee in a disciplinary proceeding "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding" (footnote omitted), no such presumption accompanies his recommendation of disciplinary measures to be applied. Id., p. 708.

Respondent should not be disbarred. As Professor Drinker said in Legal Ethics

> Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable. The Florida Bar v. Hirsch, 342 So.2d 970, 971 (Fla. 1977).

In Hirsch, this Court also stated that the purpose of disciplinary is not only to punish, but also "to reclaim those who violate" the ethical standards of our profession. Id., p. 971. The testimony before the referee clearly showed that Respondent will once again be a valuable member of our profession. Disbarring him will accomplish nothing more than imposing a harsh penalty while ignoring many years of exemplary good works.

Suspending Respondent for three years, coupled with his having to prove rehabilitation prior to reinstatement, is a stern disciplinary sanction. It is the maximum penalty that can be

imposed short of disbarment. In arguing for the suspension, Respondent is not asking this Court to condone his misconduct. He is, however, asking this Court to recognize his prior good works by reducing his penalty one notch from the ultimate sanction to the longest suspension available. Respondent has donated thousands of hours to delivering free legal services without seeing any recognition or reward. Now that he is before this Court with a blemish on his record, it is not improper for the Court to recognize his efforts by withholding disbarment.

Respondent should be suspended for three years, retroactive to the date of his earlier automatic suspension.

CONCLUSION

The referee improperly ignored Respondent's substantial mitigation in determining the punishment to be imposed. His recommended discipline should not be adopted by this Court. Rather, Respondent should be suspended for three years, nunc pro tunc July 23, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief has been forward, by U. S. Mail, to Kevin Tynan, Bar Counsel, The Florida Bar, Suite 211, Rivergate Plaza, 444 Brickell Avenue, Miami, FL 33131, this 24th day of March 1988.

JOHN A. WEISS