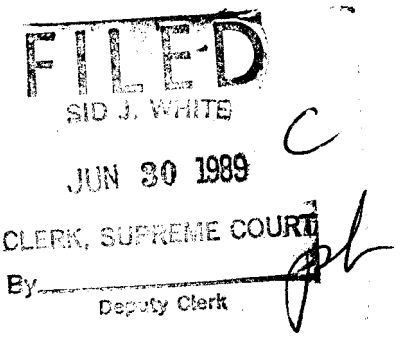
IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
vs.
LANCE E. EISENBERG,
Respondent.

Supreme Court Case
No. 71,479



REPLY BRIEF OF RESPONDENT LANCE E. EISENBERG

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INTRODUCTION

Respondent asks this Court to determine whether the Referee's recommendation of disbarment is proper -- both as a matter of law and of fact. The pertinent facts are not contested. The Bar does challenge the legal standard to apply and questions some of the inferences to be drawn from the record.[1/] As shown below, the weight of persuasive authority demonstrates that on the record in this matter disbarment is not the appropriate sanction for Mr. Eisenberg.

ARGUMENT

The Florida Bar's Answer Brief ("Ans.") raises numerous arguments challenging Respondent's contentions. These arguments are loosely organized into three categories: (i) the claim that applicable legal principles mandate disbarment (Ans. at 7-12); (ii) the claim that disbarment was justified by the record evidence (id. at 13-17); and (iii) the claim that even if The Bar had to prove that rehabilitation is highly improbable, that burden has been met (id. at 18-23). We reply to these arguments below.

1/ The criminal charges against Mr. Eisenberg and the plea documents form the only evidence submitted by The Florida Bar. These documents are the basis of the Bar's Statement of the Facts (Answer Brief at 4-5). The evidence submitted to the Referee by Mr. Eisenberg was unanswered by the Bar. As the transcript shows, the only vigorous cross-examination of Mr. Eisenberg's witnesses was conducted by the Referee -- not by Bar Counsel. The Bar's Answer Brief disputes none of the facts adduced at the hearing and relied upon in Mr. Eisenberg's Initial Brief.

1. Respondent Stated The Proper Legal Standard.

There is a fundamental disagreement between the parties regarding the legal standard to be applied in a disbarment case. The essence of The Bar's argument (*Ans.* at 1-12) is that "[w]here an attorney's conduct is sufficiently grave," disbarment is justified. Thus The Bar argues that evidence of rehabilitation and mitigation are not properly a part of the disciplinary process.[2/] With all respect to Bar Counsel, the standard for which he contends is not only contrary to this Court's recent decisions, it would reduce the disciplinary process to a simplistic formula -- if a drug crime is committed, disbarment is required. Respondent submits that this is not the law.

The Bar acknowledges that in a number of recent cases this Court has found that evidence of mitigation and rehabilitation justifies a sanction less severe than disbarment, even where drug crimes are involved. While The Bar's Answer Brief tries to distinguish these cases on their facts (e.g. Ans. at 10-11), it nowhere endeavors to reconcile the legal framework underlying these decisions with the legal standard The Bar asks this Court to apply here. In fact, The Bar appears ambivalent about the legal standard that it advocates here. Shortly after vigorously arguing

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2/ "[R]ehabilitation is relevant in a reinstatement proceeding but not in a disciplinary proceeding." Ans. at 9.

* * *

"Where an attorney's misconduct is sufficiently grave to justify disbarment, mitigating factors are insufficient to lessen the enormity of the attorney's misconduct." Id. at 11.

that mitigating factors are irrelevant, the Bar concedes that: "Respondent has a due process right to offer testimony in mitigation of any penalty to be imposed as discipline." Ans. at 16.

In further support of the simplistic principle it advocates, the Answer Brief cites a string of cases for the proposition that disbarment has been sanctioned where respondents committed drug crimes (Ans, at 7-8). But not one of these cases[3/] involved a respondent who made a serious showing of rehabilitation and mitigation.[4/] Respondent does not contend that disbarment is never appropriate when a lawyer is convicted of a drug crime -- he vigorously contends, however, that it is not proper on a record of contrition, rehabilitation and mitigation of the sort developed here.

Respondent does concede that one decision of this Court creates an apparent inconsistency in the case law, suggesting that rehabilitation is not an issue at the sanction stage of a disciplinary hearing -- The Florida Bar v. Routh, 414 So.2d 1023 (Fla. 1982). In Routh, the respondent committed a crime of violence and filed a false affidavit in a judicial proceeding.

3/ The Florida Bar v. Lopez-Castro, 508 So.2d 10 (Fla. 1987); The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986); The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985); The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985); The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983).

4/ In Marks, for example, the respondent continued to protest his innocence and the Court expressly found he had "failed to demonstrate any mitigating circumstances justifying a lesser discipline." 492 So.2d at 1329. Similarly in Price, the respondent protested innocence at his disciplinary hearing. Such a position precludes a showing of rehabilitation.

The respondent was later examined by a psychiatrist and was found to be a sociopath who "constituted a threat to society.'' (414 So.2d at 1024.) Faced with this evidence the Referee recommended that the respondent be suspended for at least three years, continuing thereafter "until he shall prove his rehabilitation." Id. at 1025. On appeal, respondent challenged the Referee's refusal to consider evidence of rehabilitation. This Court adopted the Referee's recommendation, stating (id.):

> The referee declined to consider such evidence on the ground that rehabilitation is relevant in a reinstatement proceeding but not in a disciplinary proceeding. We agree with the referee. Reinstatement is a separate matter governed by article XI, Rule 11.11 of the Integration Rule. Rehabilitation is relevant in such a proceeding but was not relevant to any of the material issues of fact in this disciplinary proceeding.

Respondent Eisenberg respectfully submits that the foregoing statement from the Routh decision -- now seven years old -- is at odds with the standard carefully crafted by this Court in The Florida Bar v. Pavlick, 504 So.2d 1231, 1235 (Fla. 1987); The Florida Bar v. Carbonaro, 464 So.2d 549, 551 (Fla. 1985); The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1983); and The Florida Bar v. Felder, 425 So.2d 528, 530 (Fla. 1982). As Respondent demonstrated in his Initial Brief (at 3-6), disbarment requires a showing by The Bar that rehabilitation is highly improbable and due process requires a consideration of mitigating factors during this phase of the disciplinary hearing. Respondent respectfully submits that to the extent that Routh is inconsistent, it is wrong.

In summary, the Answer Brief challenges the legal framework advocated by the Respondent without distinguishing the case law relied upon to define it and without offering a viable alternative. Respondent submits that this Court has established that conviction of a drug -- or a drug-related -- crime does not automatically justify disbarment. The applicable standard is as the Court described it in Carbonaro, 464 So.2d at 551, quoting The Florida Bar v. Moore, 194 So.2d 264, 271 (Fla. 1966):

> [D]isbarment is the extreme measure of discipline that can be imposed on any lawyer. It should be resorted to only in cases where the person charged has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards. To sustain disbarment there must be a showing that the person charged should never be at the bar. It should never be decreed where punishment less severe, such as reprimand, temporary suspension, or fine will accomplish the desired result.

If this is not to be the standard -- if Routh is to rule -- fundamental fairness requires The Bar, and this Court, to state the standard with sufficient clarity so that Respondent has a fair opportunity to protect his rights in the disciplinary process.

2. The Record Evidence Requires A Sanction Less Severe Than Disbarment.

Respondent and The Bar agree -- the Referee's findings of fact should not be overturned unless they are "lacking in evidentiary support." (Initial Brief at 6, n.1; Answer at 13.) All the record evidence, save the charges and plea documents

concerning the crimes to which Mr. Eisenberg pleaded guilty, demonstrates mitigation and rehabilitation. In support of its contention that the record justifies Mr. Eisenberg's disbarment, The Bar summarizes the charges against Mr. Eisenberg and ignores the record evidence in mitigation and of rehabilitation.

The Bar's reference to two "aggravating factors'' misses the mark (Ans. at 13-14). For it fails to establish the kind of record this Court has previously required to justify disbarment.[5/] The Bar's bold claim that the Referee's Report "addresses all of the evidence" offered in mitigation (id. at 15) must assume that this Court will not engage in even the simplest comparison of the Report and the record. For even a cursory comparison discloses that this claim is incorrect. And The Bar's mention of the Referee's "interest in the testimony" (id.) must surely be cynical. For every record citation offered by The Bar directs this Court to an instance in which the Referee acted as Bar Counsel should have, skeptically cross-examining Respondent's witnesses. At bottom, the Referee's Report fails to disclose that he weighed the evidence -- and it certainly fails to explain the basis for the Referee's wholesale rejection of that evidence.

5/ The two "aggravating factors" actually underscore the weakness of the Bar's case. Mr. Eisenberg's acts did cover a four-year period -- but hardly demonstrate a life-long or career-long pattern of misconduct. And while Mr. Eisenberg's misconduct occurred in the context of his law practice, it lacks the element consistently condemned by this Court -- misconduct at the expense or to the detriment of the client.

Another point raised by The Bar merits mention here. While contending that evidence of Mr. Eisenberg's rehabilitation had no place in the hearing, Bar Counsel states (*Ans.* at 15): "Even if evidence of rehabilitation was proper at this point, there is no evidence showing that Respondent would not again grow bored and succumb to illegal activities when presented to him in the course of his law practice, as he did in the case at bar." This "argument" ignores the burden of proof on this issue and is totally without foundation in the record. This "once a crook always a crook" reasoning would, if valid, require the Court to disbar every convicted felon since the same question could be asked of every respondent in Mr. Eisenberg's position. Obviously, this Court has chosen another, more rational route.[6/]

3. The Bar Failed To Show That Respondent's Rehabilitation Is Highly Improbable.

The Bar endeavors to show that even if this Court imposes the proper rule of law and requires Bar Counsel to show that Mr. Eisenberg's rehabilitation is highly improbable, this burden has been satisfied. Two arguments are offered to support this contention: (i) "there is no evidence showing that

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[6/] It merits note that this "argument" did not originate with Bar Counsel. It was the Referee who, repeatedly in cross-examination of Respondent's witnesses, voiced this theme. Respondent respectfully submits that the Referee's repeated inquiries in this vein demonstrate his insensitivity to the Court's approach to sanctions in cases involving attorneys who have pleaded guilty to criminal charges.

Respondent would not again grow bored and succumb to illegal activities" **(Ans.** at p. 19-20); and (ii) the evidence offered in mitigation and of rehabilitation is insufficient (id. at 21-23).

The flaw in the first contention, which improperly attempts to force Respondent to prove a negative, is discussed above. It was also ably rebutted by Dr. Notarius, Mr. Eisenberg's psychiatrist. When the Referee pressed the doctor on the question whether Mr. Eisenberg was likely to succumb to the pressures or temptations of life to commit a new crime, the doctor answered that in his professional opinion Mr. Eisenberg is no more likely to do so than anyone else in society -- and probably less so. Consider this exchange (Trans. at 49-51):

> *Q.* Well, in the history of man and our associations with him, once they have fallen and sought to be rehabilitated gain, many, many have fallen again.
>
> A. Correct.
>
> *Q.* So, upon reflection back of those people, they weren't really rehabilitated according to your definition.
>
> A. Also, many people have not fallen.
>
> Q. I see. So, we never know whether they are rehabilitated or not until they have not fallen?
>
> A. It cannot be absolute, there's no question about that.
>
> *Q.* And if it's not absolute, again, I ask you, isn't there degrees of rehabilitation?
>
> Let me rephrase it then, if you want to use that type of -- Let me accept your view of it.
>
> What are your views of his chances of falling again?

A. I wouldn't be here if I thought they were significant. I do not.

Q. Can you conceive of a situation that would present him in the future that may be he would fall again?

A. No. No greater risk -- No degree of significance of greater risk than most other human beings. I mean, we're all subject to temptation.

Q. He has been confronted in the past with situations that many of us have not been. Large amounts of money, international trafficking of cocaine, or of narcotics, marijuana, repeated efforts to perpetuate this type of behavior. I gather from the information, the formal document that I have read before, perhaps in Jamaica, the Bahamas, Columbia and the Cayman Islands, it took a while, over a period of time for these repeated confrontations with multiple people, of monies and intelligence. These you don't run across with very often, this is abnormal confrontations with people. I wonder if he ran across these type people again, because of past associations, and was met with this type of engendering type ideas and business opportunities once he's down and out again with no money in his possession, do we have now different situation?

A. My feeling that if that were to happen, as I know him now, he'd run like a scared rabbit.

The remainder of The Bar's argument that Mr. Eisenberg's rehabilitation is highly improbable is an attack on selected portions of the evidence in mitigation offered by Mr. Eisenberg. This approach deftly avoids the burden of proof issue -- The Bar has the burden to establish the improbability of rehabilitation and offered no evidence on it. The approach also avoids a point by point review of the evidence offered on ten different aspects of rehabilitation (see Initial Brief at 14-25). Finally, the approach is flawed on the merits.

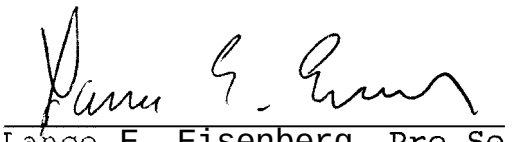
The Answer Brief devotes over a page to challenging the value, scope, nature and motivations of Mr. Eisenberg's cooperation. This challenge pales, we submit, in comparison to the record of the government's own evaluation of that cooperation, an evaluation which stands unrebutted (see, e.g., Initial Brief at 16-18 and the exhibits referred to therein). We ask the Court to consider first the fact that the last criminal act occurred nearly a decade ago and second, the way in which Mr. Eisenberg has conducted his life since. He voluntarily entered and concluded negotiations for a guilty plea. He voluntarily closed his law practice. He gave the government cooperation on a level and of a quality that far exceeded all expectations (cooperation which had an enormous impact on the sentencing judge). He went to jail. He began a new family. He began a new job. He voluntarily engaged in a long period of community service. Everything Mr. Eisenberg has undertaken in the years since his guilty plea has been a success, and demonstrates a change in character. If these circumstances do not conclusively establish that Mr. Eisenberg's rehabilitation is probable, it is difficult to contemplate circumstances that do.

CONCLUSION

The Bar's Answer Brief closes with the same simple plea with which it opened (Ans. at 24): "The criminal and unethical conduct engaged in by Respondent is so serious that disbarment is

the only appropriate sanction." This is not the rule of law applicable to this case. In fact, the overwhelming weight of the evidence shows that disbarment is not the appropriate sanction for Mr. Eisenberg, and this Court is respectfully requested to so rule.

Respectfully submitted,



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June 30, 1989

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief of Respondent Lance E. Eisenberg have been served this 30th day of June 1989, by first-class mail, postage prepaid, on the following:

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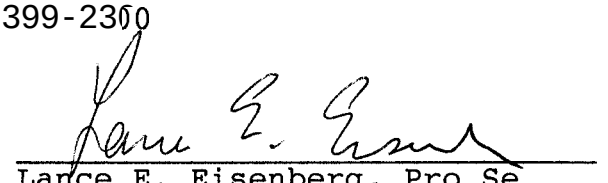

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