047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT STEPHEN RYDER,

Respondent.
_____/

Case No. 72,216

INITIAL BRIEF IN SUPPORT OF CROSS-PETITION AND ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

The Bar's Brief accurately set forth the statement of the case in these proceedings.

While the Bar's statement of the facts is accurate so far as it was stated, Respondent would supplement those facts as follows.

At final hearing, Respondent had six witnesses testify as to his good character, integrity, **pro bono** work and about his potential for rehabilitation. Among those witnesses was Edwin C. Cluster, a board certified trial lawyer practicing in the Ocala region since 1961, who is a past president of the local Bar and a past member of the Board of Governors of The Florida Bar. Other lawyers testifying on Respondent's behalf were Gregory E. Tucci, a practicing lawyer for sixteen years and a past president of the Marion County Bar Association and Stanley Ray Gill, a lawyer in Ocala since 1972 and a past president of the Marion County Bar Association. Mr. Gill is also the elected State Attorney for the Fifth Judicial Circuit.

Non-lawyers attesting to Respondent's good character included Bernhard W. Stalzer, a Chartered Life Underwriter who has known Respondent since the early sixties, Judy K. Wilson, Ph.D., the Executive Director of the Rape Crisis Spouse Abuse Centers in Marion, Lake and Hernando counties

and Father Sean Shine, a Catholic priest with a parish near Ocala.

All of the witnesses testified as to Respondent's superlative reputation for truth and veracity in the Ocala area. All considered his chances of rehabilitation to be excellent. In addition, Dr. Wilson and Father Shine testified as to Respondent's substantial **pro bono** work.

SUMMARY OF THE ARGUMENT

Respondent, while recognizing the propriety of discipline, submits that he should not be disbarred for his offense but should, instead, be suspended for eighteen months (the length of his sentence) and thereafter until his civil rights are restored.

Respondent's substantial mitigation, including the fact that he had nothing to gain from his wrongfully testifying on two occasions to the grand jury and once at trial, coupled with his excellent reputation for honesty and ability in the Ocala area should reduce his discipline from the ultimate sanction, disbarment, to a term of suspension. When Respondent's good works are factored into the equation used to determine discipline, particularly his substantial **pro bono** work on the behalf of sexually abused and battered women and children and his substantial services to Father Shine's parish, it becomes apparent that a suspension of moderate duration is the appropriate sanction for his conviction.

Disbarment should be imposed only when the lawyer being disciplined should never have stood before the Bar or that lawyer is one who is incapable of rehabilitation. Respondent has been a credit to the Bar in the past and all of Respondent's witnesses attested to his potential for rehabilitation. Clearly, he should not be disbarred.

Finally, although Respondent recognizes that this Court will not consider it a substantial factor in mitigation, Respondent asks this Court to consider the fact that his health is very poor. He suffers from diabetes and he is a candidate for a heart transplant due to the major deterioration of his heart. Part of that deterioration may be the result of stress brought on by his criminal trial and by these disciplinary proceedings.

While Respondent recognizes that this Court's decision in **The Florida Bar v Greenberg**, _____ So.2d _____, 13 F.L.W. 625, (Oct.20, 1988), if unmodified after rehearing, lays to rest the issue of whether a lawyer can receive a five year disbarment for conduct occurring before January 1, 1987, at least as far as mandatory terms go, Respondent asserts that because his misconduct occurred in 1983 this Court has the option of entering a disbarment order of three years.

ARGUMENT

Point I

THE SUBSTANTIAL MITIGATION PRESENTED TO THE REFEREE PRECLUDES AN ORDER OF DISBARMENT FOR THE CONDUCT FOR WHICH RESPONDENT WAS CONVICTED.

Although Respondent maintains he is not guilty of the crimes for which he has been convicted, he recognizes that

the conviction alone necessitates prompt and stern disciplinary action by this Court. Respondent acknowledged to the Referee at final hearing that his temporary suspension was appropriate (TR. 88). Respondent further acknowledges to this Court that, unless his conviction is reversed on his pending appeal, this Court is required to impose a material discipline. Respondent submits that an eighteen month suspension, to continue until after his civil rights are restored, is the appropriate discipline to impose.

Respondent asks this Court, in determining a sanction, to avoid the temptation to order disbarment solely because his conviction involves perjury. Respondent asks this Court to consider his entire career, his good works, and most importantly, to consider that he had absolutely nothing to gain by lying to either the Grand Jury or to the petit jury during Mr. Erp's trial. Respondent freely acknowledged to the Grand Jury that he learned of Mr. Erp's role in the airport purchase after the transaction closed. He simply had no reason to lie about the point in time when he learned of Erp's role.

The Florida Bar, in a disturbingly increasing manner, seems to be abandoning, or at best, merely paying lip service to, the primary purpose of disciplinary proceedings, i.e., protection of the public. The Bar seems to have embarked on a

course of conduct of focusing on the punitive aspect of discipline by emphasizing deterrence through punishment. The Bar seems to be even more concerned about its image than about the purpose of discipline. Respondent does not want to enter a philosophical discussion over whether stern disciplinary penalties are a deterrence,(for example, New Jersey has had a mandatory disbarment rule for trust fund violations for years and yet they still seem to occur) and whether harsh, well publicized disciplines actually improve the image of The Bar. Instead, Respondent asks the Court to re-emphasize its adherence to the philosophy expressed in **The Florida Bar v. Pahules**, 233 So.2d 130 (Fla. 1970).

In **Pahules**, this Court stated on page 132 the three purposes to be followed in determining a discipline. The first and foremost of those factors was protection of the public. The second factor to be considered was a discipline that was "fair to the Respondent" by punishing the lawyer for his misconduct while at the same time encouraging reformation and rehabilitation. It seems that this second factor has been virtually eliminated from all of the Bar's arguments to this Court. Deterrence, the last factor, has become the most important to the Bar over the recent past. Respondent suggests all three factors are of, at least, equal importance.

Respondent's conviction is inconsistent with his life-long practice. His reputation for honesty and integrity in both the business and legal community in Ocala is beyond question. The elected State Attorney for the Fifth Judicial Circuit (a past president of the local Bar Association), a former representative of the Board of Governors of The Florida Bar for Respondent's Judicial Circuit (also a past president of the local Bar) and another past president of the local Bar all testified as to Respondent's excellent reputation for truth and veracity. This reputation is inconsistent with Respondent's testimony before the Grand Jury.

Former Board of Governors member Ed Cluster has the "highest regard" for Respondent and dealt with him "on our word and a handshake." He never knew Respondent to "depart from the Code of Professional Responsibility in any regard" (TR. 28). Even after his conviction, Lawyer Gregory Tucci says Respondent's reputation for truth and veracity is excellent (TR. 38). State Attorney Gill echoed that testimony by attesting to Respondent's "excellent" character (TR. 42, 43).

Dr. Wilson testified that Respondent's reputation for truth and veracity in the business community was excellent (TR. 56) and Bernie Stalzer testified that Respondent was always truthful, "straight as an arrow," and had an

"excellent reputation in the business community" (TR.33, 34).

Finally, Father Shine testified that Respondent was "absolutely" honest and forthright and had a reputation for truthfulness and honesty in the parish that was "A-1" (TR. 61, 62).

Respondent asks this Court to take particular note of the fact that the elected State Attorney for his community testified in his behalf before the Referee. Respondent submits that testifying for a convicted felon in disciplinary proceedings is a step not lightly taken by an elected official. State Attorneys, as all public servants, live in a glass house and every action they take subjects them to possible criticism in future elections. Notwithstanding this potential liability, the State Attorney himself, the chief law enforcement officer for the State of Florida in the Fifth Judicial Circuit, testified as to Respondent's truth and veracity and his good character.

The sentencing Judge in Respondent's criminal case sentenced him to a relatively light sentence considering he was convicted of three counts of perjury. His sentence, six months in a "jail type" institution (not even prison) to be followed by twelve months probation, indicates that the Judge must not have been completely convinced that Respondent

deliberately lied to a grand jury and during trial. Maybe, just maybe, the jury erred in its decision. The Judge must have considered the fact that the primary testimony against Respondent came from a convicted felon who agreed to testify against Respondent in exchange for getting a lighter term. (TR.45, 82).

There was no showing that Respondent ever benefited financially, other than a routine $340 to $360 (TR. 81) fee from the subject real estate transaction. Respondent simply had no reason to lie to the Grand Jury and he had no reason to lie at trial. He freely testified that he learned of Erp's interest in the airport after the transaction took place. Respondent testified before the Grand Jury on six occasions in 1983 (TR.79) and on only two occasions was he found to have lied.

Perhaps, State Attorney Gill's testimony that Respondent and his lawyer made a bad tactical move when they decided that Respondent should not testify is very correct. Mr. Gill testified that

> It's been my understanding that - or it's been my impression that jurors really have two standards - I don't care what they're instructed. If you're a public official or a professional, I think they hold you to a higher standard. I think they want to hear you say you didn't do it (TR. 44).

Subsequent events confirm Mr. Gill's theory. After Respondent's trial, another local lawyer was tried for virtually the same offense. Once again Erp was the primary government witness. Except, this time after learning from Respondent's case, the Defendant testified and was acquitted (TR. 86, 87).

Respondent is not asking this Court to re-try his case or to rule that his conviction does not warrant stern discipline. He prays, however, that this Court will not view his conviction in a vacuum, but, as did the sentencing Judge, that this Court will consider all attendant circumstances in determining a discipline. This is consistent with this Court's past decisions in felony conviction cases. This Court has emphatically rejected prior positions by the Florida Bar that all felony convictions warrant disbarment. See, for example, **The Florida Bar v Pavlick**, 504 So.2d 1231 (Fla. 1987), at page 1235. There, the Bar's argument that felony convictions warranted disbarment was firmly rejected by the Court. Instead, Mr. Pavlick's conviction, after the Court was apprised of all attendant circumstances surrounding his adjudication resulted in a two year suspension.

Clearly, Respondent's actions do not warrant disbarment. In **The Florida Bar v Hirsch**, 342 So.2d 970 (Fla. 1977), this Court stated on page 971 that

> We cannot say that the record here establishes that this respondent is one that has been demonstrated to fall within that class of lawyers "unworthy to practice law in this State" as provided in Integration Rule 11.02. Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the Society of which they are a part.

Obviously, Respondent does not fall within the category of those lawyers warranting the extreme sanction. As was true in **The Florida Bar v Rosen**, 495 So.2d 180 (Fla. 1986) Respondent is capable of rehabilitation and, therefore, should not be disbarred. In **Rosen**, this Court stated on page 181 that

> Because the extreme sanction of disbarment is to be imposed only "in those rare cases where rehabilitation is highly improbable" **The Florida Bar v Davis**, 361 So.2d 159, 162 (Fla. 1978), and the finding has been made that "[**Rosen**] has an excellent chance of being a great asset to the Bar of this state," we, with the referee, "must reject the recommendation of The Florida Bar that he be disbarred, since such a punishment appears not only too harsh in the circumstances, but may well deprive the legal community of the benefit of Mr. Rosen's participation as an attorney in the future, should he be found rehabilitated and reinstated after the suspension."

Mr. Rosen's potential for rehabilitation was a material factor in the Court's refusing to disbar him. Respondent's potential for rehabilitation is just as overwhelming. Respondent has been a valuable member of this bar in the past and he will be so again. He is capable of rehabilitation and his witnesses so testified. (TR. 30, 39, 43, 56, 62). State Attorney Gill testifed that were Respondent reinstated, he would hire Respondent as a prosecutor "right now" (TR. 43).

Respondent submits that the Referee improperly ignored the material mitigation presented to him during final hearing. Mitigation is always a factor to be considered in determining discipline. Respondent submits that his mitigation certainly removes his case from the realm of those requiring disbarment. Respondent's substantial services to the rape crisis center and to Father Shine's parish indicates that he has conducted his practice in the past in an admirable manner. He has devoted substantial time and effort, for no fee, to noble causes because

> I felt that part of my responsibility to my profession was that I could contribute my time and counsel free of charge (TR.74).

Dr. Wilson testified that Respondent was instrumental in both his role as an assistant State Attorney and later as County Attorney in getting the rape crisis center established (TR. 51). He continued to help the center after he went into

private practice. He represented battered wives for free or for "very, very minimal rates" and was available for late night calls, even as late as 11:30 p.m., if it would help (TR. 54, 56). He assisted the center in its purchase of property for a center for no fee (TR. 55)

Respondent has represented 30 to 50 clients from the center (TR. 73). Most of them were charged no fee (TR. 73, 74).

Father Shine also attested to Respondent's good works. He represented the priest personally when he was sued by a contractor -- for no fee -- and he represented the parish in a zoning suit for $40,000,000 against the Church -- again for no fee (TR. 59-61). Respondent is the parish's attorney and he does not bill the church for any of his services (TR. 60).

Respondent estimated his time on the $40,000,000 zoning case alone was in excess of 30 hours (TR. 76). Considering Respondent's hourly rate was $100 to $150 per hour, the donation of his time to the parish was a generous act in accordance with the highest standards of our profession.

The Florida Standards for Imposing Lawyer Sanctions (the Standards) specifically list mitigating factors to be considered in imposing any disciplinary rule. Rule 9.32 of The Standards list the factors to be considered. Those pertinent to these proceedings are: (b) absence of a

dishonest or selfish motive; (g) character or reputation; (h) physical or mental disability or impairment; and (m) remoteness of prior offenses.

Respondent's offense is an isolated incident in his sterling career. He has been a lawyer since 1961, and except for a private reprimand for minor misconduct involving negligence some years ago, he has an unblemished career.

Respondent submits that an eighteen month suspension, roughly parallel to his sentence, followed by three years probation after reinstatement with a requirement of 360 hours **pro bono** work (10 hours per month) to either the rape crisis center or some other organization approved by The Florida Bar, is an appropriate discipline and will adequately protect the public, rehabilitate Respondent, and serve as a deterrent to other lawyers. **Pahules**, supra.

Point II

A FIVE YEAR PERIOD OF DISBARMENT IS INAPPROPRIATE BECAUSE RESPONDENT'S MISCONDUCT TOOK PLACE IN 1983, FOUR YEARS BEFORE THE ONSET OF THE FIVE YEAR DISBARMENT RULE.

Respondent's offense, if offense it was, occurred in 1983. The rule change requiring a five year disbarment did not take effect until January 1, 1987. Respondent submits that the three year rule should be applied to his case. This Court

has, in the past, imposed three year disbarments for criminal misconduct occurring prior to the rules change but in which the order of discipline was subsequent to January 1, 1987. For example, in **The Florida Bar v. Nahoom** 523 So.2d 1137 (Fla. 1988), the accused lawyer received a three year disbarment, retroactive to almost three years earlier, after a conviction for major drug offenses.

Obviously, this Court does not have to disbar Respondent for five years if it chooses not to do so under **Nahoom**. Other cases in which disbarments have not been for five years include **The Florida Bar v Newman**, 513 So.2d 656 (Fla. 1983) and **The Florida Bar v Margadonna**, 511 So.2d 985 (Fla. 1987).

As support for its argument that Respondent's convictions warrant his disbarment the Bar points to two cases involving acts far more egregious than Respondent's. In **The Florida Bar v Leon**, 510 So.2d 873 (Fla. 1987) a former judge was disbarred after he was adjudicated guilty of two counts of perjury and one count of official misconduct. The latter count was reversed on appeal. Leon's misconduct occurred while he was on the bench (he secretly contacted another judge to secure the alteration of the disposition of a criminal case) and then he lied to the JQC about his conduct. Leon was removed from the bench by the JQC and then was disbarred.

Clearly, Leon had a selfish motive for his perjury. He was trying to cover up his unethical and possibly illegal conduct when he tried to fix a case. The Respondent at bar had no motive for lying to the Grand Jury.

The other case to which the Bar refers, **The Florida Bar v Onett**, 50 So.2d 388 (Fla. 1987), also involves acts far more serious than the instant matter. Mr. Onett was convicted of six felony charges: mail fraud conspiracy; two counts of extortion; mail fraud; and two counts of perjury. No mitigation was listed.

It simply beggars the imagination to think that Respondent should receive the same disciplines as those meted out in **Leon** and **Onett**. His offenses were far less heinous.

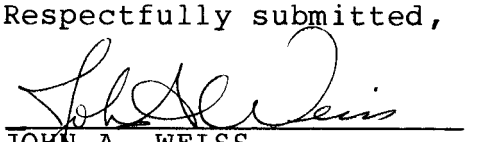
Respondent submits that disbarment is not warranted in his case at all. However, should this Court determine that disbarment is the appropriate sanction, Respondent asks that it be for three years retroactive to May 31, 1988.

CONCLUSION

The Referee ignored the substantial mitigation and Respondent's potential for rehabilitation in determining his sanction. The appropriate sanction for Respondent's offense is an eighteen month suspension, with no reinstatement allowed until civil rights are restored, with three years probation upon reinstatement during which Respondent shall be

required to do three hundred sixty hours community service.

Respectfully submitted,



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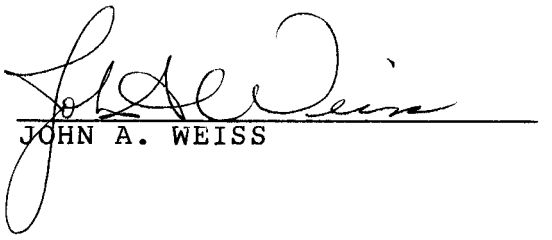
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief has been mailed to David G. McGunegle, Bar Counsel, 605 E. Robinson Street, Suite 610, Orlando, Florida 32801 on this 2nd day of December 1988.



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