IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

v

CASE NO: 79,555

GAIL ANNE ROBERTS,

Respondent.

_____/

RESPONDENT'S CROSS REPLY BRIEF

John A. Weiss
Attorney Number 0185229
P. O. Box 1167
Tallahassee, Florida 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

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RESPONDENT'S CROSS-REPLY BRIEF

STATEMENT OF THE CASE

Normally, reply briefs do not contain a statement of the facts. However, the Bar included a "Reply and Counterstatement to Respondent's Statement of the Case and the Facts" in its brief which crossed the line from a recitation of facts to argument. Accordingly, the undersigned feels compelled to address the Bar's arguments in their counter-statement of facts in this section of the cross-reply brief.

The Bar has characterized a statement by the undersigned in Respondent's first brief as being "not blatantly false" but "woefully incomplete". (Bar Brief, Page 1.) That statement read

> The Board of Bar Examiners' report and recommendations were made without the benefit of any evidentiary hearing. R 3, paragraph 9.

The cited portion of the report of referee reads

> Neither of those findings (a prior history of financial irresponsibility and a 1981 arrest) have been tested in an evidentiary hearing, however.

The undersigned's statement was completely true and the referee's report so stated.

The Bar argues in its statement of facts that Respondent had no evidentiary hearing before the Florida Board of Bar Examiners

> Because she expressly waived it in order to avoid the risk of being denied admission.

In making this argument, the Bar is merely presenting its interpretation of the basis for the agreement. At the time that Respondent agreed to conditional admission the Board had not

decided what, if any, specifications would be filed. It is subject to speculation whether Respondent would have been found guilty of the specifications and whether, even if so found, they would have resulted in a denial of her admission. What is beyond dispute, however, is the fact that a formal hearing would have taken six to nine months, thereby holding up Respondent's admission for that period of time and it would have cost her considerable sums of money in fees and costs to go to formal hearing.

On page two of its brief, the Bar challenges the accuracy of the undersigned's statement that Respondent "never admitted financial irresponsibility or illegal participation in any criminal wrongdoing." That statement appeared in the following paragraph:

> The Board of Bar Examiner's report and recommendations were made without the benefit of any evidentiary hearing. R 3, par. 9. Respondent never admitted financial irresponsibility or illegal participation in any criminal wrongdoing. There is no finding that Respondent's past financial history or her arrest were disqualifying factors by the Board of Bar Examiners.

The sentence quoted by the Bar pertained specifically to proceedings before the Florida Board of Bar Examiners. In fact, Respondent never admitted before the Florida Board of Bar Examiners any financial irresponsibility or disqualifying illegal participation in any criminal wrongdoing. The statement appearing in Respondent's brief is accurate.

There is no evidence to rebut Respondent's statement that the basis for her irregularly submitting drug tests was financial inability. Exhibit 9 shows that the Bar was aware of her financial

dilemma as early as October 26, 1987.

While the Bar correctly states that the record on appeal contains no reference to an entrapment defense, the referee made the following findings:

> 23....I specifically note that it was the undercover agent who initiated conversation with Respondent and that it was he who approached her car in the parking lot when it was evident that she was not going to comply with their earlier arrangements to meet.
>
> . . .
>
> 38. In determining the discipline to be imposed, I have considered the following mitigating factors:
>
> . . .
>
> d. The circumstances of May 11 and May 12, 1990 were exceptional. A combination of emotional turmoil, impaired judgment due to excessive alcohol consumption and an overzealous Collier County confidential informant led to Respondent's attempt to purchase a small quantity of cocaine for personal use. (emphasis supplied).

In paragraph 20 of his report, the referee found that the informant, although "he had no reason to suspect wrong-doing" deliberately initiated contact with Respondent while she was driving down the streets of Naples. In paragraph 23, the referee specifically found that Respondent was "pressured" by the undercover agent to purchase cocaine. Finally, in paragraph 19 the referee found that the informant was "setting up numerous busts" for law enforcement officials.

On page three of its reply, the Bar mischaracterizes the referee's findings by the following statement in its brief:

> By making such a finding, the referee determined that Gail Anne Roberts was justified in wilfully disobeying an Order of the Supreme Court of Florida.

In fact, the referee found

> 16. I find that Respondent had a reasonable, good faith belief that her drug testing being conducted by her probation officer was acceptable to The Florida Bar. I further find, based on Ms. Hernandez's testimony, that Respondent had good reason to believe that Ms. Hernandez was mailing her test results to Mr. Hyman. In fact, Ms. Hernandez specifically testified that monthly reports were sent to The Florida Bar.
>
> 17. Because all tests were timely taken and indicated no drug usage, I find that Respondent was in substantial compliance with the terms of her probation during the period beginning November 4, 1991 through final hearing.

The referee correctly found that Respondent "was in substantial compliance" with her probation during the period from November 4, 1991 through final hearing. The Bar does an injustice to the referee by describing the above-quoted language as being a determination that Respondent was "justified in wilfully disobeying" this Court's order. The referee made no such determination, directly or indirectly.

ARGUMENT

THE PROPER DISCIPLINE FOR RESPONDENT'S NO CONTEST PLEA TO ATTEMPTING TO PURCHASE A CONTROLLED SUBSTANCE, I.E., ONE HALF GRAM OF COCAINE FOR $40.00, WHILE CONDITIONALLY ADMITTED TO THE FLORIDA BAR, IS AN EIGHTEEN MONTH SUSPENSION TO BE FOLLOWED BY THREE YEARS PROBATION.

There is no finding before this Court that Respondent has engaged in any misconduct other than that which led to her arrest. The referee found:

> 32. Respondent has been in substantial compliance with her monthly testing since 1989.... The only material violation of her probation is her attempt to purchase cocaine.

The only misconduct charged in these proceedings is Respondent's criminal determination, which is a violation of her probation and the charges that she missed her monthly urine tests. The referee declined to find a violation of her probation in regard to the latter charges.

Respondent has never denied that discipline was appropriate for her plea for attempting to purchase one half gram of cocaine in May 1990. She argues that the appropriate discipline for her misconduct is an eighteen month suspension to be followed by three years probation. Were it not for her being on conditional admission, Respondent would argue that the appropriate discipline for her misconduct would have been a suspension in the range of 91 days to six months. See the cases cited in paragraph 35 of the referee's report for support of that proposition.

The Bar argues that Respondent has had "frequent and substantial probation violations,...." In fact, that is the Bar's opinion and there is no judicial finding to uphold that belief. The referee has made the following findings:

> 24. I find that Respondent has been in substantial compliance with her monthly testing since October 1989.
>
> 25. I find that Respondent has never had a positive test for drugs at any point in time during her conditional admission.
>
> 26. I find that only once in Respondent's almost six years of probation has there been a request by the Bar that she submit to a random urinalysis. She immediately complied with that request and the results were negative as to all controlled substances.
>
> 27. I find that, with the exception of the events occurring on May 12, 1990, which led to Respondent's plea on November 4, 1991, there is no evidence indicating that Respondent has engaged in the use of any controlled substances since her admission to The Florida Bar on December 31, 1986.
>
> . . .
>
> 32. Respondent has been in substantial compliance with her monthly testing since October, 1989. Not once during that 40 month period (or at any point since she was admitted) has there been a positive showing of her use of a controlled substance....The only material violation of her probation is her attempt to purchase cocaine.

The issue before this Court in Respondent's cross-appeal is exclusively the sanction to be imposed. The Bar would ask this Court to believe that Respondent is arguing that she is not guilty of any wrongdoing. She is not. She acknowledges the propriety of suspension. Respondent does argue, however, that the judge's withholding of adjudication of guilt is a mitigating factor to be

considered in imposing discipline. Rule 3-7.2(i)(3) states

> The failure of a trial court to adjudicate the convicted attorney guilty of the offense(s) charged shall be considered as a matter of mitigation only.

Respondent, based on the aforementioned rule, disagrees with the Bar's contention that withholding of adjudication has "no relevance" to disciplinary proceedings.

Perhaps the referee could have considered as aggravation Respondent's admissions that she occasionally used marijuana and cocaine before she was admitted to The Florida Bar in December 1986. He did not, however, list this as a factor in paragraph 37 of his report. There is no evidence whatsoever before this Court rebutting Respondent's testimony that she has never used marijuana or cocaine since her conditional admission six years ago. (Respondent submits that her arrest in 1990 was an isolated incident and was the result of unusual circumstances). As pointed out earlier, the referee found in paragraph 25 of his report that Respondent has never had a positive test for drugs at any point during her conditional admission, including the only time that the Bar has ever sought a random urinalysis. (Paragraph 26). The referee also noted in paragraph 27 of his report that:

> there is no evidence indicating that Respondent has engaged in the use of any controlled substance since her admission to The Florida Bar on December 31, 1986.

There is no doubt that until August 1989, Respondent was remiss in her submission of drug tests. However, in paragraph 24 of his report, the referee found that since October 1989 Respondent

has substantially complied with her monthly testing requirements.

The Florida Bar would have this Court believe that The Florida Bar was giving Respondent a break by agreeing to extend her conditional admission for three more years in April 1990. In fact, as is true with all settlements, each side gave and each side took.

Respondent believes that The Florida Bar agreed to a settlement in April 1990 because it did not want to come before this Court and try to answer the following arguments: (1) Why didn't The Florida Bar file any action for revocation of Respondent's probation, despite (in its opinion) three years of repeated violations, until after the three year period had expired; (2) why did The Florida Bar, despite the power to do so, never order a random urinalysis despite Respondent's missed tests; (3) why, if the Bar truly believed that Respondent was a risk to the public, did it allow her to practice without bringing an order to show cause earlier; and (4) did the Bar have jurisdiction to continue Respondent's conditional admission once it had lapsed. The Bar itself was remiss in the handling of Respondent's file and, perhaps, it did not want to have to explain its actions.

Perhaps, the Bar breathed a sigh of relief when the case was settled out of court.

Respondent specifically acknowledged on page thirteen of her brief that she violated her conditional admission. She acknowledges that suspension is appropriate. She rejects the argument that she should be disbarred for conduct that would not warrant disbarment solely because of her conditional admission.

The Bar repeatedly distinguishes between conditional admission and full admission. However, there is nothing in the Rules Regulating The Florida Bar, the Rules of Admission to the Bar or in any orders from this Court indicating such a distinction. Respondent would point to her arguments in Point II of her Answer Brief (pages 14-16) regarding the status of conditional admittees.

Disbarment is not mandated for a violation of the terms of a conditional admission. The referee so found in paragraph 33 of his report when he stated:

> 33. I also note that all language used in setting up the conditional admission program regarding the revocation of admittance is discretionary, i.e., the license "may" be revoked. Concomitantly, a violation does not require revocation.

Respondent argues to this Court that her agreement to a conditional admission was not tantamount to an admission that she was unfit for admission to The Florida Bar. Respondent submits that the limited number of checks that were returned for insufficient funds and her single credit card default were not disqualifying factors. In fact, many law students have financial problems while going to school. She further submits that her occasional use of controlled substances at parties prior to admission was not a disqualifying factor. More importantly, there is no evidence of addiction or of trafficking in the record. Respondent is confident that she would have been admitted had specifications been filed.

Respondent asks this Court to view this case in light of the facts before it, not in light of the Bar's speculations. The facts

are that in six years of drug testing, which have been very regular since fall 1989, Respondent has never tested positive for controlled substances. During this entire time span she was subject to random testing and, in fact, when one was ordered she immediately complied and it, too, was negative.

While the Bar would argue that Respondent's testing by her probation officer was a wilful disobedience of this Court's order, the Hyman letter specifically shows that the Bar would have agreed to such testing had it been specifically requested. The referee found that Respondent had a good faith basis for her belief that testing by her probation officer was acceptable to the Bar. As support for this finding, Respondent would point out that the Bar did not object to testing by Respondent's probation officer once it had learned of the new procedure.

Respondent would argue that the single incident of a check returned for insufficient funds and her suspension for dues delinquencies are not of such aggravation of discipline that she should be suspended for three years, let alone disbarred.

Respondent stands by the arguments made in Point I of her initial brief and the referee's findings in paragraph 35 of his report as support for her position that an eighteen month suspension is the appropriate discipline in this case.

Respondent does not deserve to be disbarred. Were this case before the Court without the element of conditional admission, Respondent would be arguing for a six month suspension. Tacking on an extra year because of the violation of her conditional

admission is sufficient discipline. Disbarring Respondent for the misconduct found by the referee is such a harsh discipline that it converts these remedial proceedings into a punitive proceeding. See DeBock v State, 512 So.2d 164 (Fla. 1987).

CONCLUSION

Respondent should be suspended for eighteen months nunc pro tunc April 6, 1992, the date of her felony suspension. Upon proof of rehabilitation in reinstatement proceedings, Respondent should be placed on probation for three years a condition of which will be random urinalysis.

John A. Weiss
Attorney Number 0185229
P. O. Box 1167
Tallahassee, Florida 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Respondent's Cross-Reply Brief were mailed to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, Cypress Financial Center, Suite 835, 5900 N. Andrews Avenue, Ft. Lauderdale, FL 33309 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 22nd day of July, 1993.

JOHN A. WEISS