IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

v

CASE NO: 79,555

GAIL ANNE ROBERTS,

Respondent.

_____/

RESPONDENT'S INITIAL BRIEF ON CROSS-APPEAL AND ANSWER BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

PRELIMINARY STATEMENT

The Appellee/Cross-Appellant will be referred to as Respondent or as Ms. Roberts throughout this brief. The Appellant/Cross-Appellee will be referred to as The Florida Bar or as the Bar.

References to the transcript of the final hearing will be by the symbol T followed by the appropriate page number. All exhibits submitted at final hearing will be by the symbol EX followed by the appropriate page number.

Subsequent to final hearing, a letter dated July 28, 1992, together with a transmittal letter dated August 25, 1992, was submitted into evidence by Respondent pursuant to agreement of counsel and the referee. Those letters shall be referred to as the Weiss and the Hyman letters respectively.

References to the Report of Referee will be by the symbol R followed by the appropriate page or paragraph number.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts the Bar's statement of the case as written. However, Respondent did enter one exhibit into evidence subsequent to final hearing under cover of letter dated August 25, 1992. The document submitted into evidence was a letter to Richard D. Liss from Don Alan Hyman dated July 28, 1992. Copies of that exhibit, and its transmittal letter, are appended to this brief.

Respondent would supplement the Bar's statement of facts with the following information.

The Board of Bar Examiners' 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.

Respondent testified at final hearing that her bad checks and her single credit card problem were limited to isolated instances and that the criminal charges against her were dismissed because she was not involved in her husband's wrongdoing. T 155,194-197.

Respondent testified that the reason for her irregular submission of drug tests was her inability to afford to take them. T 162. As indicated by correspondence in Bar Exhibit 9, The Florida Bar was apprised of that factor.

Respondent's tests for the previous month were not due in The

Florida Bar's office until the 15th of the following month. See for example Exhibit 9B (February 29, 1988 Tabano letter).

Disciplinary proceedings were never brought against Respondent for her single instance of an uncollected $24.50 check brought to The Florida Bar's attention. EX 15. Nor were disciplinary proceedings brought against her for her delinquency suspension for failure to pay dues during the 1988-1989 fiscal year.

As to Respondent's testing history with The Florida Bar, the referee made the following findings:

> I find that Respondent was in substantial compliance with the terms of her probation during the period beginning November 4, 1991 through final hearing (R Par. 17);
>
> I find that Respondent has been in substantial compliance with her monthly testing since October 1989 (R Par. 24);
>
> I find that Respondent has never had a positive test for drugs at any point in time during her conditional admission (R Par. 25);
>
> 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 (R Par. 26);
>
> 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 that Respondent has engaged in the use of any controlled substance since her admission to The Florida Bar on December 31, 1986 (R Par. 27);
>
> The only material violation of her probation is her attempt to purchase cocaine (R Par. 32).

As part of the negotiations that led to the continuance of

Respondent's three year conditional admission, Respondent agreed to drop any claims of laches and untimeliness in filing their proceedings to terminate her probation and their defense that the Bar's charges were untimely brought.

None of the agents that participated in Ms. Roberts' arrest at 12:15 a.m. on May 12, 1990 personally testified at final hearing. Their version of the events of that night were submitted solely in the form of depositions taken in Ms. Roberts' criminal case. Ms. Roberts, however, testified to the referee about her arrest. After reviewing the depositions of the arresting officer and his drug-dealing confidential informant the referee made the following findings regarding the events of May 11 and 12, 1990. (The numbering on the quoted paragraphs are the referee's and begins on page 6 of his report under Section II. Findings of Fact):

> 19. [R]espondent, (sic) testified that on Friday, May 11, 1990, after an argument with her boyfriend, she engaged in an evening of drinking first with friends and then with another individual named "John". Early in the evening, Ron Steigerwald, a confidential informant recently released from federal prison after being convicted of drug dealing, and currently charged with the offense of possession of controlled substances, was cruising the streets of Naples in an attempt to set up additional drug arrests. It is undisputed that Mr. Steigerwald during May 1990 was setting up numerous busts for the Collier County Sheriff's office.
>
> 20. Mr. Steigerwald noticed Respondent driving on a public thoroughfare in Naples on the evening of May 11, 1990. Although he had no reason to suspect wrong-doing, he made a U-turn and caught up with Respondent and engaged her in conversation at a traffic light. Ultimately, Ms. Roberts pulled over to the side of the road and, after speaking with him,

agreed to meet Mr. Steigerwald later that evening.

21. Respondent met John at the establishment where she was to meet Mr. Steigerwald. She and John left and went to another establishment for a drink. After driving by her boyfriend's house with John and determining that he was at home, Respondent returned to the establishment where she met John to let him out of the car. Her intention was to immediately leave and to go see her boyfriend. She was substantially late for her appointment with Mr. Steigerwald. Mr. Steigerwald approached Respondent's car while she was letting John out and asked why Respondent was so late. Ultimately, in the very early hours of May 12, 1990, Respondent agreed to purchase approximately one half gram of cocaine for $40.00 after Mr. Steigerwald made the arrangements.

22. I find that Respondent had the opportunity to terminate the transaction and did not do so.

23. While they are not defenses to the crime under the circumstances of this case, I find as mitigation that Ms. Roberts' judgment was impaired due to alcohol consumption and that she was pressured by an under-cover agent of the Collier County Sheriff's department to make arrangements to buy fake cocaine. In so doing, 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 her earlier arrangements to meet. (Emphasis supplied).

Respondent denied under oath that she initiated any conversation about buying cocaine with Mr. Steigerwald. T 180.

Respondent's testimony at final hearing was that her usage of cocaine was limited to recreational use at parties and that any purchases of controlled substances were limited to reimbursement to the individuals providing that substance. T 202-204.

The referee specifically found that Respondent was justified in relying on her probation officer to submit the results of her urinalysis to The Florida Bar. The referee, in this regard, made the following findings of fact:

> 14. Sylvia Hernandez, Respondent's probation officer, testified that Respondent has been a model client during her probation. Respondent has submitted timely to monthly urinalysis tests since November 4, 1991. The results of all tests have been negative.
>
> 15. Respondent asked Ms. Hernandez to send the results of all drug tests to The Florida Bar. In so doing, Respondent relied upon a conversation between her counsel and Mr. Hyman on November 6, 1991 [see Mr. Hyman's July 28, 1992 letter attached to this brief as an appendix]. During that conversation, Mr. Hyman was apprised of Respondent's tests to be conducted by the probation officer. While, apparently, no specific permission was given for the probation reports being submitted in lieu of laboratory tests, no objection was made when those reports started to be mailed to Mr. Hyman's office.
>
> 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.

SUMMARY OF THE ARGUMENT

The Florida Bar would have Respondent disbarred for attempting to purchase one half gram of cocaine at a price of $40.00 after she was pressured to do so by an agent of the Collier county Sheriff's Department. This incident was an isolated incident in Respondent's history and is the only time in five and one half years of probation that there has been any hint of wrongful drug usage. Were Respondent not conditionally admitted, her sanction would have been suspension for a period ranging from 91 days to six months. R Par. 36. Respondent submits that an eighteen month suspension is the appropriate discipline for her offense when all the aggravating and mitigating factors are considered together.

ARGUMENT ON CROSS-APPEAL

POINT I

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.

The only act of misconduct before the Court today is Respondent's attempted purchase of one half gram of cocaine for $40.00 on May 12, 1990. While there are numerous mitigating and aggravating factors involved, these proceedings arise from the criminal charges arising out of that nights' activities.

As a result of her arrest, on November 4, 1991 Respondent's plea of no contest to the charge of attempting to purchase a controlled substance, a felony, was accepted. Adjudication of

guilt was withheld and she was placed on probation for three years. It was Respondent's first criminal offense. T 67.

The referee specifically, and quite properly, opined that, had it not been for Respondent's probationary status with the Bar, he would have recommended "a suspension in the range of 91 days to six months". R Par. 36. The cases cited in paragraph 35 of his report justify his opinion. That paragraph reads as follows:

> 35. Disbarment of Respondent under the circumstances of this case is unduly harsh. I note that in cases involving analogous drug offenses, the Supreme Court has imposed disciplines ranging from a public reprimand to a one year suspension. Among the cases I have considered are The Florida Bar v Levine, 498 So.2d 941 (Fla. 1986), a public reprimand for possession of cocaine; The Florida Bar v Piggee, 490 So.2d 1260 (Fla. 1986), a 60 day suspension for possession of marijuana and cocaine; The Florida Bar v Liroff, 582 So.2d 1178 (Fla. 1991), a sixty day suspension for drug abuse and violation of probation; The Florida Bar v Weintraub, 528 So.2d 367 (Fla. 1988), a ninety day suspension for possession and delivery of controlled substances; The Florida Bar v Thompson, 500 So.2d 1335 (Fla. 1986), a ninety-one day suspension for possession of cocaine, disorderly intoxication and leaving the scene of an accident; The Florida Bar v Finkelstein, 522 So.2d 372 (Fla. 1988), one year suspension for felony possession of illegal drugs and a misdemeanor offense of driving under the influence; The Florida Bar v Kaufman, 531 So.2d 152 (Fla. 1988), a one year suspension for possession of controlled substance.

The referee specifically enhanced his recommended discipline due to her violation of the terms of her admission. R Par. 36.

Respondent argues in this brief that the cases cited by the referee demonstrate that her offense does not warrant the imposition of a three year suspension. Even Mr. Liroff, in his

third appearance before the Court, only received a sixty day suspension.

In determining the discipline to be imposed, the referee found that "Respondent's misconduct had no impact on her clientele". R Par. 38.a. This finding is an important factor to be considered in determining the discipline to be imposed. See The Florida Bar v Tunsil, 503 So.2d 1230, 1231 (Fla. 1986) where this Court stated:

> Although we do not condone such conduct, we perceive a significant distinction between misconduct which does not injure clients or abuse the fiduciary relationship and conduct which does and, thus, goes to the very heart of the confidence which must be maintained in the legal profession.

Ms. Roberts' misconduct had no impact whatsoever on her clientele. If protection of the public, and not punishment, is the watchword in disciplinary proceedings, a long-term suspension of Respondent is simply not required. Her clientele has not been harmed, or even affected, by her arrest. Her admonishment for minor misconduct was for simple neglect, by a new practitioner, and did not result in prejudice to the client.

Ironically, even though Mr. Tunsil was found guilty of misappropriation of client funds and had a prior disciplinary history, he received but a one-year suspension for his theft. (Coincidentally, his prior private reprimand was for the same thing as Ms. Roberts' -- neglect of a legal matter). Mr. Tunsil, unlike the case at Bar, entered a guilty plea to grand theft of his clients' funds and received a sentence which included an adjudication of guilt.

Respondent requests that she receive an eighteen month suspension for her misconduct. Even then, she is receiving a suspension half again longer than that meted out to Mr. Tunsil for conversion of clients funds.

As he was allowed to do, the referee was able to consider all of the circumstances attendant to Respondent's arrest and her subsequent plea of no contest. After weighing the evidence before him and observing the demeanor of the witnesses testifying before him, the referee made the following findings of fact (paragraph numbering is that of the referee's in his report):

> 19. [E]arly in the evening, Ron Steigerwald, a confidential informant recently released from federal prison after being convicted of drug dealing, and currently charged with the offense of possession of controlled substances, was cruising the streets of Naples in an attempt to set up additional drug arrests. It is undisputed that Mr. Steigerwald during May 1990 was setting up numerous busts for the Collier County Sheriff's office (emphasis supplied).
>
> 20. Mr. Steigerwald noticed Respondent driving on a public thoroughfare in Naples on the evening of May 11, 1990. Although he had no reason to suspect wrong-doing, he made a U-turn and caught up with Respondent and engaged her in conversation at a traffic light....
>
> 23. While they are not defenses to the crime under the circumstances of this case, I find as mitigation that Ms. Roberts' judgment was impaired due to alcohol consumption and that she was pressured by an undercover agent of the Collier County Sheriff's department to make arrangements to buy the fake cocaine. In so doing 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

(emphasis supplied).

Ms. Roberts was "set up" by a convicted drug dealer charged with similar offenses who would do anything to stay out of jail. Coincidentally, he was not wired during his conversations with Ms. Roberts. T 180. While this may be understandable in his first attempt to set her up while "cruising" the streets looking for a victim, there is no reasonable explanation for his failure to be wired at the predesignated appointment (that Respondent decided not to keep) other than the fact that the police knew he was pressuring people to buy drugs. Respondent testified to the referee and Mr. Steigerwald did not. After viewing her demeanor, the referee found that Mr. Steigerwald "pressured" her into attempting to purchasing the fake cocaine.

There are numerous mitigating circumstances set forth in the referee's report besides that of the referee's finding that there was no impact on Ms. Roberts' clientele. Specifically, he noted in paragraph 38 the following (sub-paragraph designations are the referee's):

> b. Respondent has been undergoing urinalysis testing (albeit irregularly until October 1989) since January 1987. No drug test has come back positive.
>
> c. Respondent's compliance with the drug testing procedures of The Florida Bar has been regular since October 1989.
>
> 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.

e. The quality of the character evidence submitted by Respondent's witnesses at final hearing.

f. The fact that her conditional admission was due, in part, to her honest admissions at the Board of Bar Examiner's informal hearing in August 1986.

g. Respondent's interim rehabilitation, including her abstinence from drugs, her new career, and the impending birth of her child.

The referee could also have found that the failure of the Court to adjudicate her guilty of a felony and Respondent's refusal to accept any cases after her plea, T 110,111, were mitigating circumstances.

In recommending a suspension, the referee specifically noted the three considerations involved in imposing discipline as set forth by the Supreme Court in The Florida Bar v Pahules, 233 So.2d 130, 132 (Fla. 1970). They are:

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

An eighteen month suspension clearly fits within the Supreme Court's criteria. The judgment is fair to society (although Respondent submits that, because her conduct harmed no clients,

society does not need to be protected from her) because Respondent must prove rehabilitation in reinstatement proceedings before she can practice again (see Petition of Dawson, 131 So.2d 472, 474 (Fla. 1960); it is fair to Respondent in that it allows her the opportunity to prove rehabilitation in eighteen months; and it is severe enough to deter others who might be tempted to engage in like conduct.

Disciplinary proceedings are remedial in nature. They are not punitive. DeBock v State, 512 So.2d 164 (Fla. 1987). After considering the cases cited by the referee in paragraph 35, it becomes apparent that Respondent is being sternly sanctioned for her misconduct. Despite the fact that her act of misconduct is a single incident, she is receiving a far more serious discipline than any of the above cited lawyers.

Respondent is not unmindful of the fact that she has violated her conditional admission. It is for that reason that she is arguing for an eighteen month suspension rather than six months. Were the conditional admission not a factor, a sixty or a ninety day suspension like that imposed in Piggee, Liroff and Weintraub would be appropriate.

The Florida Standards For Imposing Lawyer Discipline specifically call for a suspension under circumstances similar to that at Bar. Standard 5.12 indicates that

> Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

Clearly suspension is appropriate. Respondent's misconduct did not involve a conviction of a felony; intentional interference with the administration of justice; perjury, misrepresentation, or fraud; or theft, drug dealing or murder.

A lawyer should not be disbarred when their criminal misconduct is limited to an isolated drug offense, even if it involves a violation of probation, if there is no impact on clientele and there is no dishonest conduct involved. A three year suspension, as recommended here, is too long under the circumstances of this case considering the mitigation. For all intents and purposes, Respondent has been in full compliance with her probation (notwithstanding the Bar's quibbling about whether the December 1990 random test is a monthly test and whether drug tests taken by the Department of Corrections are valid under their rules) since October 1989. She has never tested positive for any illegal drug use.

Under the circumstances of this case, an eighteen month suspension is appropriate.

POINT II
(Addressing Bar's Point I)

THE REFEREE ERRED BY FAILING TO VIEW RESPONDENT'S MISCONDUCT IN THE LIGHT APPROPRIATE TO HER STATUS AS A CONDITIONALLY ADMITTED MEMBER OF THE FLORIDA BAR.

There is nothing in the Rules Regulating The Florida Bar or in the Rules of Admission to The Florida Bar that distinguishes the status of a conditionally admitted member of The Florida Bar from

any other member.

The Board of Bar Examiners lost jurisdiction over Ms. Roberts (with the limited exception of a one year period if she made misrepresentations on her application) when the Supreme Court of Florida ordered her admission on December 31, 1986. EX. 8. The Court's order stated that "Gail Anne Roberts shall be admitted to The Florida Bar...." As a result of that order, Respondent was placed on probation for three years.

Until she was suspended in April, 1992, as a result of her no contest plea, Respondent had practiced law in the state of Florida in the same manner as any other member of The Florida Bar for a period exceeding five years. During that period, The Florida Bar sent Respondent the same dues statement that it sent to all members of The Florida Bar. It initiated the minor misconduct disciplinary proceedings against her (for an isolated incident of neglect) in the same manner as it would have initiated disciplinary proceedings against any other member of The Florida Bar. Its dues delinquency proceeding and subsequent reinstatement were the same as for any other member of The Florida Bar.

Her probation was treated in the same manner as the probation of disciplined lawyers. R. Regulating Fla. Bar 3-5.1(c).

In short, it is only since these proceedings began that The Florida Bar has suddenly decided that Ms. Roberts' status is different from that of the other 50,000 members of The Florida Bar admitted by this Court.

The burden is upon The Florida Bar to show that the referee's findings and recommendations are "erroneous, unlawful, or unjustified." R. Regulating Fla. Bar 3-7.7(c)(5). Rather than showing that the referees findings and recommendations fall within any of those categories, The Florida Bar belittles the referee and accuses him of not grasping the issues before him. For example, on page 30, The Florida Bar chastises the referee for not finding Respondent guilty of driving under the influence of alcohol when she has never been charged with such an offense by either the Bar or by law enforcement agencies and when there was no evidence before the Court that she was so doing.

The Bar accuses the referee on page 28 of its brief of failing to grasp its arguments that a Respondent can be found guilty of misconduct not charged. Respondent argues that the referee properly limited his guilty findings to the charges brought.

The Florida Bar insists on referring to Respondent as a "drug abuser" although it conceded on page 36 of its brief that there was "no evidence" indicating Ms. Roberts was addicted to drugs. But for the circumstances of May 12, 1990, there is also no evidence that the Respondent has engaged in any illicit drug use since her admission to The Florida Bar on December 31, 1986. R Par. 27.

The Florida Bar cites no rules or case law supporting its position that the referee's standard for determining Respondent's discipline is any different from that of any other lawyer who committed an offense while on probation. Accordingly, his view of this case must be upheld by the Court.

POINT III
(Addressing Bar's Point II)

THE REFEREE ERRED BY FAILING TO MAKE SPECIFIC FINDINGS OF FACTS REGARDING RESPONDENT'S CONSISTENT AND CARELESS DISREGARD FOR THE TERMS OF HER PROBATION THROUGHOUT THE TERM OF HER CONDITIONAL ADMISSION, FROM JANUARY 7, 1987, THROUGH THE DATE OF FINAL HEARING ON JULY 20, 1992.

The Florida Bar, solely through the introduction of the report and recommendations to the Court by the Board of Bar Examiners (BX 7) sought to prove that Respondent was financially irresponsible and was guilty of a crime because her husband was arrested for possession of a controlled substance. The referee properly found that

> Neither of those charges have been tested in an evidentiary hearing, however. In fact, testimony at final hearing in this cause indicated that those criminal charges against Respondent were dropped. Accordingly, she is presumed innocent of those charges and no negative inferences may be drawn as a result of that arrest. R Par. 9.

The Board's report to the Court made no findings, and alluded to no evidence being taken, regarding Respondent's prior activities. Their "investigation" (as opposed to any evidentiary hearings) established a history of financially irresponsibility and an arrest.

Respondent, in the only evidence taken on this matter, testified that her past history did not indicate financial irresponsibility. She had some problems with a few checks while a student and she fell into arrears on her student loan and on a gasoline credit card. T 194-197. There is no other evidence

before this Court indicating financial irresponsibility before Respondent's admission. These are not atypical problems in a student's life and do not indicate a per se unfitness to practice.

Respondent testified that criminal charges against her in Iowa were dismissed. T 155,156. Accordingly, the referee's conclusion that she is innocent of the charges brought against her and that no negative inferences can be drawn as a result of that arrest are imminently correct.

Notwithstanding the Bar's arguments, in this country a person is innocent until proven guilty.

The Florida Bar characterizes on page 33 the referee's reasoning as being "misguided" when he found that

> Respondent has been in substantial compliance with her monthly testing since October 1989 (R Par. 24)....

In fact, the evidence before the Court indicated a sound basis for this finding. Respondent's failure to submit a regularly scheduled test in December 1990 was the result of a good faith mistake on her part that the random test that she submitted to that month was in compliance of her monthly report. In fact, on twelve hours notice, Respondent submitted to urinalysis and the test was negative.

The Bar further urges the Court to ignore the fact that Respondent, for every single month that she was on probation beginning on November 4, 1991, submitted to urinalysis from her probation officer. T 65. The Bar argues that because they never specifically authorized substitute testing by the probation office

(although they never objected to it, either) that Respondent's probation should be violated. The referee was not "misguided" when he found that

> 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. R Par. 17.

In fact, there is no evidence before this Court whatsoever (save the events of May 12, 1990) that Respondent ever tested positive for any drugs during any point in time during her five and one half years of testing.

A referee's findings of fact must be accepted as true by this Court if they are supported by competent evidence. The Florida Bar v Anderson, 594 So.2d 302 (Fla. 1992). In fact, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee if the referee's findings are supported by competent, substantial evidence. The Florida Bar v MacMillan, 600 So.2d 457, 459 (Fla. 1992).

The Florida Bar cites The Florida Bar v Greene, 589 So.2d 281 (Fla. 1991) as support for their position that Ms. Roberts should be disbarred. However, the Greene case cited in the Bar's brief was his sixth appearance before this Court. In 1970 he had received a public reprimand for failing to file income taxes (a crime). He was privately reprimanded in 1980 for neglect of a legal matter. In 1985 he received a public reprimand for neglecting another legal matter. Subsequently, he was held in contempt by this Court for failing to observe the conditions of his

probation from the 1985 case. In 1987, he received a 91 day suspension for neglect of a legal matter and for failing to supervise his non-lawyer personnel. The Florida Bar v Greene, 515 So.2d 1280, 1283 (Fla. 1987). Finally, in 1991, after numerous bouts with Mr. Greene, this Court disbarred him for practicing while suspended. His discipline was appropriate, he repeatedly engaged in conduct which jeopardized his clientele and caused harm to the public. His disbarment was the result of his second instance of contemptuous conduct. None of those factors is present in the case at Bar.

As was true with Mr. Greene, Mr. Bauman engaged in conduct far more egregious that the case at Bar. In his case, Mr. Bauman's repeated defiance of this Court resulted in the only available sanction, disbarment. The Florida Bar v Bauman, 558 So.2d 994 (Fla. 1990).

In 1987 Mr. Bauman received a six month suspension, upon stipulation with The Florida Bar, following his admission that he met with others to discuss importing cocaine and cannabis into the United States. Because he voluntarily withdrew from the scheme, and prevented its commission, he was treated leniently. The Florida Bar v Bauman, 505 So.2d 1326 (Fla. 1987).

As reported in the second Bauman case, respondent totally ignored his suspension. On at least five occasions after he was suspended he engaged in the practice of law. Even after he was held in contempt by a circuit judge for holding himself out as a lawyer in good standing, he continued to represent clients in

court. In disbarring Mr. Bauman, this Court stated that

> We can think of no person less likely to be rehabilitated than someone like respondent, who wilfully, deliberately, and continuously, refuses to abide by an order of this court.

Mr. Bauman's situation is far, far different than that of Ms. Roberts. She has not wilfully practiced law after being suspended by this Court. In fact, she was refusing to accept new cases six months before she was suspended. T 110.

Finally, the Bar cites The Florida Bar v Liroff, 582 So.2d 1178 (Fla. 1991) as support for its position. Mr. Liroff received a 60 day suspension for contempt of court for failing to comply with the terms of the probation of his previous disciplinary orders. Mr. Liroff received a private reprimand for conduct adversely reflecting on his fitness to practice law due to his addiction to a prescription drug in 1987. He was disciplined again in 1989 for failing to fulfill the conditions of his substance abuse program in 1989. Finally, in 1991, after violating his probation a second time, this Court suspended him for 60 days.

The Florida Bar does not explain to this Court why Ms. Roberts should be disbarred when Mr. Liroff only received a 60 day suspension for his second failure to abide by this Court's order.

Perhaps the most basic flaw in the Bar's argument regarding repeated misconduct is their assumption that the information gleaned during the Board's one-sided investigation was true or, even then, if it was disqualifying. This Court cannot assume, based on the Board's report, that Respondent was financially irresponsible or that she had anything to do with her husband's

arrest. There is no evidence, other than the Board's unsupported preliminary findings, that such was true. There is, however, unrebutted evidence from the Respondent that her financial problems prior to admission were of little significance and those frequently attendant to financially strapped students trying to earn an education.

This Court cannot assume that Respondent would have failed to meet her burden of showing that she was morally fit to assume the practice of law had the Board filed Specifications..

Rather than characterizing Respondent's conditional admission as the Board giving her a "break", Respondent submits that the Board was acknowledging that it could not prove a lack of character on her part.

POINT IV
(Addressing Bar's Point III)

THE REFEREE ERRED IN WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES PRESENTED.

The Florida Bar finds fault with the referee's failure to include numerous allegedly aggravating circumstances and then disputes the referee's listed mitigation in every single instance. The Bar's arguments on these two issues show conclusively the unreasonableness of its arguments in the case at Bar. It refuses to concede a single bit of validity to anything the referee did.

For example, the Bar characterized as "patently wrong" the referee's finding as mitigation that Respondent's misconduct had no impact on her clientele. Clearly, the referee was addressing the misconduct before him, not the previous admonishment for minor

misconduct. Even there, however, there was no prejudice to the client.

More unreasonable, however, is the Bar's argument that

> The referee's claim that all of Roberts' drug tests were negative is also misleading: (Bar brief p. 40).

The testimony of both the Bar's witnesses and Respondent's witnesses is that all of her drug tests were negative. T 56, 65. The Bar asks this Court to assume, without any evidentiary support whatsoever for its argument, that the missed drug tests during 1987 and 1988 and the two or so missed in 1989 are proof of their being positive. Conjecture based on no evidence whatsoever is an improper foundation for a finding; even in disciplinary cases.

The Bar argues that Respondent is able to manipulate the Department of Corrections (DOC), who are professional test givers and who monitor thousands of people on probation. It argues that DOC's procedures are inferior to that of the Bar. In addition to debasing the DOC, the Bar's argument is not true. The Bar's tests were completely unmonitored and could be submitted any time during the month and the reports were not due until the 15th of the following month. DOC's procedures are far more restrictive. According to Ms. Hernandez, Respondent's tests were closely monitored and were given at various times. They were all negative.

While the Bar claims foul in both the DOC's monitoring of Ms. Roberts and in her submitting tests prior to November 1991, it completely glosses over the fact it shirked its <u>responsibility</u> to order random tests. It did so only once, in December 1990. Then,

on less than twelve hours notice, Respondent submitted herself to a random urinalysis and it came back clean.

If The Florida Bar was so concerned about Ms. Roberts' compliance, and if it feared she was a threat to the public, why did it order but one random test in five and one half years?

The referee's findings that Respondent's actions on the night of May 11th were exceptional are firmly based in the evidence before the referee. There is no evidence of any drug usage by Respondent subsequent to August 1986. Prior to that date her use of cocaine and marijuana was experimental, occasional and certainly not indicative of a career criminal. The referee's finding that Gail Roberts' actions were the result of "emotional turmoil", "impaired judgment" and the actions of an "overzealous" confidential informant is soundly based on the evidence before him.

In what is obviously a good-faith slip, the Bar argues that interim rehabilitation is not appropriately considered in attorney disciplinary proceedings. They cite The Florida Bar v Routh, 414 So.2d 1023 (Fla. 1982) as support for their proposition. However, the Florida Standards for Imposing Lawyer Sanctions, Standard 9.32(j) specifically lists interim rehabilitation as a mitigating factor in disciplinary proceedings. Because the Standards were adopted by this Court effective January 1, 1987, they supersede this Court's decision in Routh in 1982.

There is no doubt that Respondent's arrest and plea constitute a violation of her conditional admission. Her failure to comply with the terms of her probation through mid-1989 is also

reprehensible. However, after late 1989, her testing was in substantial compliance with the Court's order. At most she missed one month (November 1989) between then and July 1992.

Respondent argues that the remaining aggravating factors cited by the Bar are of little relevance to her fitness to practice law or are, at worse, de minimis violations that did not weigh so heavily in the referee's decision that he wanted to list them. Most significantly, however, is the referee's specific statement that he considered disbarment and rejected it in determining discipline.

It should be noted that but for Respondent's prior admonishment for minor misconduct, she has not been charged with any other misconduct since her admission was ordered by the Supreme Court on December 31, 1986.

The referee is free to consider those elements of mitigation and aggravation as he sees fit to impose. Absent their having no evidentiary support, his conclusions are to be upheld. Johnson supra.

POINT V
(Addressing Bar's Point IV)

REVOCATION OF CONDITIONAL ADMISSION OR DISBARMENT IS THE APPROPRIATE SANCTION FOR A CONDITIONALLY MEMBER OF THE BAR WHO HAS CONSISTENTLY AND WILFULLY FAILED, OVER A FIVE AND ONE HALF YEAR PERIOD, TO COMPLY WITH THE TERMS AND CONDITIONS OF HER CONDITIONAL ADMISSION.

This Court has stated that a referee's conclusions as to the seriousness of misconduct will be upheld unless they are clearly erroneous or they are without evidentiary support. The Florida Bar

v Johnson, 526 So.2d 53, 54 (Fla. 1988). The Bar has not proven that the referee's opinion that Respondent should not be disbarred is clearly erroneous or without evidentiary support.

Once again, drawing upon the referee's report, Respondent would point out that the referee considered, and then rejected disbarment as a sanction. He so stated on page eight of his report:

> I specifically decline to recommend disbarment or revocation of respondent's license. While respondent's misconduct is serious, as discussed below, it does not give rise to the ultimate penalty in disciplinary proceedings. In recommending a suspension, I am persuaded by the Supreme Court of Florida's language in The Florida Bar v Hirsch, 342 So.2d 970, 971 (Fla. 1977) to the effect 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.

As urged in the first argument in this brief, Respondent submits that an eighteen month suspension is the appropriate

sanction for Respondent's misconduct. Were it not for her conditional admission, the appropriate discipline would be a suspension of six months or less.

In arguing for disbarment, The Florida Bar cites two cases involving far more egregious conduct. In fact, by analogizing the disciplines imposed in The Florida Bar v Santiago, 521 So.2d 1111 (Fla. 1988) and The Florida Bar v Wilson, 425 So.2d 2 (Fla. 1983) to the case at Bar, the Board of Governors demonstrates just how unreasonable it is being.

In Santiago, complaints were filed against respondent in 1986 alleging neglect of clients and abuse of trust accounts. Respondent ignored both requests to produce and subpoenas requiring production of records. Accordingly, he was temporarily suspended on April 15, 1987 with an order specifying production of records. Mr. Santiago refused to comply with this Court's order. He further flaunted this Court's authority by continuing to practice despite his suspension. Upon request of the Bar, an order to show cause was issued by this Court and it too was ignored by Mr. Santiago. Ultimately, this Court disbarred Mr. Santiago upon stipulation between him and the Bar.

In the case at Bar Ms. Roberts has not ignored subpoenas and certainly has not practiced after she was suspended. Yet, the Bar asks this Court to impose the same discipline on her (despite the fact that no trust violations have been alleged) as it did on Mr. Santiago.

The Wilson case does not even come close to justifying the

Bar's demand for disbarment. Mr. Wilson was disbarred after

> He pressured a client who was incarcerated in the Clay County jail to make arrangements to have delivered to him one and one-half pounds of cocaine. Subsequently, the cocaine was delivered to respondent who was thereupon arrested by undercover agents.

The Bar equates Ms. Roberts' purchase of one half gram of cocaine from a drug dealer working for law enforcement authorities to Mr. Wilson's pressuring an inmate in jail to have delivered to Mr. Wilson one and one-half pounds of cocaine. Even considering that Ms. Roberts was on probation, such an analogy is absurd.

To further differentiate the Wilson case from Ms. Roberts, it was pointed out by the Court that no mitigation was presented at Mr. Wilson's final hearing. Id., p. 3.

If this Court follows The Florida Bar's recommendations, it will be imposing a punishment far more severe than the misconduct calls for. In essence, this Court will be allowing caprice and arbitrary sanctions to be imposed instead of demonstrably consistent penalties. For example, if the Bar's recommendations are followed, Ms. Roberts would receive the more severe sanction than that imposed in The Florida Bar v Clark, 582 So.2d 620 (Fla. 1991). There, the accused lawyer received a 36 month suspension after he was found guilty and was sentenced to three years imprisonment for his personally retrieving from the Gulf of Mexico a load of marijuana that had been dropped by a plane.

If the Bar's recommendations are followed, she would receive a more severe discipline than that given to the accused lawyer in The Florida Bar v Jahn, 509 So.2d 285 (1987). Mr. Jahn was given

a three year suspension upon his felony conviction for possession of cocaine and delivery of cocaine to a minor. Similarly, a three year suspension was handed down for various drug related offenses in The Florida Bar v Carbonaro, 464 So.2d 549 (Fla. 1985).

These cases, when coupled with the discipline cited in Point I of the brief, demonstrates conclusively that disbarment is unwarranted in the case at Bar.

The fact that the sentencing judge withheld adjudication of guilt distinguishes Ms. Roberts' conduct from that described above in Clark, Jahn and Carbonaro. In fact, a failure to adjudicate guilt is specifically listed as a mitigating factor in the Rules of Discipline. R. Regulating Fla. Bar 3-7.2(i)(3).

Respondent's professional road has been rocky. There is no doubt about that. As is true with all of us, she is reaping what she has sowed in the past. To disbar her, however, is disproportionately harsh when compared to the nature of her offenses. If protection of the public is our guiding light in disciplinary proceedings, then Ms. Roberts should not be disciplined when there is no showing of any harm to her clientele whatsoever.

The referee's recommendation that Ms. Roberts be suspended for three years, with proof of rehabilitation before reinstatement represents the maximum range of discipline that should be imposed in this case.

CONCLUSION

The Respondent's misconduct in the case at Bar warrants, at most, an eighteen month suspension nunc pro tunc April 6, 1992. Should she prove rehabilitation in reinstatement proceedings subsequently, she should be placed on probation for three years, the terms of which include random urinalysis for controlled substances. This Court should disregard the Bar's insistence that Respondent be disbarred.

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 Initial Brief on Cross-Appeal and Answer 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 21st day of June, 1993.

JOHN A. WEISS

APPENDIX

JOHN A. WEISS
ATTORNEY AT LAW
POST OFFICE BOX 1167
TALLAHASSEE, FLORIDA 32302-1167
(904) 681-9010

August 25, 1992

FEDERAL EXPRESS

The Honorable Barry M. Cohen
County Judge
Palm Beach County Courthouse
300 N. Dixie Highway
West Palm Beach, FL 33401

Re: The Florida Bar v Roberts; Case Number 79,555

Dear Judge Cohen:

At the end of our final hearing there was some discussion regarding a telephone conversation between Don Hyman, the assistant Director of Lawyer Regulation, and myself about Ms. Roberts' drug testing. The attached July 28, 1992 letter from Mr. Hyman confirms the gist of the conversation as I represented it to the Court. I hereby move this letter into evidence. Bar Counsel Richard Liss advised me in a letter I received on August 10, 1992, that he has no objection to my entering the attached letter into evidence.

Enclosed is a proposed referee report for your possible use in the referenced proceeding. If you elect to use my report, we can incorporate any changes you wish to make and turn around a final report very quickly.

I would like to take this opportunity to thank your Honor for the courtesies extended to counsel during these proceedings.

Sincerely,

Jack Weiss

John A. Weiss

Enclosures

cc: Richard B. Liss, Esquire w/enc.
Ms. Gail Anne Roberts w/enc.

JAW/cld

THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

904/561-5600

July 28, 1992

Mr. Richard B. Liss
Branch Staff Counsel
The Florida Bar
5900 North Andrews Avenue, Suite 835
Fort Lauderdale, Florida 33309

Re: The Florida Bar v. Gail Anne Roberts; Case No. 79,555
TFB File No. 92-51,146(17B)

Dear Richard:

Pursuant to our telephone conversation on even date, please be apprised that an examination of my notes regarding the above-referenced matter has revealed the following:

1. A telephone conversation did in fact take place between Jack Weiss and myself on November 6, 1991.

2. While my notes do not reveal the sum and substance of this conversation, they do reflect that the conversation addressed the respondent's drug tests and the Department of Corrections Probation and Parole Services.

3. That had Mr. Weiss sought permission to allow the monthly testing of the Respondent by the Probation and Parole Services to suffice as her monthly test pursuant to her conditional admission probationary requirement, I would not have objected to same.

Sincerely,

Don Alan Hyman
Assistant Director
Lawyer Regulation

DAH:bbH10