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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant,

vs.

GAIL ANNE ROBERTS,

Respondent/Appellee.

Supreme Court Case No. 79,555

The Florida Bar File No. 92-51,146(17D)

THE FLORIDA BAR'S REPLY BRIEF AND ANSWER TO RESPONDENT'S CROSS-APPEAL

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PRELIMINARY STATEMENT

In the interest of consistency and continuity, the following terms of reference will be used throughout this brief: The Florida Bar, the appellant and cross-appellee herein, will be referred to as "the bar". Gail Anne Roberts, the appellee and cross-appellant herein, will be referred to by her full name, or as "Respondent", or "Roberts". References to the final hearing transcript will be made utilizing the symbol "T", followed by the transcript page number. All final hearing exhibits, with the exception of the "Weiss" and "Hyman" letters referred to in Respondent's Initial Brief on Cross-Appeal and Answer Brief, will be referred to as follows: "Exhibit____".

REPLY AND COUNTERSTATEMENT TO RESPONDENT'S STATEMENT OF THE CASE AND OF THE FACTS

Initially, The Florida Bar acknowledges that Respondent did enter a single exhibit into evidence after the final hearing: a letter to Richard B. Liss from Don Alan Hyman, dated July 28, 1992. This late-filed document was overlooked by appellate counsel, and inadvertently omitted from reference in The Florida Bar's initial brief.

In addition to the foregoing, the Bar wishes to clarify a number of facts and/or issues set forth in Respondent's Statement Of The Case And Of The Facts. First among these is Respondent's statement that the Board of Bar Examiners' report and recommendation to this Court, by which she was denied full admission in favor of conditional admission, were made "without the benefit of any evidentiary hearing." While this statement is not blatantly false it is, however, woefully incomplete. Respondent fails to remind this Court that she had no evidentiary hearing because she expressly waived it in order to avoid the risk of being denied admission. Instead, Respondent accepted the lesser status of conditional admission. The chronology of events is as follows: Gail Anne Roberts applied for bar admission, and the usual background investigation took place. Once decidedly unfavorable information regarding her past came to light, the Board caused an "extensive investigation" to take place over "a considerable period of time due primarily to the applicant's delays in responding to the Board requests for information." [Florida Board of Bar Examiners Report and Recommendation To The Court, Exhibit 7.] Thereafter, Respondent attended an investigative hearing, and signed a Consent Agreement which read, in pertinent part, as follows: "In

lieu of the filing of Specifications, the parties to this Consent Order agree as follows... ." [Consent Agreement, Exhibit 6.] Pursuant to the language of Article III(B), Section 3 of the Rules Of The Supreme Court Relating To Admission To The Bar, the Board would not have filed Specifications unless it determined that Roberts should be charged with "matters which if proven would preclude a favorable finding by the Board." [Article III(B), Section 3(b), Exhibit 1.] Pursuant to the same rule, had the Board of Bar Examiners filed its Specifications instead of entering into a Consent Agreement, Roberts would have had the evidentiary hearing she now complains of having been denied. Of course, such an evidentiary hearing would also have presented considerable risk. Had the Board's Specifications been proven, the Board of Bar Examiners could have recommended that Roberts be denied admission to The Florida Bar.

Respondent also states, in her brief, that she "never admitted financial irresponsibility or illegal participation in any criminal wrongdoing." Yet Roberts testified, at final hearing, that she issued worthless checks [T. page 194], that she was delinquent in repaying her credit card debt [T. page 196], and that she had in fact used and purchased illegal drugs such as marijuana and cocaine [T. pages 182, 200-207.] Further, the bar proved that one of Roberts' worthless checks was issued in her capacity as an attorney [Exhibit 15]. Finally, the bar also proved that Roberts was suspended from practicing law, in 1988-89, for failure to pay her Florida Bar dues. [Exhibit 16]

Respondent testified, and stated in her brief, that the "reason for her irregular submission of drug tests was her inability to afford to take them." She further states that "The Florida Bar was apprised of that factor." Prior to her testimony at final hearing, however, the record on appeal is devoid of

any reference to Respondent's financial inability to comply with her monthly urinalysis requirement, save for the cited reference made in The Florida Bar's follow-up letter to Respondent, dated October 26, 1987. [Exhibit 9.] It is important to note that this letter only refers to the September 1987 test. There is no other evidence in the record which substantiates Roberts' claim that her failure to submit monthly urinalysis was the result of financial hardship.

Respondent's brief correctly notes that "[n]one of the agents that participated in Ms. Roberts' arrest at 12:15 a.m. on May 12, 1990 personally testified at final hearing." Pursuant to Rule 1.330 of the Florida Rules of Civil Procedure, the depositions of Officer Walton and Ron Steigerwald were properly before the Referee. Both statements were sworn, and neither was objected to. Further, the record on appeal contains no reference to an entrapment defense advanced by Respondent.

In her brief, Respondent placed particular emphasis on the Referee's finding that she was justified in relying on her probation officer to submit the results of her Department of Corrections urinalysis tests to The Florida Bar. By making such a finding, the Referee determined that Gail Anne Roberts was justified in willfully disobeying an Order of The Supreme Court of Florida. Roberts' conditional admission to The Florida Bar was by Order of The Supreme Court of Florida on December 31, 1986, in Case No. 69,549. This Order stated, in pertinent part, as follows: "The urinalysis tests shall be administered by a qualified physician or medical laboratory licensed by the State of Florida." [Exhibit 8.]

Finally, Respondent points out that she testified, under oath, that she did not initiate "any conversation about buying cocaine with Mr. Steigerwald."

Mr. Steigerwald testified, also under oath, that she did. [Exhibit 14, Deposition of Ron Steigerwald, page 46.]

SUMMARY OF THE ARGUMENT

In her summary of the argument, Respondent states that "The Florida Bar would have her 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 [sic] Sheriff's Department." Roberts characterizes this act as "an isolated incident" in her history. Based on this argument and its underlying misstatement of fact, she asks this Court to view this matter as a simple drug case, which should draw a suspension for "a period ranging from 91 days to six months." Because of the annoying inconvenience of her conditional admission, Respondent urges the Court to expand the simple drug case sanction to suspension for eighteen months.

This is not a simple drug case. This is an important and broad-reaching case of first impression. This case will determine what conditional admission to the bar means in Florida, and what it should mean in the four (4) other states which have joined Florida in pioneering this innovative and democratic concept. Further, the case will influence whether conditional admission will ever exist in the several other states now considering it.

In creating conditional admission, the Board of Bar Examiners, The Florida Bar, and The Supreme Court of Florida joined together to create a noble and equitable solution to the endemic problems of psychiatric disability, alcoholism and drug abuse. Under the mantel of "conditional admission", they created a sort of revocable trust for those who had completed the academic requirements for law practice, but had fallen short in proving character or fitness due to one or several of the foregoing problems. Through the implementation of conditional admission, these applicants became the beneficiaries of a kind of judicial trust, and were given an opportunity to

prove themselves worthy to be members of The Florida Bar even as they functioned as bar members. In fashioning this solution, however, the Board, the bar and the Court were careful to avoid confusion between conditional admission and full admission. To ensure fairness, to guard against recidivism, and to protect the public as well as the profession, the trust was expressly drafted to be revocable.

In order to breach the trust this Court placed in her, Gail Anne Roberts did much more than purchase $40.00 worth of cocaine. From the time she was conditionally admitted to the time of her arrest and beyond, she was financially irresponsible, she was a drug abuser, she demonstrated a lack of candor and a haughty disrespect for the rules of the bar and the orders of this Court. Further, over a five and one half year period of probation, she wasted the limited time and spurned the sincere efforts of the Board, the bar and this Court. She has betrayed their trust.

Conditional admission must be interpreted to mean what it is -- admission contingent upon the fulfillment of conditions. When the conditions are not fulfilled, the admission must be revoked. There can be no flexibility. There must be no exceptions.

ARGUMENT ON RESPONDENT'S CROSS-APPEAL

(Addressing Respondent's 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.

In framing this issue, Respondent incorrectly states that the only misconduct before this Court is her attempted purchase of one half gram of cocaine in May 1990. In fact, this case began with The Florida Bar's Petition for Rule to Show Cause, served on March 24, 1992 and predicated upon Respondent's arrest in light of her conditional admission, her frequent and substantial probation violations, and the express language contained in her order of admission which provided for revocation of her conditional admission status should she fail to abide by the terms and conditions of her probation.

Respondent also stresses that her criminal case was swiftly disposed of: her no contest plea was accepted and adjudication was withheld. Her only penalty, for this first criminal offense, was three years probation. While this information would be helpful in determining appropriate sanctions for subsequent criminal prosecutions, it has no relevance and carries little weight in a bar disciplinary proceeding. First, the standards of proof are vastly different. In a criminal proceeding, guilt must be proven beyond reasonable doubt. In bar proceedings, the standard is clear and convincing evidence. The Florida Bar v. Musleh, 453 So. 2d 794 (Fla. 1984). Secondly, while the criminal penalty Roberts received may be enough to punish an ordinary citizen, it does not take into consideration the special duties and responsibilities incumbent upon a member of The Florida Bar. While

conditionally admitted to The Florida Bar, Gail Anne Roberts pled no contest to the charge of committing a felony. Pursuant to the Rules Regulating The Florida Bar and relevant case law, the resulting judgment is conclusive proof of guilt for purposes of a disciplinary proceeding. The Florida Bar v. MacGuire, 529 So. 2d 669, cert. denied 110 S.Ct. 413 (Fla. 1988). Further, while the May 1990 arrest may have been Roberts' first arrest, it was by no means her first criminal offense. Pursuant to her own testimony before the Board of Bar Examiners as well as before the Referee, Respondent admitted using marijuana and cocaine before law school, during law school, and after law school -- indeed, Roberts admitted using cocaine while her bar application was pending -- even as she awaited the determination of the Board of Bar Examiners as to her character and fitness. Similarly, Roberts' May 1990 arrest was not her first bar probation violation. More than two and a half years after she graduated from law school, and after significant effort on the part of the Board of Bar Examiners, The Florida Bar and this Court, Gail Anne Roberts was conditionally admitted to The Florida Bar on January 7, 1987, pursuant to a Consent Agreement ratified by this Court. By February 1987, the Bar had to send Roberts a reminder to submit timely monthly urinalysis reports. Similar letters were required in March and October of 1987 and in February, March, May, October and December of 1988. In December 1987, Roberts wrote a worthless check to the Sheriff of Dade County for service of process. In 1988-89, Roberts was suspended from the bar for dues delinquency; she continued to practice law throughout this period of time. Roberts continued to neglect the timely submission of her Court mandated monthly urinalysis reports. By December 31, 1988, Roberts had only bothered to submit seven of the required twenty-four reports. In February

1989, the Bar agreed to extend Roberts' probation, to give her a second chance at compliance. Roberts responded by failing to submit urinalysis reports for May and June 1989. The next two tests were done in July, but submitted in August 1989. This situation continued until the bar filed a Petition for Order to Show Cause in January 1990. Once again, Roberts wanted to explain away her probation violations, and negotiate a resolution that would allow her to retain her conditionally admitted status. Once again, the bar worked with her -- agreeing to extend her probation by an additional three years. The bar took a voluntary dismissal of its petition, and the Court ordered it dismissed in April 1990. A little more than four weeks later, an unemployed Roberts was arrested in Naples, Florida. She was driving a relatively expensive automobile, equipped with tinted windows and a cellular telephone. She was bar hopping, and she tried to buy cocaine.

In arguing for a sanction even less than the three year suspension which a fully admitted attorney (with no probation and no probation violations) would receive for a felony conviction, Roberts cited the Referee's report, focusing on his findings of fact as well as the case law he cited as authority for his determination that disbarment would be "unduly harsh." None of these findings of fact, however, nor any of the cited cases, appropriately address the fact that Roberts is a conditionally admitted attorney who has frequently and substantially violated the terms and conditions of her probation. Accordingly, the Referee's findings are clearly erroneous and lack competent and substantial evidentiary support in the record on appeal. Therefore, this Court must reweigh the evidence, and

substitute its judgment for that of the Referee. The Florida Bar v. Rosen, 608 So. 2d 794 (Fla. 1992); The Florida Bar v. Miele, 605 So. 2d 866 (Fla. 1992); The Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992). Further, as the issue on cross-appeal is the discipline to be imposed, it should be noted that this Court's scope of review with regard to issues of appropriate sanction is broader than its scope of review with regard to findings of fact. The Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992); The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989).

Finally, Respondent suggests that her "clientele" was not harmed by virtue of her arrest. This is because, at the time of her arrest, she had no clients. She was unemployed and living in the home of friends on the west coast of Florida, in order to be near a boyfriend. Had Roberts been practicing law at the time of her arrest, her clients would have been significantly impacted by the fact of her arrest.

In keeping with the standards set by this Court in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), three purposes must be served by the discipline imposed against Gail Anne Roberts. The judgment must be fair to society, it must be fair to Roberts, and it must be severe enough to deter others who might be prone or tempted to commit like violations. The only way to serve this trinity of purposes is to revoke Gail Anne Roberts' conditional admission to The Florida Bar. As this Court said in The Florida Bar v. Bauman, 558 So. 2d 994 (Fla. 1990): "We can think of no person less likely to be rehabilitated than someone like respondent, who willfully, deliberately, and continuously, refuses to abide by an order of this Court. We agree with the bar that disbarment is appropriate."

ARGUMENT IN REPLY TO RESPONDENT'S ANSWER

(Addressing Respondent's Point II)

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.

Respondent argues that, as a conditionally admitted member of The Florida Bar, her status and standing is exactly the same as that of a fully admitted, non-probationary member. Based on this premise, she further argues that hers is a simple case involving a drug violation for which she should be disciplined as if she were fully admitted, with no consideration of ancillary acts of attendant misconduct. This argument defies logic and reason, and vitiates the very purpose for which conditional admission was considered, petitioned for, and approved by this Court. Gail Anne Roberts cannot have it both ways. She cannot accept conditional admission (in lieu of the filing of Specifications), and then argue that it is the equitable and functional equivalent of that which she originally strove for, but failed to attain.

In this case of first impression, conditional admission must be interpreted to be exactly what it is: admission which is contingent upon the fulfillment of express terms and conditions. Failure to meet these terms and conditions must, absent extraordinary circumstances, precipitate revocation of the conditional admission. If it does not, and there is no risk of penalty, the conditional element is eliminated. Clearly, this defeats the stated purpose of the Board of Bar Examiners, The Florida Bar, and the Supreme Court of Florida.

ARGUMENT IN REPLY TO RESPONDENT'S ANSWER

(Addressing Respondent's Point III)

THE REFEREE ERRED BY FAILING TO MAKE SPECIFIC FINDINGS OF FACT 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, 1993.

The Referee erred in his determination that the findings of the Board of Bar Examiners, as they related to Gail Anne Roberts' pre-application history, were irrelevant because they had not "been tested in an evidentiary hearing." As discussed previously, Roberts had no evidentiary hearing because she expressly waived it. While it is true that the results of such a hearing cannot be speculated upon, it is uncontroverted that such a hearing would have taken place (pursuant to the Rules of the Supreme Court Relating To Admission To The Bar) had Roberts not opted to enter into a Consent Agreement. Accordingly, as the findings of the Board of Bar Examiners provided the foundation for its recommendation to this Court to conditionally admit Gail Roberts, and because these findings were not previously objected to in any forum, they should have been deemed credible by the Referee, and should be accepted as credible by this Court.

Once the Board's findings are deemed applicable to the case at Bar, Respondent's many repeated transgressions, during the five and one half year term of her probation, become significant and compelling. In light of this, it is clear that an additional period of probation or suspension will not inspire Roberts' rehabilitation and reform. As this Court stated when it disbarred

the respondent in The Florida Bar v. Greene, 589 So. 2d 281, 282 (Fla. 1991):

> We agree with the Bar that further suspension of Greene would be fruitless. Greene has a long history of disciplinary violations (citations omitted). He has completely disregarded the lesser forms of discipline imposed by this Court. He has failed to abide by conditions of probation...

And so it is with Gail Anne Roberts. She has been closely monitored for five and a half years. She has failed to reform. A further probation, following this lengthy term of probation, would be gratuitous and meaningless.

Under Pahules, the obligation to deter similar misconduct and to strive for fundamental fairness requires that Roberts' conditional admission be revoked.

ARGUMENT IN REPLY TO RESPONDENT'S ANSWER

(Addressing Respondent's Point IV)

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

Respondent takes issue with the bar's argument that the Referee's determination as to mitigating circumstances was faulty. Specifically, Respondent argues against the bar's position that the Referee erred in finding that all of Roberts' drug tests were negative, and that events of the night of Roberts' arrest were exceptional and precipitated by emotional turmoil and impaired judgment.

In making her argument to rebut that of the bar, Respondent accuses the bar of arguing that a missed drug test must be a positive drug test. Clearly, that is untrue and unfair. However, missed tests must be assigned an unknown result. Accordingly, as a number of tests are missing, the Referee was in error when he stated that all of Respondent's tests were negative. Similarly, the veracity of the test results comes into question because of the method of administration. Although this Court's order of conditional admission clearly charged Gail Anne Roberts with the unassignable duty to submit to the bar the results of monthly urinalysis tests (accomplished by a licensed physician or Florida medical laboratory), Roberts elected to unilaterally delegate the duty to her criminal probation officer. In her brief, Respondent offers no evidence to support her position that the testing methods utilized by the Department of Corrections were professional and in compliance with the standards imposed by the Supreme Court of Florida, as set out in its order of conditional admission.

ARGUMENT IN REPLY TO RESPONDENT'S ANSWER

(Addressing Respondent's Point V)

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

Given the many factors set out in The Florida Bar's initial brief, as well as those set out herein, the only appropriate sanction for the case at bar is the revocation of Gail Anne Roberts' conditional admission, or disbarment. Although Respondent argues that the Referee considered and rejected this penalty, the bar argues that the Referee based his decisions against the weight of the evidence. Accordingly, this Court must now reweigh the evidence, and substitute its judgment for that of the Referee. The Florida Bar v. Simons, 581 So. 2d 154 (Fla. 1991).

CONCLUSION

If Gail Anne Roberts was unfit, unworthy or unready to become a fully admitted member of The Florida Bar when she first applied, in 1985, she is more unfit, unworthy or unready today. Since her conditional admission in January 1987, Roberts has consistently violated her probation, refused to comply with specific conditions set out in an Order of this Court, violated the Rules Regulating The Florida Bar, and committed a felony. She has tested the patience of The Florida Bar, and betrayed the trust of this Court. Unfortunately, Gail Anne Roberts is also the first conditionally admitted Florida lawyer to betray this trust and force the Court to revoke it and wrestle it back.

For this egregious breach of faith, Gail Anne Roberts must not be rewarded with a suspension and the unconditional admission which has so long eluded her. After five and a half years of probation, any sanction short of revocation or disbarment would confer this privilege. Instead, Gail Roberts' conditional admission should be revoked, in accordance with her consent agreement, and she should be disbarred from the practice of law in Florida. Only then, should she choose to reapply for readmission after the requisite time has passed, will a claim of reform and rehabilitation convey any meaning, or carry any weight.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Bar's Reply Brief And Answer To Respondent's Cross-Appeal has been sent by regular U.S. mail and by certified mail, return receipt requested, to John A. Weiss, Esquire, attorney for Respondent, 101 North Gadsden Street, Tallahassee, Florida 32301, on this 7th day of July, 1993.

LORRAINE C. HOFFMANN