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IN THE SUPREME COURT OF FLORIDA
500 S. Duval Street
Tallahassee, FL 32399

CASE NOS.: 87,415; 87,806; and
87,913

FLA BAR NOS.: 94-50,585 (17G);
95-51,621 (17G) and 96-50,376 (17G)

THE FLORIDA BAR

Complainant/Appellee,

vs .

HOWARD ELLIOT HOROWITZ,

Respondent/Appellant.

REPLY BRIEF OF APPELLANT HOWARD ELLIOT HOROWITZ

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
<u>ISSUE I</u>	3
THE REFEREE'S FAILURE TO CONSIDER THE RESPONDENT'S MENTAL STATE IS CLEARLY ERRONEOUS AND AS A RESULT THE REPORT LACKS EVIDENTIARY SUPPORT	
<u>ISSUE II</u>	3
IN LIGHT OF THE FAILURE OF THE REFEREE TO CONSIDER THE MENTAL STATE OF RESPONDENT, THE SANCTION OF DISBARMENT IS NOT WARRANTED	
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>The Florida Bar v. Pettie</u> , 424 So.2d 734 (Fla. 1982)	4
<u>The Florida Bar v. Pahules</u> , 233 So.2d 130, 132 (Fla. 1970).	4
<u>The Florida Bar v. Condon</u> , 632 So.2d 70 (Fla. 1994)	4
<u>The Florida Bar v. Larkin</u> , 420 So.2d 11080 (Fla. 1982).	5

STATEMENT OF THE CASE AND FACTS

The Respondent disagrees with certain statements contained within Appellee's Supplement to Appellant's Statement of the Case and Facts. The areas of disagreement are clearly specified within the following paragraphs.

The Appellant alleges that the respondent's inability to respond to the Bar's Complaint was **"the** result of his express design." The Appellant thereafter quotes a portion of the transcript, p. 17, 1.1.4 as supporting this position. Contrary to any "express design" of Respondent, the Respondent indicated he had been faced with a malpractice action, (Tr. pp.18, 20), **personal** bankruptcy (Tr. p.18) and psychiatric problems. (Tr. p.20).

The Appellant further indicates that Respondent's statement that he was "severely depressed and was undergoing therapy and treatment for his condition... are outside the record on appeal. However, the transcript of the Final Hearing clearly indicates at **p. 20:**

"Mr. Horowitz: I fully informed the Bar of my attendance to a psychiatrist in prior proceedings, Judge, so, I don't know how they're surprised. This is not a surprise to them."

The Bar goes on to indicate that Respondent presented no evidence of his depression and the fact that he was under the care of a physician. Contrary, is the testimony in the Final Hearing wherein Respondent stated to the Court at p.20:

".... My psychiatrist explained to me that she had written to the Florida Bar trying to explain some of my predicaments..."

SUMMARY OF THE ARGUMENT

The Report of the referee is devoid of mitigating factors such as Respondent's bankruptcy, malpractice claim or severe depression. Evidence was presented that Respondent was severely depressed and under care of a psychiatrist. The Referee chose to ignore these facts which should as a minimum have been considered by the Referee when determining Respondent's punishment.

ISSUE I

THE REFEREE'S FAILURE TO CONSIDER
THE RESPONDENT'S MENTAL STATE IS
CLEARLY ERRONEOUS AND AS A RESULT
THE REPORT LACKS EVIDENTIARY SUPPORT

ISSUE II

IN LIGHT OF THE FAILURE OF THE
REFEREE TO CONSIDER THE MENTAL STATE
OF RESPONDENT, THE SANCTION OF
DISBARMENT IS NOT WARRANTED

In response, the Appellant has argued these two points separately in its Answer Brief, but are addressed herein jointly.

The Florida Bar at the time of the Final Hearing attempts to portray its conduct herein as exemplary. "Perhaps we've been compassionate to a **fault.**" (Tr. p.23, line 13-14). Thereafter the Bar states at p.24, line 1-7:

"If he was remorseful and he went through this period and he was seeing a psychiatrist, the proper course of conduct is to do what hundreds of respondents do every day, and that is to make admissions, to begin a course of restitution, to present evidence of mitigation, psychiatric letters, whatever. Incidentally, the Bar has no record that I'm aware of of receiving a letter from a psychiatrist. But there is a method, Your Honor, a legal procedure by which to present that kind of a **defense.**"

In the Bar's own words, Respondent should have commenced the actions pronounced in its statement at p. 24 of the Transcript. Respondent did take action as suggested but such action was either

ignored, discounted or dismissed as not relevant by the Referee as a result of the Bar's position. Taking **each** factor into consideration, as the Referee should have, the Respondent had taken the following action:

- 1) Admission of **the** wrong (Tr. p. 16-17)
- 2) Commence restitution (**Tr.** p. 17)
- 3) Present evidence **of** mitigation (Tr. P.18; malpractice action, personal bankruptcy, p. 20 under care of psychiatrist)
- 4) Psychiatric letters (Tr. p. 20)

If the Florida Bar was so "**compassionate**" (Tr. p.23) why not allow consideration of his mental state and condition rather than interposing an objection to such evidence? If **the** Florida Bar was so "**compassionate**" why did they not question the Respondent about his mental condition? IF the Florida Bar was so "**compassionate**" why not consider the elements of severe depression, one of **which** is **the** masking of the problem and avoiding a response thereto?

In The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982), the court held:

"While judgments must be fair to society **and** serve enough to deter others prone to like violations, they must also be "fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and **rehabilitation.**" The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

In the case of The Florida Bar v. Condon, 632 So.2d 70 (Fla. 1994), the court dealt with the misuse of trust account funds. The Referee recognized as mitigating factors the Respondent's

depression, anxiety, absence of prior disciplinary action, remorse, and continuing medical treatment. In determining that the Respondent's conduct was egregious the court held at page 72:

"We are in agreement with the referee that Condon's mental and emotional state, his continuing medical treatment, and absence of prior disciplinary actions, and his showing of remorse are factors that, in this instance, mitigate against disbarment. However, we find that an eighteen month suspension more properly reflects the severity of Condon's **violations.**"

Finally, it is clear that it is not necessary as the Bar indicates to present **"expert"** evidence of impairment. It is clear that Respondent attempted to address his impaired mental state before the Referee. The Referee could have deduced from Respondent's conduct and testimony, his inability to function on a normal level. The Florida Bar v. Larkin, 420 So.2d 11080 (Fla. 1982). despite this the Referee chose to indicate the Respondent presented **"No** evidence of any physical or mental disability which could have impaired his judgment..." (Report of Referee p.22). Clearly this is not correct.

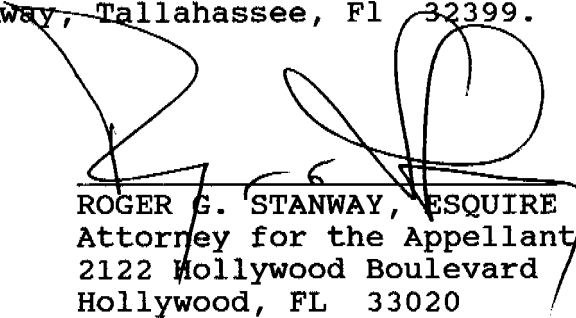
CONCLUSION

It is respectfully requested that this Court remand this cause to the Referee for the Referee to consider mitigating factors, prior to determining Respondent's punishment.

CERTIFICATE OF S——

I HEREBY CERTIFY a true and correct copy of the foregoing Reply Brief was mailed this 5th day of March 1997 to the following:

1. Original and seven copies of Florida Supreme Court:
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