IN THE SUPREME COURT OF FLORIDA

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| THE FLORIDA BAR, | ) | CONFIDENTIAL |
| Complainant, | ) | TFB Case No. 11K81102 |
| vs. | ) | Supreme Court Case No. 63,049 |
| ABRAHAM BERNARD FREED, | ) | |
| Respondent. | ) | |



REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, hearings were held on the following dates: December 6, 1984, December 7, 1984, and February 18, 1985, at Miami, Florida; and, June 29, 1985, and July 26, 1985, at Key West, Florida. At the conclusion of testimony, there was no final argument, and the attorney for the Complainant and the attorney for the Respondent were directed to prepare a suggested Report of Referee which contained references to the transcript and legal conclusions. The last Report from one of the counsel was not filed until November 6, 1985.

The following attorneys appeared as counsel for the parties:

For The Florida Bar, Jay M. Levy
6401 S. W. 84 Avenue #200
Miami, Florida 33173

For the Respondent, J. Arthur Hawkesworth, Jr.
25 W. Flagler Street
Miami, Florida 33130

II. Findings of Fact as to Each Count:

As to Count I

In Count I of the Complaint the Respondent is charged with the violation of Article 11.02(3)(a) of the Integration Rule of The Florida Bar and Disciplinary Rule 1-102(a)(6) of the Code of Professional Responsibility by failing to prevent illegal activities from taking place in a bar in which the Respondent was the principal owner and upon which premises he was at the time of the alleged illegal activity.

At approximately 9:30 P.M., January 17, 1981, four undercover agents

for the Division of Alcohol and Tobacco of the State of Florida entered the premises known as Glader Park, which is a bar and restaurant on a ten-acre facility on the Tamiami Trail, in the Everglades. The Respondent, who is an attorney with offices in Miami and who has a full practice, was the corporate owner and acting manager of the bar and restaurant. Testimony disclosed that it was a cold evening, extremely busy, and that the Respondent was short of help and was required to serve the customers. The agents divided into two teams, sitting at different locations in the bar to observe each other. One team was known as Thompson and Whitfield, and the other as Roberts and Jones. Roberts and Jones engaged in conversation with a patron, Hope, who provided them a small quantity of marijuana placed on the bar. There was conflicting testimony as to whether Respondent observed the marijuana on the bar. Even though Agent Thompson failed to mention any improper activity in her notes and her testimony disclosed that she did not see or observe any improper illegal activity, there was sufficient testimony by Agent Whitfield to corroborate the testimony of Roberts that the Respondent did see and tolerated the marijuana on the bar.

I do recommend that Respondent be found guilty of this Count and that appropriate, but moderate penalty should be imposed on the Respondent.

As to Count II

In Count II of the Complaint the Respondent is again charged with the violation of Article 11.02(3)(a) of the Integration Rule of The Florida Bar and Disciplinary Rule 1-102(a)(6) of the Code of Professional Responsibility in that Mr. Freed was found guilty of a misdemeanor, to-wit: attempted possession of a controlled substance.

As to the testimony I heard concerning this charge, there was substantial conflict of evidence, and it is not clear and convincing to me that the Respondent had knowledge of the sale of cocaine to the undercover agents Roberts and Jones, and that the Respondent joined the patron and the agents in a toilet stall and ingested a small portion of the cocaine. I specifically find that the Respondent or his employees were not in any way connected to or involved in the sale or delivery of cocaine from the patron John Hope to Agents Roberts and Jones. There was substantial and credible testimony to make the trier of the facts believe that the Respondent was not on the premises at the

time of the alleged accusation of possession of a controlled substance. Agents Thompson and Whitfield, together with witnesses McCarthy and Collison, testified that Respondent was away from the premises at the time of the alleged incident.

The Bar has taken the position that since the Respondent was found guilty by the Circuit Court of Dade County, and even though he was not adjudicated guilty, activates the Bar's disciplinary procedure, and the Referee cannot re-try the criminal case which resulted in the finding of guilt. Much of the testimony and the arguments of counsel centered on this issue during the numerous hearings and further argued in Memoranda given to the Referee. The Respondent explained why no defense was presented to the misdemeanor. It appears that the Court directed a verdict of not guilty on the felony, and there was a lengthy recess outside the courtroom, during which the Respondent was convinced by his attorneys, even though he wanted to testify, that he should not testify as his testimony would jeopardize the outcome of the administrative hearing regarding his business and liquor license. Further, one of the attorneys advising him during the recess was a member of the Board of Governors of The Florida Bar at the time and assured him The Florida Bar would not discipline him as the result of the misdemeanor.

Under the circumstances, I do not feel compelled to recommend that Respondent should be found guilty and, hence, there shall be no penalty.

As to Count III

As to Count III of the Complaint the Respondent is again charged with the violation of Article 11.02(3)(a) of the Integration Rule of The Florida Bar and Disciplinary Rule 1-102(a)(6) of the Code of Professional Responsibility by failing to exercise due diligence in preventing sale and distribution of a controlled substance at the bar which he owned.

I find that the Complainant did not prove the allegations of this Count by clear and convincing evidence. With regard to the actions of the two employees of Respondent, the evidence did not establish that either the Respondent was present at the time of the illegal activities or that he knew of illegal activities on the part of the employees.

It is my finding and recommendation that the Respondent is not guilty

of the charge contained in Count III of the Bar's Complaint and, hence, no penalty should be given.

III. Recommendation as to Disciplinary Measures To Be Applied: Having found the Respondent not guilty as to Counts II and III, no discipline is recommended for those Counts. However, having found the Respondent guilty of Count I and having considered all the evidence and the testimony of good character and no evidence of prior misconduct of the Respondent having ever been reprimanded or suspended, I recommend that a suspension of the practice of law for sixty (60) days is adequate and an appropriate penalty for Respondent's transgression which I found in Count I of the Complaint, with automatic reinstatement at the end of the period of suspension, and that there shall be no requirement of proof of rehabilitation or satisfactory passage of The Florida Bar examination.

IV. Statement of Costs and Manner In Which Costs Shall Be Taxed: It is apparent that costs have been incurred. It is recommended that all such costs be taxed to the Respondent.

DONE AND ORDERED in Chambers at Key West, Monroe County, Florida, this 2nd day of December, 1985.

M. Ignatius Lester

M. IGNATIUS LESTER
CIRCUIT JUDGE/REFEREE

Copies furnished to:

Jay M. Levy, Esq.
J. Arthur Hawkesworth, Jr., Esq.
Paul A. Gross, Esq., Branch Staff Counsel, The Florida Bar
John Berry, Esq., Staff Counsel, The Florida Bar

COPIES OF THE ABOVE ~~ORDER~~ Report of Referee WERE
MAILED TO ~~ATTORNEYS OF RECORD~~ the above
ON Dec. 2, 1985
BY E Gato