IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

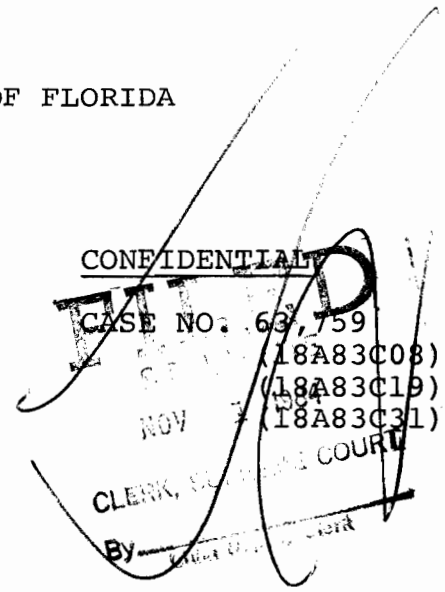
v.

EMMETT A. MORAN,

Respondent.
_____/

CONFIDENTIAL

CASE NO. 63,759
(18A83C08)
(18A83C19)
(18A83C31)



RESPONSE BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

The transcript of testimony taken on February 10, 1984 is designated T1 and the transcript of testimony taken on May 4, 1984 is designated T2.

STATEMENT OF THE CASE

The Florida Bar accepts respondent's statement of the case.

ISSUE ON APPEAL

WHETHER THE RESPONDENT SHOULD BE SUSPENDED FOR A PERIOD OF FOUR MONTHS AND THEREAFTER UNTIL HE PROVES REHABILITATION AS PROVIDED IN FLA. BAR INTEGR. RULE, ART. XI, RULE 11.10(4) AND WHETHER RESPONDENT SHOULD OBTAIN SUBSTANCE ABUSE COUNSELLING AS PART OF THAT REHABILITATION.

STATEMENT OF FACTS

Respondent represented Darlene Grace Sirtoli in a criminal case in State of Florida v. Darlene Grace Sirtoli, Eighteenth Judicial Circuit Case No. 4038 in 1972. He worked out a plea for Ms. Sirtoli which was submitted to the court in September, 1972. He also represented Douglas Phiel in a companion case, No. 4039, which was to be tried at the end of September, 1972, on the same day respondent entered Ms. Sirtoli's plea of guilty to one count of possessing less than 5 grams of marijuana. Ms. Sirtoli and Mr. Phiel fled from the jurisdiction after her plea and prior to his trial.

Eventually, Ms. Sirtoli was returned to custody in 1982. The trial court entered an order dated April 6, 1982 setting her case for sentencing on May 13, 1982, and directed a copy to respondent as attorney for the defendant. Mr. Phiel is deceased.

Respondent responded with a motion dated May 7, 1982 indicating that he never represented Ms. Sirtoli but did represent Mr. Phiel. The motion also indicates that he was never retained by Ms. Sirtoli. Respondent reiterates in Paragraph Two that he did not represent her, was not retained by her and had lost contact with her. However, in Paragraph Six, a motion indicates the attorney of record did appear January 30, 1973 which was the date of

her sentencing. The attorney of record is listed as respondent which he denied he was in Paragraph Seven. (See Bar Composite Exhibit No. 1.)

The record clearly indicates that the respondent did represent Ms. Sirtoli in 1972 and misrepresented that fact in the May 7, 1982 motion. There is no question of the misrepresentation. (See T2, Page 13, 42-43). His apparent purpose was to secure for her a fuller evidentiary hearing than she might otherwise have been entitled to had she been sentenced on May 13, 1982. He, in fact, did secure an additional hearing for her which was held in June, 1982.

The referee found that the respondent knowingly made a false statement of fact to the court and was overzealous in representing his client. The referee further indicated from the record that the respondent was under extreme mental and physical pressures due to health difficulties and overindulgence which precluded him from exercising sound judgment. The record indicates that at the time of the motion, the respondent had just concluded a lengthy murder trial. The record does not contain independent testimony with respect to any physical problems other than diabetes. Respondent further denied any dependence on alcohol or drugs during the time period. (T2, page 46).

As noted in the respondent's statement of the case, the referee recommends Count I be dismissed and he be found not guilty on Count II. The Bar takes no issue with those referee's recommendations.

ARGUMENT

THE RESPONDENT SHOULD BE SUSPENDED FOR A PERIOD OF FOUR MONTHS AND THEREAFTER UNTIL HE PROVES REHABILITATION AS PROVIDED IN FLA. BAR INTEGR. RULE, ART. XI, RULE 11.10 (4) AND RESPONDENT SHOULD OBTAIN SUBSTANCE ABUSE COUNSELLING AS PART OF THAT REHABILITATION.

The record is clear that respondent misrepresented material matters to the court in his May 7, 1982 motion apparently in hopes of obtaining a better result for his client who was facing imminent sentencing that day. He was able to secure one additional hearing and perhaps a better result. For his misguided zeal, the referee recommends that he be suspended for four months with proof of rehabilitation required prior to reinstatement. Respondent's brief does not address whether there was a misunderstanding as to the purpose of the second hearing on May 4, 1984, or whether he and his counsel were aware the referee had recommended respondent was being found guilty as to Count III. Respondent does concede in his brief that the misrepresentation is part of the record. (See Page 6). Respondent was represented by able counsel. The Bar submits he well understood the purpose of the second hearing or certainly was able to determine it. In any event, it is not up to the Bar to present respondent's case for him.

Respondent's argument apparently focuses primarily

on the referee's finding that respondent was under extreme mental and physical pressures due to health difficulties and self-induced indulgences which precluded him from exercising sound judgment with respect to the motion. True, there is no direct evidence relative to this particular finding with respect to overindulgence by the respondent. In fact, he denied having an alcohol or drug problem. (T2, Page 46). As the finder of fact, the referee certainly had the opportunity to consider the respondent's demeanor at both hearings. At the first hearing, he did not testify, although he was present throughout the entire proceeding. At the second hearing, he did testify. (T2, Pages 21-60 and 67-75). The Bar submits the referee made the "disputed" finding based on studying the respondent's demeanor at both hearings as well as listening to his testimony at the second hearing. The Bar submits the finding is clearly and convincingly sustained by respondent's demeanor and his testimony at the second hearing, particularly the latter portion. See e.g. The Florida Bar v. Snow, 436 So.2d 48 (Fla. 1983) where the Court upheld the referee's finding based on a disputed credibility issue between the respondent and an uncorroborated complainant.

The referee's findings of fact are entitled to the same presumption of correctness as the judgment of a

trier of fact in a civil proceeding. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a)(1). The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981). Those facts are presumed correct unless clearly erroneous or without support in the evidentiary record. The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978); The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968) and The Florida Bar v. Bass, 106 So.2d 77 (Fla. 1958).

It is the court's responsibility to review the determination of guilt and impose an appropriate penalty if the finding is supported by the record. The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980); Hirsch, supra. In Hoffer, the Court noted that the referee as fact finder properly resolves conflicts in the evidence citing The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966). The finding with respect to substance abuse is clearly within the province of the referee in weighing the demeanor and credibility of the respondent during his testimony and his appearance at both hearings. See e.g. Snow, supra and Bass, supra. The recommendation respondent seek counselling with respect to substance abuse is an appropriate recommendation. Both the finding of fact and the recommendation should be upheld.

The recommended suspension for four months with proof of rehabilitation prior to reinstatement is an appropriate recommendation with or without the finding of the referee relative to respondent's mental and physical condition. This is both due to the nature of the misconduct, a deliberate misrepresentation to the court, and the fact that respondent has been disciplined twice over the past several years with one case also involving misrepresentation. See The Florida Bar v. Moran, 273 So.2d 379 (Fla. 1973) and The Florida Bar v. Moran, Confidential Case No. 60,896. The latter was for neglect.

In several cases, this Court has disciplined attorneys for conduct involving misrepresentations. In Snow, supra, the Court upheld a six months suspension with proof of rehabilitation required where the attorney secured evidence for his clients based on false representations. In that opinion, it was pointed out that the respondent had been previously publicly reprimanded in The Florida Bar v. Snow, 397 So.2d 295 (Fla. 1981), a case also involving misrepresentation. In The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983), an attorney was suspended for 60 days for lying to a trial judge in order to obtain a continuance. It appears Mr. Oxner had no prior disciplinary record. In The Florida Bar v. Routh, 414 So.2d 1023 (Fla. 1982),

an attorney was suspended for three years with proof of rehabilitation required mostly for criminal misconduct, but also for filing a false affidavit in a judicial proceeding. In The Florida Bar v. Lund, 410 So.2d 922 (Fla. 1982), an attorney was suspended for ten days for misrepresenting a small portion of his testimony to the grievance committee. He urged that he was unaware of the untruthfulness of the testimony and that there was no intentional misrepresentation. Several years earlier in The Florida Bar v. Langford, 126 So.2d 538 (Fla. 1961), an attorney was suspended for a year with proof of rehabilitation required for making material misrepresentations to a grievance committee and then urging another to confirm the false testimony. In The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979), a new attorney was suspended for 60 days for attempting to influence a referee's decision in a disciplinary proceeding concerning another and knowingly filing a false response accusing the referee of lying as to what had happened.

As the foregoing cases demonstrate, there is ample authority for suspension when an attorney knowingly files matters with the court containing false information. The cases also indicate that suspension will normally result whether or not an attorney has a prior record. In this instance, the respondent has been previously disciplined twice. As noted, one case also involved misrepresenta-

tion amongst other matters.

This Court has long been committed to the principle of more stringent discipline for cumulative misconduct whether or not the newer misconduct is similar to the prior misconduct. See The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983) and the cases cited therein. In that case, the Court noted it deals more harshly with cumulative misconduct. Misconduct of a similar nature warrants even a more severe discipline than might dissimilar conduct. The principle is valid in this case and does involve prior discipline with misrepresentation. It is apparent from the argument at the second hearing and the referee's report that he considered the respondent's prior record in reaching his recommended suspension.

Finally, this respondent is not a new or inexperienced attorney. He has been practicing for well over 20 years primarily in the area of criminal defense. He cannot claim ignorance. His explanation that he had lost his file and relied on the mistaken statement of the clerk of the court without bothering to determine who the judge was or whether the judge had the file was simply rejected by the referee. It is also interesting to note that the referee might well have recommended a longer suspension but for his "disputed" finding of

substance abuse and recommendation with respect to counselling. Certainly, the finding can be viewed as a mitigating rather than an aggravating factor.

The Bar submits the referee's finding is supported by the clear and convincing weight of the evidence which is the evidentiary standard and that with or without the "disputed" finding the recommended suspension for four months with proof of rehabilitation required prior to reinstatement is the appropriate discipline given the nature of the misconduct and the respondent's prior record.

CONCLUSION

Wherefore, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact, recommendations of guilt and discipline in Count III which is Case 18A83C31; suspend him for four months with proof of rehabilitation required prior to reinstatement; order him to obtain substance abuse counselling and; pay the costs of these proceedings now totalling $842.42.

Respectfully submitted,

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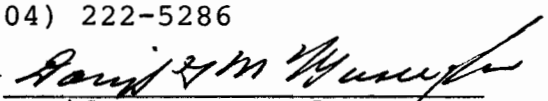
By 
David G. McGunegle
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response Brief has been furnished, by mail, to Mr. Frank McKeown, Jr., Counsel for Respondent, 340 Royal Palm Way, Palm Beach, Florida 33480; a copy of the foregoing Response Brief has been furnished, by mail, to Mr. Emmett A. Moran, Respondent, at Post Office Box 13194-A, Orlando, Florida 32859; and a copy of the foregoing Response Brief has been furnished, by mail, to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, on this the 31st day of October, 1984.

David G. McGunegle
Bar Counsel