IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant

v.

JOHN P. FITZGERALD,

Respondent
_____/

The Florida Bar File No.
86-20,045 (15D)

Supreme Court Case No. 71,348

RESPONDENT'S ANSWER AND CROSS-PETITION BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

John P. Fitzgerald was the lawyer for Silvio Giannetti. Mr. Giannetti was an experienced businessman involved in the construction of public works projects in Florida and Michigan (269, 271) and the oil exploration business in Texas (271).

The bar and respondent are in agreement that in September 1979, John Fitzgerald and Silvio Giannetti became partners for the purchase and ownership of a parcel of land in Jupiter, Florida. Title was taken in the name of John P. Fitzgerald, Trustee. There was no partnership agreement. Appellee owed Silvio Giannetti a fiduciary duty both as a lawyer and as trustee for the partnership.

On May 1, 1981, John P. Fitzgerald mortgaged the property to secure a personal loan from Lawrence Simon (bar's exhibit #11). Mr. Giannetti testified that Mr. Fitzgerald did not tell him he had mortgaged the property (265, 266), and John Fitzgerald testified that he did, either in person or over the telephone (88). Giannetti and Fitzgerald transacted most business by phone (275). Later the same year, the mortgage was paid off out of proceeds from a closing on the sale to Oceanside Development Corporation (bar's exhibit #12).

Giannetti testified that he advised Mr. Fitzgerald he would be traveling in Italy for thirty to forty-five days (277). Giannetti gave specific authority to Fitzgerald to sell the property (278). His testimony before the referee was that he approved the sale to Oceanside for $420,000.00 (280). Appellee

admits that Giannetti also says the reverse. Unfortunely, the bar has chosen, in its statement of the case and of the facts, to only relate those times during Giannetti's testimony that he denied knowledge or denied giving Fitzgerald authority to perform acts for him.

Giannetti admitted that Mr. Fitzgerald had his authority to enter into a contract to sell the property (289). He admitted that Mr. Fitzgerald had sent him a copy of a contract between himself and some purchasers (289). Due to the fact that there had been a prior contract on the property which had fallen through, Mr. Giannetti was uncertain which contract he had been furnished (298).

The bar made much ado at the hearing of this matter and its brief about the original contract with Oceanside providing for a $120,000.00 second mortgage and it being modified to a $170,000.00 purchase money second mortgage. As explained by Mr. Fitzgerald, and not disputed by anyone, the purchaser, Oceanside, had a shortfall in its purchase money funds from its first lender in the amount of $50,000.00. That amount was escrowed to an interest reserve thus requiring either a termination of the transaction or an increase in the principal amount of the mortgage (71). Regardless, Giannetti's testimony was that he was happy to receive the mortgage (283).

Giannetti was happy to receive a mortgage earning 15% (284), and he was happy when the lot was sold (284, 285).

By October 20, 1983, Mr. Giannetti had decided that he had approved the sale to Oceanside Development, Inc. for $420,000.00,

but that his problem was that Fitzgerald had acted as attorney for the purchaser, Oceanside (bar's exhibit #23, complaint, Giannetti v. Fitzgerald paragraph 10). At the trial of this matter before the referee, both Mr. Giannetti (280) and his lawyer (313) claimed that the allegation in the complaint was in error not only in its allegation that respondent represented both parties, but also in error in describing Mr. Giannetti's approval of the proposal to sell to Oceanside for $420,000.00.

Respondent admits that monies from the closing were applied to what has been described as the Morris and Ensinger notes and mortgages (bar's exhibits #14 and #15). Mr. Fitzgerald explains that of the proceeds used to fund those mortgages, one of the mortgages actually belonged to him, and one to Mr. Giannetti (99, 100). The loans were made to employees of businesses owned by Fitzgerald, and, as he explains, Mr. Giannetti was aware of and agreed to the mortgages (102). Fitzgerald has personally paid off those mortgages (541).

On December 21, 1981 a satisfaction of the Giannetti mortgage was recorded in the public records of Palm Beach County (bar's exhibit #20). Silvio and Mary Giannetti's signatures on the satisfaction are forgeries. It is that satisfaction of mortgage which has spawned several lawsuits, appeals, settlements and this subject case. There has been no evidence that Mr. Fitzgerald was the forger, or aware of any forgery. There has been no finding of such fact by anyone in any case and there is no evidence of any motivation on the part of Fitzgerald to procure forged signatures.

John P. Fitzgerald has admitted that he was negligent in the handling of the satisfaction of mortgage (524). He has admitted that his signing of the satisfaction as a notary was in violation of Section 117.09(1). This court's referee found Mr. Fitzgerald grossly negligent and that he violated the law.

Fred Harney, president of Oceanside Development, advised John Fitzgerald that he had been in contact with Giannetti in order to substitute collateral and obtain a satisfaction of the mortgage (495). Mr. Fitzgerald prepared the satisfaction of mortgage, signed it as a notary and left it with his secretary to affix his notary seal when the satisfaction was delivered with the Giannetti signatures thereon. The bar called Linda Parker Zimmer, who was at that time Mr. Fitzgerald's secretary, and she confirmed that it was not unusual for her to be asked to do this (360).

Fitzgerald had been told by Fred Harney that he was going to discuss with Giannetti the satisfaction of the mortgage by a substitution of collateral (115). Giannetti told Mr. Fitzgerald in December or January that he was coming up to West Palm Beach in order to get a new note (502).

The bar's witnesses, Fred Harney, his daughter, Deborah Harney, and Mr. Fitzgerald all agree that Giannetti had consented to a substitution of collateral for the $170,000.00 obligation. Deborah Harney, Fred Harney's daughter, and an officer of Oceanside, testified that Giannetti had come to Jupiter, met with her father at the construction trailer on site and that two different notes had been prepared that day for substitution, so

that Mr. Giannetti could "subordinate" his mortgage (399, 401, 407, 409).

Fred Harney testified that he met with Mr. Giannetti for the purpose of substituting collateral or notes either in the fall of 1982 (198) or May of 1982 (203) or when the note was signed (198).

The replacement note signed by Mr. Harney is dated December 10, 1981 (bar's exhibit #19). Fitzgerald did not prepare the note (501).

From the beginning, after the closing in which Oceanside received title to the property and gave Mr. Giannetti a mortgage, Mr. Harney knew that he had to get rid of the second mortgage in order to obtain construction financing (211, 213). Deborah Harney testified that her father, Fred, had said that he would not be able to get construction financing unless he did something with the Giannetti mortgage (438).

Mr. Harney testified that when he gave the new note to Mr. Giannetti, whenever he did, he believed that the note and mortgage given at the time of closing had been satisfied and that there was no longer a lien upon the property (203,206).

It is obvious that Mr. Harney knew that his obligation to Mr. Giannetti was coming due, according to its terms, in the spring of 1982 and that he had to get it satisfied in order to obtain his construction financing. He contacted Mr. Giannetti to discuss a substitution of collateral and told Mr. Fitzgerald that that communication had taken place (495). Mr. Fitzgerald foolishly allowed the satisfaction to take place without proper

precaution or protection of his client and partner, Silvio Giannetti. However, in accordance with the overwhelming evidence presented by the bar's own witnesses, Mr. Giannetti did come to Jupiter, met with Mr. Harney, and accepted a substitution of collateral, all of which was consistent with what respondent had been told by Harney.

According to Fred Harney, he told Mr. Giannetti that he had a $1,200,000.00 purchase money mortgage on some property on Cape Cod (220).

According to Giannetti, he did not meet with Mr. Harney at a construction trailer, but rather in the completed building (which would put off the timing of the meeting) (300). Mr. Giannetti denies discussions about a substitution of another note (301). He admits that after the initial meeting, whenever it took place, he met with Mr. Harney on the site four more times (301).

Giannetti admits that at the time of his first meeting with Harney, he was aware that he had a mortgage on the property in the amount of $170,000.00, because John Fitzgerald had told him so (302). He states that the reason that he met with Mr. Harney was not that he was upset about anything (303), but that "I was looking to get paid" (304). For whatever reason, it was not until the project was failing and Mr. Giannetti had not been paid, by the fall of 1983, that he went to a lawyer to have him "investigate" (306).

The bar's witness, Deborah Harney, testified that her father admitted that the satisfaction had been obtained fraudulently (415). She and her father had discussed the satisfaction and how

he had said that he would not be able to get construction financing unless he did something with the Giannetti mortgage (438). At the time of the first meeting with Mr. Giannetti, she testified that she was aware of the mortgage having been satisfied (414). She further testified that she and her father were engaged in the making of fraudulent loan applications to lenders in order to get the construction loan application, not showing the obligation owed to Mr. Giannetti (421).

As the bar's statement of the case and facts notes, after the satisfaction of mortgage was recorded, Fred Harney secured his construction financing from Sunrise Savings and Loan Association of Florida. Sunrise and Giannetti later had litigation involving the priority of their mortgages as liens on the property.

Giannetti filed suit against Oceanside Development, Harney and Mr. Fitzgerald on October 20, 1983 (bar's exhibit #23). At trial, the case was settled. The bar's statement of case and facts, at page 8, makes pains to describe the settlement as "carefully designed" and "to avoid even an appearance of double recovery...". The bar's statement is pure argument. The parties settled the case for a lot of reasons, but, as Mr. Fitzgerald testified, he acknowledged his responsibility to Mr. Giannetti (524), and Giannetti's attorney felt the settlement was "the best possible settlement for the Giannettis" (342). A final judgment was agreed upon in which John Fitzgerald was determined to be liable for breach of contract (bar's exhibit #21). Under that final judgment, Mr. Fitzgerald has made payment for his liability

on the Morris and Ensinger notes, and Giannetti's loans to Mr. Fitzgerald, discussed below. There is a remaining issue as to responsibility for attorney's fees (336, 111). Mr. Fitzgerald was not required to pay the amounts due on the mortgage given by Oceanside to Mr. Giannetti (541).

The settlement agreement between the parties in the action against Fitzgerald was announced on the record before the Honorable Mary Lupo, Circuit Court Judge, Fifteenth Judicial Circuit, Palm Beach County. The bar introduced into evidence of this cause a transcript of the proceedings, bar's exhibit #22. There, at page 18, Mr. Giannetti's counsel put on the record his and his client's understanding of their obligations not to prefer charges against Mr. Fitzgerald for any of the actions arising out of his representation of Mr. Giannetti. This was an important part of the settlement of that suit, as evidenced by the exchange between counsel at page 9 of bar's exhibit #22. The settlement occurred on February 22, 1985.

Giannetti's attorney was Scott Sheftall. He testified that before they finally agreed to settle the case, a conference call was made to Joe Reiter who was then president-elect of the Florida Bar (341). The attorneys discussed with Mr. Reiter the situation in order to gain an opinion as to whether there was any obligation to go any further or to report any actions to the Florida Bar. Mr. Reiter apparently cleared the way for the settlement (343, 344).

As a result of stipulation for settlement, the agreed final judgment provided (bar's exhibit #21):

> "The Defendant, OCEANSIDE DEVELOPMENT, INC., is found by the court to have committed fraud upon the Plaintiffs, SILVIO and MARY GIANNETTI. A satisfaction of mortgage dated December 15, 1981 was procured by the corporation's agents through fraud and without the knowledge or consent of Plaintiffs and without any negligence on the part of the Plaintiffs..."

The final judgment went on to cancel the satisfaction and reinstate the mortgage as a valid lien upon the property. Later, the action between Sunrise and Giannetti was litigated.

In his litigation with Sunrise, it was important for Mr. Giannetti to avoid the appearance of negligence in his dealings with Oceanside Development (or Fitzgerald). It didn't work. Sunrise Savings and Loan Association was not a party to that first litigation between Giannetti, Fitzgerald and Oceanside. It was not bound by the agreed final judgment finding him blameless. In the subsequent litigation between the parties, Giannetti was determined to be inattentive and careless. Sunrise Savings and Loan Association of Florida v. Giannetti, 524 So.2d 697 (Fla. 4th DCA 1988). That case is final, Giannetti v. Sunrise Savings & Loan Assn., No.72, 752 (Fla. Aug. 30, 1988).

The priority of mortgage trial in the Circuit Court, which was appealed by Sunrise and Giannetti to the Fourth District Court of Appeal was tried without John Fitzgerald as a party (339). As Giannetti's counsel testified before the referee, Mr. Fitzgerald was not a party at the time of the trial, did not have counsel at the trial, and there was no one there advocating anything on his behalf (339, 340).

The bar's inclusion of the excerpt of Judge Glickstein's opinion in its statement of the case and of the facts, is unfair

and an embarrassment. Here, the Florida Bar, with knowledge that Mr. Fitzgerald is not bound by the determination in that case, and had no opportunity to defend himself, is clearly guilty of "piling on".

What did happen at the trial of that action, before the Honorable Daniel T. K. Hurley, Circuit Court Judge, Fifteenth Judicial Circuit, Palm Beach County, has some impact on this case and how it became a grievance case, despite the efforts of Mr. Giannetti and Mr. Fitzgerald's lawyers. At that trial Fred Harney told Judge Hurley that his agent, who had procured the forgery, was John Fitzgerald (222, 225, 226). Mr. Harney, called as a witness for the bar, changed his testimony and stated that he didn't know who had done it (226). Mr. Harney stated, at page 226:

> "The only thing that I was concerned about was that I was found innocent...as long as they found me innocent that I didn't do it, that's what I was concerned with."

Mr. Harney further stated he had no idea who had procured the forgery (227, 229). Fitzgerald testified Harney admitted forging the signature (507).

As a result of the trial before Judge Hurley, Mr. Giannetti's lawyer prepared a report to the bar, at Judge Hurley's direction (330). That case, which started with the perjured testimony of the bar's witness, Fred Harney, continues to travel on the perjured, conflicting, or troubled testimony of Fred Harney, Deborah Harney and Silvio Giannetti. All are bar witnesses.

The bar's statment of the case and of the facts raises an issue as to two loans made by Silvio Giannetti to John Fitzgerald. The referee found no improper conduct in the acceptance of these loans from Giannetti. Mr. Fitzgerald admitted seeking and obtaining loans from his clients which he has never denied owing, including after being sued (519). He has paid back those loans (109). Mr. Giannetti testified that he had no problem in making the loans to John Fitzgerald (280, 281). He never asked for nor expected any security for the loans (281). Mr. Giannetti's testimony was that at no time has John Fitzgerald ever denied that he owed the money (281). Prior to filing suit, Mr. Giannetti had not ever made a demand for repayment of the loans (519).

The bar's statement of the case, at page 6, states that after the closing of the transfer of title from John P. Fitzgerald, Trustee to Oceanside Development, Inc., Mr. Fitzgerald had provided some representation to Mr. Harney in introducing him to various investors. The bar's statement of the case notes that Mr. Fitzgerald lived close to the Oceanside property and saw Mr. Harney frequently. So what? This is not the subject of any allegation against Mr. Fitzgerald and no part of the referee's finding. There was no testimony as to Mr. Fitzgerald ever having a conflict of interest. The only person who has ever even alleged a conflict was Mr. Scott Sheftall when he filed the complaint on behalf of Mr. Giannetti (bar's exhibit #23) and erroneously stated in paragraph 10 that at the closing of the transaction, Mr. Fitzgerald had represented the purchaser,

Oceanside. Oceanside was represented by another attorney, Charles Burns (199).

Despite the conflicting testimony provided by the bar's witnesses, the referee found the appellee guilty of more than just gross negligence and violation of the notary public law. The referee's report virtually adopts the recitation of code sections and integration rules contained in the complaint and finds Fitzgerald guilty of them all except those relating to the loans (Count V).

At the disciplinary phase of the referee trial, the Florida Bar failed to provide any evidence whatsoever relating to the necessity of a disbarment of John P. Fitzgerald. The only evidence and testimony presented to the referee was that this lawyer practices law in a completely different manner than during the period of time that the events complained of occurred. The testimony was clear from a number of witnesses who knew John P. Fitzgerald well, that he had rehabilited himself and ought to be able to continue to hold his license to practice law. He has complied with the terms of his final judgment. The one to three year suspension is excessive in light of the passage of time.

John P. Fitzgerald seeks a reversal of the referee's recommendation that he be found guilty of the violations charged in Counts I, II and IV. Respondent admits the violations and the finding of gross negligence in violation of Section 117.09(1) as charged in Count III. John P. Fitzgerald seeks a modification of the recommended discipline to be a suspension of ninety days or less without a requirement to show rehabilitation and combining

such suspension with terms of probation as this Court may find or deem appropriate.

SUMMARY OF ARGUMENT

The bar has a duty to prove the allegations of its complaint by clear and convincing evidence. While there is some evidence in the record of this case which might support some of the referee's findings, such evidence comes from the same mouths that also provides sworn testimony that the sale and taking of the mortgage was authorized and agreed upon. Moreover, it is obvious that Fitzgerald, while being negligent, was the victim of the fraudulent financing schemes of Fred and Deborah Harney, principals of Oceanside Development Company. The evidence presented by the bar was conflicting and troublesome, not clear and convincing.

The discipline recommended by the referee, and that which is advanced by the Florida Bar, is neither fair to society, fair to John Fitzgerald nor will it deter others from the same conduct. It is not fair to the legal profession.

Since the last date of the incidents complained of in the complaint, John P. Fitzgerald has rehabilitated himself and no longer practices in the same manner as he once did. The testimony of other members of the bar, and their letters of recommendation, show that he is a person who should continue to enjoy the rights to practice law in this state. The Florida Bar offered no conflicting evidence.

That the purposes of encouraging rehabilitation and reformation can best be served by a suspension of ninety days or less combined with a probation period and appropriate terms.

ARGUMENT

I. THE REFEREE'S FINDINGS OF RESPONDENT'S GUILT ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The referee must be presented with clear and convincing evidence in order to make a finding of misconduct. The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987).

The referee's findings of fact are presumed correct if supported by competent and substantial evidence. The Florida Bar v. Neely, 502 So.2d 1237 (Fla. 1987); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). However, even though there may be evidence to support the referee's findings, evasive and inconsistent testimony will not establish the charges against the lawyer with that degree of certainty as is required in order to meet the burden imposed upon the bar. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970).

Here, the bar presented inconsistent and unreliable testimony from its witnesses which could not establish the serious charges against John P. Fitzgerald with that degree of certainty in order to justify a finding of guilt of the bar's charges in Counts I, II, and IV of its complaint. The quantum of proof necessary to sustain a referee's finding of guilty is something more than mere "preponderance of the evidence", The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973). It is this court's responsibility to review the evidence to determine whether the standard of proof has been applied erroneously. Richardson v. State, 192 So. 876 (1940); The Florida Bar v.

Schonbrun, 257 So.2d 6 (Fla. 1971); The Florida Bar In Re: Inglis, 471 So.2d 38 (Fla. 1985).

In Count I of its complaint the bar alleged:

> "24. By entering into the Oceanside contract of purchase and sale, closing title thereunder and appropriating all of the cash proceeds derived therefrom without disclosure to and without the knowledge or consent of his client and cestui que, respondent violated..."

In paragraph 25 of the bar's complaint against John P. Fitzgerald, the bar again restated that the sale and application of the proceeds was without the knowledge of Mr. Giannetti, but added that he violated DR 7-101 (A)(3) by taking a subordinate mortgage in favor of Giannetti and by applying the remainder of the funds to Ensinger and Morris loans.

As for the sale of the property by John P. Fitzgerald, Trustee to Oceanside, even Giannetti's testimony shows that Fitzgerald had the specific authority to enter into a contract (289), to sell the property (278) and that he had been furnished with one of the contracts (298). Moreover, his testimony was that he approved the sale to Oceanside (280), he was happy when the lot was sold (284, 285) and he was happy to receive a mortgage earning 15% (284).

The bar, in its argument, makes reference to the mortgaging of the property to Lawrence Simon for $100,000.00. Mr. Giannetti claims he didn't know about that mortgaging, and Mr. Fitzgerald testified that he told him. Either way, the mortgaging of the property to Simon, which mortgage was paid off out of Fitzgerald's money at the closing to Oceanside, is simply not one

of the offenses charged in Count I of the complaint, paragraphs 24 and 25.

There is a basic conflict in the testimony between Fitzgerald and Giannetti on the Ensinger and Morris notes. It is conceded that Giannetti has not testified that he approved of the Morris and Ensinger loans and that the only testimony in conflict with his position is that of John P. Fitzgerald. However, because of the conflicting testimony of Silvio Giannetti on other issues, his motivation to color his testimony and his need to establish a lack of knowledge as to Fitzgerald's actions, his testimony should be afforded little weight. This is especially so in light of the fact that although Mr. Giannetti's testimony was that he approved of the sale to Oceanside, and was happy to receive a $170,000.00 mortgage, he waited almost two years to ask where the rest of his money was. Then he claimed that he was unaware of the Morris and Ensinger notes. The Morris and Ensinger mortgages were made in November 1981 and suit was brought by Giannetti in October 1983.

In Count II of the bar's complaint, Fitzgerald is charged with violation of Integration Rule 11.02(4). The rule provides that money entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose. The bar's complaint is that Fitzgerald's application of the proceeds from the sale to Oceanside violate the Integration Rule.

With respect to Count II, Fitzgerald cannot be in violation of the Integration Rule where Giannetti's testimony is that he approved of the sale, and the receipt of the mortgage in the

amount of $170,000.00. If Giannetti's testimony was that he had directed that the funds be held in a different manner, or applied to a purpose, a lawyer violating those specific directions might not be complying with Integration Rule 11.02(4). However, here, Giannetti testified both that he didn't know about the transaction (and thus couldn't direct how the funds should be held or applied to a specific purpose) and that he approved of the transaction and the $170,000.00 mortgage.

In Count III of the bar's complaint, paragraph 35, the bar alleges violation of Section 117.09(1) Fla. Stat. relating to the notarization outside the presence of the person whose signatures are being notarized. The bar also alleges that such act is a violation of various Integration Rules and DR 7-102(A)(8). John Fitzgerald agrees that he violated that law and those rules and code sections.

In Count IV, the bar charged Fitzgerald with violating Integration Rules and code sections dealing with engaging in actions intentionally prejudicing or damaging a client. There is no evidence that John Fitzgerald obtained the forgeries or was the forger of the signatures on the satisfaction of mortgage. Instead, the evidence is clear and convincing that Fitzgerald was negligent in allowing himself to be victimized by Fred Harney, who forged or obtained the forgeries upon the satisfaction and then tried to cover it up in his subsequent dealings with Giannetti by getting him to substitute collateral.

With respect to the forgery, and all of the matters alleged by the bar in Count IV of its complaint, there is simply no

possible way that the bar met its burden by clear and convincing evidence, The Florida Bar v. Schonbrun, 257 So.2d 6 (Fla. 1971). The bar called Giannetti who claimed not to know anything about the satisfaction. The bar called Fred Harney whose testimony was to admit that he told Judge Hurley that Fitzgerald had done the forgery, then to recant that testimony.

In all respects, the testimony of Fred Harney is incredible. His testimony clearly showed that he is a liar who was financially motivated at the time of the events of this case to engage in fraud. His daughter, Deborah Harney, testified that she and her father were submitting fraudulent loan applications, hiding the Giannetti obligation that they both knew existed. Both Harneys testified as to the meetings with Mr. Giannetti on the property in which there were discussions of substitution of collateral with Mr. Giannetti.

In Count V of the complaint, and in the bar's initial brief, Fitzgerald is alleged to have violated disciplinary rules by not preparing sufficient documentation regarding the loans and thereafter failing and refusing to repay the loans. Mr. Giannetti, a sophisticated businessman used to dealing in large construction projects, oil exploration, and valuable real estate matters didn't request or expect security for the loan. John Fitzgerald has never denied owing the money, and Mr. Giannetti never made demand for it until suit was brought. The money has been paid.

It is respectfully submitted that the testimony in this case could not support a finding of guilt if the standard applied was

clear and convincing evidence. While the Florida Bar may disagree with the way Mr. Fitzgerald practiced law during the time period involved herein, 1981 - 1983, it is not relieved of its obligation to present credible testimony in its case against a lawyer. The testimony of Silvio Giannetti conflicts with testimony of Silvio Giannetti. The bar's other main witnesses, Fred Harney and Deborah Harney, conflict with each other and with their own testimony.

While it is conceded that at times the bar witnesses provided some testimony which supports the bar's allegations, that evidence, in light of the conflicting testimony, does not show the referee's decision to be supported by substantial competent evidence. The evidence in this case shows that the referee's report is supported only by substantially conflicting, confused and perjured testimony.

Except for the allegations and violations relating to the notarization of the forged signatures, the charges have not been proved with that degree of certainty as would justify a finding of guilt. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970); The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987).

The findings of the referee with respect to Counts I, II, and IV should be rejected.

II. RESPONDENT'S MISDEEDS NOT ONLY DO NOT WARRANT DISBARMENT, BUT THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS TOO HARSH

The referee recommended, in effect, a minimum one-year suspension. The suspension could be three years unless Fitzgerald pays the cost of this proceeding and the balance due on the judgment entered in the civil case against him (bar's exhibit #21). Whether or not the cost or the judgment is paid, the suspension could presumably be longer based upon a requirement to demonstrate that he has rehabilitated himself.

The testimony presented in this case regarding the quantity of discipline to be meted out to John Fitzgerald was that over the past three or four years he had, in effect, rehabilitated himself. As the referee noted in his supplemental report,

> "The witnesses further testified that during the immediate past three or four years, respondent has been a reliable and dependable attorney with the best interest of his clients foremost at all times."

The testimony was that there had been a major change in John Fitzgerald's life and his practice of law. John Fitzgerald has complied with the terms of the final judgment against him. Mr. Fitzgerald has remarried, and substantially changed his drinking and dietary habits.

In The Florida Bar v. Thompson, 271 So.2d 758 (Fla. 1972) the attorney was found guilty of serious offenses based upon testimony that was subject to substantial doubts or inconsistencies. There the court noted that the penalty assessed

in bar cases should not be for the purpose of punishment. The court said:

> "The discipline should be corrective and the controlling considerations should be the gravity of the charges, the injuries suffered, and the character of the accused. Holland v. Flournoy, 142 Fla. 459, 195 So. 138 (1940).

Justice Terrell, speaking for the court in State v. Murrell, 74 So.2d 221 (1954) stated:

> "...disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferable..." (Emphasis supplied)
>
> "A removal from the bar should therefore never be decreed where any punishment less severe, such as reprimand, temporary suspension or fine, would accomplish the end desired."

The lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charged against him. State v. Murrell, supra; The Florida Bar v. Wendel, 254 So.2d 199 (Fla. 1971); See also Florida Bar v. Moore, 194 So.2d 264 (Fla. 1966) and The Florida Bar v. Blalock, 302 So.2d 758 (Fla. 1974).

The bar's position is that John Fitzgerald has a prior disciplinary offense which should be considered an aggravating factor warranting not only his disbarment, but an "enhanced" disbarment.

Appellant has cited The Florida Bar v. Fitzgerald, 491 So.2d 549 (Fla. 1986). The conduct that the Florida Bar has alleged to be wrongful in this case occurred in 1981 and 1982. In the 1986

action against Mr. Fitzgerald, the public reprimand that he received in that case was based upon conduct occurring in 1982. The conduct in the prior case does not make this case "cumulative misconduct", The Florida Bar v. Carter, 429 So.2d 3 (Fla. 1983).

There are three purposes of discipline, The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970); The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988). They are:

> 1. 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.
>
> 2. The judgment must be fair to the attorney, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation.
>
> 3. The judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The respondent has accomplished a rehabilitation by a change in life style and manner of practicing law. The bar has failed to make any showing that there is a need to protect the public from any unethical conduct of Fitzgerald. The bar has cited the cases of The Florida Bar v. Roman, 526 So.2d 60 (Fla. 1988) and The Florida Bar v. Vannier, 498 So.2d 899 (Fla. 1986) apparently in support of an argument that the violations, in and of themselves, warrant disbarment, regardless of any other mitigating circumstances. While both dealt with conduct that had occurred a number of years earlier, at the time the matter came before this court, both had not been practicing law. Vannier apparently presented evidence "that his current character is

honorable" and Roman's mitigating circumstances were that he had cooperated with his criminal prosecutors and the Florida Bar and was currently remorseful.

The testimony of Fitzgerald's witnesses as to the change of his habits and practice of law is best exemplified by the testimony of his wife, Donna, and his fellow lawyer, Patrick Casey. He has conducted himself in a proper manner in the period subsequent to the matters charged by the bar, all of which ended in 1982. The extreme sanction of disbarment is to be imposed only "in those cases where rehabilitation is highly improbable" The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986); The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988).

In attempting to balance the first requirement of the Pahules case, the court ought not to deny the public the services of a qualified lawyer. In the opinion of the witnesses testifying on John P. Fitzgerald's behalf, he is qualified. His good conduct subsequent to the events charged in this case should influence this court's determination of the choice of penalty. The Florida Bar v. Silverman, 196 So.2d 442 (Fla. 1967); The Florida Bar v. Moran, 273 So.2d 379 (Fla. 1973); The Florida Bar v. Solomon, 338 So.2d 818 (Fla. 1976).

The second consideration in determining the type of discipline is that it must be fair to the attorney. While being sufficient to punish, it should "at the same time encourage reformation and rehabilitation". In The Florida Bar v. Rosen, supra and The Florida Bar v. Hartman, supra, this court imposed lengthy suspensions instead of disbarment. In Rosen, this court

imposed a three year suspension, nunc pro tunc and to the point that the effective suspension after the court's decision was six months. In that case, Mr. Rosen would be reinstated if he was found after the suspension period to have been rehabilitated. In The Florida Bar v. Hartman, the attorney was "making progress" towards rehabilitation.

It is respectfully submitted that a suspension of one year, as the referee has recommended, is inappropriate in this case in that it is not fair to the accused attorney. Mr. Fitzgerald has already been rehabilitated, and the disruption of his practice now, as a belated punishment to him and as an example to other members of the bar, hardly seems consistent with a desire to encourage reformation and rehabilitation. As Justice Ervin's dissent, in The Florida Bar v. Silverman, 196 So.2d 442 (Fla. 1967) points out:

> "With Shakespeare, I believe in these circumstances it would be a 'cruelty to load a falling man.' Compare The Florida Bar v. King, Fla., 174 So.2d 398. I think it would suffice to reprimand him and place him upon a year's probation."

In determining a discipline that is fair to the attorney, it should be remembered that this grievance case is not the only case that has burdened John Fitzgerald arising out of the same circumstances.

In the first case, Giannetti v. Fitzgerald, Case No. 83-5891 (L) F, in the Fifteenth Judicial Circuit, Mr. Fitzgerald was sued in a multi-count complaint accusing him of what Mr. Giannetti and his own attorneys have characterized as erroneous allegations. There, the only time in which both Silvio Giannetti and John P.

Fitzgerald had a legal representation, the case was settled upon terms that Giannetti's attorney described as "the best possible settlement for the Giannettis" (342). Right or wrong, Fitzgerald believed the case was over.

Instead of being over, and instead of being relieved of the fear of the continuing professional embarrassment generated by these charges, Mr. Fitzgerald a witness in the Giannetti litigation with Sunrise Savings and Loan Association. There, out of his presence and out of the presence of any lawyer advocating on behalf of Mr. Fitzgerald, Mr. Harney decided that it was to his benefit to provide perjured testimony to Judge Hurley that John Fitzgerald procured the forgery of Giannetti's signatures.

Regardless of whether Harney's perjury was the reason for this matter case coming to the attention of the Florida Bar, the fact remains that in the litigation with Sunrise Savings and Loan Association, no one was trying to protect the interests of John P. Fitzgerald. Sunrise's interest was obviously to show Fitzgerald as a wrongdoer and Giannetti as a person who was negligent in guarding his own affairs. Giannetti's attorneys needed to characterize their own client as having been defrauded by John Fitzgerald, the fraud overcoming any argument that Giannetti's loss occurred because of his negligence. For all of this, John Fitzgerald was given featured billing in Judge Glickstein's opinion in Sunrise Savings and Loan Association of Florida v. Giannetti, 524 So.2d 697 (Fla. 4th DCA 1988).

Now, in addition to the first lawsuit which resulted in a settlement, the trial of the Sunrise and Giannetti case in which

Harney gave perjured testimony, and Judge Glickstein's damning opinion, the Florida Bar wants more, totally ignoring any concepts of what might be fair to the attorney and his rehabilitation and accomplishments over the significant length of time from the events involved in the violations.

It is conceded that the Florida Bar acted on a timely basis after it was informed through Judge Hurley that he believed that there was grounds for investigation. While the consultation with the president-elect of the Florida Bar, Joe Reiter, in February 1985, ought to mean something, it is conceded that the president-elect cannot waive the Florida Bar's rights to proceed in a grievance matter. Yet, the passage of time involved in this case, and the professional embarrassment already generated by the cases that have already occurred, is suggestive of what the attorney must have experienced in The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970). There, as here, the lawyer had been subjected to professional embarrassment and exposed to investigations, charges and hearings over an extended period of time as Justice Thornall noted:

> "During this unduly long period of investigation and prosecution, the accused lawyer is left roaming through the fields of Limbo where dwelt what Dante called 'the praiseless and the blameless dead'. State v. Oxford, supra."
>
> "...that years of exposure to public scrutiny and criticism supplemented by clear evidence of rehabilitation, justify a terminal penalty that otherwise perhaps would be considered inadequate."

The third consideration for discipline in The Florida Bar v. Pahules, supra, is that the discipline "must be severe enough to deter others who might be prone or tempted to become involved in like violations." Assuming that there is a deterrent value in the sanction of disbarment different from that in suspension and professional embarrassment, to respondent's knowledge there is no requirement that disbarment be the sanction in all cases involving like violations. The failure to disbar John Fitzgerald, or provide a long-term suspension in this case is not going to encourage the lawyers of this state to go out and engage in similar conduct. Moreover, such harsh discipline isn't consistent with the other two considerations for discipline in Pahules, supra, and considered with them, would not be fair. Moreover, such serious discipline would be inconsistent with the Florida Bar's own stated positions as expressed in Florida Standards for Imposing Lawyer Sanctions (1987), which recognize mitigating factors.

In its brief, page 22, the Florida Bar has attempted to claim some questionable benefit of testimony involving the transfer, by a quit claim deed, by Mr. Fitzgerald of the property to Mr. Harney's lawyer while Oceanside Development Company was involved in litigation over the priority of mortgages with Sunrise and Giannetti. Even the referee identified this as immaterial and irrelevant and completely understandable (159). This argument, and indeed the rest of the bar's argument in portion III of its brief is characteristic of the unfair presentation of this case by the bar.

The bar position is that The Florida Bar v. Fitzgerald, 491 So.2d 549 (Fla. 1986) qualifies for a "prior disciplinary offense." A reading of that case shows that it is not an aggravating factor. The bar argues that the evidence in this case warrants a "pattern of misconduct" but there is no evidence of any pattern. The bar even goes on to claim that Mr. Giannetti qualifies under the aggravating factor of "vulnerability of victim." The bar further cites as an aggravating factor "indifference to making restitution." The bar must have heard different evidence or conducted a different case. The evidence was that the only issue left to resolve with respect to the final judgment was credit due Mr. Fitzgerald on the $125,000.00 judgment because of attorney's fees.

John Fitzgerald has admitted the violation under Count III of the complaint involving the notarization of the Giannetti signatures. A public reprimand might be in order for such conduct. The Florida Bar v. Atwood, 409 So.2d 1022 (Fla. 1982); The Florida v. Bell, 493 So.2d 457 (Fla. 1986).

Regardless of whether the findings of guilt are limited to just count III, and even if the findings of violation include all of those for which the referee has determined exist, the appropriate discipline in this case is a suspension. It is respectfully submitted that that suspension ought to be combined with a meaningful probation period and that the period of suspension be ninety days or less. John Fitzgerald ought not to have to prove again the rehabilitation. The disruption of his

law practice caused by a lengthy period of suspension would be devastating.

If there is any truth to the notion that discipline is corrective, not punishment, and if the second consideration in the Pahules case, involving the encouragement of rehabilitation, has any meaning, then disbarment or long suspension should not be used in this case. A ninety-day suspension is punishment. The publication in the Southern Reporter, The Florida Bar News, and the knowledge that your fellow attorneys are aware of your transgressions, is all punishment. Here, this attorney has been involved in investigations, lawsuits and has had to incur great expense in order to obtain representation. If there is a need to insure that there is punishment for falling below ethical standards, or even engaging in intentional wrongdoing, then that need has been met. If there is a need for more punishment and suffering as a demonstration to other members of the profession, fairness is not compromised by limiting it to ninety days.

In The Florida Bar v. Weintraub, 528 So.2d 367 (1988) this court provided for a ninety day suspension and a two year probation period. The lawyer was required to complete fifty hours of community service in addition to other conditions of his probation. See also The Florida v. Marshall, No. 71,018 (Fla. Sept. 29, 1988). This Court imposed probation after limited suspension in The Florida Bar v. Neely, 502 So.2d 1237 (Fla. 1987) and The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980).

If there was worry that the rehabilitation of John Fitzgerald was not complete, then this Court ought to consider

the probation and make as conditions of probation the taking of an ethics course or the passing of the ethics portion of the Florida Bar exam. Florida Bar v. Peterson, 418 So.2d 246 (Fla. 1982). As a condition of probation, this Court could order Mr. Fitzgerald to attend Continuing legal education programs, in excess of those required by CLER. Florida Bar v. Glick, 283 So.2d 642 (Fla. 1980). This Court could order supervision of files by the Florida Bar or by another attorney.

With respect to restitution, John Fitzgerald has paid over $57,000.00 of his final judgment in favor of Giannetti. He is to get a credit for attorney's fees recovered by Giannetti in the event of his success in his litigation. The remainder of his judgment has been secured by the assignment of certain fees that Fitzgerald is to receive. There has been no problem in his payment of his judgment, all of which has gone on without Florida Bar involvement or is any requirement of probation or suspension. It is respectfully requested that it remain that way. Giannetti and Fitzgerald bargained for a final judgment in a settlement. Mr. Giannetti and his lawyers neither bargained for nor counted on the Florida Bar as a collection agent for the final judgment. Mr. Fitzgerald has made progress in the making of his payments, and should be able to pay off the final judgment without being required to. This could obviously change if he is kept out of the practice of law and his earning capacity impaired.

Remembering the considerations of The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), the penalty that is fair to society, fair to respondent, and fair to the profession is a

suspension of less than ninety days with appropriate probationary terms.

CONCLUSION

The referee's findings of fact and recommendation of guilt as to the matters alleged in Counts I, II and IV should be rejected. The referee's finding of not guilty of the allegations of Count V should be accepted. In making his findings of fact and determinations of guilt, based upon the evidence presented by the bar, the referee could only have applied a preponderance of the evidence test rather than clear and convincing. The testimony of the bar is confusing, conflicting, and false.

The discipline that should be imposed in this case, in any event, ought not to be more than a ninety-day suspension combined with an appropriate time period of probation combined with terms as this Court may deem appropriate under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. mail to David M. Barnovitz, Esq., The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, FL 33309; John T. Berry, Esq., The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300; and John F. Harkness, Jr., The Florida Bar, 650 Apalachee Parkway, Tallahasse, FL 32399-2300, this 1st day of ~~October, 1~~Nov 1988.

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