IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

V.

CHRISTOPHER R. FERTIG,

Respondent.

CASE NO. 71,886

The Florida Bar Case No. 8620,258(17A)

ANSWER BRIEF OF RESPONDENT AND RESPONDENT'S INITIAL BRIEF ON CROSSPETITION FOR REVIEW

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PRELIMINARY STATEMENT

This brief is filed on behalf of Christopher R. Fertig and serves as both his Answer Brief to the Initial Brief filed by The Florida Bar and his Initial Brief on Cross-Petition for Review. Respondent will be referred to as such, as well as by name.

The following symbols will be used for reference purposes:

T. for reference to the transcript of final hearing (June 24, 1988), followed by a page.

IB. for reference to the initial brief filed by The Florida Bar in this matter.

JS. for reference to the sworn statement of Joan Smith.

RR. for reference to the Report of Referee, Sidney Shapiro.

All emphasis has been supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Due to inaccuracies and omissions contained in the Bar's Initial Brief, we feel compelled to supplement same. Hereinafter follows Respondent Fertig's Supplemental Statement of the Case and Facts:

Christopher R. Fertig was born in January of 1951. He attended the University of Miami Law School during which time he clerked for James V. Dolan. Upon passing the Bar exam in November of 1976, Fertig was promoted to the position of Associate with the law firm of James V. Dolan and Associates, P.A. (T. 153).

During the course of his employment, Fertig was introduced to a new client by James V. Dolan. The new client was Gerald R. Smith, an ex-Fort Lauderdale policeman, who was referred to the law firm by Jim Eden, a local yacht broker (T. 154). Dolan agreed to undertake Smith's representation and assigned Fertig to work on his case (T. 154). The nature of the case was a civil forfeiture (T. 154).

From the inception of Fertig's employment with James V. Dolan and Associates, it was Dolan's practice to take extended leaves of absence. As time went on, Dolan disappeared more frequently and for greater lengths of time (T. 141). During Dolan's prolonged absences, the associates were responsible for the day to day operation of the law firm. Dolan's continued unavailability disrupted the practice of law (T. 141).

Dolan initially represented Jerry Smith in various real estate deals. He set up offshore corporations and established offshore bank accounts to effectuate Smith's

plan (T. 145). Additionally, Dolan and Smith became good friends and lived across the river from each other (T. 138).

On one occasion, while Dolan was in Colorado working on a land acquisition project for Jerry Smith and building a home for himself, Smith appeared at the law office looking perturbed (T. 157). Fertig was present and attempted to help the client. Smith showed Fertig a list of what appeared to be deeds and corporate records (T. 157). Upon Smith's request, Fertig reviewed the documents which were a jumbled mess (T. 157). Fertig initially could not make heads or tails of what was going on (T. 157) and realized that Dolan had taken shortcuts and had not properly done his work. Jerry Smith said: "You better fix it." (T. 158).

Fertig explained that in order to help Smith straighten out the mess, Smith would first have to explain the plan to Fertig (T. 158). In response, Smith briefly explained that a prominent local law firm had devised an international tax shelter for him (T. 158-159). After further review of the documents, Fertig told Smith that he would make an effort to correct the mess (T. 158-159).

Upon Dolan's return to town, he was confronted by Fertig who explained what had happened (T. 159). Dolan was very upset with Fertig for suggesting to a client that the work was not correctly performed (T. 159). He sat down with Fertig and showed him how the offshore corporations were supposed to work (T. 159), and explained the chain of money and how it was supposed to work (T. 159-160). During all of this, Fertig was under the understanding that the plan was absolutely legal (T. 160). To become more proficient, Fertig was sent to a tax seminar (T. 160).

At a point in time, Fertig was advised that Smith wished to set up some corporations in the Bahamas to fund business ventures in the United States (T. 162). Dolan decided to form the corporations (T. 162), and did so (T. 163). Subsequently, Dolan requested that Fertig physically transport some money to a bank in the Bahamas to fund the corporation (T. 163).

Fertig thought the request odd and inquired of Dolan as to whether this was legal (T. 164). Dolan told Fertig he was not to be the judge and jury of his clients (T. 164). Dolan said there was no law saying you cannot take money and deposit it in a foreign bank account (T. 164). Still not certain, and prior to agreeing, Fertig researched the law on this point (T. 164). Fertig found no law prohibiting the transfer of funds, but noted a Statute requiring that a transfer of funds in excess of $5,000.00 be declared (T. 164-165). The penalty for failing to declare the funds was civil forfeiture and not criminal penalty (T. 165).

Fertig flew to the Bahamas with the money as requested by Dolan and Smith (T. 165). When Fertig got in the plane, he requested a declaration form (T. 165). He recalls the pilot saying, "Fine, maybe there is something at the other end" (T. 165). To Fertig's surprise, upon reaching the other end, there was no declaration form and no one seemed to care about his declaration (T. 166).

When Dolan once again told him to take some more money to the bank, Fertig decided not to take a private plane (T. 166). Instead, he flew a commercial airliner in order to declare the funds (T. 166). When he got to the ticket counter and asked

for a declaration form, they did not have one (T. 166). Although Fertig was uncomfortable, Dolan once again assured him there was nothing criminal about his actions (T. 167).

One weekend, Fertig loaned his father's boat to Jerry Smith for a pleasure outing (T. 45-46). When Fertig went to check on the boat, he was shocked to learn that Smith had used it to transport drugs, a fact which was readily apparent (T. 169). This was his first clear indication that Smith was a drug smuggler (T. 168).

Fertig was extremely upset and immediately set about to contact Dolan to express his horror, Fertig will never forget the confrontation during which Dolan said, "Well, Chris, why do you think I leave my house for these trips?" (T. 170). Fertig was horrified (T. 170).

Fertig and Curtis told Dolan that the firm absolutely needed to disassociate from Smith, or Fertig and Curtis would disassociate from Dolan (T. 171). Dolan tried to talk them out of it (T. 171). Dolan used the fact that Fertig owed him money as leverage to influence his decision (T. 171). Nonetheless, Fertig and Curtis were insistent (T. 144, 147).

Fertig and Curtis advised Gerry Smith of their decision. Smith **was** absolutely livid and launched into a tirade (T. 172). Fertig and Curtis were firm in their refusal to handle the files relating to the waterfront houses (T. 172). Smith finally realized they were serious, but asked why they would not continue handling a perfectly legitimate, fully legal corporation (T. 173). The file was fully documented and there

seemed to be nothing wrong with it (T. 173). Jerry Smith persisted, reminding them that he was being sued on a real estate contract and that discovery was pending (T. 172-173). Fertig and Curtis acquiesced and maintained two civil matters for Smith (T. 174). Fertig made no secret of his involvement with the files (T. 174).

Later in the year, Thomas Dolan (James V. Dolan's brother) and James Brian Dolan (James V. Dolan's son) were arrested for trafficking in narcotics (T. 140). Fertig was questioned by then Assistant State Attorney Mark Speiser in connection with the Dolan arrests (T. 174-176). Fertig told Speiser everything he knew including the fact that he was still handling the two civil matters for Smith.

The police next came to Fertig for information (T. 175). Fertig was stunned and was not certain he had any information to offer (T. 175). He told the police everything he knew and even attempted to help bring in Jerry Smith, who by then had become a fugitive.

Prior to giving a series of statements, Fertig was given full use and transactional immunity by **A.S.A.** Speiser (T. 181, et seq.). He participated as fully in the investigation of Dolan and Smith as was possible (T. 180, 183, et seq.). Throughout the course of the investigation, Fertig kept Speiser and the Court apprised of the fugitive status of Jerry Smith as well as his continued representation in the civil matters (T. 174, 176, 178; also, see deposition of Hon. Mark Speiser). Although Fertig anticipated the State Attorney's office would seize Wilton Properties (T. 179), same did not occur. Ultimately, Jerry Smith's wife, Joan, returned to Fort Lauderdale and after resolving her criminal problems with the State Attorney's office, removed the files from the firm (T. 179).

Several years after the initial investigation was closed, James V. Dolan approached the State Attorney General in order to make a deal for his son, as well as his brother, both of whom had been convicted of drug trafficking as part of Jerry Smith's scheme. In an effort to make a deal, Dolan implicated Fertig in the money laundering scheme (T. 98). Once again, Fertig cooperated as fully as possible in the investigation,

Fertig's cooperation was not limited to giving statements; through his own efforts, he actually found Jerry Smith (T. 104). Unfortunately, an internal leak (T. 105, 215) at the Fort Lauderdale Police Department allowed Jerry to learn of the pending arrest and flee, however, Fertig's efforts led the police to property which they seized (T. 105). With his own funds, Fertig also hired a private investigator to search for Howard S. Alford, who was Jerry Smith's partner (T. 213). Fertig's investigation enabled the police to locate and arrest Alford (T. 105). As a result of Fertig's complete cooperation, his counsel was advised that no charges would be filed.

As a consequence of being implicated in the scheme by Dolan, Fertig was actively investigated by the State Attorney during the summer of 1984. Although Fertig offered his full cooperation, the State Attorney did not refrain from making threats. Among the various threats, Fertig was advised that barring his immediate cooperation, the police "could come by and pick him up and take him on in" (T. 94), that Ralph Burns was going to "freeze all of his assets" (T. 94), and that "they were going to get a Court Order freezing everything, his business accounts and his personal accounts..." (T. 94). Fertig was told "the bond would be at least a million dollars"

(T. 95). Fertig's counsel, "envisioned the police coming to the door at 4 or 5 o'clock in the morning and carting him off in front of his wife and kids" (T. 95).

Notwithstanding the earlier promise, as well as the grant of full use and transactional immunity (T. 181, et seq.), in March of 1986 while on Easter vacation with his family, Fertig was contacted by his counsel. He was advised that charges were imminent and that he should return to town immediately (T. 100, 103, 104, 105, 106).

Fertig entered a nolo contendere plea under extreme duress. He described it as being "like holding a gun to your head..." (T. 205). Fertig was not afforded the luxury of time within which to make his decision. In fact, he did not know the contents of the plea prior to accepting same. (T. 194-195) In retrospect, the entire charging document was probably invalid as Respondent had been granted immunity. (T. 191) Some of the conduct which allegedly constituted a predicate act and formed the basis for the charging document was done with the full knowledge (and in some cases, the assistance) of the State Attorney (T. 177). There is no evidence of any impropriety occurring after 1980.

In addition to entering the plea, Fertig also forfeited his home in Wilton Manors, as well as other properties (T. 206, et seq.). Fertig was not adjudicated guilty. He was sentenced to four years probation; the probation was terminated early due to his excellent conduct.

Within a few days of the plea which was entered in April of 1986, Fertig formally advised The Florida Bar of the plea. An investigator was sent to the State Attorney's office where he was given copies of nine of Mr. Fertig's statements, three of which served as the Bar's only evidence in this case.

The Florida Bar filed formal charges on February 8, 1988. On February 24, 1988, the Honorble Sidney B. Shapiro was appointed Referee by The Supreme Court of Florida. On March 23, 1988, the matter was scheduled for final hearing to be held on June 24, 1988.

On May 11, 1988, a hearing was held before Judge Shapiro on The Florida Bar's Objections to Respondent's Request to Produce its file relating to James V. Dolan. At that time, Bar Counsel asserted that Fertig's name had come up during the Bar's investigation of Mr. Dolan.

A final hearing was held as scheduled before the Referee on June 24, 1988. At the hearing, the undisputed testimony was that Fertig's suspension from the practice would impact adversely upon the community. Testimony was offered by members of the Bench and Bar, as well as by other prominent and substantial non-lawyer citizens on Fertig's behalf. Judge J. Cail Lee testified in response to the Referee's inquiry seeking guidance that the public would not be served by Fertig's suspension from the Bar and in fact the public would be adversely affected by such action.(T. 78) (See also concurring testimony of Ed Curtis (T. 147-148), Philip Spucci (T. 87, et seq.), Father Heath (T. 123), and George Pascoe (T. 62)) John Wiederhold, Esq., testified likewise,(T. 127) adding that he would not mind having Fertig as a partner

(T. 128) The testimony reflects that Fertig has given his clients gold-plated service in his legal representation of them.

At the hearing, the Bar attempted to confuse the issues by failing to distinguish between what Fertig knew at the time of his actions and what he subsequently came to know. Notwithstanding Fertig's repeated assertions both during the course of his statements and the hearing that he was not able to recall dates and times, the Bar completely ignored this fact (T. 33, 223, 224; Sworn Statement of Christopher R. Fertig, August 14th, 1984, page 30, lines 3-5, page 40, line 2-14). That his memory only became worse with the passage of time should come as no surprise. However, the Bar completely ignored this point. The Transcript of the Hearing, as well as the many statements given by Fertig, make clear the fact that despite best efforts, Fertig was unable to recall what he knew contemporaneous with his actions and what he subsequently came to know.(August 14th Statement, page 15, lines 9-10, page 20, lines 4-20)

After hearing the matter, Judge Shapiro entered a report recommending that Respondent be suspended from the practice of law for twelve months. The asserted purpose of the lengthy suspension was punishment and deterrence. The Referee's Report also concluded that Fertig had been totally and completely rehabilitated. The Referee asserted that Fertig had mitigated his actions by cooperating with authorities and turning his life around since he committed the acts complained of.

No witnesses were presented by The Florida Bar at the final hearing disputing that Fertig's character was impeccable and that his conduct has been exemplary.

SUMMARY OF ARGUMENT

The initial brief of The Florida Bar "in support of a 90-day suspension" of Respondent is replete with inaccuracies and misrepresentations of facts and law.

The brief submitted by the Bar advocating a reduction to a ninety (90) day suspension is almost identical to the Memorandum of Law filed by the Bar in the lower Court in support of a six month suspension. No new arguments are made by the Bar now that it is advocating a reduction to ninety (90) days, nor are any cases cited reflecting the change in the Bar's position.

Although the Bar correctly advises this Court that the Board of Governors of The Florida Bar determined that the mitigating factors presented by the Respondent in this case justify a reduction in the recommended discipline, its argument is neither persuasive nor sincere. Had counsel intended to persuade this Court, surely counsel would have explained that the Board's decision was predicated upon many mitigating factors, all of which lead to the inescapable conclusion that this case has been a travesty of justice since the beginning.

The argument suggests that the only options available in this case are either a lengthy suspension or disbarment; the tone of the entire brief is set by this misleading representation. Had Bar counsel intended to follow the instructions given by the Board of Governors, surely counsel would have argued that in the past, where mitigating factors have been present, this Court has ordered public reprimands as well as sixty and ninety day suspensions in cases involving more egregious misconduct than in the instant case.

Although this purports to be a brief urging review, Bar counsel neglects to mention that the Referee's Report was erroneous, unlawful and unjustified, thereby requiring reversal. We are certain the Bar is unaware of any authority standing for the proposition that punishment for punishment's sake is either acceptable or appropriate, yet the issue is never addressed.

The Summary of Argument fails to mention the Referee's finding of total and complete rehabilitation on the part of Respondent. Also missing is a convincing argument that many mitigating factors led to the Board of Governor's conclusion that the Referee's recommendation was entirely too harsh. (Bar counsel apparently would have this Court believe that the Board of Governors arbitrarily overrode the recommendation of the Referee in this case.)

Finally, although a cursory review of the Bar's brief by one unfamiliar with disciplinary case law in this jurisdiction might lead to the conclusion that the brief actually supports a ninety day suspension, careful scrutiny of the cases cited by the Bar, as well as those omitted, demonstrates that Bar counsel never intended to persuade this Court to impose a ninety day suspension. In fact, the Bar brief fails to cite a single case supporting the Board of Governor's position. Rather than arguing or even calling this Court's attention to cases where a rehabilitated Respondent is suspended for a period of ninety (90) days or less, the brief repeatedly cites cases involving disbarment. This omission is not due to a shortage of case law where mitigating factors have played a significant role in reducing discipline.

Contrary to the Referee's opinion and the Board of Governor's determination that suspension without rehabilitation is appropriate in this case, the initial brief cites only seven cases, each of which impose a disciplinary action requiring proof of rehabilitation; and three of which impose complete disbarment. The brief ignores the abundance of case law which would have supported the Bar's argument for reduction of discipline. It ignores the mitigating circumstances which form the basis for the Board of Governors' determination. It ignores the total and complete rehabilitation of Respondent and the impropriety of imposing punishment for punishment's sake. It ignores the fact that in all of the cases cited in its initial brief, the Referee made a finding that the Respondent had knowingly and wilfully engaged in the proscribed conduct. In the instant case there was no such finding by the Referee. This distinction is obvious and important.

ARGUMENT

I.
THE FACTS AND CIRCUMSTANCES OF THIS CAUSE DO NOT WARRANT SUSPENSION.

The Board of Governors of The Florida Bar determined that the mitigating factors presented by the Respondent justified a reduction in the discipline recommended to a suspension for a period of ninety (90) days. The mitigating factors (notably excluded from the Bar's initial brief) include:

- the total and complete absence of a prior (or subsequent) disciplinary record;
- the absolute absence of a dishonest or selfish motive;
- personal and emotional problems brought upon by threats relating to Respondent's life and safety, as well as the safety of his family;
- Respondent's repeated efforts to rectify the consequences of misconduct;
- Respondent's full, free and cooperative disclosure to all investigating authorities;
- Respondent's inexperience in the practice of law;
- Respondent's exemplary conduct prior to and since the misconduct resulting in the support of both the Bench and the Bar;
- Respondent's excellent reputation for truth and veracity as well as quality legal representation;
- the inordinate delay by the Bar in bringing these proceedings;

- the imposition of other penalties or sanctions including the years of suffering,
- extreme remorse on the part of Respondent; and,
- the undisputed total and complete rehabilitation of Respondent.

The Bar's assertion that case law requires a suspension in this matter is misleading (IB-7). While we agree that in the absence of so many mitigating factors suspension might indeed be supported, under the facts of this case areprimand would certainly suffice. See, the The Florida Bar v. King;, 174 So.2d 398 (Fla. 1965), where this Court ordered public reprimand instead of disbarment due to mitigating factors; and the The Florida Bar v. Welch, 272 So.2d **139** (Fla. 1972) where this Court **imposed public reprimand** and probation in lieu of a three year suspension recommended by Referee **notwithstanding Respondent's previous disbarment.**

The Bar's citation of The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1983) is inappropriate under the circumstances, especially in light of its attempt to distinguish same from the instant case. Although Pettie could have and should have been argued in support of mitigation and leniency, it was not. While Pettie and the Respondent in the instant case both voluntarily cooperated with law enforcement in an effort to undo the damage done by their misconduct, the Bar argues that Pettie initiated this conduct while Respondent sat back waiting for law enforcement to find him. Although not supported by the record, the inference created is that the sanctions in the instant case should be more severe than those in Pettie's case, based on a theory

of non-initiation. (The Referee made no such distinction, and found that Respondent had cooperated fully with authorities and turned his life around (RR-2) .

The evidence in this matter clearly demonstrates that Respondent went well beyond the bounds of normal cooperation in attempting to locate the drug smuggling Jerry Smith who had by then become a fugitive. In addition to telling all he knew and participating in an undercover operation, Fertig on his own initiative and with his own funds hired a private investigator to find the fleeing felon. **As** a consequence of these activities, Fertig lived in reasonable fear for his life and safety, as well as that of his wife and four children . There is no reason to believe the threat of violence or retaliation by Smith and his cohorts has passed.

The Bar neglects to mention that many of the mitigating factors present in Respondent's case were not present in Pettie. For example, Pettie was an experienced attorney, having practiced law for almost twenty (20) years. Fertig was inexperienced; his lack of experience was a substantial factor in his involvement in this nightmare.

In Pettie, the Referee made a specific finding of fact that Pettie **knowingly** assisted in the smuggling conspiracy. No such finding was made in Fertig's case.

Pettie never disputed his **knowing involvement** in the drug smuggling operation, nor his substantial complicity in the scheme to import and distribute 15,000 pounds of cannabis. Pettie never claimed he was set up and never denied actual

knowledge of the true purpose of the operation. In Fertig's case, the opposite is true.

Although it remains unclear to what degree Pettie profited by his actions, it is clear that Fertig did not profit at all.

Where Pettie is helpful in Respondent's case, the Bar's interest inexplicably wanes and it completely ignores same. No mention is made of this Court's pronouncement that engaging in illegal conduct is not the same as engaging in dishonest conduct. We are mindful of this Court's pronouncement that the concepts of dishonesty and illegality are not co-extensive. Much that is dishonest is not illegal; much that is illegal is not dishonest. Pettie at 737. This theory applies under the facts of both Pettie and Fertig, yet the Bar completely fails to present the argument. While the Referee has determined that Respondent's participation in the criminal acts was illegal, he has never been charged with lying, cheating, fraud or untrustworthiness. While Fertig's acts may have been illegal, they were not dishonest.

In Pettie, this Court reiterated the well-established concept that it is appropriate in determining the discipline to be imposed to take into consideration circumstances relating to the incident, including cooperation and restitution. The instant case, like Pettie, is clearly atypical and, given the unique facts of the case, requires special consideration, We cannot imagine that the omission of references to any helpful portion of the Pettie opinion was an oversight on the part of the Bar. The fact that Pettie was suspended for one year rather than disbarred does little to support the Bar's recommendation of a ninety (90) day suspension.

Nothing whatsoever in the Bar's brief urges this Court to impose a ninety (90) day suspension in the instant case. In fact, it clearly argues for disbarment. In another case cited by the Bar, The Florida Bar v. Lewis, 145 So.2d 875 (Fla. 1962), the Respondent was disbarred after being convicted of fraudulently concealing the assets of a bankrupt estate, for which he was sentenced to five years imprisonment. No mitigating factors were discussed in this Court's opinion, nor were any of the facts germane to this case. The Bar's assertion that in the instant case, "Respondent similarly helped conceal illegal drug money" (IB-7) is patently offensive.

In the instant case, Respondent's conduct can hardly be described as fraudulent. As distinguished from the instant case, in Lewis, the issue of whether Respondent knowingly participated in criminal activities was never a factor. Although it would have been well within the scope of his authority, the Referee declined to make a finding of fact that Respondent Fertig participated knowingly. In the instant case, the Referee found as a matter of fact that Fertig had been totally and completely rehabilitated. We are uncertain as to how or why Lewis found its way into the Bar's brief in this matter as it is completely irrelevant and inapplicable to the facts at hand.

The Florida Bar next cites the case of The Florida Bar v. Beaver, 248 So.2d 477 (Fla. 1971). In Beaver, Respondent was suspended from the practice of law for one year for deliberately counseling his client to secrete assets in order to misrepresent his financial status in a divorce action. Beaver filed no answer to the Bar's Complaint. He did not appear at the final Bar hearing and no evidence was presented in his defense. In fact, Beaver exhibited a total disdain for these proceedings. Unlike the instant case, in Beaver there was absolutely no evidence whatsoever that Respondent

had been rehabilitated. In fact, Respondent was adjudicated incompetent and was committed to a state hospital under the division of mental health during the pendency of these proceedings.

There was no assertion by Beaver that he was an unwitting participant as was Fertig. None of the mitigating factors present in the instant case were present in Beaver. Once again, we are offended by Bar counsel's statement that "Respondent's conduct involved money-laundering for illegal drug smuggling activities and Respondent personally helped carry out the activities (IB-7)." This statement is calculated to mislead this Court erroneously to the conclusion that Respondent Fertig knowingly played a major role as a drug smuggler. In fact, there has never been the slightest suggestion that Fertig himself was in any way involved with drugs, that he has ever used drugs, or that he was anything less than appalled when he discovered the true purpose of the operation with which he had become unwittingly involved. There was no finding by the Referee that Fertig participated knowingly. Beaver is neither germane to the instant case nor persuasive under this set of facts.

In support of The Florida Bar's brief purportedly urging a ninety (90) day suspension of Respondent, Bar counsel next cites the case of The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla. 1985), where the Respondent was suspended for three years after being convicted of conspiracy to possess with intent to distribute cocaine after pleading guilty to the charges. In the instant case, Fertig never pled guilty and continues to maintain his innocence. Fertig pled nolo contendere as a plea of convenience in an effort to put this matter behind him. He was repeatedly assured that a plea of nolo was not tantamount to a guilty plea. The Bar rules in effect at the

time supported this position. Additionally, Fertig entered the plea under duress; in fact, Fertig never heard the charges prior to appearing in Court to plead nolo to them. Although Carbonaro was young when the offense was committed, and he evinced a desire to rehabilitate himself, the case is readily distinguishable from the instant case in that there was no finding of Respondent's rehabilitation when Bar discipline was imposed.

Further, although it is undisputed that Fertig was a pawn in someone else's scheme, Carbonaro was clearly the architect of his own destiny. Finally, in Carbonaro, the Bar urged disbarment.

After Bar counsel cites The Florida Bar v. Horne, 527 So. 2d 816 (Fla. 1988), not a single effort is made to distinguish the Horne case from the instant case. The Bar merely sets forth that Horne was disbarred for misconduct involving money laundering (IB-8). In Horne, Respondent was sentenced to **five (5) years' imprisonment** after being found guilty of various drug-related activities including money laundering and intentional tax evasion. The Referee described **Horne's dealings as being fraught with dishonesty, misrepresentation and fraud.** The Referee further found that

> "the entire scheme Horne was involved with was to do **anything but the right or lawful act.** This conduct on the part of Horne constituted illegal conduct of **moral depravity.**" Horne at 430. (Emphasis Supplied)

There was no evidence whatsoever that Horne was rehabilitated at the time of these proceedings. There is no evidence of any mitigating factors in the record. **The** Referee's Report urging Horne's disbarment was not contested by the Bar or by

Horne. In the instant case, while Fertig's conduct was described by the Referee as being serious, no finding of moral depravity, dishonesty, misrepresentation or fraud was made. That the Bar should compare Chris Fertig to Melvin Horne is insulting and outrageous.

Next, in what can only be termed sabotage, the Bar cites The Florida Bar v. Meros, 521 So.2d 1108 (Fla. 1988). The Bar's inclusion of this case in support of a ninety day suspension is incredible as Meros was sentenced to **forty (40) years** in prison after having been found guilty in Federal Court of at least thirteen **(13)** counts of drug and racketeering activities. We are shocked by the inclusion of this case and wonder how the disbarment of Meros, a felon sentenced to prison for **forty (40) years,** was meant to be persuasive authority in support of a ninety day suspension for Respondent, Meros is readily distinguishable from the instant case as it is obvious that Meros , among other things, defrauded an agency of the United States by trick, scheme or device with total knowledge and intent.

II.

THE PUBLIC INTEREST WILL NOT BE SERVED BY THE IMPOSITION OF ADDITIONAL PUNISHMENT.

The disciplinary process has evolved to protect the public interest, not to punish the lawyer. This Court recently reiterated that attorney disciplinary proceedings are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the Court to continue in that capacity and to protect the Courts and the public from the official ministration of persons unfit to practice. Thus, the real question at issue in a disciplinary proceeding is the public interest and the attorney's right to practice a profession imbued with public trust. The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987); State v. Rendina, 467 So.2d 734 (Fla. 1985); In Re: Echeles, 430 F.2d 347, (7th Cir. 1970); and Ex parte Wall, 107 U.S.265 (1882).

Bar disciplinary proceedings are remedial, not punitive; they are designed to determine the lawyer's fitness to practice so as to protect the public, **not to punish the lawyer in question.** State v. Rendina, supra at 736, citing: Segretti v. State Bar, 544 P.2d 929 (1976); In re: March, 376 N.E.2d 213 (1978); Maryland State Bar Association, Inc. v. Suparman, 329 A.2d 1 (1974); In re: Connaghan, 613 S.W.2d 626 (Mo.1981); Anonymous Attys v. Bar Ass'n of Erie Cty, 362 N.E.2d 592 (1977) and, In re: Daley, 549 F.2d 469 (7th Cir. 1977).

The question of Fertig's fitness to practice was addressed in the disciplinary hearing. **Judge J. Cail Lee testified** that he was familiar with Fertig's reputation in the community (T. 71) and that **"he has an excellent reputation in every respect**

insofar as I'm aware." (T. 71) Judge Lee further testified that it was his "sincere view that Chris is of the highest character." (T. 72) When asked by the Referee whether the community would be in any way harmed by Fertig's continuing to practice, Judge Lee responded:

> "Absolutely not, Sir. In the entire time I have known him, Judge, this is the only single bad word, if you can call it that, I have ever heard expressed against him or any problem that I have ever been aware of... He is considered to conduct himself in an absolutely appropriate fashion." (T.78, 79)

In response to the Referee's inquiry as to whether there would be an impact on Fertig's clients in the event of a suspension, Judge Lee responded "...I don't see how it could but hurt the clients that he represents..." (T.79).

Further, John Wiederhold, a prominent local attorney, testified that Fertig's reputation is "one of high moral standard and high ethical standards" (T. 127). Wiederhold testified that in his opinion Fertig's

> "legal ability is excellent. He is a formidable opponent: honest, trustworthy ...And, I might add, an honest---very honest opponent. He is very ethical." (T. 128).

Finally, in response to the Referee's inquiry as to whether there would be **any** negative impact on the State of Florida or the Bar if Fertig were not suspended, the witness testified "absolutely not" (T. 128).

Jerry Pascoe, a well-known local marine surveyor and insurance adjuster, opined he was familiar with Fertig's reputation in the community and "in my opinion, it is a very high reputation" (T. 64). Regarding Mr. Fertig's integrity, Pascoe testified that:

> "everything that I have seen that he has demonstrated has been the highest principles and integrity ... I am not remiss in saying that he, in my opinion, has one of the highest principles and moral standards in this community..."

Phil Spucci, Assistant Vice President for Scor Reinsurance, testified that **Mr.** Fertig "seemed to be straight and narrow" (T. 87), had an appreciation for his ethical obligations (T. 88), and showed remorse (T. 91). When asked what effect Fertig's suspension would have, Spucci responded:

> "I feel his reputation and his presence is critical in controlling the various multi-faceted parties that we deal with. We are not able to see a cohesiveness without his presence and his controlling these parties. It would be disastrous in terms of the negative outflow of cash" (T. 91).

Henry Heath, a priest, expressed the community's sentiments, stating that Fertig's reputation and integrity in the community was without any qualifications **"as** good as it can be" (T. 123).

Although the Referee found that Fertig had been totally and completely rehabilitated, he nonetheless recommended a one-year suspension. We are not left to wonder what purpose this suspension would serve; the Referee specifically sets forth that the two-fold purpose of the discipline is for punishment for the acts committed and as a deterrent to others. (RR-2)

In coming to this conclusion, the Referee ignored well-settled law which clearly states that: "Disciplinary or disbarment proceedings are solely for the purpose of purging the role of legal practitioners of unworthy or disreputable members and **not** for the purpose of punishment for any malfeasance or dereliction of duty, and no fine,

imprisonment or **other punitive sentence** can be imposed. The Florida Bar v. King, 174 So.2d 398 at 403 (Fla. 1965), citing State ex rel. The Florida Bar v. Rubin, 142 So.2d 65 (Fla. 1962). In seeking to punish Respondent, the Referee lost sight of the goal to be accomplished and went far afield in his determination to make an example of Mr. Fertig.

An extensive review of this Court's opinions in disciplinary matters leads to the inescapable conclusion that nowhere is punishment for punishment's sake permitted by the Bar rules or applicable case law.

The Florida Bar cannot seriously suggest that it truly believes Respondent's continued practice of law constitutes a danger to society. Had the Bar believed Respondent's continued practice posed any threat whatsoever, surely it would have moved more quickly in an effort to eradicate the danger (either permanently or temporarily, but definitely more swiftly!) Although the Bar was empowered to suspend Fertig automatically upon his pleading nolo to the charges, it chose not to exercise this option (T. 57). It is difficult to accept that the caretaker of the public trust knowingly allowed an unfit person to practice law for nine (9) years while taking no action. The fact that the Bar now advocates Respondent's suspension under the guise of protecting the public is equally unacceptable.

The focus of a disciplinary proceeding should be to gauge an individual's present fitness to practice law, and not to judge the criminality of his prior acts or to inflict punishment for them. State v. Rendina, 467 So.2d 734 (Fla. 1985). Notwithstanding the foregoing, both The Florida Bar and the Referee desire to punish Respondent

Fertig unde the ostensible guis of deterring others in th future. The stated goal might seem more plausible under other circumstances, but is untenable under this set of facts. It requires a great stretch of the imagination to believe that punishing Fertig now for acts which occurred almost ten years ago would have any deterrent effect whatsoever. In fact, it is more likely that such punishment would discourage cooperation by attorneys and would undermine public confidence.

In other cases, where this Court has determined that the public interest and the interest of preserving the purity of The Florida Bar would not be served by the imposition of a suspension, this Court has declined to order same. The Florida Bar v. Welch, 272 So.2d 139 (Fla. 1972). Welch was found to have **knowingly, deceitfully and fraudulently** induced the complaining witness to deed her property to his wife. Fertig was never found to have participated knowingly in any misconduct, and in fact, the Referee's silence on this point must be construed in Respondent's favor. Additionally, Fertig's conduct was not alleged to have been deceitful or fraudulent.

Although it is undisputed that Fertig had never been the subject of a Bar grievance or a Complaint prior to or since the instant proceeding, **Welch had in fact been previously disbarred in this state!**

Although Welch had considerable experience in the practice of law, Respondent Fertig was recently admitted to the Bar; his lack of experience played a significant role in this fiasco.

Notwithstanding the previous misconduct in Welch and the gravity of the offenses with which he was charged, not once but twice, **this Court opined that the public interest would not be served by Welch's suspension** from the practice of law. Given this analysis, it is unfathomable that the public interest would be served by Fertig's suspension. There is no dispute about the fact that Fertig is presently fit to practice law. In fact, the Bar has never suggested otherwise, nor has it presented any evidence to the contrary. It is noteworthy that the Bar adduced no testimony **at** the hearing of this cause tending to disprove Fertig's impeccable character or his fitness to practice law.

The only purpose to be served by imposing a suspension for longer than ninety (90) days is to insure the public that Respondent will be required to show proof of rehabilitation prior to his offering the public the services of a qualified lawyer. **As** the Respondent has in the past many years conducted himself in a manner which has convinced the Referee that he is **totally and completely rehabilitated,** there is no reason to again require proof of rehabilitation and, therefore, no reason to impose a suspension in excess of ninety (90) days. Surely this Court would not condone **an** unnecessary act.

This Court must not allow The Florida Bar's overzealous desire to punish Fertig to operate to the detriment of the public, nor should it allow the Bar's goal of punishment to outweigh the public interest in having access to competent legal counsel.

III.

THIS COURT SHOULD CONSIDER THE DISCIPLINE IMPOSED IN SIMILAR SITUATIONS PRIOR TO IMPOSING DISCIPLINE IN THIS CAUSE.

Although this Court has ruled that each case is to be taken on its own merits, the Florida Standards For Imposing Lawyer Sanctions and case law state that consideration should be given to the discipline imposed in similar situations.

No case more closely parallels the circumstances of the instant case than the case of Fertig's employer, James V. Dolan. Notwithstanding this fact, neither the Referee's Report nor The Florida Bar's initial brief make any mention of the ninety (90) day suspension imposed by the Bar in the case of The Florida Bar v. James V. Dolan, 452 So.2d 563 (Fla. 191984). This is odd in light of the undisputed fact that Mr. Dolan, an experienced attorney, was far more involved with Gerald Smith and his scheme than was Fertig.

Smith was Dolan's client (T. 139,148). Dolan and Smith lived across the river from each other and were social friends, (T. 138-9, 154) Dolan introduced his associates, Chris Fertig and Ed Curtis, to Gerald Smith (T. 138, 153). Dolan instructed Fertig to take money to the Bahamas (T.163). When Fertig and Curtis vocalized their concern (T. 141, 142) about the propriety of these actions, Dolan reassured them that there was nothing wrong with representing Gerald Smith (T. 142, 143), and that Smith had a right to counsel (T. 142, 164). Dolan encouraged them to continue as planned (T. 164,167) and in fact made threats about what would happen if Fertig refused (T. 171). Finally, Fertig and Curtis insisted that the firm cease its

representation of Smith (T. 144, 171). Thereafter Fertig and Curtis disassociated with James V. Dolan.

As if the foregoing were not enough, when Gerald Smith's empire began to crumble, Dolan continued to do everything within his power to protect himself as well as Smith. While the investigation was pending, Dolan was less than forthcoming with truthful information. To the contrary, Dolan actually made matters worse **by** lying to then Assistant State Attorney Mark Speiser during the course of his investigation of Gerald Smith, an offense for which he was subsequently criminally charged (State of Florida v. Dolan, Case No. 81-13289 CF-, 17th Judicial Circuit).

Lest there be any doubt in this Court's mind that The Florida Bar was well aware of Dolan's conduct **prior** to its acceptance of his conditional plea of guilty on the charge of perjury and the imposition of a 90-day suspension, we feel compelled to supplement the record with the September 15, 1983 statement of Joan Smith (Appendix). (Although counsel for Repondent are aware of the general rule that an appellate court will not consider matters not presented to the to the trier of fact, we feel an obligation to our client to at least offer this statement for the Court's consideration and to suggest that the Court may properly consider it because of the unique and special constitutional authority and responsibility of the Court in all proceedings pertaining to members of the Florida Bar.[1]

1 Florida Constitution, Article V, Section 15. This Court has held that its jurisdiction over attorneys is to be exercised according to law and conscience and not by technical rules. Richardson v. State, 192 *So.* 247 (1940); Gould v. State, 238 *So.* 635 (Fla. 1970) where this Court considered letters of recommendation not previously a part of the record.

In fact, although the Bar in its Brief filed in the Dolan matter asserted to this Court and continues to maintain that Dolan was not involved with drugs (a conclusion it reached after fully investigating the matter), the opposite is true. Joan Smith's statement taken in the presence of Counsel for The Florida Bar actually places Dolan on a boat unloading marijuana. (Statement from Joan Smith, page 48.)

Additionally, this newly acquired statement is replete with references to Dolan's knowing involvement with Gerald Smith, including allegations that Dolan formed corporations for Smith (JS. 37), that Dolan knew that Smith was smuggling marijuana (JS. 38, 39), and, Dolan eventually ran off with his client's money. **(JS.** 55, 56, 57, 58). Meanwhile, Chris Fertig did not know what was going on (JS. 41).

The discussion of Fertig's involvement on pages 10, 37, 38, 41, 43 and 46 of Joan Smith's statement taken in the presence of Counsel for The Florida Bar on September 15, 1983 totally discredits Bar Staff Counsel's repeated assertions that Fertig's name had not been heard by the Bar prior to his pleading nolo contendere on April 1,1986.

If the rules are to be followed, true consideration must be given to the discipline imposed in similar instances. If such consideration is to have any meaning whatsoever, Respondent Fertig's sanctions cannot be equal to or greater than the sanctions imposed on the mastermind himself, James V. Dolan. To impose upon Fertig sanctions greater than those imposed upon Dolan would make a mockery of the entire disciplinary process and would lead to an extremely unfair result.

IV.

THE BAR FAILED TO EXERCISE DILIGENCE IN FILING ITS COMPLAINT IN THIS CAUSE. THE UNDUE DELAY REQUIRES A REDUCTION IN THE PENALTY TO BE IMPOSED.

The Bar's delay in pursuing this disciplinary proceeding should not operate to further punish Chris Fertig. There is substantial evidence that the Bar was well aware and investigated Respondent's activities as far back as 1981. (See transcript of Joan Smith, pages 10, 37, 38, 41, 43 and 46) The Bar Complaint was not served until 1988. During the years that passed, Respondent was left to play a dreadful waiting game.

Bar staff counsel, Jacqueline Needelman was quoted in a 1986 newspaper article stating the Bar "would probably investigate the matter." However, no Complaint was filed for almost two years after Respondent pled nolo contendere. The Bar admits it never approved a deferral or suspension of any investigation of Respondent Fertig. (The Florida Bar's response to Respondent's Request for Admissions, served May 16, 1988.) The Bar's assertion that it was unaware of Respondent and that no investigation of Respondent by The Florida Bar existed until on or about **April** 1, 1986 is inconsistent with Bar Staff Counsel's statement to Judge Shapiro on May 11, 1988.

According to Ms. Needelman, Fertig's name came to the attention of The Florida Bar during its investigation of James V. Dolan in 1981. (See Transcript of Hearing before Judge Shapiro, May 11, 1988, Page 17, Line 15.)

By the time the Bar Complaint was filed, almost eight (8) years had elapsed since the last overt act had occurred.

The Bar's unwarranted delay in prosecuting this matter has resulted in irreparable harm, injury and prejudice to Respondent. Fertig has been substantially punished by the years of public humiliation, emotional distress and embarrassment he and his family have suffered over the years (T. 69, 74, 75, 132, 134, 135, 221). Additionally, he has incurred the expense of defending himself in the criminal and disciplinary proceedings. Even worse was the constant humiliation of checking in with his probation officer every time he wished to leave the Broward County area. Although Respondent's counsel repeatedly moved for dismissal of this matter in the lower Court based on undue delay, the Referee erroneously denied the Motions.

This Court has repeatedly made clear its position that disciplinary proceedings are to be handled with dispatch and without any undue delay. The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978), citing The Florida Bar v. King, 174 So.2d 398 (Ha. 1965).

Time after time this Court has substituted its judgment for that of a Referee with regard to the recommendation for discipline, where as here, The Florida Bar has failed to expeditiously prosecute a disciplinary proceeding. This is true even where Respondent's conduct has been described as reprehensible. For example, in The Florida Bar v. King, supra, it was determined that Respondent, inter alia, **knowingly and willfully** testified falsely under oath before a Grand Jury. Additionally, he was

found to have suborned perjury. King made no attempt to defend his conduct, but on the contrary, confessed his misconduct. In the instant case, while Fertig maintains he did not know his acts were illegal when done, upon learning of their illegality, he never denied same. He testified it was the sorriest thing he had ever done and showed great remorse.

In King, this Court refused to follow the Bar's recommendation of disbarment and instead ordered not suspension but a public reprimand. The Referee's Report in King could easily have been written in the instant case:

> "If this matter had been brought before me shortly after the acts of misconduct, I believe I would have unhesitatingly recommended disbarment for a substantial period, if not permanently. **However, the situation has been drastically changed by the lapse of time and the actions of the Respondent in the interim. The misconduct took place over eight years ago.** It is the only act of misconduct ever attributed to the Respondent. Before and since that time, he has conducted himself in an exemplary fashion and earned and retained the confidence of the Bench and Bar of his circuit. Under these circumstances, to recommend **either disbarment or suspension would accomplish no worthy objective."** King at **402.** (Emphasis Supplied)

Obviously in the instant case, Respondent Fertig has retained the confidence of the Bench and Bar of his circuit (T. 69-73, 125-129). Equally obvious is the fact that a lengthy suspension would accomplish no worthy objective and would actually be detrimental to the Bar, as well as the public. In fact, the testimony of Judge Lee (T. 69, et seq.), Phil Spucci (T. 81, et seq.), John Wiederhold (T. 125, et seq.) and others leaves no doubt but that the **suspension of Fertig would adversely affect the Bench, Bar and public.**

The Referee's Report in King continues by explaining that Respondent had been substantially punished by the destruction of his political future, the loss of the $10,000.00 bribe, the expense of defending himself in the criminal and disciplinary proceedings and in the humilitation and embarrassment he must have suffered over the years. His clients did not suffer as a result of his misconduct. King; at 402. With the obvious exception of the loss of the bribe, the foregoing can certainly be said in the case sub judice.

After carefully considering the record in King, this Court opined:

> "The acts committed by Respondent were extremely reprehensible, and we are convinced, as was the Referee, that had this case been diligently initiated and prosecuted at the time of the commission of such acts, we would have considered disbarment required. Had such occurred, and had Respondent now nine years later petitioned for reinstatement and presented the record of exemplary conduct both before and after these acts that he has presented here, we would order reinstatement." King at **403.**

Based on the foregoing, the Court ordered a public reprimand instead of disbarment, stating:

> "In spite of the Respondent's gross misconduct of nine years ago, we believe that by his subsequent exemplary conduct he has earned the right to continue to serve his profession. We believe that he will at all times in the future conduct himself in such a manner as to rectify, insofar as he can, the blemish that he has placed upon his record. If we did not think so, we would agree with the Board of Governors and sustain the order of disbarment. Under the circumstances heretofore related, however, **we consider disbarment or suspension at this late date *to* be excessive.**" King at 404.

Had Fertig been prosecuted by the Bar upon the Bar's discovery of his conduct, and had the Bar been successful in disbarring Fertig, his petition for reinstatement

would by now have been granted by this Court. This assertion is predicated upon the Referee's finding that Respondent has been **totally and completely rehabilitated.**

At this juncture, it is important to note that the principal participants in this scheme have already received their punishments or sanctions, served same, and have resumed their normal daily activities. James V. Dolan presides over a flourishing legal practice. Gerald Smith has been released from prison; he is neither on probation nor parole.

In The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970), this Court once again opted for a ninety (90) day suspension with public reprimand in lieu of the two (2) year suspension recommended by the Board of Governors. The Referee in Randolph made seventeen (17) specific findings of various acts of mishandling of trust assets between 1958 and 1961, inclusive. This Court asserted that these findings illustrated the **grossly irresponsible,** and indeed almost **Willfully abusive** manner in which this trust was administered. Randolph at 636. Notwithstanding the many egregious trust account violations committed by Randolph, this Court opined:

> "**There was no finding of dishonesty. It was more the handiwork of a fool than a knave.**"Randolph at 637.(Emphasis Supplied)

While embarrassing, we must point out that Fertig's conduct almost ten years ago was more akin to that of a fool than that of a knave.

While on the subject of dishonesty, we are mindful of this Court's pronouncement that the concepts of dishonesty and illegality are not coextensive. The Florida

Barv, Pettie, 424 So.2d 734 (Fla. 1983). While we may now concede with the benefit of hindsight that Fertig's acts were illegal, we maintain that they were not dishonest. **Nowhere in the record is there even a shred of evidence evincing the slightest corrupt motive.**

The following passage from Randolph is equally applicable here:

> "In the instant matter, the Respondent points out that for more than six years he has been exposed to the agonizing ordeal of investigations, charges and hearings. During this time, he and his family have been subjected to the stigma of community suspicion and criticism. He comes to this Court with the repentant spirit of one who has tried to hold his head high under awesome professional embarrassment, generated by charges of serious breaches of ethics. He concedes that even if some of the charges of mismanagement have been established, there has been no showing of dishonesty or infamy. **He believes that he has suffered enough and that neither the public nor the profession would profit from the prescription of added punishment.** Randolph at 638. (Empahasis Supplied)

Likewise, in the instant case, Respondent has endured the agonizing ordeal **of** both the criminal investigations and proceedings as well as the Bar proceeding. He has had to advise potential new clients of the situation prior to undertaking their representation. He and his family have had to endure embarrassing newspaper coverage of Respondent's conduct notwithstanding an agreement that there would be *no* press. Perhaps worst of all, he has had the threat of this Bar proceeding looming over his head for all of these years.

Opining that inordinate delays are unfair, unjust and prejudicial to the accused attorney, this Court, in Randolph, supra, explicated:

> "They permit violators to remain active in the practice. They dim the memories of witnesses. They mar effective and efficient enforcement of the canons of ethics. Worst of all, perhaps, they undermine the public confidence in the Bar's pronounced determination to keep its own house in order." The Bar v. Papy, 358 So.2d 4 at 6 (Fla. 1978).

There can be no doubt but that the Bar's delay in filing the Complaint against Fertig was unfair, unjust and prejudicial. Memories of witnesses called to testify at the final hearing had faded (T. 26, 29, 31, 33), and in fact Respondent **Fertig himself could no longer distinguish between what he knew at the time the acts occurred and what he subsequently came to know.** Despite tremendous pressure exerted by the various investigators in this matter including Bar counsel, so much time had elapsed between the actual acts and the subsequent questioning that Fertig was absolutely unable to recall dates and times with any accuracy notwithstanding his every attempt to do so.

Although it has been stated many times, this Court said it best when it explained its position on undue delay:

> "We have repeatedly announced that disciplinary proceedings should be handled with dispatch. In cases of flagrant delays, such as the matter sub judice, we have held 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."

Randolph at 638, citing The Florida Bar v. King, 174 So.2d 398 (Fla. 1965); State ex rel. The Florida Bar v. Rubin, 142 So.2d 65 (Fla. 1962); and State ex rel, The Florida Bar v, Oxford, 127 So.2d 107 (Ha. 1960). This Court continued:

> "**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 praise-less and the blameless dead.'" Randolph at 639.

As a consequence of the inordinate delay in Randolph, this Court imposed **a** ninety day suspension in lieu of the two year suspension urged by the Board of Governors. Comparing the instant case to the facts in Randolph, we can only conclude that the lengthy suspension recommended here by the Referee is excessive.

Where, as here, the Bar abdicates its responsibility for pursuing disciplinary proceedings with dispatch, Respondent should not be made to suffer the consequences of such delay, When the requisite diligence is lacking in disciplinary proceedings,

> "the penalizing incidents which the accused lawyer suffers from unjust delays might well supplant more formal judgments as **a** form of discipline. This is so even though the record shows that the conduct of the lawyer merits discipline." Randolph at 639, citing The Florida **Bar** v. Wagner, 197 So.2d 823 (Fla. 1967).

Counsel for Respondent urge that any mistakes of judgment Chris Fertig may have made in this matter have already been more than sufficiently punished **by** these unduly protracted proceedings. This delay, taken in conjunction with Respondent's total and complete rehabilitation (as well as the totality of the circumstances), mandate that Respondent not now be further punished by a suspension.

CONCLUSION

The Respondent has demonstrated that the Report of the Referee is erroneous, unlawful or unjustified. Accordingly, the Court should enter a judgment reversing the conclusions of the Referee, rejecting his recommendation of a suspension, and ordering a reprimand or dismissal of this cause.

REQUEST FOR ORAL ARGUMENT

The respondent hereby requests oral argument in this cause

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed to Jacquelyn P. Needelman, **Esq.,** Bar Counsel, The Florida Bar, Cypress Financial Center, 5900 N. Andrews Avenue #835, Fort Lauderdale, Florida 33309 and John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 6 day of February, 1989.

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