

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHRISTOPHER R. FERTIG,

Respondent.

CASE NO. 71,886

The Florida Bar Case

No. 86-20,258(17A)

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INITIAL BRIEF OF THE FLORIDA BAR

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PREFACE

For purposes of this brief, The Florida Bar will be referred to as "The Florida Bar" and Christopher R. Fertig will be referred to as "Respondent." The following abbreviations will be utilized:

T - Transcript of final hearing held on June 24, 1988.

TFB EX - Exhibit of The Florida Bar admitted into evidence at final hearing held on June 24, 1988, to be followed by appropriate exhibit numbers.

RR - Report of Referee.

STATEMENT OF THE CASE AND FACTS

This is an attorney disciplinary proceeding conducted under the Rules Governing The Florida Bar.

A formal complaint was filed against the Respondent on February 8, 1988. On the same date, The Florida Bar's Request for Admissions was also filed. On February 24, 1988, the Honorable Sidney B. Shapiro was appointed Referee by the Supreme Court of Florida. On March 23, 1988, this matter was scheduled for final hearing to be held on June 24, 1988.

On May 6, 1988, Respondent submitted his notice of taking deposition of Michael Powell.

On May 9, 1988, The Florida Bar filed its objections to Respondent's Request for Production of Documents, based upon verbal notification of said Request for Production.

Respondent filed his Answer and Affirmative Defenses and responded to The Florida Bar's First Request for Admissions on May 9, 1988.

On May 10, 1988, Respondent filed his Request to Produce. On May 11, 1988, a hearing was held before Judge Shapiro on The Florida Bar's Objections to Respondent's Request to Produce and the Referee sustained The Florida Bar's objections in an Order dated May 19, 1988.

On May 11, 1988, The Florida Bar filed its response denying Respondent's affirmative defenses.

On May 10, 1988, Respondent filed his Request for Admissions. The Florida Bar filed its Response to Respondent's Request for Admissions on May 16, 1988.

On May 24, 1988, The Florida Bar filed its notice of the taking of the deposition of Christopher R. Fertig.

The final hearing in this cause was held on June 24, 1988. Bar

Counsel advised the Referee that Staff Counsel and Bar Counsel of The Florida Bar recommended that the discipline in this cause be suspension for a period of six (6) months and that the recommendation of the Designated Reviewer of The Florida Bar was for suspension for a period of sixty (60) days.

The parties submitted memorandum of law. On July 20, 1988, the Honorable Sidney B. Shapiro, Referee, submitted his Report finding the Respondent guilty of the rules indicated in the complaint, Florida Bar Integration Rule, article XI, Rules 11.02(3) (a) and 11.02(3) (b). The Referee recommended that the Respondent be suspended for a period of twelve (12) months with no proof of rehabilitation required.

The Board of Governors of The Florida Bar, at its meeting which ended September 30, 1988, voted to file a petition for review requesting that the discipline in this cause be suspension for a period of ninety (90) days. The Florida Bar filed its petition for Review in this Honorable Court on October 17, 1988. Respondent submitted his Petition for cross review on October 19, 1988.

The Florida Bar's complaint concerned Respondent's nolo contendere plea to an Information for violating the Racketeer-Influenced and Corrupt Organizations Act (TFB EX. 1). At the final hearing, The Florida Bar introduced into evidence copies of sworn statements given by Respondent on August 14, 1984, August 16, 1984 and August 20, 1984, admitted as TFB's Exhibits 2, 3, and 4 respectively. In said statements Respondent admitted his active involvement in a money laundering operation for a drug Smuggler, one Jerry Smith.

As to Florida Bar's Exhibit 2, The August 14, 1984 statement, The Florida Bar specifically points out the following statements made by the Respondent under oath:

(a) Page 38, lines 8 through 20, wherein Respondent acknowledged he received cash from Jerry Smith and he knew what Jerry Smith was doing.

(b) Page 39, Lines 22-24, Respondent referenced an unspoken understanding.

(c) Page 55, line 6 through line 22, regarding Respondent knowing that boats were being used as dope boats.

(d) Pages 57-58, regarding Respondent's boat being used for marijuana.

(e) Page 58, line 23, through page 59, line 23, concerning bringing cash to the Bahamas and bringing back checks.

(f) Page 60, line 25 through page 62, line 25, regarding bringing more than \$5,000 in cash to the Bahamas on two (2) or three (3) occasions.

(g) Page 67, line 5, through page 68, line 25, wherein Respondent admitted that at the time he started receiving cash, he knew that said cash came from Jerry Smith's illegal drug smuggling enterprise, and that the purpose of Respondent performing these tasks was to hide the ownership and source of the funds.

(h) Page 69, line 10 through page 70, line 9, wherein Respondent admitted again and acknowledged that he took drug money to a foreign country to hide the source and ownership of the money and that he knew the money's source was from a drug enterprise.

(TFB's Ex. 2).

As to Respondent's August 16, 1984 statement, The Florida Bar's Exhibit 3, The Florida Bar specifically points out the following:

(a) Page 18, Line 8 through page 22, line 18, concerning Respondent's negotiation of a purchase of a marina for Jerry Smith with

Jerry Smith's drug money.

(TFB's Ex. 3).

As to Respondent's August 20, 1984 statement, The Florida Bar's Exhibit 4, The Florida Bar specifically points out the following:

(a) Page 11, line 18, through 24, wherein Respondent acknowledged he had to have known by April-June 1979 that Jerry Smith was a drug smuggler. At about this same time, Respondent borrowed money from Jerry Smith (see Composite Exhibit 5 and T. 37-42).

(b) Page 17, line 3, through page 20, line 7, concerning cash being taken to the Bahamas to hide its source.

(c) Page 23, line 23, through page 24, line 6, wherein Respondent acknowledged he received cash from Jerry Smith's dope smuggling business.

(TFB's Ex. 4).

The Referee found in pertinent part the following:

4. Respondent attempted to explain his actions and dealings with Jerry Smith which actions were clearly criminal in nature. (TR. 30-51).

5. There is no question but that based upon the evidence presented, Respondent is guilty of violating the Code of Professional Responsibility and specifically those rules indicated in the complaint.

(See Report of Referee, Findings of Fact, PP 1-2).

The Referee further found as follows:

I recommend that the Respondent be suspended for a period of twelve (12) months. Contrary to Rule 3-5.1 (e), Rules of Discipline, based upon further observations of the undersigned, I recommend that no proof of rehabilitation be required. Mr. Fertig has in the past several years conducted himself in a manner which has convinced the undersigned that he is now totally and completely rehabilitated. The recommendation for discipline is made for a two-fold purpose - for punishment for the acts committed and as a deterrent to others. The

actions of **Mr.** Fertig were extremely serious. He has mitigated these actions by cooperating with authorities and turning his life around since he committed these illegal acts. It is based upon these considerations and mitigating factors that a suspension is recommended as opposed to disbarment. (P. 2, Par. IV, Report of Referee.

The Respondent presented character witnesses at the final hearing.

SUMMARY OF ARGUMENT

I. **THE DISCIPLINE TO BE IMPOSED IN
THIS CAUSE SHOULD BE SUSPENSION
FOR A PERIOD OF NINETY (90) DAYS.**

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 be suspension for a period of ninety (90) days. In The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1983), The Respondent's cooperation with law enforcement agencies justified a reduction in the recommended discipline.

The Referee stated in his report that he was recommending suspension as opposed to disbarment because of the rehabilitation demonstrated by the Respondent, his cooperation with authorities and turning his life around since his commission of the illegal acts. (P. 2, Report of Referee, Par. IV.)

Due to the length of time since the misconduct occurred and the rehabilitation found by the Referee, The Florida Bar submits that a ninety (90) day suspension will be sufficient in this cause.

ARGUMENT

I. THE DISCIPLINE TO BE IMPOSED IN THIS CAUSE SHOULD BE SUSPENSION FOR A PERIOD OF NINETY (90) DAYS.

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 be suspension for a period of ninety (90) days.

Case law definitely supports a suspension in this matter. In The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1983), the Respondent was suspended for a period of one (1) year in light of his voluntarily initiated contact with law enforcement agencies and cooperation with them, including risking his life.

In this case, Respondent assisted regarding forfeitures and Respondent testified that he felt he was in danger wherein he helped locate someone. However, Respondent acknowledged that he was first contacted by police officers in this matter. (T. 50).

In The Florida Bar v. Lewis, 145 So.2d 875 (Fla. 1962), the Respondent attorney was disbarred for fraudulently concealing the assets of a bankrupt estate. In the instant case, Respondent similarly helped conceal illegal drug money.

In The Florida Bar v. Beaver, 248 So.2d 477 (Fla. 1971), the Respondent was suspended for one (1) year for counseling his client to secret assets to misrepresent his client's financial condition and allowing his client to deposit money in his trust account for that purpose. The instant Respondent's conduct involved money laundering for illegal drug smuggling activities and Respondent personally helped carry out the activities.

In The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla. 1985), the

Respondent was suspended for three (3) years for a conviction of conspiracy to possess with intent to distribute cocaine wherein there existed mitigating factors and wherein he demonstrated a potential for rehabilitation.

The instant Respondent has also established mitigating factors.

In The Florida Bar v. Melvin R. Horne, Case No. 70,932 (July 7, 1988), the Respondent was disbarred for misconduct involving money laundering.

In The Florida Bar v. Meros, 521 So.2d 1108 (Fla. 1988), the Respondent was disbarred for convictions for drug and racketeering offenses.

In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), the Supreme Court stated that Discipline must serve three (3) purposes:

(1) First, 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) Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. (3) Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations (citations omitted) Id., at 986.

Respondent testified concerning mitigating factors and clients testified concerning their need and preference for the Respondent's representation. Additionally, an important factor is to deter other attorneys who might be tempted to engage in similar unethical and illegal activities.

In November 1986, The Florida Bar's Board of Governors approved Florida's Standards for Imposing Lawyer Sanctions. The Florida Bar submits that the following standard is relevant in this cause:

5.12 Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice law.

Respondent's good behavior subsequent to his criminal misconduct is certainly noteworthy and justifies why The Florida Bar is not seeking a disbarment or lengthy suspension.

The Referee stated in his report that he was recommending a suspension as opposed to disbarment because:

(1) The Respondent in the past several years conducted himself in a manner which convinced the Referee that he is totally rehabilitated; (2) the recommendation for discipline is made for a two-fold purpose - for punishment for the acts committed and as a deterrent to others. The actions of Mr. Fertig were extremely serious. He has mitigated these actions by cooperating with authorities and turning his life around since he committed these illegal acts. (P. 2, **Report** of Referee, Par. IV).

At the final hearing Respondent presented the testimony of clients and a Circuit Court Judge **who** has known the Respondent in his legal career and personally.

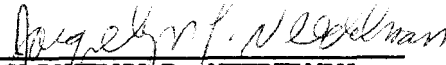
Respondent's nolo plea to the criminal charge took place on April 1, 1986. The criminal misconduct occurred between March 1, 1978 and April 28, 1983. (TFB Ex. 1.)

Due to the length of time since the misconduct and the rehabilitation found by the Referee, The Florida Bar submits that a suspension for a period of ninety (90) days will be sufficient discipline in **this** cause.

CONCLUSION

For the Above stated reasons, The Florida Bar respectfully requests **this** Honorable **Court** to uphold the Referee's findings of fact, impose a discipline of suspension for a period of ninety (90) days and have execution issue against the Respondent in the of \$2,003.01 for the costs **incurred** by The Florida Bar in **this** proceeding.

Respectfully submitted,

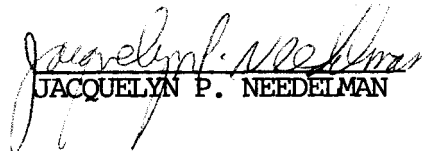

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of The Florida Bar has **been** forwarded to Lance J. Thibideau, Attorney for Respondent, 901 South Federal Highway, Suite 300, Fort Lauderdale, Florida 33316, via certified mail, return receipt requested, #P 608 633 092; a copy to Robert C. Josefsberg, Attorney for Respondent, City National Bank Building, Suite 800, 25 West Flagler Street, Miami, Florida 33130, via certified mail, return receipt requested, #P 608 633 093, on **this** 14th day of November, 1988, and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.


JACQUELYN P. NEEDELMAN