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)

# REPLY AND ANSWER BRIEF OF THE FLORIDA BAR

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TABLE OF CONTENTS

TABLE OF CASES AND CITATIONS

TABLE OF CASES AND CITATIONS CONTINUED

## 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 FACTS

The Florida Bar hereby points out the following inaccuracies contained in Respondent's Statement of the Case and Facts:

Respondent's brief at page 3, paragraph 2 states in pertinent part "Fertig found no law prohibiting the transfer of funds ...." Although Respondent cites pages **164-165** for this statement, no support for same is found in the record.

Additionally, at page 3, paragraph 3 of his brief, Respondent attributes the pilot saying "Fine, maybe there is something at the other end," when the transcript at page **165** reflects that the Respondent made this statement.

At page 9, paragraph 2 of his brief, Respondent claims that "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". The facts argued by The Florida Bar came from the Respondent's own sworn testimony which was admitted as The Florida Bar Exhibits 2, 3 and 4. Said statements speak for themselves.

In its Memorandum Of Law, The Florida Bar advised the Referee that the discipline recommended was: Staff Counsel and Bar Counsel recommended a suspension for a period of six **(6)** months. The Designated Reviewer recommended a suspension for a period of sixty **(60)** days.

After its review of the Report of Referee, the Board of Governors determined that The Florida Bar **seek** suspension for a period of ninety (90) days in this cause.

## SUMMARY OF ARGUMENT

Based upon the facts of Respondent's criminal plea and the mitigating factors present in this case, The Florida Bar is recommending that the Respondent be suspended for a period of ninety (90) days. One of the mitigating factors present in this case is that the misconduct charged occurred beginning in 1979.

Pursuant to The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984), the Respondent was given an opportunity to explain the circumstances of his plea in the criminal case. The Referee's findings of fact should be upheld by this Court.

The discipine sought by The Florida Bar is based upon proper factors. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

This Court should consider discipline imposed in similar cases.

There was no undue delay by The Florida Bar in this case. However, where a delay has been found, the Court has reduced the discipline and has not dismissed the changes. The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978).

The Florida Bar is only seeking a ninety (90) day suspension because of the rehabilitation evidenced by the Respondent and the length of time that has passed since the misconduct occurred through no fault of The Florida Bar.

## ARGUMENT

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

The Florida Bar is submitting this brief and ignoring the aspersions cast by Respondent in an apparent attempt to excuse his misconduct. The Florida Bar will address the issues before this court concerning the Respondent's misconduct and will address matters advanced in Respondent's brief.

The mitigating factors found by the Referee were that 1) the Respondent was totally and canpletely rehabilitated and 2) that he cooperated with authorities and is turning his life around since he committed these illegal acts. (RR, page 2).

The Florida Bar disputes the following mitigating factors stated by the Respondent in his brief:

(1) "Respondent's repeated efforts to rectify the consequences of misconduct'' (P. 13, Respondent's brief). Respondent testified at trial that he had not gone to the authorities prior to the time that he was contacted by some police officers (T. 50). The Florida Bar submits that without same, this mitigating factor fails.

(2) "Respondent's full, free and cooperative disclosure to all investigating authorities" (P. 13, Respondent's brief). In his testimony before the Referee, the Respondent attempted to negate the full effect of his prior sworn testimony (T. 226-227). The Florida Bar contends that such conduct does not exhibit full, free and cooperative disclosure.

(3) "The inordinate delay by the Bar in bringing these proceedings" (P. 13, Respondent's brief). The Florida Bar disputes that there existed an inordinate delay by The Florida Bar in bringing these proceedings. This point will be addressed in issue IV of this brief.

As indicated in The Florida Bar's initial brief, the Respondent's misconduct was serious. However, The Florida Bar views that the mitigating circumstances justify the discipline in this cause being a suspension for a period of ninety (90) days.

The Referee found that "4. Respondent attempted to explain his actions and dealings with Jerry Smith which actions were clearly criminal in nature." (RR, p. 1, paragraph II 4.).

The Referee's findings of fact are supported by the record and by clear and convincing evidence and should therefore be upheld by this Court. The Referee's findings of fact should be accorded substantial weight and should not be overturned unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Hawkins, 444 So.2d 961, 962 (Fla. 1984); The Florida Bar v. Lopez, 406 So.2d 1100, 1102 (Fla. 1962), The Florida Bar v. Carter, 410 So.2d 920, 922 (Fla. 1982).

The Florida Bar submitted as evidence the information filed against the Respondent and the disposition evidencing that the Respondent plead nolo contendere and that adjudication of guilt was withheld. (TFB's Composite Ex. 1). The Florida Bar further introduced as Exhibits 2, 3 and 4 sworn testimony given by the Respondent on August 14, 1984, August 16, 1984 and August 20, 1984. In The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984), this Court held that nolo contendere pleas are admissible in disciplinary proceedings and stated that what is important

is that the Respondent attorney be given an opportunity to explain the circumstances surrounding his plea, Id. The Respondent testified fully at the final hearing. The Respondent introduced testimony challenging the criminal proceedings. Such challenge would be appropriate in the criminal court. In the hearing before the Referee the Respondent testified and explained the circumstances of his plea in accordance with The Florida Bar V. Lancaster, supra. The Referee then made findings of fact finding the Respondent guilty of engaging in criminal activity (RR).

Respondent disputes that he knowingly participated in criminal misconduct. The Referee found that the Respondent's conduct was clearly criminal in nature. The criminal information that Respondent plead nolo contendere to contained language that the Respondent and other individuals did unlawfully, willfully and knowingly conduct and participated in said enterprise through a "pattern of racketeering activity..." (TFB's Composite Ex. 1). Although Respondent testified that he was pressured into entering his criminal plea without much notice, the Referee's findings concern the criminal information against the Respondent. (See RR, page 1 and 2, Findings of Fact). Said information is attached hereto as Appendix I.

Accordingly, The Florida Bar submits that case law evidencing knowing and illegal misconduct is certainly appropriate and necessary to present to this Court.

The case of The Florida Bar V. Lewis, 145 So.2d 875 (Fla. 1962) is certainly relevant as Respondent Lewis was disciplined after being convicted of fraudulently concealing the assets of a bankrupt estate.

In the instant case, the Respondent's misconduct concerned money laundering and hiding the ownership and source of the funds. (See TFB's Ex. 2, page 67, lines 5 through 22). Respondent further stated in this sworn testimony that he engaged in these acts with knowledge of what he was doing (TFB's Ex. 2, page 67, line 23 through page 68, line 4, page 69, line 10 through page 70, line 9).

The Florida Bar disputes that the Respondent was an unknowing participant in illegal activity based upon the Respondent's own sworn testimony which is specified at pages 2 through 4 of TFB's initial brief in this cause. In Seaboard Coast Line Railroad Company V. Nieuwendaal, 253 So.2d 451 (Fla. 2d DCA 1971), the court stated:

> It is well settled that an admission against interest may be introduced into evidence as substantive evidence of the truth of the matter stated. This is so even though the person making the admission against interest subsequently denies making such admission. Id., at 452.

The germane Bar rules and case law in effect at the time of Respondent's guilty plea is the same as the present rules and case law. Prior to Respondent's criminal plea, attorneys were disciplined for conduct involving nolo contendere pleas. See The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981) and The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1980). Additionally, in The Florida v. Burch, 195 So.2d 558 (Fla. 1967), the Respondent was disciplined based upon a nolo contendere plea and a withhold of adjudication in a criminal case.

The case of The Florida Bar V. Horne, 527 So.2d 816 (Fla. 1988), clearly involves money laundering and is relevant. The Horne case

lacked the mitigating factors present in the instant case and accordingly Respondent Horne was disbarred. Based upon the mitigating factors in the instant case, the Respondent's rehabilitation and the length of time since the misconduct occurred, The Florida Bar is only seeking a discipline consisting of a ninety (90) day suspension.

The Referee in his report stated that he recommended a suspension as opposed to disbarment based upon the mitigating factors he found. (RR, page 2, paragraph IV.).

Respondent's plea concerned a racketeering offense as also existed in The Florida Bar v. Meros, 521 So.2d 1108 (Fla. 1988). Certainly Respondent Meros' misconduct was more severe and he received disbarment for same.

In The Florida Bar v. Stoskopf, 513 So.2d 141 (Fla. 1987), the Respondent received a ninety (90) day suspension and probation for five (5) counts of failure to report a financial interest in a foreign bank account and one (1) count of conspiracy to commit the other offenses. Respondent's misconduct appeared to have involved his having signatory authority on a Panamanian bank account, an arrangement devised as a service to *some* clients and without any unlawful or corrupt intent on the Respondent's part.

The instant Respondent should similarly be suspended for ninety (90) days.

Based upon the foregoing and the argument presented in The Florida Bar's initial brief in this cause, the discipline in this cause should be a suspension for a period of ninety (90) days based upon the mitigating reasons and the findings of the Referee (See RR, pages 1-2).

11. THE DISCIPLINE SOUGHT BY THE FLORIDA BAR IN THIS CAUSE IS BASED UPON PROPER FACTORS.

In The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) and The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), this 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 fran 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 tim 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.

Accordingly, it is appropriate for a factor of discipline to be to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Additionally, the deterrence of others is also appropriate as the Lord and Pahules cases indicate, rehabilitation is not the only purpose for discipline of attorneys. In the Lord case, the Referee found that the Respondent had been rehabilitated and the Respondent received a suspension as the discipline in the case.

In a case involving serious misconduct as the instant one (See TFB's Ex.'s 2, 3 and 4), suspension for a period of ninety (90) days is appropriate in accordance with the mitigation involved in this cause.

## 111. THE COURT SHOULD CONSIDER DISCIPLINE IMPOSED IN SIMILAR SITUATIONS.

In determining discipline, this Court should certainly consider discipline imposed in similar situations. The cases cited in The Florida Bar's original brief and in issue one of this brief discuss cases including similar or related misconduct. Respondent Dolan's discipline in The Florida Bar v. Dolan, 452 So.2d 563 (Fla. 1984) (Supreme Court Case No. 65,059), concerned Dolan's criminal nolo plea and withhold of adjudication of guilt concerning the criminal charge of perjury in an official proceeding. Respondent Dolan received a suspension for a period of ninety (90) days. The criminal charge that the instant Respondent entered a plea to and that is the subject of this disciplinary matter concerns money laundering and a pattern of racketeering activity.

The instant case concerns the Respondent Christopher R. Fertig. Accordingly, The Florida Bar does not feel that it is appropriate in this brief to address what was done or not done in the Dolan matter.

The Florida Bar feels that it is not appropriate for Joan Smith's statement to be attached to the appendix when same was not offered in evidence before the Referee. However, The Florida Bar will not object to the inclusion of said statement.

In paragraph three of page 2 of his brief, Respondent makes the following statement:

> 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.

The record is abundantly clear that The Florida Bar represented in this proceeding that no case existed on Mr. Fertig regarding this matter prior to his nolo contendere plea in April, 1986 and that The Florida Bar was not aware of a criminal investigation concerning Mr. Fertig. (See transcript of May 11, 1988 hearing before the Referee, pages 8-9 and page 17). The Florida Bar never contended that Fertig's name had not been heard.

Accordingly, based upon the case law previously presented and the mitigating factors present in this case, The Florida Bar submits that a ninety (90) day suspension is appropriate.

## IV. THERE WAS NO UNDUE DELAY BY THE FLORIDA BAR.

The Respondent contends that Joan Smith's September 15, 1983 statement (Appendix III to Respondent's brief) provides substantial evidence that the Bar was aware and investigated the instant Respondent as far back as 1981. Ms. Smith's statement, however, evidences the contrary.

The statement of Ms. Smith evidences that it was taken by an agent with the Drug Enforcement Administration and that Patrick N. Brown, a member of a Florida Bar Grievance Committee, was present at the taking of this statement. The statement appears to have mainly concerned Jerry Smith and James Dolan, Esquire. However, there were *some* questions asked regarding Christopher Fertig. On page 41, lines 9 and 10, the following question was asked and answered:

> Q. Did you ever see Chris Fertig receive any monies?
>
> A. I never saw Chris Fertig receive any monies.

On page 46, lines 15 through 17, the following question was asked and answered:

> Q. Have you heard anything with respect to Chris Fertig's involvement with money?
>
> A. No, sir.

Said answers and testimony of Ms. Smith evidence no reason for The Florida Bar to open a file on Mr. Fertig. Additionally, the statement made no reference concerning any criminal investigation regarding Mr. Fertig.

Further, at the hearing held on May 11, 1988, the Referee was unimpressed with Respondent's argument on this point. (See transcript of May 11, 1988 hearing).

Respondent's counsel acknowledged at the May 11, 1988 hearing that his client did not come to The Florida Bar during the pendency of the criminal investigation (See transcript of May 11, 1988 hearing, page 15, lines 18 through 25).

The record is clear that during the pendency of the criminal investigation that the Respondent's attorneys were concerned about the effect of Respondent's criminal plea upon Florida Bar proceedings and that Respondent's attorneys even attempted to convince the criminal authorities not to take any affirmative steps towards institution of Bar proceedings. (See Respondent's Ex. B and testimony of Respondent's attorneys, T. 116-117, 201-202).

Accordingly, it is clear that the Respondent was aware that there were no Bar proceedings pending prior to his plea in the criminal case.

The transcript of the hearing before Judge Shapiro, the Referee, on May 11, 1988 makes it clear that The Florida Bar's position was that The Florida Bar was unaware of a criminal investigation concerning the Respondent until he entered his plea on or about April 1, 1986. (See transcript of May 11, 1988 hearing, pages 6-8, 17). The Florida Bar did state that Respondent's name probably came to the attention of The Florida Bar as he was a partner or associate of Dolan. Ms. Smith's 1983 statement (Appendix III to Respondent's brief) evidences that there was no reference to any wrong doing on Respondent Fertig's part.

Once Respondent entered his plea on or about April 1, 1986 and the matter came to the attention of The Florida Bar, negotiations were engaged in between Bar Counsel and Counsel for the Respondent. The Florida Bar's Complaint was filed on February 8, 1988 when it was clear that negotiations could not be reached. The Referee entertained discussion on this subject (T. 52-55).

The Florida Bar disputes that there was an undue delay. However, in cases where delay has been found, the Court has reduced the discipline and has not dismissed the charges. In The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978), where it took a period of six (6) years for the processing of the case, the Court took such factor into consideration in reducing the discipline to a suspension for a period of one (1) year instead of the disbarment recommended by the Referee.

In The Florida Bar v. Randolph, 238 So.2d 635, 639 (Fla. 1970), the Respondent was publicly reprimanded and suspended from the practice of law for ninety (90) days and thereafter until he paid the costs of the disciplinary proceedings. In Randolph, seven (7) years had transpired since the disciplinary processes were set in motion and ten (10) years had passed since *some* of the alleged misconduct occurred.

In The Florida Bar v. King, 174 So.2d 398 (Fla. 1965), the Respondent received a public reprimand due to the delay found in the case. The misconduct occurred eight (8) years prior to The Florida Bar's charges being filed. The King opinion is silent as to the reason why the Respondent was not charged earlier.

The record is clear in the instant case that The Florida Bar's case began when the Respondent entered his plea in April 1986. (T. 52-55).

It is also clear that Respondent's attorneys were concerned about what action The Florida Bar would take once his plea was entered. (See Respondent's Ex. B, T. 116-117, 201-202). The criminal proceedings regarding the Respondent appear to have taken several years. However, that is a matter that could have been raised in the criminal case.

Respondent contends that memories of witnesses called to testify at the final hearing had failed. The first such witness was Andrew Slater, who had been an Assistant State Attorney involved in the case. Mr. Slater testified that his memory would have been best four (4) years ago when he took the statements. (T. 31). The statements were taken in 1984. However, Mr. Slater further testified that Respondent's criminal plea did not take place until 1986 and that copies of the statemnts were not furnished to The Florida Bar until 1986. (T. 31). Further, Mr. Slater identified the August 14, 16 and 20, 1984 statements as the statemnts that he took from Mr. Fertig. (T. 11-12).

Respondent testified at the final hearing before the Referee that he had a hard time with dates and times (T. 33). However, Respondent also testified at the final hearing that at the time he gave the 1984 statements (TFB's Exs. 2, 3 and 4) he had absolutely no idea as to dates and times (T. 209, lines 7-8). Further, TFB submits that the sworn testimony given by the Respondent in The Florida Bar's Exhibits 2, 3 and 4 speaks for itself.

The discipline being sought by The Florida Bar in this cause is suspension for a period of ninety (90) days. The Florida Bar is only seeking a ninety (90) day suspension because of the rehabilitation evidenced by the Respondent and the length of time that has passed since

the misconduct occurred. However, The Florida Bar contends that the length of time involved in this case is no fault of The Florida Bar. During the pendency of his criminal case, the Respondent did not come forth to The Florida Bar regarding same. (See page 15, lines 18–25 of May 11, 1988 transcript before the Referee).

The misconduct engaged in by the Respondent was serious. However, due to his rehabilitation and the period of time since the misconduct, The Florida Bar feels that a ninety (90) day suspension is appropriate. Reprimand or dismissal is not warranted under the facts of this case.

## CONCLUSION

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

Respectfully submitted,

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