

W00A

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. 71,886

V.

The Florida Bar Case

No. 8620,258(17A)

CHRISTOPHER R. FERTIG,

Respondent.

FILED
 SID J. WHITE
 MAR 6 1999
 CLERK, SUPREME COURT
 Deputy Clerk

REPLY BRIEF
OF CHRISTOPHER R. FERTIG

ROBERT C. JOSEFSBERG
Podhurst, Orseck, Josefsberg, Eaton,
Meadow, Olin & Perwin, P.A.
801 City National Bank Bldg.
25 W. Flagler
Miami, Florida 33130

DONNA E. ALBERT
750 S. E. Third Avenue
Suite 200
Fort Lauderdale, FL 33316

LANCE THIBIDEAU
901 South Federal Highway
Suite 300
Fort Lauderdale, Fl 33316

TABLE OF CONTENTS

| | |
|--|------------|
| Table of Citations | ii |
| Preliminary Statement | iii |
| Supplemental Statement of Facts | 1 |
| Summary of Argument | 2 |
| Argument | 4 |
| Conclusion | 10 |
| Certificate of Service | 11 |

TABLE OF CITATIONS

| | |
|--|---|
| The Florida Bar v. Horne, 527 So.2d 816 (Fla. 1988) | 8 |
| The Florida Bar v. Lewis, 145 So.2d 875 (Fla. 1962) | 8 |
| The Florida Bar v. Meros, 521 So.2d 1108 (Fla. 1988) | 8 |
| The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982) | 7 |
| The Florida Bar v. Stoskopf, 513 So.2d 141 (Fla. 1987) | 9 |

..

PRELIMINARY STATEMENT

This reply brief is filed on behalf of Christopher R. Fertig.

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.

RB. for reference to the Reply and Answer Brief filed by The Florida Bar.

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

All emphasis has been supplied unless otherwise noted.

SUPPLEMENTAL STATEMENT OF FACTS

The Florida Bar incorrectly asserts that there is no support for the contention that Fertig found no law prohibiting the transfer of funds (RB-1). Respondent's clear testimony was that he went to the United States Code to look up the law (T . 1 6 4). He found no law prohibiting the transfer of funds.

Fertig once again asserts that the Bar continues to confuse the issues by failing to distinguish between what he knew at the time of his actions and what he subsequently came to know. Respondent's unrebutted sworn testimony all along has been that he is not accurate with dates and times and cannot recall same. Also, the Bar consistently fails to mention that the questions Fertig was asked were prefaced

"with the knowledge **that you** have **today**, either directly **or** indirectly, do you know...?"(TFB EX #2 page 15)

The Bar attached to its brief a copy of the Information which charges Fertig and others with criminal acts "beginning on or about March 1, 1978 and continuing thereafter through and including April 28, 1983..." During the nolo plea hearing there was no admission or denial of the relevant dates. During the grievance proceedings, Fertig maintained that all questionable conduct terminated in the beginning of 1980. The Bar never contested Fertig's position and there has never been a scintilla of proof at the criminal court plea or at the Bar grievance proceedings that Fertig's improper activity continued past January 1980.

The brief submitted by the Bar in support of the ninety day suspension cites the same cases and makes the same arguments as were cited and made in The Florida Bar's memorandum of law in support of a six month suspension. There is no need to repeat our disagreement with The Florida Bar's analysis of the case law.

SUMMARY OF ARGUMENT

Respondent adopts the Summary of Argument set forth in his Answer Brief/Initial Brief on Cross Petition for Review.

The Bar correctly states that one of the mitigating factors present in this case is that the misconduct charged occurred beginning in 1979 (RB-2). However, it neglects to mention that the proscribed conduct terminated shortly thereafter. In other words, the last act for which the Bar now seeks to impose discipline occurred more than nine years ago. This fact is critical to this Court's fair resolution of this matter. The obvious undue delay in this case mandates a reduction in the penalty to be imposed.

Unfortunately, the Bar's pronouncement that the criminal proceedings regarding Respondent appeared to have taken several years (RB-14) does not make amends for the unnecessary suffering and expense inflicted on the Respondent as a result of the delay by both the criminal authorities and The Florida Bar.

The Bar correctly states that Respondent was afforded an opportunity to explain his nolo plea, but once again entirely fails to mention that the Referee made no finding that Respondent participated knowingly as alleged by the Bar. Motive, intent and knowledge are relevant factors for this Court's consideration in evaluating the allegations of dishonesty.

The Bar correctly states that this Court should consider the discipline imposed in similar cases (RB-2). No case is more similar than the case of Fertig's employer, James V. Dolan. Even though the Bar was aware Mr. Dolan was personally involved¹ with drug dealing, and masterminded a money laundering operation, The Florida Bar

1 Statement of Joan Smith September 15, 1983 pages 49 through 58.

filed a brief with this Court urging this Court's acceptance of a ninety (90) day suspension. The Florida Bar falsely represented the following to this Court:

"respondent [Dolan] is currently cooperating with and assisting a local police agency in a **drug** trafficking investigation; **respondent not being a party to such activity.**" Brief of The Florida Bar, The Florida Bar v. James Vincent Dolan, Filed May 10, 1984 page 5.

After carefully considering the briefs, this Court five years ago ordered only a ninety (90) day suspension for Mr. Dolan who had, among other things, physically assisted in the offloading of marijuana-filled boats and absconded with a million dollars of his drug-dealing client's funds².

Finally, while the **Bar** is seeking "only" a ninety (90) day suspension, Respondent and his 18 employees are **only** seeking a just and fair result. In light of the Referee's finding of Respondent's total and complete rehabilitation, a suspension requiring proof of rehabilitation would be both unfair and a total waste of this Court's time.

2 Ibid.

ARGUMENT

The Florida Bar has once again attempted to tap dance around the two major issues in this case, to-wit: Firstly, the passage of more than nine years since the last act occurred on the part of Respondent. Secondly, the fact that his employer, James V. Dolan, was suspended five years ago, for a period of only ninety days, for far more serious conduct.

The Florida Bar does not consider it appropriate to address what was done or not done in the Dolan matter. The fact that no case more closely parallels the instant case mandates that we scrutinize the Dolan case in an effort to evaluate the instant case fairly and achieve some degree of parity. Were this Court to ignore the Dolan matter, as The Florida Bar continues to urge, the ensuing disparity would make a mockery of this entire process. The message this Court would send by imposing more severe punishment on a minor player than on the mastermind himself would be illogical and tend to undermine the entire disciplinary system.

It is paradoxical that The Florida Bar distinguishes the Dolan case because it deals with merely making a false statement. The reason it deals only with making a false statement is because the Bar chose the disciplinary charge. They took the case of Jerry Smith's counsel in a drug smuggling case and whitewashed the offense down to that of making a false statement: The Bar chose to ignore the physical offloading of marijuana, the money laundering scheme and the theft of client funds, and instead chose to charge Dolan with perjury. We do not question The Florida Bar's right to undercharge Mr. Dolan, but to now advocate in these proceedings that Dolan's crime is less severe than Fertig's crime is intellectually dishonest.

It is difficult to demonstrate to this Court the unfairness, pervasive misrepresentation and basically misleading nature of The Florida Bar's position more clearly than The Florida Bar itself has done. In its brief at pages 11-12, The Florida Bar states:

"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)."

Based on The Florida Bar's brief, one would assume that Joan Smith's statement of September 15, 1983 was presented to the Referee. It was not. The Florida Bar had the statement, but in pre-trial discovery prevented Fertig from receiving it. In

November of 1988, long after the Referee's hearing in May, long after the final hearing in June, and long after the Referee's decision in July, Respondent's counsel received a copy of Joan Smith's sworn statement which was attached as an appendix to Fertig's first brief. Prior to that time only The Florida Bar had the statement.

We cannot, at this stage, raise evidentiary issues regarding The Florida Bar's failure to produce the statement at the Referee's hearing, but we do deeply resent their presentation on pages 11 and 12. The Referee **was not unimpressed** with this point. Rather, **he was unaware** of this point.

It is correct that Ms. Smith's answers do not incriminate Mr. Fertig. However, the Bar representative's questions clearly indicate an awareness of Mr. Fertig and an interest in his conduct at the time the statement was given.

The Florida Bar would have this Court believe that the Referee found Respondent guilty of knowingly and willfully committing criminal acts. Such is not the case. Although afforded every opportunity to do so, the Referee never made a finding that Fertig's participation was knowing or willful, nor did he conclude that Fertig had any ill motive such as greed or avarice. In fact, the record supports Respondent's contention that such motive was clearly absent.

Respondent does not seek to minimize or justify his two trips to the Bahamas to deposit money in the bank. Respondent does not now, nor has he ever denied making the trips almost ten years ago. However, the two (2) overt acts do not constitute "dishonest" conduct or conduct prejudicial to the administration of justice.

Disciplinary Rule 1-102 provides as follows:

DR 1-102 Misconduct.

(A) A lawyer shall not:

- (1) Violate a disciplinary rule.
- (2) Circumvent a disciplinary rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Respondent contends that the word "dishonesty" was not intended to be and is not sufficiently broad to encompass any and all alleged criminal activity. Respondent submits that his activities did not constitute conduct which was dishonest. "Dishonesty" is defined in Black's Law Dictionary as "disposition to lie, cheat or defraud; untrustworthiness; lack of integrity." (Revised Fifth Edition, 1979p. 421) "Illegal" is defined in Black's Law Dictionary as "against or not authorized by law." (Revised Fifth Edition, 1979p. 673) This Court affirmed the position that much that is illegal is not dishonest. The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982). There is not a shred of evidence of any corrupt motive or other dishonest intent in the instant case.

The Bar's attempt to detract at this late date from the mitigating factors raised by Respondent at the time of the final hearing of this matter and subsequently in his brief is both misguided and untimely. No evidence whatsoever was adduced by the Bar at the time of trial tending to dispute any of the mitigating factors presented by Respondent. The Bar's efforts to contort the facts and testimony at the appellate level are unpersuasive and improper. Nonetheless, we will address them in an effort to elucidate the situation.

The undisputed fact is that at all times Respondent cooperated as fully and freely as possible with law enforcement agencies. In fact, the referee found "he has mitigated these actions by cooperating with authorities.." (RR-2). As a consequence of this cooperation, it is undisputed that both Respondent's life and the lives of his family members were in danger. Respondent actually located Jerry Smith for the police and State Attorney. Additionally, Fertig enabled authorities to arrest and convict Howard (Scooter) Alford. The fact that the police called Respondent prior to his calling them should in no manner detract from the assistance he rendered.

Next, the Bar suggests that by attempting to defend himself at the disciplinary hearing of this matter, Fertig has committed some further breach of ethics. Contrary to the Bar's assertion (RB-3), Fertig did not attempt to negate the effect of his prior sworn testimony, but rather attempted to clarify and explain same. As Fertig was not afforded an opportunity to explain his conduct either at a jury trial of the criminal case or during a grievance committee hearing of this matter, the disciplinary hearing afforded him the first and only opportunity to explain the underlying facts of this matter.

Respondent's Initial Brief scrutinizes the case law presented repeatedly by The Florida Bar in its Memorandum of Law (July 5, 1988), Initial Brief (November 14, 1988), and Reply and Answer Brief (February 17, 1989). The Florida Bar continues to refuse to recognize that the instant case bears no resemblance whatsoever to the cases of Messrs. Horne, 527 So.2d 816 (Fla. 1988), Lewis, 145 So.2d 875 (Fla. 1962), and Meros, 521 So.2d 1108 (Fla. 1988). In each of these cases cited by The Florida Bar, the proscribed conduct evinced a totally willful and flagrant disregard for the laws of this State:

- Mr. Meros' conduct was sufficiently illegal and reprehensible to warrant a forty year prison sentence.

- Mr. Horne's illegal conduct of moral depravity which was described as being fraught with dishonesty, misrepresentation and fraud, landed him a five year prison sentence.
- Mr. Lewis was sentenced to five years in prison after being convicted of conduct involving fraud.

Finally, in The Florida Bar v. Stoskopf, 513 So. 2d 141(Fla. 1987), the Respondent Attorney pled guilty to six misdemeanor charges in Federal Court. Respondent Fertig never pled guilty. Additionally, the Bar neglects to mention that Stoskopf agreed to the imposition of a ninety day suspension.

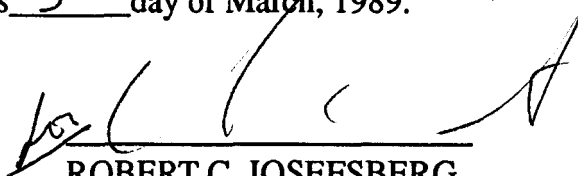
The caselaw cited by The Florida Bar fails to recognize the unique facts and circumstances of this case. The totality of the circumstances, including the passage of more than nine years, the Bar's inactivity in light of what it knew about Respondent as early as 1983, the obvious disparity between the instant case and the Dolan matter, as well as Respondent's total and complete rehabilitation, require a substantial reduction in the penalty to be imposed in this case.

CONCLUSION

The Respondent has demonstrated that the Report of the Referee is erroneous, unlawful and unjustified. Accordingly, for the reasons hereinbefore stated as well as the reasons set forth in Respondent's Answer Brief/Initial Brief on Cross Petition for Review, this 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.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing 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 3rd day of March, 1989.**



ROBERT C. JOSEFSBERG
1201 City National Bank Bldg.
25 W. Flagler
Miami, Florida 33130
Tel: (305) 358-2800

DONNA E. ALBERT, ESQ.
750 S.E. Third Avenue
Suite 200
Fort Lauderdale, Florida 33316
Tel: (305) 763-5020 BROWARD
945-6250 DADE

LANCE THIBIDEAU
901 South Federal Highway
Suite 300
Fort Lauderdale, Florida 33316
Tel: (305) 463-6755