IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Case No. 72,653

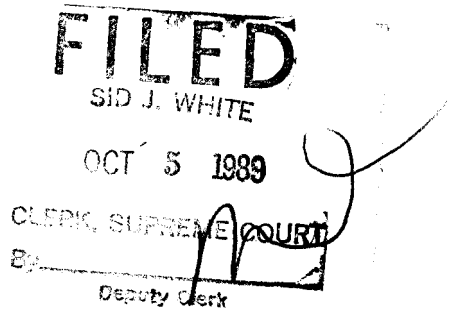
THE FLORIDA BAR,

Complainant,

vs.

FRANK DIAZ-SILVEIRA,

Respondent.
_____/



RESPONDENT'S ANSWER TO PETITIONER'S INITIAL BRIEF ON CROSS-PETITION FOR REVIEW. *AND* REPLY BRIEF TO COMPLAINANT'S ANSWER

FERRELL, WILLIAMS
A Professional Association
1920 Miami Center
100 Chopin Plaza
Miami, FL 33131
(305) 371-8585

TABLE OF CONTENTS

/

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920, MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

RESPONDENT'S POINTS ON APPEAL

I. WHETHER THE REFEREES FINDING OF "GUILT' WITH REGARD TO COUNT **XI** OF THE COMPLAINT IN THESE PROCEEDINGS WAS SUPPORTED BY THE EVIDENCE.

II. WHETHER THE REFEREES RECOMMENDATIONS OF AND WITH REGARD TO PENALTY OR SANCTIONS **IS** WARRANTED AND APPROPRIATE, BOTH ON THE FACTS AND UNDER THE LAW.

COMPLAINANT'S POINTS ON APPEAL

I. WHETHER THE REFEREES FINDING OF GUILT WITH REGARD TO COUNT XI (ELEVEN) OF THE COMPLAINT WAS SUPPORTED BY THE EVIDENCE.

II. WHETHER DISBARMENT RATHER THAN A THREE YEAR SUSPENSION **IS** THE APPROPRIATE SANCTION.

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920, MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

STATEMENT OF THE CASE AND OF THE FACTS

INTRODUCTION

The Respondent (hereinafter, "MR. DIAZ-SILVEIRA") had sought review of certain findings and conclusions at which the Referee had arrived, and, particularly, the Referee's recommendation with regard to penalty or sanction.

The Complainant (hereinafter, "The Florida Bar" or "The Bar") had cross-petitioned for review in that same regard. The Bar, however, thought the Referee's recommendation of a three-year suspension to be too *lenient*, rather than too stringent (as had been the position of MR. DIAZ-SILVEIRA). Accordingly, The Bar cross-petitioned for review of that element.

This combined Brief, then, constitutes MR. DIAZ-SILVEIRA's answer to The Bar's Initial Brief, as well as his Reply to The Bar's answer to ***his*** initial Brief; and they shall be presented in that order.

SUPPLEMENTAL STATEMENT OF FACTS

In its Brief, The Bar made extensive reference to the transcript of proceedings before the Referee (which here, as in The Bar's Brief, shall be denominated by the use of the symbol, "TR," followed by a page number).

We think that there is more to that transcript that ought be included in the Statements of Facts, toward which end we provide the following:

Although The Bar relied heavily upon some testimony elicited from its in-house auditor, one CARLOS J. RUGA ("MR. RUGA"), what The Bar did *not* say about MR. RUGA is as revealing as what *was* said.

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920, MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

So, for example, although The Bar, in its Brief (on page 2), in treating of the Referee's finding with regard to Count XI, emphasized the dishonor of something in the neighborhood of 245 checks due to "insufficient funds," The Bar has failed to point out that the record itself (and particularly the bank statements from the three accounts in question which MR. RUGA had identified as Exhibits 1, 2 and 3 *(see* initial description, TR. 40 through 42)) combine to make it abundantly clear that the number of checks "dishonored" (for whatever reason, about which more will be said later) was actually infinitely smaller: the figure of approximately 245 was determined as the result of some checks' having been represented for payment successively, and having been returned more than once, albeit within a short time span.

Although The Bar attempted to elicit testimony from MR. RUGA in support of its charge(s) of "commingling" contained in Count XI, MR. RUGA's testimony with regard to transactions he inspected in both the Trust Account and operating account of MR. DIAZ-SILVEIRA was fatally deficient in at least (if not more) very significant area: each time MR. RUGA purported to describe a transaction which amounted to "commingling," he was forced to concede that he "assumed that certain transactions constituted commingling, without having had any objective proof thereof (TR. *56).*

As illustrative of this shortcoming as anything is the fact that, throughout his testimony on direct examination, MR. RUGA referred to various persons with regard to whom financial transactions had occurred as "clients" of MR. DIAZ-SILVEIRA. However, on cross-examination, with regard to every such "transaction" described by MR. RUGA, he was required to admit or concede the following things: that he didn't know the original source of the funds (TR. 139); that he didn't know whether each

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920, MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

transaction with which he concerned himself on direct examination occurred with the acquiescence and consent of the people to whom the funds belonged, or not (TR. 142); that he didn't know the purpose for which a transfer from one account to another might have been made (TR. 142-143); that he didn't know who actually effected the transfer (TR. 143); and that he didn't know who actually even drew or wrote the check (TR. 143). To be sure, at one point, the Referee admonished MR. RUGA that it was for the Court to determine whether a commingling had occurred (TR. 144), and not the witness himself, immediately after which MR. RUGA had admitted that he had been testifying to "assumptions" when he used the word, "commingling." (Id.)

MR. RUGA didn't know whether the names by which he identified certain transactions to which he testified were names which identified one person, in the form of a hyphenated or compound last name, or whether the name represented or identified two different persons (TR. 135-146). MR. RUGA didn't even know whether the name by which he (RUGA) identified the transactions were names of clients of MR. DIAZ-SILVEIRA or not (TR. 155; TR. 164; TR. 165; TR. 166; TR. 167; TR. 169; TR. 173).

Similarly, with regard to transactions in which amounts deposited into an account maintained by MR. DIM-SILVEIRA differed from those transferred out, ***apparently*** in respect of the same transaction, MR. RUGA could not state whether the differential was attributable to the payment of attorney's fees to MR. DIAZ-SILVEIRA or not (TR. 156).

But it gets better (or worse): after admitting (TR. 110) that among the possible reasons for the return of a check could be a bank error, and after confirming that he was aware of at least one instance in which MR. DIAZ-SILVEIRA's bank had made a

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920, MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

$2,000.00 error to MR. DIAZ-SILVEIRA's disadvantage (TR. 150), MR. RUGA admitted that he didn't know whether there were other occasions when similar bank errors had occurred (TR. 151), which in turn could give rise to a "ripple effect" on MR. DIAZ-SILVEIRA's accounts.

Past admitting wholesale lack of knowledge concerning the identities of the persons for whom banking transactions ostensibly were accomplished *(ante),* or whether any of those persons occupied an attorney-client relationship with MR. DIAZ-SILVEIRA *(ante),*MR. RUGA went on to admit that he neither made so much as an effort to communicate with any of the people who ostensibly were principals in those transactions (TR. 175) nor suggested to any other personnel connected with The Bar that the same be done (Id.).

And finally, with regard to all three of the accounts drawn into question by these proceedings, MR. RUGA admitted, once again on cross-examination, that although he interviewed MR. DIAZ-SILVEIRA, who was quite candid with him and who provided records to him whenever requested, MR. RUGA still didn't know whether, in the event that overdrafts occurred, they were the result of inadvertence or mistake nor whether, to the extent that such a thing occurred, it was attributable to the uncontrollable acts of third persons (TR. 177).

One of the accounts upon which The Bar's complaint in Count XI focused was the so-called "**VISA** account"--an account which MR. RUGA characterized as a Trust Account, but which was in reality maintained by MR. DIAZ-SILVEIRA for the purpose of handling collections and disbursements for one specific client (TR. 210). However, the uncontroverted evidence showed that that "**VISA** account" was *not* a "Trust

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920, MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

Account": at an earlier meeting among MR. DIAZ-SILVEIRA, MR. RUGA, and an earlier staff attorney for The Florida Bar, it was expressly concluded by MR. RUGA and The Bar's staff attorney that the VISA account was *not* a "Trust Account" as far as The Bar was concerned (TR. 210-211).

In sum, then, a reading of the transcript of these proceedings shows MR. RUGA, The Bar's only witness, *not* to have known more than he ***did*** know, with the absences of knowledge being with regard to critical areas embraced by Count XI of the Complaint.

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920, MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

ARGUMENT AND AUTHORITIES

DISBARMENT RATHER THAN A THREE-YEAR SUSPENSION IS NOT THE APPROPRIATE SANCTION.

We need not belabor this point greatly, asserted by The Bar commencing on page 10 of its Brief. In *every* case cited by The Bar, there were knowing, intentional acts, not just of "commingling" (which has *not* been shown here), but of outright theft or other, similar misconducts on the part of the errant attorneys. The Bar itself concedes that knowledge and intent are necessary elements by relying, *inter alia*, upon Standard **4.11** (on page 12 of its Brief).

One last time, we remind this Court that not only has there been no showing of any knowing or intentional violation on the part of MR. DIAZ-SILVEIRA, but, equally importantly, not only has no client of his been injured or damaged, but none has even complained!

THE REFEREES FINDING OF GUILT WITH REGARD TO COUNT XI WAS NOT SUPPORTED BY THE EVIDENCE.

We have already asserted, in our initial Brief, that the evidence was insufficient to support a finding in favor of The Bar. Even the Referee himself (who, incidentally, presided over these matters with a degree of fairness, equanimity, decency and scholarliness not too often seen by this writer in his 22 years of practice) expressed some reservation concerning his recommendation (and therefore, we suggest, implicitly, its underpinnings) when he said:

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920, MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

> "Conceivably, that recommendation may not be accepted by the Supreme Court in the current state it is in." (TR. **291)**

What The Bar has *not* proved is: that MR. DIAZ-SILVEIRA occupied an attorney-client relationship with any of the people whose funds were involved in any of the transactions embraced by the all-encompassing Count XI; or that such persons even existed--or at least, whether in any given situation the third party involved was one person, or more; or that to the extent that there were problems with the maintenance of bank balances and transfers, they were attributable to MR. DIAZ-SILVEIRA, as opposed to bank error; or, with regard to the so-called "VISA account," that it was itself in reality a Trust Account (and therefore, subject to the rules and regulations pertaining to Trust Accounting carrying the potential for penalty in the event of violation).

On the other hand, what MR. DIAZ-SILVEIRA ***did*** prove, in addition to his good faith compliance with, or efforts to comply with, earlier Orders of this Court and regulations imposed by The Bar, was that he is and was a person of totally sterling character, held in the highest regard by members of the bench, the Bar, the executive branch of Government, and the legislative branch of Government.

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920. MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

CONCLUSION

Before the Court is FRANK **DIM-SILVEIRA,** a practicing attorney who has come to be known for his decency and his public works. Although it has been conceded that **MR. DIAZ-SILVEIRA** was not possessed of as much expertise with regard to matters of office administration as he is as **a** lawyer, he is not, under any circumstances, a miscreant. Given the circumstances in this case, coupled with the significant evidentiary shortcomings, the suggestion of disbarment for **MR. DIM-SILVEIRA** is draconian and inappropriate. **As** we have already said on several prior occasions, even a three-year suspension **is** far too harsh. **MR. DIAZ-SILVEIRA** has been bereft of his ability to function as an attorney for approximately a year already. That by itself is too much punishment for a decent and competent practitioner who has harmed nobody and has endeavored to satisfy the obligations which had previously been imposed upon him.

We respectfully suggest that this Court ought to suspend **MR. DIAZ-SILVEIRA** ***nunc pro tunc*** to the time of its original ("temporary") suspension order, and immediately restore him to his ability to practice his chosen profession.

FERRELL, WILLIAMS A PROFESSIONAL ASSOCIATION
SUITE 1920, MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131-2305, TEL (305) 371-8585

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing was mailed this 4th day of October, 1989, to the Hon. Randi Klayman Lazarus, Esq., Assistant Branch Staff Counsel, The Florida Bar, 444 Brickell Avenue, Miami, FL 33131, the Hon. George A. Shahood, Broward County Courthouse, 201 S.E. 6th Street, Ft. Lauderdale, FL 33301, and John F. Harkness, Jr., Esq., Executive Director, and John T. Berry, Esq., Staff Counsel, The Florida Bar, Tallahassee, FL 32399-2300.

FERRELL, WILLIAMS
A Professional Association
1920 Miami Center
100 Chopin Plaza
Miami, FL 33131

By: _____
Douglas L. Williams