IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DAVID CARLTON ARNOLD,

Respondent.
_____/

Supreme Court Case No. SC94727

The Florida Bar File No. 1999-70,788(11N)

On Petition for Review

REPLY BRIEF OF COMPLAINANT

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INTRODUCTION

I HEREBY CERTIFY that this brief is typed in Times New Roman, 14 Point type.

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WILLIAM MULLIGAN
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ARGUMENT

THE REFEREE ERRED BY RECOMMENDING A SUSPENSION OF ONLY SIXTY DAYS

A. The factual distinctions advanced by the Respondent are irrelevant, and to some extent fictional.

The Respondent has not addressed the salient aspects of the Bar's Initial Brief. The Florida Bar v. Horne, 527 So. 2d 816 (Fla. 1988) is a case cited by the Bar because it pertained to Federal crimes that were similar. The discipline in Horne was disbarment, a disciplinary result which isn't remotely similar to the sixty day nunc pro tunc suspension advocated by the Referee.

The Bar did not argue that Horne and this case were identical. However, the offenses involved were both federal felonies related to drug offenses.

The respondent seeks to create a distinction by arguing that what the respondent did was not "money laundering." The import of whether or not respondent's offense was "money laundering" is not readily apparent. The respondent, without regard to description of the statute, committed a related federal felony.

Respondent cites United States v. Baker, 19 F. 3d 605 (Ct. App., 11Cir, 1994) in support of his position. Baker, in a footnote (No. 45), seeks to disfavor the reference of the District Court and the parties to "money laundering" in relation to 18 U.S.C. 1957. The Circuit Court, however, quotes the commentary to the sentencing

guidelines to the effect that 18 U.S.C. 1957 is "similar" to the money laundering statutes. Further, it authorizes a ten year sentence. The respondent apparently seeks to de-emphasize the knowledge requirement of the statute. However, the footnote in Baker points out that respondent only need not have knowledge of a "specified unlawful activity" which produced the tainted funds.

The Bar has also cited The Florida Bar v. Eisenberg, 555 So. 2d 335 (Fla. 1989). Our brief suggests "similar," not identical, crimes related to illegal drug proceeds. While the respondent in this case can claim many mitigating factors, none of them reach the level of mitigation in Eisenberg. Federal prosecutors advised the Court that respondent's cooperation had helped to "dismantle domestic and foreign laundering operations." Nevertheless, Eisenberg was disbarred because of the drug related felonies which he had committed. Eisenberg's discipline is light years away from the sixty day suspension nunc pro tunc recommendation of the Referee. Similarly, The Florida Bar v. Golub, 550 So. 2d 455 (Fla. 1989) involved a serious crime which was given greater weight than the potential mitigation.

In its Initial Brief the Bar has also pointed out that the Referee was unduly influenced by The Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994), a case cited by the Referee in the Report in which the referee recommends sixty (60) day suspension. The respondent's argument regarding Marable is seriously misleading in several

respects.

First, Marable's discipline was an actual sixty (60) day suspension, not a sixty (60) day suspension nunc pro tunc which the respondent advocates in this case. The respondent's argument regarding a finding of the referee is pure fiction. Respondent argues:

> In both Marable and in the case at Bar, the Referee found a violation of a disciplinary rule based upon the plea and conviction.
>
> (Respondent's Brief, p.10).

In fact, there was no plea and conviction in Marable. Rather, there was a Referee's finding that a crime had been proved. Furthermore, this Court rejected the Referee's finding that a crime had been committed stating:

> We therefore conclude that the Referee's finding that Marable committed the crime of solicitation of a burglary is not supported by competent, substantiated evidence.
>
> (At 645 So. 2d 443).

The sixty day effective suspension, i.e., not nunc pro tunc, was based solely upon an ethical violation and not the commission of a crime.

B. A Reinstatement Proceeding is Not The Same as the Final Hearing Conducted in this Case.

The respondent correctly recognizes that the three year suspension nunc pro

tunc urged by the Bar would require a Petition for Reinstatement pursuant to Rule 3-7.10. Respondent suggests that a reinstatement hearing would merely be the same as the proceedings which are the subject of this Petition for Review and, therefore, reinstatement proceedings need not be required. That assertion is incorrect.

Rule 3-7.10 places the burden of proof upon the respondent,* unlike these proceedings. In addition, the scope of both the Reinstatement Petition and hearing is much broader than the final hearing regarding disciplinary violations.

Rule 3-7.10(n)(3) calls for information regarding dependents, residence, financial obligations, applications for good character references, memberships, civil actions, and authorization for the release of tax returns, among other items.

Furthermore, Rule 3-7.10(n)(4) provides for widespread circulation of the Petition. That includes dissemination to local board members, local grievance committees and others. That mechanism provides a broader scrutiny of the Petitioner (Respondent) than that which has taken place.

C. Sixty to Ninety Day Suspensions are not Comparable to a Sixty Day Suspension nunc pro tunc to May, 1993.

Respondent claims that case law supports the Referee's recommendation. In that regard respondent cites a number of cases in which there were disciplinary

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* The Florida Bar v. Grusmark, 662 So. 2d 1235 (Fla. 1995)

suspension recommendations of sixty to ninety days. Those cases do not apply.

The cases cited by the respondent do not pertain to a situation in which the nunc pro tunc application results in no actual suspension. The cases cited by the respondent all resulted in an actual period of suspension. A period of effective suspension for sixty or ninety days, in practical terms, is more serious than a nunc pro tunc suspension in which there is no actual suspension.

Second, the vast majority of the "cases" cited by the respondent are unreported decisions. Respondent has apparently based his summary of those cases on news reports. Insofar as such is the source of respondent's case, they cannot be given any weight since the reasons for this Court's rulings cannot be determined or analyzed.

Third, one case which respondent discusses in detail, is clearly an aberation. In The Florida Bar v. Fertig, 551 So. 2d 1213 (Fla. 1989), the respondent received a ninety day suspension for money laundering. While mitigation was considered, one factor was emphasized by the Court:

> "Of particular significance is the fact that
> Dolan received only a ninety day suspension."
> (At 1214).

Dolan received no criminal penalty since he had cooperated with the prosecuting authorities. Three of the seven justices dissented to the ninety day suspension. The dissenting opinion is instructive as to the majority's reasoning, and the discipline which would ordinarily be considered.

> "The fact that his employer, Dolan, who brought Fertig into the illegal scheme also received only a ninety-day suspension no doubt weighs heavily in the majority's conclusion to impose no greater discipline upon Fertig. However, the extent of Dolan's discipline cannot diminish the gravity of Fertig's conduct. Furthermore, there may have been difficulties of proof or other considerations which caused the Bar to agree to Dolan's discipline upon the entry of a conditional guilty plea for consent judgment. *The Florida Bar v. Dolan,* 452 So. 2d 563 (Fla. 1984). At the very least, I would approve the referee's recommendation of a twelve-month suspension. Except for the mitigating circumstances, Fertig should be disbarred.
>
> (At 1214-15, emphasis supplied)

D. The Referee's Recommendation Offends the Purposes of Discipline

The Bar's Initial Brief sets forth the purposes of discipline. It must be fair to society, fair to the attorney, and severe enough to serve as a deterrent. The Florida Bar v. Porter, 684 So. 2d 810 (Fla. 1996). Discipline which neither requires an actual period of suspension or requires that the respondent assume the burden of proving a basis for rehabilitation is unfair to society. A token suspension which produces no actual period of suspension and no requirement of a petition for reinstatement is

hardly a deterrent to other attorneys. Furthermore, token discipline has a negative impact upon the public.

This Court in State v. Murrell, 74 So. 2d 221, 224 (Fla. 1954) quotes from the preamble to the ABA Canons of ethics to the effect that:

> ... it is peculiarly essential that the system for establishing and dispensing justice be maintained so that the public shall have absolute confidence in the integrity and impartiality of its administration.

Disciplinary proceedings are largely controlled by the facts of the particular case. Murrell, supra. This case pertains to a serious federal offense, the violation of which affects drug trafficking. A criminal violation of considerable weight cannot receive minimal discipline if the public is to have confidence in the integrity and impartiality of the system. Such discipline also sets a bad precedent for the future.

CONCLUSION

WHEREFORE, based upon the foregoing the Bar would submit that the sixty (60) day suspension should be rejected and a three year suspension nunc pro tunc should be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Reply Brief of Complaint was mailed to Debbie Causseaux, Acting Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 and a true and correct copy was mailed to David Carlton Arnold, respondent, co-counsel, at his record bar address of 8301 S.W. 164th Street, Miami, Florida 33157-3640, and to Jerome H. Shevin, Attorney for respondent at 100 North Biscayne Boulevard, 30th Floor, Miami, Florida 33132 and mailed to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this ____ day of February, 2000.

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WILLIAM MULLIGAN
Bar Counsel