IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

J. BLAYNE JENNINGS,

Respondent.
_____/

Case No. 66,398
(TFB Nos. 1984C86/Rich
1985C11/Brown)

COMPLAINANT'S BRIEF IN SUPPORT OF REFEREE'S RECOMMENDED DISCIPLINE

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, will be referred to as "The Bar", and respondent, J. Blayne Jennings, will be referred to as "respondent". The symbol "R" followed by a page number will indicate the Referee's Report, attached in the Appendix.

POINTS INVOLVED ON APPEAL

POINT I - WHETHER AN ATTORNEY HAS AN ETHICAL RESPONSIBILITY TO DISCLOSE MATERIAL FACTS RELATING TO THE STATUS OF PROPERTY USED AS SECURITY AND THE EXTENT OF HIS INDEBTEDNESS WHEN SOLICITING A LOAN FROM NON-CLIENT RELATIVES?

POINT II - WHETHER THE PUBLIC REPRIMAND RECOMMENDED BY THE REFEREE IS APPROPRIATE DISCIPLINE WHERE AN ATTORNEY FAILS TO DISCLOSE MATERIAL FACTS WHEN SOLICITING A LOAN FROM NON-CLIENT RELATIVES?

STATEMENT OF THE CASE

On October 3, 1984, the 19th Judicial Circuit Grievance Committee found probable cause to pursue an action against Mr. J. Blayne Jennings, the respondent in this action, in two separate cases.

Both cases involved loans made to respondent by his family members. In each case the committee found probable cause for violations of the Integration Rule of The Florida Bar, Article XI, Rule 11.02(3)(a) for conduct contrary to honesty, justice or good morals; Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar, 1-102(A)(4) for conduct involving fraud, deceit, dishonesty or misrepresentation, and 1-102(A)(6) for conduct reflecting adversely on his fitness to practice law.

The Florida Bar, complainant, filed a two count complaint alleging the above violations. Count One of the complaint involved a $30,000.00 loan to respondent from Emma and Titus Rich. Respondent was married to Emma Rich's sister.

Count Two of the complaint involved a similar $30,000.00 loan to respondent from Eugene and Mary Brown, also in-laws of the respondent.

Respondent filed an answer to the complaint on May 6, 1985, admitting and denying certain portions of the complaint.

The final hearing before a referee, the Honorable Frederick Pfeiffer, was held on June 21, 1985 in Vero Beach, Florida. The referee recommended that respondent be found guilty on both counts of violating the Integration Rule of The Florida Bar and The Florida Bar's Disciplinary Rules as charged. The referee recommended that respondent be disciplined by public reprimand, by personal appearance before the Board of Governors of The Florida Bar, pursuant to Rule 11.10(3) of the Integration Rule of The Florida Bar, Article XI.

This Court requested briefs from each party as to the recommended discipline.

STATEMENT OF THE FACTS

Count I (1984C86) In late January 1982 respondent borrowed $30,000.00 from Titus and Emma Rich, his in-laws, as a short term loan. He pledged a parcel of real property in North Vero Beach, Florida, as collateral and advised them it would be theirs in the event of default. In order to make the loan, the Richs took out a second mortgage on their home. On February 10, 1982, respondent filed and had recorded the mortgage and note he had prepared attesting to this agreement. Respondent made payments on the loan for about a year and one half before defaulting around October 1983. After being informed respondent could not resume payments, the Richs contracted an attorney who discovered the property securing the loans was already in foreclosure and had been subject to another lien when the loan was made. The Richs have had to make both the first and second mortgage payments to protect their home against foreclosure, R-2.

Although he was well aware of these facts, respondent did not inform the Richs the property securing the loan was already encumbered or that it was in foreclosure. He further failed to inform them of the full extent of his debts totalling at least

$75,000.00 consisting of loans from ex-clients, demand notes from local banks and two IRS liens. Respondent also failed to inform them the mortgage was a second mortgage at best and he was giving another mortgage on the same property to Mr. and Mrs. Brown. Respondent further failed to advise them of measures they could take to protect their interest in foreclosure by redeeming the property at the foreclosure sale for about $23,000.00 on property purportedly worth $200,000.00, R-3.

At no time during the loan negotiations or thereafter did respondent advise the Richs their interest could differ or they should retain an attorney to insure adequate representation, R-3.

The referee noted that although there was not an actual attorney-client relationship, the Richs relied upon respondent's status as a family member and attorney possessing sufficient earning power in making the loan, R-3. The referee found respondent had taken advantage of his position as a family member and as an attorney in securing the loan by not making full disclosure of the financial indebtedness and encumbrances on the property. He further noted respondent was the only attorney involved and did what legal work was necessary, R-4.

Count II (1985C11) In late January 1982 respondent borrowed $30,000.00 from Eugene and Mary Brown, his in-laws, as a short term loan to pay his IRS debts among other things. The Browns secured a second mortgage on their home in order to furnish the loan. Respondent told Mr. Brown the loan was needed to clear a parcel of property he would pledge as full security for the loan once it cleared, R-4. On February 10, 1982, respondent filed and recorded a note and mortgage he had prepared purportedly providing collateral for the loan. He did not send a copy of these documents to the Browns nor did he inform them the property described in the mortgage had been used to secure at least two other loans. One loan had already been in default and the property was in foreclosure at the time of the loan, R-5.

Respondent made about ten monthly mortgage payments and then defaulted. Mr. Brown visited respondent and was asked to wait approximately six months before doing anything and to not seek counsel. When Mr. Brown again approached respondent about his failure to pay he was told the property was in foreclosure and had been for some time, and that his mortgage was without value. The Browns have had to make both the first and second mortgage payments to protect their home from foreclosure, R-6.

At the time the loan was negotiated, respondent did not inform the Browns the property he offered as security was in foreclosure even though he was aware of this fact. He did not tell them they would hold a second mortgage at best and he had given a mortgage on the same property to the Richs, although the Brown's mortgage was recorded first. Respondent further failed to apprise them of the full extent of his debts or to advise them to seek independent counsel, R-7.

Additionally, respondent failed to advise the Browns of the routes they could pursue to protect their interests in foreclosure by redeeming the property at foreclosure for $23,000.00 on property purportedly worth $200,000.00, R-6.

The referee noted that as with the Richs, the Browns relied upon respondent's status as a family member and practicing attorney in making the loan. Respondent was the only attorney involved and did all the necessary legal work. He failed to fully disclose the extent of his indebtedness as well as the status of the security offered for the loan. In fact, at the time of the loans the property used as security had already been encumbered with at least a $23,000.00 mortgage which was in foreclosure as well as two IRS liens totalling $36,266.03. The

referee found specifically that although an actual attorney-client relationship did not exist, over-reaching by respondent was present and disciplinary jurisdiction exists, R-7.

Respondent has made one additional payment of about $1,000.00 each to the Browns and the Richs since their complaints to The Florida Bar, R-3 and 5.

SUMMARY OF ARGUMENT

It is well settled that an attorney is subject to discipline for conduct in violation of the Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar even where it falls outside of the attorney-client relationship. Case law and The Florida Bar Integration Rules, Article XI, Rule 11.02(3)(a) provide that an attorney's standards of professional conduct must be maintained whether during the course of his relations as an attorney or otherwise.

The fact that respondent's conduct in failing to disclose the extent of his indebtedness and the encumbered status of the property he pledged as security occurred during a transaction with non-client relatives is not a factor for mitigation of discipline. In fact, since respondent's family members were less likely than others to question his representations, respondent should have been more vigilant than usual in disclosing information regarding the loan, as well as in advising them to seek other counsel due to their differing interests. Respondent's in-laws have suffered financially, and will continue to do so, because they relied on respondent's statements in placing second mortgages on their homes to loan him a total of $60,000.00.

A public reprimand, with an appearance before the Board of Governors, as recommended by the referee, is the appropriate discipline in this case.

Case law involving similar misconduct supports the decision that a public reprimand is the minimally acceptable discipline for misconduct such as respondent's, in violation of the Integration Rule of The Florida Bar, Article XI, Rule 11.03(a) for actions contrary to honesty, justice and good morals, Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar 1-102(A)(4) for conduct involving dishonesty, fraud, deceit or misrepresentation, and 1-102(A)(6) for other conduct reflecting adversely on his fitness to practice law. Further, a public reprimand is necessary because those that are familiar with respondent's actions and those who might consider similar misconduct should be aware of the outcome of this case.

ARGUMENT

POINT I

AN ATTORNEY HAS AN ETHICAL RESPONSIBILITY TO DISCLOSE MATERIAL FACTS RELATING TO THE STATUS OF PROPERTY USED AS SECURITY AND THE EXTENT OF HIS INDEBTEDNESS WHEN SOLICITING A LOAN FROM NON-CLIENT RELATIVES.

The case at hand involves a fundamental requirement of attorneys-that their duty conduct themselves in a manner consistent with the professional standards required of attorney conduct does not always cease because an attorney-client relationship is not present.

It is well settled that an attorney's standards of professional conduct must be maintained even outside the attorney-client relationship. See The Integration Rule of The Florida Bar Article XI, Rule 11.02(3)(a):

> "the commission by a lawyer of any act contrary to honesty, justice or good morals, WHETHER THE ACT IS COMMITTED IN THE COURSE OF HIS RELATIONS AS AN ATTORNEY OR OTHERWISE, whether committed within or outside the State of Florida, and whether or not the act is a

> felony or misdemeanor, constitutes a cause for discipline". (emphasis added)

In the case at hand, there was a failure to make full disclosure as to all the problems involved in a loan. There is a family status as well as an attorney status. The family members who loaned money to respondent testified at the grievance committee hearing as well as at the referee hearing that they relied on respondent's attorney status in entering into the loan agreement, both as to his ability to generate income and his reliability.

The situation at hand may not, at first glance, appear to be serious since this involves a family situation without an attorney-client relationship. However, the ethical duties of an attorney do not cease merely because a family relationship is involved. In fact, the trust inspired by a family relationship should require greater prudence on the part of an attorney in disclosing any possible risks. There are a number of cases which indicate that the court's jurisdiction does apply when an attorney is engaging in business transactions with non-clients under certain circumstances where the non-client is looking to an attorney's status or is relying on the representations of the attorney.

The fact that a family member is involved has not been held to be a mitigating factor in similar cases. In The Florida Bar v. Terry, 333 So.2d 24 (Fla. 1976), Mr. Terry was appointed as a guardian for his incompetent aunt. Where Mr. Terry accepted a large cash gift from the incompetent aunt and then failed to disclose or account therefor a public reprimand followed by three years probation was warranted. This was true even though the relationship was one of fiduciary rather than attorney-client status.

The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982) involved a dispute over the management of family property involving a grandson and his mother, the respondents, and their grandmother/mother, all of whom were lawyers. Mr. Carter was publicly reprimanded for failing to promptly pay funds he received as an attorney for his grandmother to her upon demand and placing them in his personal account, as well as making derogatory statements about a judge. The court specifically noted that the facts of the case arose from a complicated intra-family dispute. Thus, the court's jurisdiction does pertain when an attorney is engaging in business transactions with non-client family members under certain circumstances where the non-client is looking to the

attorney's status or is relying on the representations of the attorney.

In The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973), it was held that respondent's position as an attorney involved ethical responsibilities where he entered into a business deal. The attorney was acting partially as an attorney in drawing some documents in the business transaction and also as a venturer in it. As trustee for a group of investors, Bennett misrepresented transactions and failed to pay taxes for which he was given money to do so. Bennett asserted his participation was only as a businessman and not as an attorney. However, he was suspended for one year, the court stating:

> "Some may consider it 'unfortunate' that attorneys can seldom cast off completely the mantel they enjoy in the profession and simply act with simple business acumen and not be held responsible under the high standards of our profession. It is not often, if ever, that this is the case. In a sense 'an attorney is an attorney is an attorney', much as the military officer remains 'an officer and a gentleman' at all times. We do not mean to say that lawyers are to be deprived of business opportunities; in fact, we have expressly said to the contrary on occasion. We do point out that the requirement of remaining above suspicion, as Caesar's wife, is a fact of life for

> attorneys. They must be on guard and act accordingly, to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing. At 482

An attorney-client relationship was not present in The Florida Bar v. Davis, 373 So.2d 683, (Fla. 1979). Mr. Davis was publicly reprimanded for his conduct during a speculative real estate transaction with a non-client businessman. Mr. Davis accepted funds for tax payments but used them for another purpose, commingled funds received for different purposes in order to promote his own business objectives, and failed to return the unpaid balance when the deal was not completed. Mr. Davis was publicly reprimanded, the court specifically noting, at 685, that there was no attorney-client relationship involved.

Citing Davis and Bennett, supra, the court in The Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984), repeated that an attorney is subject to discipline for failing to completely disclose essential matters in business transactions with non-clients. Where Mr. Adams failed to notify his non-client business partner of his sale of property as trustee and failed to make a timely accounting of funds received from the sale he was suspended for 60 days.

As the Bennett case, supra, describes, even though people may say that they are not looking to someone as an attorney, the fact that one is an attorney and well versed in the transactions inevitably leads to some reliance thereon. Under the circumstances of the loan in the case at hand, there was at the very least a duty on respondent's part to make full and complete disclosure of his financial difficulties and of the status of the land that he was offering them as security for the loan.

ARGUMENT

POINT II

THE PUBLIC REPRIMAND RECOMMENDED BY THE REFEREE IS APPROPRIATE DISCIPLINE WHERE AN ATTORNEY FAILS TO DISCLOSE MATERIAL FACTS WHEN SOLICITING A LOAN FROM NON-CLIENT RELATIVES.

In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), the court addressed the purpose of attorney discipline:

> "Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: 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 service of a qualified lawyer as a result of undue harshness in imposing penalty. 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. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations," at 986

The goals of attorney discipline are further discussed in The Florida Bar Integration Rule Article XI, Rule 11.02, which provides that the purposes of attorney discipline are protection of the public, administration of justice, and the protection of

the legal profession by the discipline of members through The Florida Bar.

In The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984), the court noted another important purpose, that of protecting the favorable image of the legal profession by imposing visible and effective discipline for serious violations, at 1341.

Although at first glance respondent's actions may seem less serious since they occurred within a family relationship, it is the position of The Florida Bar this relationship actually makes his actions more serious. Because of the trust and reliance family members placed in respondent, they were less likely to question his statements and actions.

There are cases dealing with similar situations where a public reprimand has been held appropriate for an attorney with no prior discipline record as in this case. In addition to the Terry and Carter cases, supra, there are several cases dealing with similar situations within the attorney-client relationship.

In The Florida Bar v. Simonds, 376 So.2d 853 (Fla. 1979), Mr. Simonds was granted leave to resign from The Bar in lieu of

discipline in six pending disciplinary actions. Two of the cases involved his engaging in business investment transactions with clients by obtaining loans from them and subsequently being unable to repay the loans due to the fact that the investment went bankrupt. Mr. Simonds failed to disclose to his investors that he was the substantial owner of the venture, but did promise to personally endorse the notes. The court noted that he failed to advise his clients of their differing interests and rights.

In The Florida Bar v. Conrad, 372 So.2d 73 (Fla. 1979), Mr. Conrad was granted leave to resign pending two disciplinary proceedings. One of the disciplinary proceedings involved his solicitation of a $10,000.00 personal loan from a client which was without interest and unsecured. Mr. Conrad failed to advise his client to seek other counsel regarding the loan which was not repaid. The client was eventually forced to sue for repayment of the loan.

In The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981), Mr. Golden borrowed money from a client which he was unable to repay for two years and had inadequate trust account record-keeping. He was publicly reprimanded, having no past disciplinary record.

In The Florida Bar v. Staley, 457 So.2d 489 (Fla. 1984), Mr. Staley was publicly reprimanded and placed on probation for one year where he accepted employment in a loan transaction where his own financial interests were involved and failed to disclose such to his client. His trust account record keeping was also inadequate.

The Florida Bar v. Capodilupo, 291 So.2d 582 (Fla. 1974), Mr. Capodilupo was publicly reprimanded where, as an officer of a land company, his actions disregarded the rights of a land purchaser who was not a client. Besides other mismanagement, he failed to disclose to the land purchaser that the contract seller merely had an option to purchase the property. In The Florida Bar v. Thomas Davis, 419 So.2d 325 (Fla. 1982), the attorney was publicly reprimanded and suspended for three months where as attorney and director of a time-share corporation his non-fraudulent conduct failed to provide adequate protection for purchasers from the corporation.

In the case at hand, the respondent has breached a duty by failing to disclose the extent of his indebtedness as well as the foreclosure status of the property he pledged as security to his lenders. He has been found in violation of Integration Rules of

The Florida Bar, Article XI, Rule 11.03(a) for actions contrary to honesty, justice and good morals, Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar 1-102(A)(4) for conduct involving dishonesty, fraud, deceit or misrepresentation, and 1-102(A)(6) for other conduct reflecting adversely on his fitness to practice law. Those that are familiar with this case, and others who may consider such conduct, have a right to know of the result. Thus, the discipline recommended by the referee involving a public reprimand with an appearance before the Board of Governors, is the minimum sanction necessary to serve the purposes of attorney discipline.

CONCLUSION

Wherefore, the Board of Governors of The Florida Bar respectfully prays that this Honorable Court will approve the referee's recommended discipline of a public reprimand with a required appearance before the Board of Governors and order the respondent to pay costs in these proceedings currently totalling $890.10.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Brief in Support of Referee's Recommended Discipline have been furnished by ordinary U.S. mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing has been mailed by ordinary U.S. mail to J. Blayne Jennings, respondent, 2871 45th Street, Gifford, Florida, 32960; and a copy of the foregoing has been mailed by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 2nd day of December, 1985.

Jan Wichli

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Asst. Bar Counsel