IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

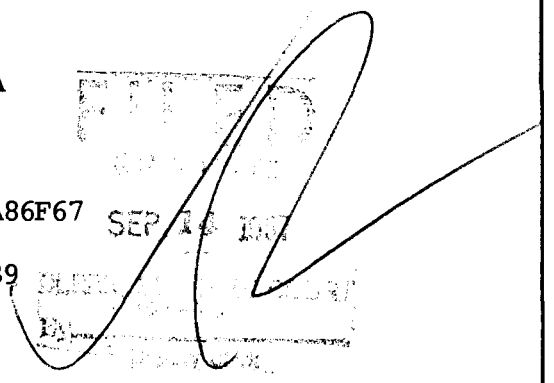
HUGH PAUL NUCKOLLS,

Respondent.

_____/

TFB File No. 20A86F67

Case No.: 69,639



ANSWER BRIEF OF THE FLORIDA BAR

DAVID M. BARNOVITZ
Assistant Staff Counsel
The Florida Bar
915 Middle River Drive
Suite 602
Ft. Lauderdale, FL 33304
(305) 564-3944

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, FL 32301-8226
(904) 222-5286

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, FL 32301-8226
(904) 222-5286

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STATEMENT OF THE CASE AND OF THE FACTS

Fla. R. App. P. 9.210(c) requires a counterstatement of the case and of the facts where there are areas of disagreement. There are such areas, mandating this statement.

In its complaint, the bar charged appellant with three (3) counts of misconduct. The referee has recommended a finding of guilt on all counts. The first two (2) counts involve a bank fraud committed by the appellant and the third involves appellant's violation of obligations he undertook as a land trustee which violations the referee found to adversely reflect on appellant's fitness to practice law.

The bar's first area of disagreement with appellant's statement of the case and of the facts concerns the bank fraud charges. Basic to the bar's allegations and the referee's findings and recommendations is the fact that appellant participated in a scheme of fraud with others convincing two (2) lending institutions to advance seven (7) $36,000.00 loans each such loan purporting to be 80% of a stated purchase price in each loan transaction of $45,000.00. At page two of his statement of the case, appellant attempts to obscure his absolute knowledge of an intentional misrepresentation to the financing institutions involved that at all relevant times he knew that the actual purchase price of each parcel of realty was, in fact, $36,000.00 and not $45,000.00. Thus, at page 2 of his brief, appellant makes reference to a purported belief on his part concerning some debt relief to certain purchaser and at page 3 of his brief makes the same reference concerning the other purchaser involved. What appellant fails to point out is that in connection with certain parallel civil litigation he testified, under oath, as follows:

Question: And you knew, did you not, that the individual units that were being sold were being sold to the doctors for $36,000.00; isn't that correct?

Answer: I think so. Yes, sir (135, 136).

At page 2 of his statement of the case, appellant concedes that he led one lender to believe that down payments had been collected from the purchasers-mortgagors and that he led another lender to believe that the down payments would be collected. While this is accurate, the statement hardly captures the harsh and unseemly manner in which appellant led the two (2) financial institutions to believe in and rely upon his misrepresentations. The bar considers it important that the Court appreciate that after respondent closed title to the transactions in which Pioneer Federal Savings and Loan Association participated, knowing that 100% loans had been advanced rather than the 80% loans applied for, respondent, when expressly called upon by a Pioneer representative to verify the missing 20% involved in each such transaction, perpetuated the fraud, in writing in the form of correspondence and closing statements (see composite Exhibit 1A attached to the bar's complaint). Thereafter, when pressed further by Pioneer's representative, respondent furnished a copy of a check payable to himself in the sum of $36,000.00 representing that the money was "received at the time of closing and applied to balance due and owing from buyer thereby requiring no further funds from the buyer." (See the bar's composite Exhibit 2 annexed to the bar's complaint). In the transactions involving the other financial institution, Progressive Financial Services, respondent made his misrepresentations in written statements submitted to Progressive and in affidavits sworn to by him (See composite Exhibit 4 annexed to the bar's complaint).

The next area of disagreement concerns appellant's footnote 3 appearing at page 4 of his brief where appellant urges that as a matter of law the referee's recommendations of guilt for the cumulative violations of Disciplinary Rule 7-102(A)(5) and Disciplinary Rule 7-102(A)(7) of the Code of Professional Responsibility are inappropriate in that no attorney-client relationship existed between appellant and any of the purchasing physicians. Nothing could be more factually inaccurate. It is undisputed that there was, at all times relevant to the proceeding, an attorney-client relationship between appellant and his partnership. Paragraph 4 of the bar's complaint specifically alleged:

> At all times hereinafter mentioned respondent acted as attorney for the Partnership.

Such allegation was admitted in appellant's answer and in his response to requests for admissions which constitute part of the record before this Court. Apparently, appellant would urge to the Court that unless an attorney represents the victim of his wrongdoing there can be no violation of Canon 7 as appellant readily concedes that he represented the partnership and while engaged in such representation made false representations to the two (2) financial institutions (Disciplinary Rule 7-102(A)(5)) and assisted his partnership in a scheme of bank fraud (Disciplinary Rule 7-102(A)(7)).

Obviously the bar disagrees with appellant's characterization at page five of his statement of the case and of the facts that the recommended discipline is excessive. The bar will address this area in its argument.

SUMMARY OF ARGUMENT

Appellant attempts to portray his various violations of the Code of Professional Responsibility as stemming from one transaction. Appellant, at page 1 of his brief refers to the counts charged by the bar in its complaint as "interrelated".

As a matter of fact, counts I and II of the bar's complaint are interrelated. Count III relates to an independent transaction of misconduct having as the only common element thereof the participation of appellant's partnership. In the bar's view, when the cumulative effect of appellant's misconduct is weighed, involving dishonesty, deceit, fraud, misrepresentation and breach of fiduciary responsibility adversely reflecting on his fitness to practice law, coupled with appellant's obvious motive of personal gain by freeing his partnership and thereby himself from considerable debt, the recommended discipline of a four (4) month suspension is appropriate.

ARGUMENT

APPELLANT'S MULTIPLE VIOLATIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY WARRANT IMPOSITION OF A FOUR (4) MONTH SUSPENSION.

Appellant has defined the sole issue before the Court as the appropriate discipline to be imposed for his conduct relating "to the commercial transactions between his business partnership and the three (3) doctors." (Appellant's brief, page 7). In so characterizing his conduct, appellant wittingly or unwittingly attempts to portray his violations as stemming from one transaction. As a matter of fact, his misconduct involving bank fraud and his misconduct in a totally separate incident involving his abuse of a fiduciary position as land trustee are separate and distinct breaches which, it is respectfully submitted, merit separate examination and enhanced discipline, a well established doctrine in Florida Bar discipline cases. The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).

It is interesting to note that appellant, himself, urges that a public reprimand is appropriate discipline for his breaches involving bank fraud and also urges that a public reprimand is also called for in connection with his breaches regarding his violations of his fiduciary obligations. Despite this acknowledgement by appellant, he concludes that the public reprimands he regards as appropriate for each of his separate acts of misconduct somehow add up to one public reprimand as adequate discipline.

In the bar's view, the bank fraud perpetrated by appellant, by itself, warrants imposition of the recommended four (4) months suspension. Unlike The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985), The Florida Bar v. Fitzgerald, 491 So.2d 547 (Fla. 1986), and the balance of cases cited by appellant in his discussion of the appropriate discipline for the bank fraud he committed, his misconduct consisted of a series of misrepresentations each occurring after the prior was complete and after appellant had an opportunity to reflect, recant and cure. In his dealings with Pioneer Federal Savings and Loan Association respondent, by separate and distinct actions, repeated his misrepresentations and bank fraud time and time again. Thus, when asked by a bank representative to account for the $9,000.00 down payments in each of the subject loan transactions, respondent, on February 18, 1985 misrepresented receipt of $36,000.00 which he categorically stated was received and applied to the balances due and owing from the various purchasers. On February 20, 1985, knowing that it was worthless, respondent repeated his misrepresentation to a bank representative by enclosing a copy of the $36,000.00 check he had previously represented was received and applied. After a lapse of several months, when again requested to furnish copies of signed respa statements to establish the amount of the down payments, respondent again submitted written statements to Poineer repeating his prior misrepresentations and fraud. (See Exhibits 1, 1a and 2 attached to the bar's complaint).

In the loans involving Progressive Financial Services, respondent's fraud and misrepresentations followed a similar pattern. By instruments dated October 3, 1984 subscribed to by respondent and submitted to

Progressive, respondent misrepresented the purchase prices of the various parcels of real estate involved at $45,000.00 knowing full well that the sales were actually to be consummated at $36,000.00. In January, 1985 respondent prepared and submitted respa statements perpetuating the fraud and at the same time submitted sworn affidavits similarly misrepresenting the purchase prices. (See Exhibits 3 and 4 attached to the bar's complaint).

There were no subtleties involved in appellant's misrepresentations. Unlike the actions of the respondent in The Florida Bar v. Beneke, supra, where the referee found respondent's actions to have "subtly intended" to support a loan application in excess of the purchase price, appellant's persistent and repeated misrepresentations were cast in monumental proportion. Unlike the victim of respondent's misrepresentations in The Florida Bar v. Fitzgerald, supra, who knew that monies from additional closing would have to be used to satisfy the mortgage and liens affecting his unit despite statements to the contrary, the financial institutions in the case at bar could have no conceivable similar knowledge regarding the fact that they were making 100% rather than 80% loans. Respondent's repeated statements including sworn affidavits submitted to Progressive and his furnishing of a copy of a worthless $36,000.00 check to Pioneer constituted, in the bar's view, far graver misconduct than that involved in the cases above cited.

In the third count charged by the bar and for which the referee has made a recommendation that appellant be found guilty, as charged, appellant, in what he characterized as an extremely complicated and complex transaction (118-124), predicated upon an oral agreement (124)

based solely upon the representations of his own partners in a partnership he represented, proceeded to close such complex and complicated transaction for the benefit of his partnership while at the same time acting as land trustee for a purchaser with whom appellant never consulted regarding the proposed transaction. (125-127) As a result of such transaction, appellant freed his partnership of numerous mortgages which, without consultation with the cestui que of his land trust were made liens against his cestui que's property. As a consequence of such total lack of communication, appellant subjected his cestui que to litigation which was still pending and unresolved as of the date of the final hearing in these proceedings (122).

It cannot be questioned that as a result of appellant's misrepresentations and fraud upon the financial institutions resulting in the funding of the purchases of partnership assets and as a result of appellant's backloading of partnership mortgage indebtedness against his cestui que's property appellant's partnership and thereby his personal interest therein was greatly enhanced. It is respectfully submitted that respondent's repeated misrepresentations and fraud coupled with the victimization of his cestui que mandates imposition of the recommended four (4) months suspension. In The Florida Bar v. Fussell, 189 So.2d 881 (Fla. 1986) the respondent was convicted of two (2) counts of knowingly making a false statement in an application for a home improvement loan in violation of Title 18, United States Code, Section 1010 and upon prosecution by the bar, this Court suspended respondent for a period of six (6) months. In The Florida Bar v. Moran, 462 So.2d 1089 (Fla. 1985) the Court imposed a four (4) month suspension where

respondent was found to have knowingly made a false statement to a court. Recently, in The Florida Bar v. Clodfelter, No. 70,061 (Fla. March 30, 1987) the Court ordered that respondent be suspended pursuant to Rule 3-7.2(e), Rules of Discipline where respondent submitted false statements in a loan application in violation of Title 18, United States Code, Section 1010.

The bar would urge that the repetitious nature of appellant's misconduct involving two (2) lending institutions and a separate incident involving the victimization of a land trust cestui que when coupled with appellant's selfish purpose more than justifies the Court's implementation of the referee's recommendations. In the bar's view, appellant's special relationship to the public as a former state legislator (as introduced into the record for the first time by appellant's brief) creates an aggravating circumstance in that appellant, perhaps more than someone who has not occupied such a special position of public trust, should be held to even higher standards.

CONCLUSION

The referee's recommendation of a four (4) months suspension plus taxation of the bar's costs should be adopted and implemented by this Court.

Respectfully submitted,

DAVID M. BARNOVITZ
Assistant Staff Counsel
The Florida Bar
915 Middle River Drive, Suite 602
Ft. Lauderdale, FL 33304
(305) 564-3944

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing answer brief of The Florida Bar was furnished to Harry A. Blair, P.A., attorney for appellant, 2138-40 Hoople Street, Post Office Box 1467, Ft. Myers, FL 33902 and to Alan C. Sundberg, Esquire and F. Townsend Hawkes, Esquire, attorneys for appellant, Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A., Post Office Drawer 190, 410 First Florida Bank Building, Tallahassee, FL 32302, by regular mail, on this 11th day of September, 1987.

DAVID M. BARNOVITZ