IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v. TFB File No: 20A86F67

HUGH PAUL NUCKOLLS, Case No: 69,639

Respondent.

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THE INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

This case concerns the conduct of the Respondent, Hugh Paul Nuckolls, relating to an episode of commercial real estate transactions between the business partnership to which he belonged and a group of doctors purchasing investment properties from the partnership. As a consequence of these business transactions, one of the purchasing doctors complained to The Florida Bar, who brought a Complaint charging the Respondent in three interrelated counts.

The business partnership, which was formed for the purpose of real estate acquisition, rentals and resales, was comprised of Mr. Nuckolls, Dr. John Hugill (a physician), Michael Dewberry (a real estate broker), and Louis Sali (a building contractor). (Hearing Transcript [TR] 76-77). The partnership developed a 22-unit townhouse project known as DeSoto Village. Dr. Hugill convinced three doctors with whom he was friends to purchase these townhouses. (Grievance Committee Transcript [GCTR] 310-15)[1]. Dr. Mateo and his wife (Dr. De Sa Periera) ultimately purchased four (4) units, and Dr. Williamson purchased three (3) units. (TR 82).

The contracts and closing documents relating to the purchases of the townhouses reflected a purchase price of $45,000.00 per unit and a downpayment of $9,000.00. However, the

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[1] The Grievance Committee proceedings were admitted as evidence in the Hearing before the Referee. See TR 43.

partnership only received $36,000.00 for each unit from the doctors. Nevertheless, in communications with two lenders which were financing the purchases, Respondent lead one lender to believe that the downpayments had been collected from the purchasers and another lender to believe that the downpayments would be collected. (TR 50-54).

Initially, Respondent believed that some of the downpayments would eventually be collected from the purchasers based on representations of his partners. (TR 84-87). One of his partners, Mr. Dewberry, actually issued a $36,000.00 check for the downpayments from his real estate accounts to cover the four purchases by Dr. Mateo and his wife, although requesting that Respondent hold the check until the funds were actually received from the doctors. (GCTR 70-71). Mr. Dewberry stated that this check was issued on December 31, 1984, without funds in hand at the behest of the doctors who wished to claim the transaction for 1984 income tax purposes. (GCTR 72). He stated that closing without the downpayment was not unreasonable since the purchasers were friends of one of the partners, Dr. Hugill. (GCTR 71).[2]

As to the purchases by Dr. Williamson, Respondent and Mr. Dewberry believed that the downpayment was to be in the form of debt relief to the partnership, as Dr. Williamson would allow the

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[2] Dr. De Sa Periera testified that the purchase price on the units she and her husband purchased was $45,000, but that she was to receive a $9,000 rebate on each unit. Notably, she had no contacts with Respondent, but dealt only with Mr. Dewberry. (GCTR 368-71).

partnership to transfer certain of its mortgages onto another commercial property (Lora Lane Apartments) which he was also purchasing from the partnership. (GCTR 124-26, 410) Dr. Williamson confirmed that it was contemplated that a second mortgage would be placed on his property by the partnership, although he disputed the amount of this mortgage and whether the mortgage was actually for debt relief. (TR 32; GCTR 178, 389).

Ultimately, however, further payment from Dr. Mateo and his wife was never received and Respondent returned the check to Mr. Dewberry. (TR 47-49). Respondent failed to inform the lender that these downpayments did not materialize. He also failed to inform the lender financing Mr. Williamson's units that only $36,000 had been received as the purchase price and that no further funds were due. (TR 49-54). He explained that these failures partly resulted from the complete collapse of the partnership which is now involved in litigation. (TR 112). As a consequence, the lenders relied on this inaccurate information in providing the doctors with 100% financing on their townhouse purchases. Notably, one of the lenders testified that its loans were current and pointed to no problems with the loans. (GCTR 32-34).

Dr. Williamson also complained that Respondent had not adequately communicated with him prior to closing the doctor's purchase of another of the partnership's commercial properties, the Lora Lane Apartments. Specifically, Respondent effectuated an oral agreement between the doctor and the partnership by

placing several junior mortgages on this property. Dr. Williamson stated that Respondent believed he had the authority to effectuate such an agreement. (GCTR 207, 296). Respondent was acting as the doctor's trustee at the closing, and did not adequately communicate prior to the closing with the doctor, who understood the oral agreement differently. (GCTR 177, 208). However, the trust agreement itself was not signed until closing. (GCTR 436). As a result of this lack of communication, Dr. Williamson disputed the amount of junior mortgages which were placed on the apartments, and this ultimately resulted in litigation. Dr. Williamson also complained that, because he had not been informed of the placement of these mortgages, his efforts at refinancing had been hampered. (GCTR 199).

After a Grievance Committee Hearing was held on September 26, 1986 and October 10, 1986, and a Referee's Hearing on April 24, 1987, before Circuit Judge Lynn Silvertooth, the Referee entered his Report. He found that Mr. Nuckolls had violated Disciplinary Rule 1-102(A)(4) (conduct involving dishonesty), and the cummulative violations of DR 7-102(A)(5) (making false statement of fact in representing client) and DR 7-102(A)(7) (counseling client in fraudulent conduct).[3] He also found that

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[3] Since it was undisputed that no attorney-client relationship existed between Respondent and any of the purchasing doctors, these cummulative violations based on the attorney-client relationship are apparently inappropriate. (TR 124-26; GCTR 174-80, 207-08, 403). The former disciplinary rules were used by agreement of the parties, despite adoption of the new Rules Regulating The Florida Bar. (TR 14-15).

Respondent violated the generic DR 1-102(A)(6) (conduct adversely reflecting on fitness to practice law) for his inadequate communications with Dr. Williamson when acting as his agent. The Referee recommended a four-month suspension. Review of this recommended punishment is sought as being excessive in the circumstances of this case.

SUMMARY OF ARGUMENT

When Respondent's conduct is compared to that of other attorneys disciplined for similar transgressions, the proposed discipline of a four-month suspension appears unduly harsh. In cases involving similar circumstances, such as The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985), and The Florida Bar v. Fitzgerald, 491 So.2d 547 (Fla. 1986), the appropriate discipline was a public reprimand.

If these cases are considered with other mitigating factors in Respondent's case, such as Respondent's lack of any prior disciplinary problems and his decade of public service as a member of The Florida House of Repesentatives, imposition of a public reprimand is the most equitable and appropriate punishment.

ARGUMENT

I

THE CIRCUMSTANCES OF THIS CASE WARRANT IMPOSITION OF A PUBLIC REPRIMAND

The sole issue before this Court is the appropriate discipline to be imposed on Mr. Nuckolls for his conduct relating to the commercial transactions between his business partnership and the three doctors. The Respondent conceded that he acted unwisely in failing to inform the lenders that the downpayments were not actually in the partnership's possession. (TR 89). Importantly, however, neither lender complained to the Bar about the inaccurate statements which Respondent made concerning the purchase price and downpayments on these townhouses. One lender could identify no problems existing with the loans.

From this scenario, it is apparent that Mr. Nuckolls failed to exercise good judgment in dealing with the lenders. Likewise, Respondent concededly should have exercised more care to communicate with his principal when acting as a fiduciary agent for Dr. Williamson in closing on the doctor's purchase of the Lora Lane Apartments. But the question arises as to whether a four-month suspension, which requires a showing of rehabilitation and possibly retaking the Florida Bar Exam,[4] is the appropriate punishment for this failure to use good judgment.

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[4] See Rule 3-5.1(e), Rules Regulating The Florida Bar. Furthermore, Respondent is required by Rule 3-5.1(h) to give notice to his clients if he is suspended.

Respondent submits that when his conduct is compared to that of other attorneys disciplined for similar transgressions, his proposed discipline of a four-month suspension is unduly harsh. Most notably, in a very similar case, The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985), an attorney presented to a bank for financing an invalid, preliminary contract for his purchase of a commercial property for $245,000.00, while his final and binding contract for $159,000.00 was intentionally not given to the lending bank. Based on the invalid contract, the bank loaned $160,000.00, exceeding the actual purchase price. The attorney tried to conceal his acts and exaulted in his scheme. Only a public reprimand was imposed. In contrast, Respondent made no loan application for his direct benefit as in Beneke. Rather, the immediate beneficiaries of the financing arrangements were the purchasing doctors. Further, Respondent has made no effort to conceal his transgression, and has been contrite in recognizing his impropriety. (TR 54).

Similarly, in The Florida Bar v. Fitzgerald, 491 So.2d 547 (Fla. 1986), an attorney misrepresented to a condominium purchaser that he had sufficient funds to pay off certain encumbrances. These funds did not exist, and the attorney knowingly misrepresented the status of the title. In light of the attorney's restitution and some question as to reliance by the purchaser, a public reprimand was imposed. Likewise, an officer of one of the loan companies in this case was uncertain that knowing the purchase price was only $36,000.00 would

necessarily have precluded financing the entire amount. (GCTR 23-25). Moreover, neither lender has complained about the status of any of these loans or about the Respondent's actions.

As a general proposition, a public reprimand is appropriate punishment for a lapse in judgment, The Florida Bar v. Welch, 369 So.2d 343 (Fla. 1979), or for an isolated neglect of duty, The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979). Also, in considering the appropriate punishment, this Court will consider an attorney's past derelictions. See The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981). Respondent has no prior disciplinary record and this case displays a lapse in judgment involving this one episode of a related series of commercial real estate transactions. Hence, public reprimand is an appropriate discipline.

Other cases have also involved attorneys who have become emeshed in misleading or dishonest business transactions, yet these attorneys have received only a public reprimand. In The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986), a public reprimand was imposed on an attorney who defrauded his in-laws in a real estate transaction for his own advantage, violating DR 1-102(A)(4) and 1-102(A)(6). The attorney in The Florida Bar v. Davis, 373 So.2d 683 (Fla. 1979), participated in a speculative real estate transaction with other businessmen. He accepted monies from these co-investors, but used the monies for his own purposes rather than as agreed. This resulted in loss to all the investors. A public reprimand was imposed for this dishonest

conduct. A public reprimand along with a probationary period was also imposed against an attorney who induced his wife to forge a note and mortgage, induced a notary to acknowledge these documents, and wrongfully secured funds using these forged instruments. The Florida Bar, In re Baccus, 329 So.2d 274 (Fla. 1976). See also The Florida Bar v. Bell, 493 So.2d 457 (Fla. 1986) (violating DR 1-102(A)(4), (A)(6) and DR 7-102(A)(5), (A)(7) by falsely acknowledging and witnessing a deed and other legal instruments warrants public reprimand).

Regarding Respondent's failure to adequately communicate with his principal Dr. Williamson, such breaches are also generally punished with a public reprimand. In The Florida Bar v. Toothaker, 477 So.2d 551 (Fla. 1985), an attorney breached his fiduciary duties and violated DR 1-102(A)(4) and 1-102(A)(6) (conduct involving dishonesty or fraud, and conduct adverse to attorney fitness) by receiving a deposit as an escrow agent and failing to deal with the deposit as promised, as well as misrepresenting his actions to his principal. Additionally, the same attorney, in another count, neglected a legal matter entrusted to him. The discipline imposed for both violations was public reprimand. See also The Florida Bar v. Sterling, 380 So.2d 1295 (Fla. 1980) (violating fiduciary duty by failing to deliver funds; public reprimand imposed).

Importantly, Dr. Williamson himself recognized that Mr. Nuckolls' behavior in failing to communicate was not willful. Dr. Williamson testified that Mr. Nuckolls genuinely believed he

had the appropriate authority to act as agent based on other partner's representations to Mr. Nuckolls. (GCTR 207). Thus, any failure by Respondent to adequately communicate with his principal was wholly inadvertent.

The recognized purposes of attorney discipline are to protect the public from harmful conduct, to be fair to the attorney, and to discourage others from committing similar acts. See The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970). Respondent's improprieties associated with this episode of commercial transactions does not display a conduct which threatens the public in general. He is aware that he failed to use good judgment in these transactions, and a fair punishment should recognize his regretful attitude. See The Florida Bar v. Craig, 261 So.2d 138 (Fla. 1972) (where attorney has recognized his mistake and will be able to resume practice according to professional standards, a public reprimand is sufficient). Public censure will adequately discourage others from committing these transgressions by warning attorneys that they must be vigilant to use sound judgment in business transactions with which they become involved.

This transgression is Mr. Nuckolls' only professional dereliction. As this Court stated, "For isolated acts, censure, public or private, is more appropriate". Pahules, 233 So.2d at 131. Moreover, Mr. Nuckolls has shown his committment to society through a decade of public service as a member of the Florida

House of Representatives from 1972 to 1982.[5] Indeed, this Court has noted that a record of public service suggests that an individual will not do willful violence to the ethics of the profession and is amenable to minimal corrective measures. The Florida Bar v. Goodrich, 212 So.2d 764 (Fla. 1968). Further, Respondent has practiced law since 1970 with no previous disciplinary problems. Respondent would request that these factors be considered in determining an appropriate discipline.

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[5] Respondent requests that this Court take judicial notice of this matter of public record.

CONCLUSION

Based on the above factors, Respondent respectfully requests that this Court impose a discipline of public reprimand with imposition of costs. Public reprimand is a particularly significant penalty when imposed against an attorney, such as Respondent, who has been publicly known. Therefore, Respondent submits that this punishment is the most appropriate in his case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to:

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