IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v. TFB File No: 20A86F67

HUGH PAUL NUCKOLLS, Case No: 69,639

Respondent.

_____/

THE REPLY BRIEF OF RESPONDENT

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In View of the Mitigating Factors, the Circumstances of this Case Warrant Imposition of a Public Reprimand

In an effort to avoid the Referee's findings of fact and to ridicule Respondent's, Mr. Nuckolls, candid acknowledgement of his inappropriate conduct, the Florida Bar seizes on and quotes some conflicting evidence concerning Mr. Nuckolls' knowledge of whether he ever expected to receive any down payments from either of the purchasers. What the Bar fails to mention is that this quotation is taken completely out of context, and Mr. Nuckolls later explained at the hearings that he had misunderstood the question. (TR 136-39; GCTR 304-06). Perhaps more importantly, the Referee did not find in his Report as to Count I (concerning Dr. Mateo's purchases) that Mr. Nuckolls never expected that the Mateo down payments would be forthcoming. Thus, this factual issue was resolved in Respondent's favor by the Referee, and Mr. Nuckolls' testimony that he initially expected Dr. Mateo's down payment should be accepted.

The Bar next asserts that the cumulative violations of DR 7-102(A)(5) and DR 7-102(A)(7), which involve counseling a client to make a false statement, are appropriate because Mr. Nuckolls acted on behalf of his own partnership. However, the statements made to the lender banks were clearly on behalf of the doctor-borrowers who were seeking the financing, and with whom no attorney-client relationship existed. Thus, the attorney-client

relationship is not directly implicated in this misconduct. A point the Bar also fails to appreciate is that the conduct is still the same for purposes of determining discipline, as these violations are totally cumulative.

The Bar asserts, without record support and without reference to a Referee's finding, that Mr. Nuckolls' conduct was motivated by personal gain and a desire to free his partnership from debt. This is simply an unsupported and fanciful conclusion which the Bar has independently reached. Such speculation which is unsupported by any finding of the Referee is highly improper and should be ignored by this Court.

The Bar's principal argument is that because there were two violations, one involving the doctors' bank loans and one involving a failure to communicate with one of the doctors (Dr. Williamson), the punishment should be enhanced. The Bar simply stretches too far in its attempt to exact an extreme punishment for Mr. Nuckolls' transgressions. The only complainant to the Bar was Dr. Williamson, who was upset with Mr. Nuckolls' for his failure to keep the doctor informed during the closing of Lora Lane Apartments. Indeed, the key part of the problem was Mr. Nuckolls' placing junior mortgages on these apartments, and Dr. Williamson disputing his oral agreement as to these liens. Importantly, Mr. Nuckolls and his partner, Mr. Dewberry, understood these junior mortgages were a form of debt relief to the partnership since they released partnership property, and were in lieu of Dr. Williamson's down payment on the Desoto

Village Apartments. (GCTR 124-26, 410). Indeed, the Referee found, in the alternative, that this was the contemplated oral agreement with Dr. Williamson. See Referee's Report at 4-5. Thus, even though Mr. Nuckolls knew that no cash down payment would be forthcoming from Dr. Williamson, he did expect, as supported by a Referee's finding, that a form of consideration, debt relief, would be forthcoming from Dr. Williamson. Moreover, even Dr. Williamson recognized that Mr. Nuckolls' placement of these junior mortgages was reasonably based on his partner's representations to him and any mistake was wholly inadvertent. (GCTR 207).

From this scenario, it is evident that these commercial transactions were all interrelated, and that one complaint from one of the doctors was the consequence. Notably, neither of the lenders who financed the doctors' purchases has complained to the Bar or other authorities, and no problems were reported with the loans. There is no evidence that any of the loans are in default, and, indeed, one lender testified that his loans were current. (GCTR 32-34). Thus, no one has been injured. Moreover, the Bar's assertion that Mr. Nuckolls compounded his misconduct through repetition ignores that these loans all involved only a single property. All of the communications with the lenders involved the closings on one apartment complex with the two borrowers, Drs. Mateo and Williamson, and occurred within a relatively short period of time. Further, Mr. Nuckolls' partner, Mr. Dewberry, had issued the $36,000 check which

represented the Mateos' down payment, assuring Mr. Nuckolls that funds would eventually be received from the Mateos. (TR 87). Importantly, there was no finding by the Referee that Mr. Nuckolls, when he presented the copy of the check to the lender, did not reasonably expect that this check would eventually be covered by the Mateos.

The Bar unjustly seeks to multiply the punishment by finely parsing Mr. Nuckolls' actions. Yet, it is clear that these communications represent loan transactions with lenders only on the Desoto Apartments. The Bar is also incorrect in asserting that Respondent characterized this case as involving a single transaction, as Respondent's Initial Brief repeatedly refers to "transactions". Respondent only asserts - correctly - that the transactions were interrelated as an episode. Mr. Nuckolls has acknowledged his wrongdoing in these transactions and took no efforts whatsoever to conceal his transgressions. The attorney in The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985), not only misrepresented a loan application for his own direct benefit as it was his loan, but he also subtly concealed the scheme and exalted in it. Thus, the conduct of the attorney in Beneke was much more egregious. When Respondent's acts are viewed as a whole, including the breach of fiduciary obligation which his own fiduciary testified was wholly inadvertent, public reprimand is most appropriate for this episode of dereliction.

The Bar's reliance on three disciplinary cases is wholly misplaced. In The Florida Bar v. Fussell, 189 So.2d 881 (Fla.

1966), prior opinion, 179 So.2d 852 (Fla. 1965), the attorney was convicted of two counts of federal felonies involving bank fraud, and received a fine and suspended jail sentence. Because a felony conviction was the predicate for discipline, he was ultimately suspended for six months after a full hearing, a ruling he did not contest. The case of The Florida Bar v. Moran, 462 So.2d 1089 (Fla. 1985), bears little resemblance to the case at hand since the attorney there made a misrepresentation to a court, conduct which was found to be prejudicial to the administration of justice (DR 1-102(A)(5)), which is not an issue in the present case. Finally, the Bar cites an unpublished order of this Court, The Florida Bar v. Clodfelter, No. 70,061 (Fla. 1987), to support its position on discipline. Review of this file at the Court reveals, however, that the attorney was found guilty after a federal grand jury indictment of two felony counts of lender fraud, and received a jail term and fine. The attorney was automatically suspended due to a judgment of guilty of a felony, as required under Rule 3-7.2, Rules Regulating The Florida Bar. Respondent obviously does not come before this Court even charged with such an offense, much less convicted. Therefore, this felony conviction case is completely inappropriate as a measure of for Respondent's punishment. Respondent's cases previously cited is his Initial Brief much more closely match the circumstances at issue here.

Mr. Nuckolls has recognized his misconduct, which he never sought to conceal, and he is contrite. The Bar does not dispute

this. Moreover, this is Mr. Nuckoll's first transgression, a point the Bar does not acknowledge. And even though the Bar unkindly insists that Mr. Nuckolls' ten years of public service in the Legislature should count against him, this Court has wisely held otherwise:

> This respondent has an excellent record of public service both to his community and his profession. He has held numerous positions of responsibility in the Bar and in community life. This type of background does not excuse professional misconduct. However, it does tend to suggest that an individual so committed and so oriented professionally is not likely to do willful violence to the ethics of the profession. It further suggests that such an individual is amenable to minimal corrective measures in the event of an unintentional professional misprison.

The Florida Bar v. Goodrich, 212 So.2d 764, 766 (Fla. 1968). The primary purpose in punishing an attorney is to protect society from an attorney's misconduct:

> [The punishment] 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 services of a qualified lawyer as a result of undue harshness in imposing penalty.

The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). Based on Mr. Nuckolls' recognition of his mistakes and his outstanding record of public service, he offers no realistic threat to society, which would be better served by his continued participation in its legal processes.

CONCLUSION

Based on the above mitigating factors, Respondent respectfully submits that a punishment of public reprimand is adequate and most fitting for the conduct in this 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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