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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Plaintiff, v. JACK BARITON, Respondent.	Supreme Court Case No. 76,157 The Florida Bar File No. 88-51,231 (17B)

ANSWER BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar, Plaintiff, will be referred to as "the Bar" or "The Florida Bar." Jack Bariton, Respondent, will be referred to as "Respondent." The symbol "TR" will be used to designate the transcript of the final hearing and the symbol "RR" will be used to designate the Report of Referee.

STATEMENT OF THE CASE AND THE FACTS

The Florida Bar is constrained to submit its own statement of the case and facts, as the Respondent's version of the same is argumentative and includes numerous references to matters outside the record on appeal.[1]

The facts of this case are relatively simple. On April 27, 1988 The Florida Bar received from the Respondent, a complaint against Mark Perlman, a member of The Florida Bar. R.R. at 1. In support of his complaint, the Respondent submitted a copy of a letter addressed to Perlman, dated January 27, 1988. R.R. at 1. This letter was introduced at trial as The Florida Bar Exhibit One (1). A copy of the same is attached hereto in the appendix as Exhibit One (1).

The Florida Bar Exhibit One (1) is not a true and correct copy of the Respondent's January 27, 1988 letter written to Perlman. R.R. at 2. In his reply to the Respondent's complaint, Perlman provided a true and correct copy of the letter in question. R.R. at 2. This "true version"

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[1]The Respondent's statement of the facts discusses in detail the matters considered by Grievance Committee 17"B" at two separate hearings. See pages 3 through 5 of the Respondent's Initial Brief. These grievance hearings and the proceedings related thereto are not part of the record before the Honorable Gerald D. Hubbart, Referee, as the same was not submitted as evidence by either party or otherwise inserted into the proceeding before the Referee. Therefore, any reference to the grievance proceedings in the Respondent's Brief should be ignored. Rules 3-7.6(l) and 3-7.7(c)(2), Rules of Discipline. Altchiler v. State DPR, Division of Professions Board of Dentistry, 442 So.2d 349 (Fla. 1st DCA 1983). The Florida Bar will not argue the merits of the Respondent's version of the grievance proceedings, as the same would further violate the Rules of Appellate Procedure.

of the January 27, 1988 letter was introduced at trial as The Florida Bar Exhibit Two (2). A copy of The Florida Bar Exhibit Two (2) is attached hereto in the appendix as Exhibit Two (2).

The Florida Bar Exhibit One (1) is different from The Florida Bar Exhibit Two (2) in that a portion of the first paragraph of said letter has been deleted from The Florida Bar Exhibit One (1). R.R. at 2. The language omitted from The Florida Bar Exhibit one (1) reads as follows:

> ". . . and in addition, there was a two week period around my terminated notice where I did not receive a paycheck. Your response at that time was 'When the cases are settled and fees come in, you can deduct your hourly wages that are owed from those monies.'" R.R. at 2.

The Florida Bar Exhibit One (1) and Two (2) are also typed on different letterhead. R.R. at 2. It is both parties' opinion that the aforesaid changes in The Florida Bar Exhibit One (1) are not material in nature.

On March 28, 1990 a Florida Bar grievance committee found probable cause concerning this matter. On June 15, 1990 The Florida Bar filed a complaint against Respondent in the Supreme Court of Florida. On June 25, 1990 Dade County Court Judge Gerald D. Hubbart was appointed Referee in the disciplinary matter and on November 8, 1990 final hearing was held before him.

On December 4, 1990 the Referee rendered his Report and found Respondent had violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] and 3-4.3 [The commission by a lawyer of any act contrary to honesty and justice is cause for discipline.] of the Rules of Discipline, and Rules 4-8.4(a) [A lawyer

shall not violate the Rules of Professional Conduct.] and 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.] of the Rules of Professional Conduct. The Referee recommended that Respondent be publicly reprimanded. The Respondent, by his Petition for Review dated January 31, 1991, is appealing the Referee's finding of guilt and his recommendation of a public reprimand.

SUMMARY OF ARGUMENT

The Respondent submitted a copy of a document to The Florida Bar in support of a grievance that he was filing against a member of The Florida Bar. The Respondent knew or should have known, that said document was not a true and accurate copy of the document in question. Neither party contends that the changes in the document were material. Yet, the inescapable conclusion is that an altered document was submitted to the Bar in the course of a Bar grievance. Who submitted the document? The Respondent did. He should be held accountable for his actions whether they were intentional or not.

The Florida Bar relies upon the accuracy of the documents submitted to it by members of the Bar. In this instance, The Florida Bar's trust was misplaced and the Respondent should therefore be disciplined.

The Referee found the Respondent guilty of certain rule violations and recommended that the Respondent be publicly reprimanded. The Bar is in complete agreement with the findings of guilt and the recommended discipline.

A public reprimand is reserved for those isolate instances of minor misconduct. The Florida Bar v. Welty, 382 So.2d 1220, 1223 (Fla. 1980). This case is appropriately resolved by a public reprimand.

ARGUMENT

POINT I

A PUBLIC REPRIMAND IS APPROPRIATE DISCIPLINE FOR SUBMITTING AN ALTERED DOCUMENT TO THE FLORIDA BAR WHEN THAT ALTERATION IS NOT MATERIAL.

The Respondent, a member of The Florida Bar, filed a Bar grievance against another member of the Bar, Mark Perlman. As an attachment to his complaint, the Respondent included a copy of a letter purportedly sent to the accused attorney (The Florida Bar Exhibit One). It was later revealed that the Respondent's attachment to his grievance was not a true and accurate copy of the letter actually sent to Perlman. However, the alterations in the same were not material.

Irrespective of whether the changes were material or if the Respondent, by making these changes, intended to mislead the Bar by the same, the Bar was in fact mislead that the version of the letter submitted was in fact a true and correct copy of the letter in question. The Florida Bar should be able to rely on the documents being submitted in the course of the grievance process. This is especially true when the document is supplied by an attorney.

> "The preamble to Chapter 4 of the Rules Regulating The Florida Bar states, 'Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities.' When taking the oath of admission to The Florida Bar, one must swear to 'never seek to mislead the judge or jury by any article or false statement of fact or law.'"

The Florida Bar v. Kickliter, 559 So.2d 1123, 1124 (Fla. 1990). For misleading The Florida Bar by submitting the letter in question (The

Florida Bar Exhibit One), which letter had several lines deleted from the original text, the Referee found the Respondent in violation of Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] and 3-4.3 [The commission by a lawyer of any act contrary to honesty and justice is cause for discipline.] of the Rules of Discipline and Rules 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] and 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.] of the Rules of Professional Conduct.

It is well settled that a Referee's findings of fact are presumed correct and will be upheld unless found to be clearly erroneous. The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990), The Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990). The Respondent has failed to demonstrate that the Referee's finding of fact and guilt were clearly erroneous.

The appropriate discipline for negligently submitting an incorrect document in a court proceeding is a public reprimand. Fla. Standards for Imposing Lawyer Sanctions, 6.13. A Bar proceeding is the equivalent of a court proceeding. Standard 6.13 of The Florida Standards for Imposing Lawyer Sanctions states that a:

> Public reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld.

In the case at hand, the Respondent knew or should have known that the document submitted was not accurate. At the least he was negligent in determining the accuracy of the same. Therefore Standard 6.13 is

applicable and warrants a public reprimand. Id.

The submitting of a non materially altered document in a disciplinary proceeding would appear to be a case or first impression the State of Florida.[2] However, the issue has been addressed in at least one other jurisdiction.

In Michigan Attorney Grievance Commission v. Metry D.P. 144/81 (Mich. Atty. Disc. Board 1981) a lawyer was publicly reprimanded where he accidentally filed a motion for a bond which contained inaccurate statements. The hearing board noted that it was Metry's "responsibility, as attorney of record, to insure that no material misstatements were contained in a document submitted to the Court." Id. at 4. Attorneys in Florida are held to this same standard. The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990). In fact, attorneys have been disbarred for this type of misconduct. Id. The fact that an attorney submits a document with immaterial alterations, whether intentional or not, also warrants the imposition of discipline. In any event, Metry's misconduct is similar to the Respondent's action as both attorneys submitted inaccurate documents to a tribunal.

In an analogous case, this Court has publicly reprimanded an attorney for submitting a notarized pleading to a court, when the

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[2] If the changes were material in nature, the Bar would be seeking sterner discipline. The The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990) [Forging a client's name on a will and then submitting the same for probate warranted disbarment notwithstanding a lack of a dishonest motive by the attorney.], The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979) [Among other things filing a knowingly false response in a grievance proceeding warranted a sixty day suspension.]

attorney knew, or should have known, the pleading in question contained an untrue factual averment. The Florida Bar v. Sax, 530 So.2d 284, 285 (Fla. 1988). The case at hand is similar to Sax, as the Respondent knew, or should have known, the version of the January 27, 1988 letter he submitted to the Bar had several lines deleted from it, was on different stationary and was, therefore, not a true and correct copy of the document in question.

Given Standard 6.13 and the cases cited above, a public reprimand is the appropriate discipline for Respondent's misconduct.

POINT II

THE FLORIDA BAR NEED NOT DEMONSTRATE INTENT TO SUSTAIN THE RESPONDENT'S CONVICTION.

The Respondent failed to determine whether the document submitted with his complaint against Perlman was accurate. Whether this failure was intentional or not makes no difference. Even the negligent failure to determine whether documents are false warrants a public reprimand. Fla. Standards for Imposing Lawyer Sanctions, Standard 6.13, Sax at 285.

The Respondent raises two arguments in regards to intent. He first contends that "It happened by accident, whether by secretary or computer, that the sentences were not included in (The Florida Bar) Exhibit One." Respondent's Initial Brief at page 12. The record is devoid of any other explanation or detail about this alleged "accident". It is respectfully contended if there was such an accident, the Respondent had an obligation to correct the Bar's misunderstanding of The Florida Bar Exhibit One upon knowledge that he had submitted an

incorrect version of the letter in question. This he did not do.[3]

The Respondent also argues that the submission of the altered document caused no actual or potential injury to a party or to the Bar's proceeding. This contention is not determinative of guilt or innocence, but should only be taken into account in analyzing the appropriate level of discipline to be meted out for the Respondent's ethical defalcation. In any event, any time an attorney submits an altered document to a tribunal, whether intentional or not, the same causes harm to our system of justice. The court and other attorneys must be able to trust the accuracy of the documents submitted to them by a fellow attorney. When that trust is misplaced, our system of justice suffers as the participants therein begin to question fellow member of the Bar about the correctness of copies.

The action of the Respondent in this case went much further than mere unprofessionalism. The implied representation to the Bar, that the letter produced was a true copy and warrants a public reprimand regardless of the intent. Rapid Credit Corp. v. Sunset Park Centre, Ltd., 566 So.2d 810, 812 (Fla. 3DCA 1990) (Schwartz, C.J., specially concurring). Chief Justice Schwartz noted that the attorneys

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[3]Although the Respondent's contention that he could not testify at the grievance committee hearing as he invoked his Fifth Amendment privileges upon advice of counsel, is outside the record, it should be noted that there were several non testimonial ways for him to have corrected the Bar's misunderstanding about The Florida Bar Exhibit One. For example, he could have sent a short letter to the Bar explaining the reason for the differences in the two exhibits.

> ". . . implied representation to the clerk, to secure a default without notice that the defendants had made no appearance in the case and, even more shocking, their similar representations - no less untrue and no less wrongful because they were made by silence - that their appearances before the lower court were something more than charades, although an unrevealed default had already been taken, may involve violations [of certain enumerated Rules of Professional Conduct.]"

Id. [Emphasis supplied.]

In the case before this Court the Respondent's representation that he had supplied an accurate copy of his January 27, 1988 letter to Perlman was "no less untrue and no less wrongful because (it was) made by silence." Id.

Clearly the Bar need not prove intent in this case.

CONCLUSION

A public reprimand is appropriate discipline for submitting an altered document to The Florida Bar when that alteration is not material. This supposition is upheld by Standard 6.13 of Florida's Standards for Imposing Lawyer Discipline and the cases cited herein.

That same standard clearly implies that intent is of no import in determining guilt when the Respondent neglected to determine whether the document submitted to the Bar was false.

Respondent should be publicly reprimanded and directed to pay the Bar's costs in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of The Florida Bar has been furnished to Jack Bariton, Respondent, at 7800 W. Oakland Park Blvd., Suite 109, Sunrise, FL 33321, by regular mail on this 10th day of April, 1991.

KEVIN P. TYNAN