047



IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JOHN R. FORBES,

Respondent.
_____/

Case No. 76,451

TFB File No. 91-00030-04B

# ANSWER BRIEF OF COMPLAINANT

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

## PRELIMINARY STATEMENT

The Appellant in these proceedings, JOHN R. FORBES, will be referred to as Respondent in this Brief. The Appellee will be referred to as The Florida Bar.

All references to the Referee's Report will be designated by (RR-_____). References to the transcript of the final hearing will be designated by (TR-_____). Any references to the Respondent's Initial Brief will be designated by (IB-_____).

## STATEMENT OF CASE AND SUMMARY OF FACTS

This case is a matter of original jurisdiction before the Supreme Court of Florida pursuant to Article V, Section 15 of the Constitution of the State of Florida.

The Florida Bar has no objection to the statement of facts set forth in the Respondent's Initial Brief. In addition, it is undisputed that Respondent was convicted of violating Count 2 of a federal indictment upon a plea of guilty (RR-5). This was a charge of knowingly and willfully making materially false statements in a document submitted to First Federal Savings and Loan to influence its action for granting a loan to Respondent (RR-5). This violation constitutes a felony.

Pursuant to Rule 3-7.2(b), Rules of Discipline, Respondent's conviction is conclusive proof of guilt of the criminal offense charged in the indictment.

On August 13, 1990, The Florida Bar filed a complaint against Respondent with the Supreme Court of Florida. A final hearing on this matter was held on February 22, 1991. After hearing all of the evidence, the presiding Referee found Respondent guilty of violating Rule 3-4.3 (the commission by a lawyer of any act which is unlawful or contrary to honesty

and justice), of the Rules of Discipline of The Florida Bar; and Rules 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another), 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a a lawyer in other respects), and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct of The Florida Bar. After considering both mitigating and aggravating factors, the Referee recommended that Respondent be disbarred (RR-6).

## SUMMARY OF ARGUMENT

The Referee had the opportunity to see and hear Respondent and weigh the mitigating factors in the matter before the Court. The conclusion of the Referee was that Respondent should be disbarred and such discipline was recommended.

The actions of Respondent were knowingly and willfully committed and the Standards for Imposing Lawyer Sanctions and recent case law support the recommended sanction of disbarment.

## ARGUMENT

The facts surrounding Respondent's conviction are undisputed. Respondent's federal felony conviction was a direct result of his fraudulent conduct--he knowingly and willfully made materially false statements in a document submitted to a Savings and Loan to influence its decision on whether to grant the Respondent a loan (RR-5). Respondent submitted a construction contract that was not only false and fraudulent as to its date and price, but also as to the scope of work that was to be done (IB-4).

Respondent cannot hide behind a mask of ignorance. He admitted that he knew there were two contracts (each with a different price) in existence (TR-44). Respondent also knew the contracts were backdated (IB-4). Moreover, Respondent entered a voluntary guilty plea to a federal felony count of making false statements to a federal savings and loan in order to obtain the benefits of a construction loan. The facts of this matter, as they are stated in the record, clearly demonstrate the Respondent knew the ramifications of his conduct.

Nor is it reasonable to say the Respondent was inexperienced and, therefore, that his misconduct was a mere mistake. Respondent has been a practicing attorney for over twenty years (TR-45). Further, he has been in the development business for approximately twenty years (TR-41). Respondent

admits that he has been doing serious development work for over ten years (TR-41). Thus, it is unreasonable to assume that Respondent was unaware of his misconduct when he gave the savings and loan a fraudulent contract. He knew the savings and loan would base its decision--on whether to loan him the funds or not--on the construction contract. Accordingly, Respondent was convicted of violating Title 18, U.S.C. §§ 1014 and 2, when his actions were discovered.

Respondent tries to downplay the seriousness of his misconduct. He asserts that he only gave "false and misleading information to a savings and loan" (IB-11), "that he was involved in two other construction projects and that no improprieties were associated with these projects" (IB-13), "that he never drafted the fraudulent contract" (IB-12), "that the subsequent financial failure of these projects was not Respondent's fault" (IB-13). Respondent also states he cooperated with the authorities (IB-14), and did not misuse the loan proceeds (IB-11). Despite all of these justifications, the fact remains, Respondent engaged in fraudulent conduct and was subsequently convicted. Respondent was an experienced lawyer and developer, yet, he knowingly misled a financial institution. The Florida Supreme Court should not be expected to treat such conduct lightly.

Since the Respondent's guilt is undisputed, the only issue left to be resolved is the appropriate discipline. It is The Florida Bar's position, with the Referee's concurrence, that Respondent should be disbarred. A review of analogous caselaw

and the Florida Standards for Imposing Lawyer Sanctions will demonstrate that this severe sanction is warranted.

The Respondent's counsel argues that attorneys who have engaged in similar misconduct have only received public reprimands or minor suspensions. In support of this argument, he cites three cases in which these minor sanctions were levied. The Florida Bar v. Nuckolls, 521 So. 2d 1120 (Fla. 1988); The Florida Bar v. Siegel, 511 So. 2d 995 (Fla. 1987); The Florida Bar v. Beneke, 464 So. 2d 548 (Fla. 1985).

There are, however, several major differences between these cases and the case at bar. The Respondent was convicted of a federal felony for his actions; none of the attorneys in the cases cited by the Respondent were convicted for their misconduct. Further, in none of the Respondent's cases did the Referee recommend disbarment. Evidently, after reviewing the facts first-hand, these Referees concluded that a less severe sanction was appropriate. This is not what happened in the case at hand. After listening to all of the evidence, the Referee recommended disbarment for Respondent notwithstanding the mitigating factors (RR-6).

Moreover, the cases cited by the Respondent are not even analogous to each other. In Nuckolls, the court noted that, in its view, Beneke and Nuckolls were not apposite. 521 So. 2d at 1122. Therefore, under the Florida Supreme Court's analysis, two of the Respondent's cases should not be considered analogous. Respondent, however, tries to argue that Beneke, Nuckolls, and Siegel are virtually identical to

the case at hand (IB-8). Only in Nuckolls and Siegel do the facts even faintly resemble the instant case; in these cases the attorneys deliberately schemed to secure financing. In Beneke--where the attorney was only given a public reprimand--the attorney applied for a loan using a "bona fide contract for sale". See Nuckolls, 521 So. 2d at 1122. It was only later, when the contract was modified, that he failed to inform the bank. Id. Thus, there does not exist any caselaw identical to the case at hand where an attorney only received a public reprimand as Respondent concludes.

As noted above, there are several major differences between Nuckolls, Siegel and the case at hand, which demonstrate that these cases are not useful in determining what sanction Respondent should receive. Again, these crucial differences are: Respondent was convicted, and the referee, based on his review of the facts, recommended that Respondent be disbarred.

There is, nevertheless, an abundance of caselaw that imposes severe disciplinary measures for conduct similar to the Respondent's. Before reviewing these cases, a review of the Florida Standards for Imposing Lawyer Sanctions is essential in determining an appropriate sanction. The following sections are applicable (RR-6):

5.11 Disbarment is appropriate when:

5.11(a) - A lawyer is convicted of a felony under applicable law.

5.11(b) - A lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft.

5.11(e) - A lawyer attempts or conspires or solicits another to commit any of the offenses listed in sections (a)-(d).

5.11(f) - A lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

It is also essential that both mitigating and aggravating factors be considered before imposing a sanction. The following aggravating factors were found applicable (RR-7):

9.22(b) - Dishonest or selfish motive;

9.22(i) - Substantial experience in the practice of law.

Likewise, the following mitigating factors were found applicable (RR-7):

9.32(a) - Absence of a prior disciplinary record;

9.32(e) - Full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

9.32(l) - Remorse.

The Referee also took into consideration the Respondent's cooperation with the Governmental authorities (RR-7). Based on his cooperation, the Referee recommended that the Respondent's disbarment be retroactive to the date of his felony conviction. It is The Florida Bar's position, however, that the Respondent's cooperation with the authorities is not proper grounds for mitigation. It is a fallacy to excuse criminal behavior after the behavior is exposed, merely because the attorney cooperated with the authorities in an effort to further his own interests. The Florida Bar, therefore, does not believe the Respondent's cooperation with the Governmental authorities should be considered a mitigating factor.

Next, there are several cases which demonstrate how the court has dealt with other, similar misconduct; the sanctions imposed in these cases also coincides with the sanctions recommended by the Florida Standards for Imposing Lawyer Sanctions.

In The Florida Bar v. Greene, 557 So. 2d 867 (Fla. 1990), an attorney was disbarred for conduct virtually identical to the case at hand. In Greene, the attorney was convicted for knowingly and willfully making materially false statements to a bank in an effort to influence its actions.

Even though the attorney's disbarment was the result of a consent judgment, this court accepted the agreement as just and fitting. A copy of the Conditional Guilty Plea for Consent Judgment and the court order are attached hereto for the court's review. See, "Appendix".

In The Florida Bar v. Isis, 552 So. 2d 912 (Fla. 1989), Isis was adjudicated guilty of serious fraud, misrepresentation, deceit, and dishonesty involving large sums of money. The court stated that "disbarment is required based on the serious nature of the felony for which Isis was convicted. Id. at 913.

It should be noted that all felony convictions do not warrant disbarment. Instead, this court has stated each case must be viewed solely on the merits. The Florida Bar v. Jahn, 509 So. 2d 286, (Fla. 1987). However, in similar cases this court has not hesitated in disbarring the attorney. See The Florida Bar v. Haimowitz, 512 So. 2d 201 (Fla. 1987) (attorney convicted of obtaining property by false pretenses, mail fraud, and extortion was disbarred).

The court has implicitly stated that fraudulent conduct is a serious enough charge to warrant disbarment. In The Florida Bar v. Lowe, 530 So. 2d 58 (Fla. 1988), an attorney was disbarred for fifteen years based on his fraudulent conduct and criminal conviction. In The Florida Bar v. Simons, 521 So. 2d 1089 (Fla. 1988), an attorney was disbarred for attempting to defraud an insurance company coupled with several acts that constituted theft. Finally, in The Florida Bar v. Cooper,

429 So.1 (Fla. 1983), an attorney who was involved in several fraud schemes was disbarred for twenty years.

All of these cases clarify that an attorney should be disbarred when he engages in conduct similar to the Respondent's--he knowingly and willfully engaged in fraudulent conduct which resulted in his criminal conviction.

It is also important to note that in Lowe, Simons, and Haimowitz, the Referee, after reviewing the facts, recommended disbarment. Similarly the Referee in this case recommended that Respondent be disbarred. Even though the Referee's function is only to weigh the evidence and determine its sufficiency, this court has noted that "The Referee's recommendation ... carries great weight. The Referee had the opportunity to see and hear respondent and weigh the mitigating factors against the seriousness of the offense." The Florida Bar v. Simmons, _____So. 2d _____, 16 F.L.W. S433 (Fla. June 6, 1991). This is exactly what has happened here. The Referee weighed all of the evidence, taking into consideration both mitigating and aggravating factors, and, accordingly, he made his recommendation. The Florida Bar asserts that, based on analogous caselaw and the Florida Standards for Imposing Lawyer Sanctions, the Referee's disbarment recommendation was proper and justified.

Additionally, The Florida Bar believes disbarring the Respondent will fit squarely within the three-prong test enunciated by this court in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970).

> "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 services 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."

In disbarring the Respondent, a clear message will be sent to the public, the legal profession, and the Respondent. Fraudulent conduct will not be treated lightly or condoned. Hopefully, others will be deterred from engaging in similar conduct.

Based on the foregoing reasons, The Florida Bar respectfully asks this court to approve the Referee's recommendation and disbar the Respondent.

## CONCLUSION

The recommendation by the Referee that Respondent be disbarred is the appropriate discipline and should be affirmed.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Complainant regarding Supreme Court Case No. 76,451; TFB File No. 91-00030-04B has been forwarded by regular U.S. mail to JOHN A. WEISS, Counsel for Respondent, at his record bar address of Post Office Box 1167, Tallahassee, Florida 32302-1167, on this 19th day of August, 1991.

JAMES N. WATSON, JR.
Bar Counsel

# APPENDIX