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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

v CASE NUMBER 76,451

JOHN R. FORBES,

Respondent.

_____/

RESPONDENT'S REPLY BRIEF

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ARGUMENT

THE PROPER DISCIPLINE FOR RESPONDENT'S CONVICTION OF ONE COUNT OF MAKING A FALSE STATEMENT OR REPORT WHILE APPLYING FOR A LOAN IN 1984, A FELONY, PARTICULARLY IN LIGHT OF THE MITIGATING FACTORS PRESENT, IS A THREE YEAR SUSPENSION.

The three cases involving lawyer misconduct most similar to Respondent's, The Florida Bar v Beneke, 464 So.2d 548 (Fla. 1985), The Florida Bar v Nuckolls, 521 So.2d 1120 (Fla. 1988) and The Florida Bar v Siegel and Canter, 511 So.2d 995 (Fla. 1987) resulted in disciplines ranging from a public reprimand to ninety days. The Florida Bar cannot sufficiently distinguish those cases from the case at Bar to justify their demands that Respondent be disbarred.

The only case cited by the Bar that is similar to the instant case, The Florida Bar v Greene, 557 So.2d 867 (Fla. 1990) was a discipline imposed by consent. And, Greene was disbarred for four felony convictions involving four instances of perjurious conduct. His crimes covered a period exceeding three months. The other cases cited by The Florida Bar involve offenses much, much more serious than the instant case.

As pointed out in Respondent's initial brief, he has been convicted of one count of making false statements to a bank in order to secure a loan in November 1984. Even The Florida Bar conceded on page six of its Brief that Respondent only "misled a financial institution." Respondent did not misuse any loan proceeds. In fact, he built an award-winning condominium project exactly as represented to First Federal.

The Florida Bar does not rebut Respondent's testimony that the actual loan transaction for the money borrowed for Hoyt House was closed in June, 1984, some five months before the false statements were made to Respondent's bank.

Respondent, in essence, told the bank that the cost of refurbishing the building to turn it into condominiums would be $350,000.00 when, in actuality, the cost would be $425,000.00 and Respondent would be responsible for the enhanced sum. Respondent did not ask First Federal to increase the amount of the loan to him.

The Florida Bar glosses over the fact that Respondent had two other projects financed by First Federal at the same time that Hoyt House was being built, that there were no improprieties with those projects whatsoever, and that Respondent lost all three projects as the result of an economic turndown.

There is no allegation that Respondent lost his three projects as a result of any improper conduct on his part.

There is also no evidence in the record that shows that First Federal lost any money as a result of their taking over Hoyt House.

In the case at Bar, unlike the numerous instances when The Florida Bar appeals the Referee's recommended discipline, the Bar urges this Court to lend a presumption of correctness to the Referee's recommended discipline. However, this Court has emphatically stated that no presumption of correctness accompanies a referee's recommended discipline. The Florida Bar v McCain, 361 So.2d 700 (Fla. 1978) at page 708. It is "the sole province and

responsibility" of the Supreme Court of Florida to determine the appropriate sanction to be imposed in a disciplinary case. As the Bar noted in its Answer Brief, each case must be decided on its own merits. The Florida Bar v Jahn, 509 So.2d 286 (Fla. 1987).

Respondent urges this Court to look at the cases most clearly analogous to that at Bar: Beneke, (who received a public reprimand); Nuckolls, (who received a 90 day suspension) and Siegel and Canter, (who received 90 day suspensions). Each of those individuals lied to a financial institution in an attempt to secure financing of mortgages on property.

In Beneke, the lawyer secured financing in excess of the purchase price (after representing that he was only borrowing 80%). He then exhibited "smug exultation" over his success.

The accused lawyer in the Nuckolls case engaged in a scheme to fraudulently obtain 100% financing of several condominium units. He perpetrated his fraud by photocopying checks representing to be down payments and then forwarding them to the bank. There was also an additional count of misconduct involving Mr. Nuckolls' violation of his fiduciary responsibility as a land trustee.

Finally, Ms. Siegel and Mr. Canter, law partners, lied to a financial institution on numerous occasions over a six month period in an effort to obtain 100% financing of a building to house their law practice.

Respondent argues that Ms. Siegel Messrs. Beneke, Nuckolls and Canter received appropriate disciplines for their misconduct. Each one of those lawyers made a serious error in judgment while trying

to borrow money. Each lawyer had a previously clean record. The discipline meted out in each case reflected the likelihood that none of those lawyers would be in trouble again. Respondent submits the same is true in his case.

Respondent realizes that his felony conviction warrants a more severe suspension than that imposed in the above cited cases notwithstanding the fact that, for all intents and purposes, the misconduct was identical. But, to disbar Respondent for the same acts for which others received short suspensions makes a mockery of precedence. To elevate the sanction for Respondent's misconduct from a short suspension to disbarment solely because he was convicted of a felony is contrary to this Court's holding in The Florida Bar v Pavlick, 504 So.2d 1231 (Fla. 1987). As pointed out in Respondent's initial brief, the Court stated on page 1235 of Pavlick that:

> We note further that neither the Integration Rule [now replaced by the Rules Regulating The Florida Bar] nor case law mandates disbarment for all lawyers who are convicted of a felony. (Citations omitted) page 1235.

The cases cited by The Florida Bar as support for disbarment all involve misconduct far more serious than that at issue here.

The case that is the least inappropriate is The Florida Bar v Greene, 557 So.2d 867 (Fla. 1990). The Court's opinion in Greene had no facts. The Florida Bar has attached to its brief a copy of the consent judgment that led to the Court's approval of the arrangements reached between Mr. Greene and the Bar. (Respondent's counsel would urge this Court to accord consent judgments very

limited effect in appeals. As is true of all plea agreements, a plea arrangement involves give and take. The consent judgment tendered to the Supreme Court by Mr. Greene may not include all of the circumstances involved in the negotiations between the parties. For example, as consideration for the plea The Florida Bar may have dropped charges or may not have brought additional charges against Mr. Greene. Respondent's counsel would also point out that there are probably consent judgments in the Bar's files, which are unavailable to Respondent, in which consent judgments were approved for misconduct similar to Respondent's but which did not result in disbarment).

Unlike the case at Bar, which involved one count of misconduct, Mr. Greene was convicted of four felonies. He lied to a financial institution regarding its attempt to collect a $123,413.00 judgment against him on three separate occasions, April 12, 1984, May 9, 1984 and June 12, 1984. He first lied by saying he had no net worth and was unable to pay the entire amount of the judgment on April 12, 1984. He then lied twice to the bank on May 9, 1984 by stating that he had a nominal or negative net worth and by stating that his CPA had advised him against preparing net worth statements. He lied on a third occasion on June 12, 1984 when he stated that he could not afford monthly settlement payments of $533.00 per month.

In addition to being convicted for the previously mentioned three counts, Mr. Greene was also convicted of an additional count of making false statements in connection with a $170,000.00 loan application to purchase a limited partnership interest in New York. That misconduct occurred during the period May 2, 1984 through July 12, 1984.

Thomas H. Greene agreed to disbarment after engaging in a course of conduct involving numerous lies over a long period of time in an attempt to forestall judgment proceedings against him. Accordingly, his case is completely unlike the case at Bar. John Forbes was guilty of only one count of misconduct and he used the proceeds from the loan for exactly the project that he said he was going to use it for. It is also very significant that Respondent had two other projects financed by First Federal that involved no hints of misconduct.

The other five cases cited by The Florida Bar as support for their position are easily distinguished and should not be considered grounds for disbarment.

In The Florida Bar v Isis, 552 So.2d 912 (Fla. 1989), the accused lawyer was disbarred after pleading no contest to charges of conspiracy to commit organized fraud and to unlawful use of boiler rooms. Mr. Isis was convicted of two felonies that clearly involved more than a single act of misconduct. Most importantly, however, the Court found that two aggravating factors existed that justified disbarment. Specifically, those factors included

> using a professional license and legal skills to violate the law and a prior disciplinary

> offense resulting in three months' suspension. (Citation omitted).

Unlike Mr. Isis, the Respondent at Bar did not use his "legal skills to violate the law" and he does not have a prior disciplinary offense.

The misconduct in the instant case is nowhere near as serious as that involved in The Florida Bar v Haimowitz, 512 So.2d 200 (Fla. 1987). There, the accused lawyer was disbarred after being found guilty of the commission of six felonies including extortion. The Bar would have this Court impose the same disciplinary sanction for a single instance of making a false loan application as it would for extortion. Such an argument must be rejected by this Court.

The other cases cited by The Florida Bar as support for disbarment involve such serious misconduct as to totally remove them from consideration in Mr. Forbes' case. In The Florida Bar v Lowe, 530 So.2d 58 (Fla. 1988) the lawyer was convicted of two counts of grand theft. The case is silent as to how much money Mr. Lowe stole. However, there is no allegation of theft in the case at Bar.

The lawyers in The Florida Bar v Simons, 521 So.2d 1089 (Fla. 1988) and The Florida Bar v Cooper, 429 So.2d 1 (Fla. 1984) were each disbarred for twenty years. Ms. Simons was found guilty of

> several acts constituting theft and several acts in furtherance in an attempt to defraud an insurance company.

Mr. Cooper was involved in several fraud schemes, one of which was very elaborate and which involved theft of funds. Both lawyers

engaged in an extensive course of conduct involving fraud, repeated lies and the theft of money. (As is usually true with lawyers disbarred for long periods of time, neither Ms. Simons nor Mr. Cooper defended themselves in the Bar's disciplinary proceedings. One almost wonders if the Bar does not take advantage of "empty chairs" in seeking enhanced disbarments).

In determining the discipline to be imposed, Respondent asks this Court to give the same priority to the factors used in determining discipline as they are listed in The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970). The first and the most important factor is protection of the public. The second factor is a discipline that is fair to the Respondent, encouraging rehabilitation while yet punishing the misconduct. The final factor, deterrence, while important, should not be considered more important than the first two.

Suspending Respondent from the practice of law for three years will provide the public with the protection it needs. John R. Forbes, with the exception of the events in November, 1984, has never been a threat to the public. He has practiced law for 22 years without any problems or harm to the public. He has nobly served the public as a state legislator and in various quasi-governmental roles. His single act of misconduct involved, at worse, obtaining funds for a development project improperly. Those funds, however, were properly used to build the project.

Disbarment would be patently unfair to Respondent and to his family. This Court should never lose sight of the fact that it is passing judgment on an individual and his family whenever it metes out disciplinary orders. Protection of the public is primary, but fairness to the accused lawyer is still very important.

Respondent's acts, while warranting discipline, do not warrant disbarment. Disbarment should be reserved for those lawyers whose rehabilitation is highly unlikely. The Court's pronouncements on this topic in The Florida Bar v Felder, 425 So.2d 528 (Fla. 1982) are very applicable to this case. In Felder, the Court said on page 530 that:

> We do not believe this is an appropriate case for disbarment. "Disbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable." The Florida Bar v Davis, 361 So.2d 159, 162 (Fla. 1978). "[I]t is appropriate in determining the discipline to be imposed to take into consideration circumstances surrounding the incident, including cooperation and restitution." The Florida Bar v Pincket, 398 So.2d 802, 803 (Fla. 1981). There is no showing that the rehabilitation of respondent Felder is highly improbable. He has been a member of the Bar since 1950 and this is the first time he has been involved in disciplinary proceedings.

As was true with Mr. Felder, there is no showing that the rehabilitation of Respondent Forbes is highly unlikely.

On page six of its brief, The Florida Bar asks this Court not to treat Respondent's misconduct "lightly". A three year suspension is not a light sanction! Removing one from one's chosen profession after 22 years of practice is a harsh discipline indeed. The financial consequences are overwhelming. The loss of esteem

is traumatic. And, those consequences are not limited to the respondent lawyer. The spouse and children of the Respondent must also live under the pall of the sanction that is handed down. While Respondent acknowledges to this Court that he is responsible for his actions and the consequences stemming from them, he submits his actions do not warrant the devastating effects that disbarment will have on him and his family.

This Court should not dilute the sanction of disbarment by imposing it for a single count of misrepresentation while obtaining a loan when the loan proceeds were properly used. Isolated acts of misconduct, when occurring outside the practice of law, and which do not involve misuse of funds, should not result in the same discipline as those involving six felony counts including extortion (see Haimowitz, supra); or misconduct involving four counts of repeated lies to a financial institution to defeat the legitimate collection of a judgment (Greene supra); or using one's "professional license and legal skills" to operate boiler rooms resulting in two felony convictions (Isis, supra). Respondent has one blemish in an otherwise long and notable practice. His misconduct did not involve the practice of law which, when coupled with the other mitigating factors involved, removes this case from those warranting the ultimate sanction, i.e., disbarment.

CONCLUSION

Respondent asks this Court to reject the Referee's recommendation that he be disbarred and that this Court impose as the appropriate discipline suspension from the practice of law for three years, nunc pro tunc September 12, 1990.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was mailed to James N. Watson, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this third day of September, 1991.

JOHN A. WEISS