IN THE SUPREME *COURT* OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STEVEN NECKMAN,

Respondent.
_____/

SUPREME COURT CASE
NO. 78,489
THE FLORIDA BAR CASE NO.
92-70,218(11N)

REPLY BRIEF OF THE FLORIDA BAR

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PREFACE

For purposes of this brief, the complainant, The Florida Bar, will be referred to as The Florida Bar and Steven Neckman will be referred to as the Respondent.

Abbreviations utilized in this brief are as follows:

"R" refers to the Report of Referee dated September 14, 1992.

"SR" refers to the Supplemental Report of Referee dated October 6, 1992.

"T" refers to the Transcript of final hearing held on August 10, 1992.

"TR" refers to the Transcript of the hearing held on October 2, 1992.

"E" refers to exhibits introduced at the final hearing.

SUMMARY OF ARGUMENT

The Referee's recommendation that Respondent receive a mere private reprimand (admonishment) for practicing law while resigned pending disciplinary proceedings from The Florida Bar is erroneous, and Respondent should be disbarred for his misconduct.

Respondent's conduct evidences a total disregard of this Honorable Court and warrants the imposition of disbarment. The Respondent escaped The Florida Bar seeking disbarment on the original misappropriation charges by submitting a five (5) year disciplinary resignation. Thereafter, the Respondent practiced law and violated this Court's January 24, 1991 Order. The cases cited by Respondent are inapplicable to the instant facts.

Disbarment is appropriate under these facts, not a private reprimand, wherein a disciplinary resigned attorney has violated and disregarded this Honorable Court's Order and continued to practice law and hold himself out as an attorney.

ARGUMENT

I. The Referee's recommendation that Respondent receive a mere private reprimand (admonishment) for practicing law while resigned pending disciplinary proceedings from The Florida Bar is erroneous, and Respondent should be disbarred for his misconduct.

The Referee's recommendation that Respondent receive a mere private reprimand (admonishment) for his unauthorized practice of law while resigned from The Florida Bar is erroneous. As stated in Standard 8.4 of the Florida Standards for Imposing Lawyer Sanctions.

> "Admonishment is not an appropriate sanction when a lawyer violates the terms of a prior disciplinary order or when a lawyer has engaged in the same or similar misconduct in the past." (Emphasis added).

Respondent was permitted to resign amidst serious allegations that Respondent misappropriated client funds. By the terms of this Honorable Court's Order approving Respondent's resignation, Respondent was not permitted to accept any new business. Respondent's representation of Robert Gottron in an employment dispute was in direct contravention of this Honorable Court's Order, and a private reprimand (admonishment) is inappropriate.

Respondent's conduct evidences a total disregard of this Honorable Court and warrants the discipline of disbarment.

Respondent's brief correctly states that the Florida Standards For Imposing Lawyer Santions defines intent as "the conscious objective or purpose to accomplish a particular result." Respondent's misconduct in this cause was intentional. Respondent consciously represented Mr. Gottron. The Referee found at page 5

of his supplemental report, "Although the Respondent testified that his contact with Peter Leighton was exclusively as a collection agent for Bob Gottron and not as his attorney, there is clear and convincing evidence to establish that the Respondent attempted to represent himself as an attorney to Mr. Leighton." (*See* Supplemental Report of Referee, Page 5, attached hereto as an Appendix.)

Respondent gratuitously terms his conduct as negligent, but there was no finding by the Referee to that effect. In fact, the Referee found the following aggravating factors:

1. the obvious, serious error in judgment displayed by the Respondent in connection with the collection matter on behalf of Bob Gottron;

2. the apparent statutory violation committed by the Respondent when he attempted to portray himself as an attorney; and

3. The Respondent's lack of candor at trial in denying any inappropriate behavior on his past. The seriousness of these aggravating factors cannot be minimized. (See Supplemental Report of Referee, Pages 6-7)

Respondent cites the case of The Florida Bar v. Golden, 563 So. 2d 81 (Fla. 1990) wherein the Respondent received a one (1) year suspension for unauthorized practice of law. The Golden case is readily distinguished from the case at bar.

In Golden, the respondent's initial discipline was a ninety (90) day suspension, wherein the instant Respondent was under a five (5) year disciplinary resignation. Further, in Golden the

Respondent began his representation of the client while in good standing with The Florida Bar. The instant Respondent began representing Mr. Gottron after the effective date of his five (5) year disciplinary resignation.

Additionally, Respondent references the case of The Florida Bar v. Weil, 595 So. 2d 202 (Fla. 1991) and The Florida Bar v. Levkoff, 511 So. 2d 556 (Fla. 1987). Both the Weil and the Levkoff cases are inapplicable to the instant facts as they involved practicing law while dues delinquent and not while under a disciplinary resignation or suspension.

The Florida Bar accepted Respondent's five year resignation from The Florida Bar in light of the mitigation of his drug addiction regarding the serious misappropriation matters that were pending against him.

The Respondent cites The Florida Bar v. Rosen, 495 So. 2d 180 (Fla. 1986), The Florida Bar v. Hartman, 519 so. 2d 606 (Fla. 1988) and The Florida Bar v. Dubbeld, 594 So. 2d 735 (Fla. 1992) as cases wherein the Respondents were not disbarred in misconduct cases involving drug/alcohol addictions. However said cases concerned original discipline cases involving misconduct and were not contempt cases for violation of a previous court order.

In the instant case, the Respondent escaped The Florida Bar seeking disbarment on the original misappropriation charges by submitting a five (5) year disciplinary resignation. The present charges concern contempt for violating this Court's January 24, 1991 Order in case no. 77,107, the misappropriation case and continuing to practice law. Most importantly, Respondent's

misconduct in the instant case occurred after he was already a recovering addict and had been clean, both of drugs and alcohol for at least 10 - 11 months. (See Report of Referee, Pages 3-4 and T. 88, 89). Further, this Court has disbarred attorneys notwithstanding their defenses of suffering from alcoholism and or drug addictions at the time of the misconduct. The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986), The Florida Bas v. Golub, 550 So. 2d 455 (Fla. 1989), and The Florida Bar v. Rodriguez, 489 So. 2d 727 (Fla. 1986).

The cases cited by Respondent were cases in which the Respondents were under a short-term suspension. The present case is one in which the Respondent was under a five (5) year disciplinary resignation which was submitted concerning the pending misappropriation charges. Respondent is already under a five year period wherein he cannot practice law. The Referee found him in contempt and in violation of this Court's Order dated January 24, 1991 in case number 77,107.

The Florida Bar v. Winter, 549 So. 2d 188 (Fla. 1989) concerned more egregious facts and accordingly led to a permanent disbarment. None of the other contempt cases cited concerned attorneys who were under a resignation.

The instant Respondent was allowed to resign amidst serious allegations of misappropriation and avoided the imposition of serious discipline. Thereafter, he practiced law and violated this Court's January 24, 1991 Order.

Instead of being on his best conduct after being allowed to resign, Respondent committed a serious violation, engaging in the

unauthorized practice of law. The public would perceive of the Respondent receiving a private reprimand after being a resigned attorney pending serious disciplinary proceedings as a slap on the wrist. Accordingly, disbarment for a period of five (5) years is appropriate, not a private reprimand. A private reprimand is certainly not appropriate under these facts for a disciplinary resigned attorney who violates and disregards this Court's order and continues to practice law and hold himself out as an attorney.

CONCLUSION

For the foregoing reasons and the reasons stated in The Florida Bar's Initial Brief, The Florida Bar respectfully requests this Honorable Court to uphold the Referee's findings of fact and recommendation as to guilt and to impose disbarment for a period of five (5) years as discipline, and tax the costs of these proceedings against Respondent in the amount of $2,570.16.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Reply Brief was sent to Sid J. White, Clerk of The Supreme Court, Supreme Court Building, Tallahassee, Florida 32399-8197; and a copy was mailed via certified mail to Richard Marx, Attorney for Respondent, at 7900 Red Road, Suite 9, South Miami, Florida 33143; and a copy was mailed to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32399-2300 this 9th day of February, 1993.

Jacquelyn P. Needelman

JACQUELYN P. NEEDELMAN
Bar Counsel

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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complaintant,

CASE NO: 78,489

vs.

STEVEN NECKMAN,

Respondent.

SUPPLEMENTAL REPORT OF REFEREE

I. Summary *of* Proceedings: Pursuant to the undersigned being duly appointed as referee *to* conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:

A. Pretrial Conference - April 16, 1992

The following attorneys appeared as counsel for the parties:
For the Florida Bar: Jacquelyn P. Needelman, Esq.
For the Respondent: Richard J. Diaz, Esq.

B. Trial - August 10, 1992

The following attorneys appeared as counsel for the parties:
For the Florida Bar: Jacquelyn P. Needelman, Esq.
For the Respondent: Richard B. Marx, Esq.

C. Disciplinary recommendation hearing - October 2, 1992

The following attorneys appeared as counsel for the parties:
For the Florida Bar: Jacquelyn P. Needelman, Esq.
For the Respondent: Richard B. Marx, Esq.

11. The Florida Bar in its Petition for Order *to* Show Cause alleged two separate incidents involving the Respondent which the Bar contended each constituted the unlawful practice of law. The two separate incidents were alleged as two parts of one count. Those incidents occurred on or about the following dates:

Incident one - March/April, 1991

Incident two - July, 1991

This report will address those two separate incidents individually.

urged her to write a letter to the sellers indicating that they must vacate the property being purchased by Ms. Brooks or, in the alternative, pay Ms. Brooks a penalty for storage, hotel room, etc. (R-33/34) Ms. Vaughn testified that the Respondent became angry with her when she refused to write the letter he had requested. She further testified that the actions of the Respondent raised a question in her mind regarding whether or not the Respondent was actually an attorney. (R-34)

8. Ms. Vaughn contacted the Florida Bar and was advised that the Respondent was not an attorney in good standing. Thereafter, she had no further contact with him. (R-34/35)

9. The Respondent's recollection of his conversation with Betty Vaughn was in striking contrast to Vaughn's testimony. The Respondent stated, "All I said to her was, 'You promised Karen that you would do something. Now do it. Don't get me involved. I'm not here to represent her.'" (R-85)

10. Ms. Brooks described the Respondent's actions as follows, "I would say he sort of held my hand and helped me through it." (R-68)

11. Ms. Vaughn acknowledged that the Respondent never identified himself as an attorney *for* Ms. Brooks. (R-38)

12. The Respondent neither negotiated terms of the contract nor advised Ms. Brooks regarding those terms. (R-70)

13. There is no evidence that the Respondent ever gave legal advice, prepared a document, or sought any type of fee in connection with his involvement in the real estate transaction in question. (R-110-112)

AS TO INCIDENT TWO

14. In July, 1991, the Respondent was contacted by Bob Gottron, a former client, regarding a collection matter involving Gottron's former employer.

15. As a result of Gottron's request for assistance, the Respondent made certain phone calls to James Lobel and Peter Leighton on behalf of Gottron. (R-114-117)

16. James Lobel testified that in July or August, 1991, he received a call from a person who identified himself as Bob Gottron's attorney. (R-25)

17. Mr. Lobel was unable to recall the name of the person who had called as Gottron's attorney. (R-27)

18. Mr. Lobel referred the caller to Peter Leighton. (R-26)

19. The Respondent acknowledged calling Mr. Lobel on Mr. Gottron's behalf. However, the Respondent denied representing himself as an attorney. (R-115)

20. In July, 1991, Peter Leighton was contacted by the Respondent regarding the same debt to Bob Gottron that was the subject of the Respondent's conversation with Jim Lobel. (R-48)

21. Before speaking to the Respondent, Mr. Leighton had received a telephone message that Mr. Gottron's attorney had contacted him and that he would call back. (R-47)

22. Shortly thereafter the Respondent called back and left his pager number.

23. Mr. Leighton called the number and spoke with the Respondent. (R-48)

24. After their initial conversation, Mr. Leighton received information that the Respondent was not an attorney. (R-50)

25. Thereafter, the Respondent again contacted Leighton by phone. Leighton confronted the Respondent and asked him if he was

Gottron's attorney. The Respondent informed him that he was in fact Gottron's attorney. (R-49)

26. Leighton then told the Respondent that he was aware that he was not a practicing attorney. At that point the Respondent denied ever indicating that he was Gottron's attorney. (R-49)

27. Bob Gottron testified on behalf of the Respondent, Mr. Gottron witnessed certain telephone conversations between the Respondent, Mr. Lobel, and Mr. Leighton. Gottron testified that he never heard the Respondent represent himself as an attorney. (R-138)

28. In other respects Gottron's recollection of the telephone conversations was inconsistent with the Respondent's recollection. Gottron testified that the conversation between Respondent and Lobel got a little nasty. (R-137) On the other hand, the Respondent testified that he had a very amicable telephone conversation with Mr. Lobel. (R-122) The Respondent testified that he made at least two calls to Mr. Leighton. (R-114-116) Originally, Mr. Gottron's recollection was also that two phone calls were made to Mr. Leighton. (R-135) However, later in his testimony Mr. Gottron stated that the Respondent made only one call to Mr. Leighton. (R-148/149)

29. Mr. Gottron's testimony made it clear that he did not perceive what the Respondent was doing as legal work. (R-135)

30. The Respondent specifically denied ever holding himself out as a practicing attorney. (R-92)

IV. Recommendation as to Whether or Not the Respondent Should be Found Guilty: As to each allegation of the Complaint I make the following recommendations as to guilt or innocence:

AS TO INCIDENT ONE

I recommend that the Respondent be found not guilty of the unauthorized practice of law. Although the Respondent is guilty of

a serious error in judgment in not immediately advising Ms. Brooks and Ms. Vaughn that he was not a practicing attorney, the Respondent took no action in connection with the real estate transaction that could not have been lawfully attempted by a layperson. The Respondent sought no reimbursement for his assistance to Ms. Brooks. The Respondent gave no legal opinions, negotiated no terms of the contract, or specifically represented himself as an attorney to either Ms. Brooks or Ms. Vaughn. Clearly, the better practice would have been for the Respondent *to* advise both Ms. Brooks and Ms. Vaughn immediately that he was not an attorney. However, since the Respondent took no affirmative steps to mislead either Ms. Vaughn or Ms. Brooks regarding his standing with the Bar and since his participation did not rise to a level to sufficiently constitute the practice of law, I recommend a finding of not guilty.

AS TO INCIDENT TWO

I recommend that the Respondent be found guilty of the unauthorized practice of law and that specifically he be found guilty based upon his representation to Peter Leighton in July, 1991, that he was an attorney representing Bob Gottron. Although evidence also indicates that the Respondent represented himself as an attorney to Jim Lobel, Mr. Lobel's testimony was insufficient to establish by clear and convincing evidence that the Respondent actually made that representation.

Although the Respondent testified that his contact with Peter Leighton was exclusively as a collection agent for Bob Gottron and not as his attorney, there is clear and convincing evidence to establish that the Respondent attempted to represent himself as an attorney to Mr. Leighton. In fact, it should be noted that the debt being sought by Respondent was not properly a collection matter pursuant to Florida Statute 559.72.

V. Recommendation as to Disciplinary Measures to Be Applied: I recommend that the Respondent receive a private reprimand and immediately be placed on probation which would continue until such time that the Respondent is eligible to apply for readmission to the Florida Bar. Because of his prior resignation the Respondent would be unable to practice law during the probationary period. As a condition of probation the Respondent should be required to perform a minimum of ten (10) hours of community service work per month. The community service work should be performed in an area related to the field of addiction and, if possible, should be directed toward other professionals with addiction problems.

Additionally, as a condition of probation the Respondent should continue his counseling and treatment under the direction of the Florida Lawyers Assistance, Inc. program. It is suggested that both the Respondent's personal counseling and community service work could be directed by the Florida Lawyers Assistance, Inc. program.

The final recommended condition of probation would be for the Respondent to pay the costs reasonably incurred by the Florida Bar in connection with this proceeding.

This Court is mindful of the recommendation of the Florida Bar that the Respondent be disbarred. However, this Court is convinced that the actions of the Respondent herein do not rise to a level of egregiousness which would justify disbarment.

Factors this Court has considered in aggravation include the obvious, serious error in judgment displayed by the Respondent in connection with the collection matter on behalf of Bob Gottron: the apparent statutory violation committed by the Respondent when he attempted to portray himself as an attorney; and the Respondent's

lack of candor at trial in denying any inappropriate behavior on his part. The seriousness of these aggravating factors cannot be minimized.

However, this Court feels that the mitigating factors under this unique set of circumstances clearly outweigh those factors in aggravation. First, there was no actual injury to any party. Second, financial gain was not a motivating factor in the mind of the Respondent, His actions were more motivated by a desire to help his friends than by a desire for financial reward. Third, the violations alleged are unrelated to the Respondent's original problems. There are no allegations of misappropriation of funds or of substance abuse. Finally, the Respondent's rehabilitation seems to be in order and seems to be progressing rapidly. The testimony presented at the October 2 hearing has convinced this Court that the Respondent is aware of the seriousness of his violations and, consequently, there is little or no likelihood of repetition. Therefore, it would seem appropriate to avoid further damage to the Respondent's reputation when future ethical violations seem unlikely.

Based upon the circumstances of this particular case this Court strongly recommends against disbarment. It is the belief of this Court that the Respondent has the ability to enhance and not damage the reputation of the Bar despite his prior addiction and resulting violations. The Respondent should be given the opportunity, through supervision, to establish that he can be a benefit and not a detriment to the Florida Bar.

VI. Personal History and Past Disciplinary Record: After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(4), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: 33
Date admitted to Bar: October, 1985
Prior disciplinary convictions and disciplinary measures imposed therein: None
Other personal data: See Disciplinary Recommendation

VII. Statement of *Costs* and Manner in Which Cost Should be Taxed. I find the following costs were reasonably incurred by the Florida Bar.

Administrative Costs:	$ *500.00*
Court Reporter Costs:	
Deposition (Genovese and Pallant) 6/23/92	223.95
Deposition (Pallant) 6/23/92	33.75
Deposition (Blutstein) 7/2/92	*50.00*
Referee Hearing 8/10/92	706.35
Final Hearing 10/2/92 (Approx. costs)	428.75
Miscellaneous:	
Bar Counsel's Pre-trial Conf. Travel Expenses	18.50
Witness Peter Leighton's Travel Expenses	562.00
Bar Counsel's Travel Expenses *to* 10/2/92 Hrg.	46.86
TOTAL ITEMIZED COSTS	**$2,570.16**

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent. It is further recommended that these costs be paid as a condition of probation.

DATED this 6th day of October, 1992.

PETER D. BLANC
Referee

I HEREBY CERTIFY that a copy of the above report of referee has been served on the following:

JACQUELYN P. NEEDELMAN, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-L00, Miami, FL 33131

JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300

JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300

RICHARD J. DIAZ, ESQ., Attorney for **Respondent, 3730 Southeast Financial Center, 200** South **Biscayne Boulevard, Miami, FL 33131**

RICHARD B. MARX, ESQ., Co-Counsel for **Respondent, 7900 Red Road, Suite 9, South Miami, FL 33143**

on this 6th day of October, 1992.

Stefanie A. Lee

Judicial Assistant