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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee

v.

PATRICK H. WEIDENBENNER,

Respondent/Appellant

_____/

Supreme Court Case
No. 80,756

The Florida Bar Case
No. 91-50,247(15C)

ANSWER BRIEF OF THE FLORIDA BAR

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

R. Regulating Fla. Bar

Fla. Stds. Imposing Law. Sancs.

PRELIMINARY STATEMENT

In order to ensure a clear record, the following terms of reference will be utilized throughout this brief: The Florida Bar, the appellee herein, will be referred to as "the bar". Patrick H. Weidenbenner, the appellant herein, will be referred to by his full name, as "respondent", or as "Weidenbenner". References to the final hearing transcript will be made by utilizing the symbol "T" followed by the transcript page number. Exhibits introduced into evidence at the final hearing will be referred to as "Exhibit ___". References to the report of referee will be made by utilizing the symbol "RR".

STATEMENT OF THE CASE AND OF THE FACTS

I. STATEMENT OF THE CASE

Following a finding of probable cause by Fifteenth Judicial Circuit Grievance Committee "C", a complaint was filed with this Court on November 10, 1992. On November 20, 1992, the Honorable James W. Midelis was appointed as referee. A final hearing was had on April 29, 1993, and Judge Midelis' report was served on the parties on May 14, 1993. The report of referee and the record were filed with the Court on May 17, 1993. The referee's report, which recommends that respondent receive a public reprimand for violating Rules Regulating The Florida Bar 3-4.2, 3-4.3, 4-4.1(a), 4-8.4(a) and 4-8.4(c) and pay costs, was considered by the Board of Governors of The Florida Bar at a meeting which ended on May 28, 1993. By letter dated May 28, 1993, the parties were notified that the bar would not seek review. Respondent's petition for review was filed on June 16, 1993.

II. STATEMENT OF THE FACTS

Although the bar is in basic agreement with most of the facts set forth in respondent's brief, the brief is basically devoid of references to the record and omits certain facts the bar deems important.

Respondent participated in the preparation of the Joint Trust Agreement of Willard Utley and Eva Utley, his wife, ("trust") which was executed in 1979. Respondent was therefore familiar with the terms of that trust agreement (T 8). The trust named respondent and First National Bank in Palm Beach ("bank") as co-trustees. Article 2 of the trust provided for distribution of trust assets upon the death of the last survivor of Willard and Eva Utley. However, Article 2 of the trust was subject to Article 4 of the trust which provided that upon written request of the personal representative of the estate of either of the settlors, the trust was to pay such amount as necessary to pay all or any part of either of the settlor's debts, funeral expenses, estate or inheritance taxes and administrative expenses prior to distribution. Respondent and his children were beneficiaries of the trust. (Exhibit 2).

Following Eva's death on February 12, 1981, respondent participated in the preparation of the last will and testament of Willard Utley which was executed on June 23, 1981 ("1981 will") (T 10-12). Respondent and his children were also named beneficiaries in the will, and respondent was the named successor personal representative. Respondent's bequest of $25,000 was subject to a reduction by whatever sum he had received from the trust. The $6,000 bequest to respondent's children was not subject to a similar reduction. (Exhibit 3). The 1981 will was silent as to how payment of debts, estate expenses and administrative expenses was to be made (T 15-16).

Willard Utley died on March 17, 1988 (T 19). On March 23, 1988, letters of administration were issued to respondent (Exhibit 5). By letter dated March 24, 1988, respondent provided his co-trustee with a copy of the letters of administration and sought distribution of the trust assets (Exhibit 6). By court order dated March 25, 1988, the letters of administration issued to respondent were revoked predicated upon a caveat to the will which had also been filed on March 23, 1988. (Exhibit 7). Thereafter, respondent did not advise the bank that his letters had been revoked and the estate was without a personal representative. (T 27-28). A suit contesting the 1981 will was filed on or about June 6, 1988, and respondent was a named defendant in that lawsuit. (T 29).

On June 21, 1988, respondent met with the bank's trust officers who continued to believe respondent was the personal representative of Willard Utley's estate. (Exhibit 10, p. 329-331). The summary of the discussion which took place at that meeting is set forth in a letter to respondent from the bank dated June 23, 1988. Respondent acknowledged and approved the content of the letter by affixing his signature to the document on June 27, 1988. The letter clearly indicates that the estate would not seek reimbursement of debts, costs or taxes from the trust (Exhibit 9), a determination which could only be made by the personal representative of Willard Utley's estate. Thereafter, the trust assets of $235,711.89 were disbursed with respondent's approval, at which time respondent received the sum of $5,000 (Exhibit 11). The costs of administration of Utley's estate were "in the neighborhood of $250,000". (T 56).

SUMMARY OF ARGUMENT

In bar disciplinary proceedings, the party seeking review of a referee's findings and recommendations must demonstrate that the referee's findings are clearly erroneous or lacking in evidentiary support, and unless that burden is met, the referee's findings are upheld on review. Because the record is replete with clear and convincing evidence to support the referee's findings, respondent has failed to demonstrate any error. The gravamen of respondent's argument seems to be that because the referee failed to make a specific finding that respondent's conduct was intentional, respondent engaged in no wrongdoing. However, respondent has failed to cite any relevant authority whatsoever which would mandate a specific finding of respondent's intent, and the referee's finding of intent is implicit in the findings of fact made by the referee.

The referee's recommendation that respondent receive a public reprimand and pay costs for violating Rules Regulating The Florida Bar 3-4.2, 3-4.3, 4-4.1(a), 4-8.4(a) and 4-8.4(c) is supported by relevant caselaw as well as Florida's Standards for Imposing Lawyer Sanctions and should be upheld.

ARGUMENT

I. WHETHER THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF MISREPRESENTATION

In bar disciplinary proceedings, The Florida Bar has the burden of proving its charges by clear and convincing evidence. Thereafter, the party seeking review bears the burden of showing that the referee's findings are clearly erroneous or lacking in evidentiary support, and unless that burden is met, the referee's findings will be upheld on review. The Florida Bar v. McClure, 575 So. 2d 176 (Fla. 1991). The bar met its heavy burden; respondent has not and cannot meet his. The record is replete with evidence to support the referee's findings that respondent engaged in conduct involving misrepresentation. That finding is clearly correct and must be upheld on review.

Letters of administration were issued to respondent on March 23, 1988 (Exhibit 5). Respondent sent a letter dated the following day to his co-trustee, providing them with a copy of the letters appointing him personal representative of Willard Utley's estate and seeking distribution of the trust assets. By court order dated March 25, 1988, respondent's letters of administration were revoked a mere two days later. Respondent admitted that he received a copy of the order revoking the letters and was fully aware that he was no longer the personal representative of Willard Utley's estate. Notwithstanding that fact, he did not advise his co-trustee that he was no longer the personal representative and therefore had no authority to act in that capacity. This was respondent's first act of misrepresentation, by omission.

Respondent attended a meeting with bank representatives on June 21, 1988. The discussions held during that meeting were confirmed in a letter to

respondent from the co-trustee dated June 23, 1988, which he acknowledged and approved by signing it on June 27, 1988. The misrepresentation made by respondent at that meeting is evidenced by paragraph four (4) of the letter which confirms the determination that Willard Utley's estate would not claim reimbursement from the trust. Pursuant to the express terms of the trust, only the personal representative could make that written demand. At the time of the June 21, 1988 meeting, respondent was not the personal representative of the estate of Willard Utley and therefore could not represent to the bank what claims would or would not be made against the trust by the estate. Nevertheless, respondent did precisely that with the full knowledge that he was not the personal representative.

Respondent's claim that he simply failed to read the letter of June 23, 1988 carefully or that his recollection of the meeting is different from the letter is simply not credible for at least two reasons. First, respondent read the letter carefully enough to ensure payment of his final fee as evidenced by his handwritten notation on the document. (T 31-32). Second, respondent admitted that during the ten year period during which the trust was in existence, he received many letters from the bank and never found an error or misstatement in any of those letters and in fact found them to be consistent with what had been discussed. (T 78). There is no reason to conclude that the discussions described in the June 23, 1988 letter did not occur or that the letter is in any way inconsistent with what transpired at the meeting on June 21, 1988.

Quite simply, respondent represented to the bank that he was the personal representative of Utley's estate and never advised them that within two days of being appointed personal representative, the letters of

administration so appointing him were revoked. As evidenced by the testimony of Virginia Reel, the bank continued to believe respondent was the personal representative and therefore authorized to speak on behalf of the estate. The comment to Rules Regulating The Florida Bar 4-4.1(a), which the referee also found respondent to have violated, clearly states that "misrepresentations can also occur by failure to act". Thus, there was clear and convincing evidence to support the referee's findings.

To support his position that the referee erred in finding respondent guilty of violating Rules Regulating The Florida Bar 4-8.4(a) [sic], respondent cites The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992) and the cases cited therein, for the proposition that the bar must prove intent. However, all of the cases upon which respondent relies, Neu, supra; The Florida Bar v. Burke, 578 So. 2d 1099 (Fla. 1991); The Florida Bar v. Dougherty, 541 So. 2d 610 (Fla. 1989); and The Florida Bar v. Lumley, 517 So. 2d 13 (Fla. 1987), involve trust accounts and alleged improprieties associated with client funds, one of the most serious offenses a lawyer can commit. In each of those cases, the court held that in order to prove dishonesty, fraud, deceit or misrepresentation in trust account cases, it was necessary for the bar to prove the attorney's intent to deprive, defraud or misappropriate client funds. The court also explained that when imposing discipline for trust account violations, a distinction is drawn between cases in which the conduct was intentional and deliberate and cases in which the conduct was negligent or grossly negligent. Neu, 597 So. 2d at 269.

Respondent is not charged with trust account violations, and his reliance on the cases cited in his brief is simply misplaced. He has failed to cite any authority whatsoever which would mandate a specific finding by the

referee that respondent intended to misrepresent his status to the bank. The requisite intent is implicit in the findings of fact made by the referee in his report (RR 2-3).

The referee's function is to weigh the evidence and to determine its sufficiency. This court will not substitute its judgment for that of the referee unless it is "clearly erroneous or lacking in evidentiary support." The Florida Bar v. Weiss, 586 So. 2d 1051 (Fla. 1991). The findings made by the referee are neither erroneous nor lacking in evidentiary support and should be upheld. Respondent, the party seeking review, has clearly failed to meet his burden of demonstrating that the report of the referee is erroneous, unlawful, or unjustified. Rules Regulating The Florida Bar 3-7.7(c)(5).

II. WHETHER, BASED UPON THE FACTS AND CIRCUMSTANCES OF THE CASE, ANY DISCIPLINE MAY BE JUSTIFIED

After having notified the bank that he had been named the personal representative of Utley's estate, respondent clearly concealed from the bank the fact that he retained that status for only two days. He then went further and asserted a position with regard to Utley's estate which could be asserted only by the personal representative. The bank, his co-trustee, to whom respondent concedes he owed a fiduciary duty (T 76), continued to believe respondent was the personal representative, and in reliance upon respondent's representation that the estate would not seek reimbursement from the trust for costs, debts and taxes, disbursed the trust assets with respondent's approval.

The value of the trust assets which were disbursed totaled $235,711.89, of which respondent received the sum of $5,000. The costs of administration of the estate were in the neighborhood of $250,000. Due to the tiers of distribution set forth in the trust (Exhibit 2), but for respondent's unauthorized representation that the estate would not seek reimbursement of costs from the trust, respondent would not have received the $5,000 distribution from the trust.

A plethora of cases supports the referee's finding that respondent should receive a public reprimand and pay costs. In The Florida Bar v. Bratton, 389 So. 2d 637 (Fla. 1980), an attorney represented on two separate occasions that he had received funds to be held in escrow when he had not. He received a public reprimand and was required to pay costs. In The Florida Bar v. Sax, 530 So. 2d 284 (Fla. 1988), an attorney submitted a notarized pleading to a court when he knew or should have known it contained an untrue

factual averment and when he also knew he had signed it outside the presence of the notary subsequent to affixing of the jurat by the notary. He received a public reprimand and was required to pay costs. In The Florida Bar v. Batman, 511 So. 2d 558 (Fla. 1987), an attorney testified falsely concerning his practice of law in representing clients while suspended for nonpayment of bar dues. He received a public reprimand and was required to pay costs. It is undisputed that respondent knew he was no longer the personal representative of Utley's estate on June 21, 1988.

Even when no harm results, the court has approved a public reprimand for misrepesentation. In The Florida Bar v. Fitzgerald, 491 So. 2d 547 (Fla. 1986), the attorney misrepresented the status of title on a title policy and further represented to the buyers of the property that he had possession of sufficient funds to satisfy outstanding encumbrances on the property when in fact he did not. Notwithstanding the fact that the payments were ultimately made, the attorney received a public reprimand and was required to pay costs.

All of the cases cited above involve misrepresentation by an attorney during the course of his representation of a client. However, attorneys may also be disciplined for failing to completely disclose essential matters in business transactions with nonclients. In The Florida Bar v. Adams, 453 So. 2d 818 (Fla. 1984), an attorney failed to notify a business partner of the sale of some property by the attorney as trustee for a group of investors and failed to make a timely accounting of funds received from the sale. The attorney was suspended for sixty days and required to pay costs.

Respondent misconstrues the bar's position at final hearing. The bar's position was that even if the referee failed to find that respondent made

misrepresentations and was merely negligent, as respondent contended, a public reprimand was nevertheless the appropriate discipline. In The Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1993), an attorney received a public reprimand and was required to pay costs for negligently failing to advise his client that he would have to continue to pay child support pursuant to a prior court order even though the child was then residing with the client. Littman also failed to include a requisite affidavit with his motion to change custody. The court acknowledged there was no damage to the client other than embarrassment. While the court stated that absent a prior disciplinary history Littman's conduct might have warranted an admonishment, respondent's misconduct herein is far more egregious. In The Florida Bar v. Orr, 504 So. 2d 753 (Fla. 1987), an attorney with no prior disciplinary record neglected to inform his client that a criminal appeal had been dismissed for lack of prosecution and advanced a claim or defense unwarranted under existing law and unsupported by good faith argument. As stated by this court, "Public reprimand is an appropriate discipline for isolated instances of neglect or lapses of judgment." Id. at 756.

However, the referee found that respondent had violated Rules Regulating The Florida Bar 3-4.2, 3-4.3, 4-4.1(a), 4-8.4(a) and 4-8.4(c), and recommended the discipline he deemed appropriate. The referee is never bound by counsel's recommendation as to appropriate discipline. In addition to the caselaw which supports the referee's recommendation that respondent receive a public reprimand and pay costs, additional support may be found in Florida's Standards Imposing Lawyer Sanctions 5.13 which provides as follows:

> Public Reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

Thus, pursuant to the facts found by the referee, relevant caselaw, and Florida's Standards Imposing Lawyer Sanctions, the referee's recommendations are supported by clear and convincing evidence, are correct, and should be upheld.

CONCLUSION

The bar respectfully submits that the bar met its burden of proving by clear and convincing evidence that respondent misrepresented his status as personal representative of Utley's estate on two separate occasions, once by omission and once by affirmative act. Respondent has not demonstrated any error by the referee, nor has he demonstrated that the findings made by the referee were lacking in evidentiary support. The bar therefore urges the court to adopt the report of referee finding respondent guilty of rule violations, publicly reprimand respondent, and award costs to the bar.

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 was sent by regular mail to Patricia Brown, Esq., attorney for respondent, at 2666 McMullen Booth Road, #1015, Clearwater, Florida 34621 on this 17th day of August, 1993.

Luain T. Hensel

LUAIN T. HENSEL