IN THE SUPREME COURT OF FLORIDA
(BEFORE A REFEREE)

THE FLORIDA BAR,

Complainant,

v.

PATRICK H. WEIDENBENNER,

Respondent.

_____/

Case No. 80,756

RESPONDENT'S INITIAL BRIEF

IN SUPPORT OF

PETITION FOR REVIEW

BY: PATRICIA J. BROWN
2666 McMullen Booth Road
#1015
Clearwater, Fl. 34621
813 724-1360
Fl. Bar No. 315990

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PRELIMINARY STATEMENT

Throughout this brief, the Respondent shall be referred to as either "Weidenbenner," or "Respondent." The Florida Bar shall be referred to as the "Bar." Symbols for specific portions of the record shall be as follows: TR - Transcript of the proceedings before the Referee; RR - Referee Report; and exhibits shall be referred to by their number from the hearing before the Referee.

STATEMENT OF THE CASE AND THE FACTS

The instant case originated when an attorney representing plaintiffs in a will contest filed a complaint with The Florida Bar against Respondent. Respondent, who had assisted in the drafting of the will which was at issue, was a named defendant in the lawsuit.

Grievance Committee 15(C) found Probable Cause and The Florida Bar filed a formal complaint against Respondent. On April 29, 1993 the Honorable James W. Midelis, as Referee heard the case and on May 14, 1993 filed his report with this court. Judge Midelis found Respondent guilty of violating Rules 3-4.2 and 3-4.3, Rules of Discipline and Rules 4-4.1(a), 4-8.4(a) and 4-8.4(c), Rules of Professional Conduct, and recommended that Respondent be disciplined by Public Reprimand. Respondent filed a Petition for Review of the Referee's findings and the matter is now before this court.

The facts of this case are as follows. Respondent, a practicing attorney for over twenty years in the state of Florida formed a working relationship with a fellow attorney who practiced in the same building with him, one Willard Utley. Mr. Utley asked Respondent to assist him in the preparation of wills for himself and his then wife, Eva, as well as in the preparation of a Joint Trust Agreement. Respondent did not regard Mr. Utley as a client, but rather as a fellow attorney, and friend for whom he provided expertise in his primary area of practice by assisting in the preparation of the Trust Instrument. (TR.p64 l.10). Respondent along with First National Bank in Palm Beach was named Co-Trustee, and Respondent was also named as a successor Personal Representative of the will.

Eva Utley died on February 12, 1981. Shortly thereafter, Mr Utley married Cleola James, his secretary for over forty years. Mr. Utley thereupon executed a new will on June 23, 1981, with his new wife being named the primary beneficiary, and with certain bequests to Respondent and to Respondent's children. Respondent was also named the successor Personal Representative.

Mr. Utley was again preceded in death by his wife, Cleola, who died in November, 1986. Mr. Utley was at that time approximately ninety-one years old and in a Nursing Home. He died on March 17, 1988. On March 23, 1988 Letters of Administration were issued to Respondent as Personal Representative of the estate of Willard Utley, and on March 24, 1993, Respondent mailed copies of the Letters to his Co-Trustees at First National Bank in Palm Beach.

On March 23, 1988, a Caveat to the will was filed and an order was entered on March 25, 1988 revoking Respondent's Letters of Administration. The Caveat had been filed on behalf of a nephew of Mr. Utley and resulted in protracted litigation in the Circuit Court of Palm Beach County over the validity of Mr. Utley's will. Respondent was a named Defendant in this litigation. The Circuit Court ultimately ruled that Mr. Utley's will was valid.

During the course of the trial on the will contest, the attorney for the nephew of Mr. Utley presented a letter dated June 23, 1988 from Virginia Real, a Trust Officer at the Bank, addressed to Respondent. (Bar Exhibit #9). The letter purported to confirm what had taken place at a meeting of the Co-Trustees on June 21, 1988, and showed that Respondent had signed the letter confirming his agreement with the contents. Paragraph 4 of this letter became the crux of this Bar case.

The paragraph stated that the estate of Willard Utley would not claim any reimbursement from the Trust for debts, costs, or taxes. The import of this paragraph relates back to Article 4 of the Trust Instrument with 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 taxes or inheritance taxes and administrative expenses prior to distribution under Article 2 of the Trust.

Since Article 4 states that it is the Personal Representative who can make the demand, and Respondent was not the Personal Representative of Willard Utley's estate as of June 21, 1988, his letters of administration having been revoked, the implication is that Respondent signed off on this letter, confirming his agreement with paragraph 4 and acting as if he were the Personal Representative.

It is the contention of The Florida Bar that Respondent misrepresented his status, letting his Co-Trustees at the bank believe he was still acting as Personal Representative of the estate. They further contend that his motivation for so doing was to insure that he would receive the $5000.00 bequest from Article 2 of the trust, which he may not have received had the Trust Assets been depleted for the expenses enumerated above and paid from Article 4.

Only at the conclusion of the trial on the will contest did the attorney for the nephew of Willard Utley file this complaint with The Florida Bar.

ISSUES ON APPEAL

WHETHER THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF MISREPRESENTATION.

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

SUMMARY OF THE ARGUMENT

Respondent has been charged with knowingly and intentionally perpetrating a misrepresentation upon the bank with which he had an on-going relationship as Co-Trustee of the Joint Trust Instrument of Willard and Eva Utley. The Rules of Professional Conduct which he is charged with violating include Rule 4-8.4(a), "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation."

In order to find that Respondent is guilty of violating this Rule, it is necessary to prove that he had the requisite intent to commit fraud or misrepresentation. The record is devoid of substantive proof of this specific intent on the part of Respondent. He admits, and in fact, the Bar suggests, that he may have been negligent in not recognizing the import of Paragraph 4 of the June 23, 1988 letter. The Bar, in fact, argued the case alternatively, asking for a Public Reprimand if Respondent were found guilty of negligence, and a Suspension if found guilty of fraud.

The argument which follows shall show that the Referee erred in finding Respondent guilty of misrepresentation as the requisite intent was never shown. Further, in light of Respondent's flawless disciplinary record prior to this case, a Public Reprimand is far too harsh a discipline for a first offense. Had the Referee found Respondent guilty of Negligence, the appropriate discipline would perhaps be an admonishment. This brief will substantiate the position that Respondent was erroneously found guilty of misrepresentation, and no discipline is warranted.

ARGUMENT

THE REFEREE WAS CLEARLY IN ERROR IN FINDING RESPONDENT GUILTY OF MISREPRESENTATION.

In order for the Referee in the instant case to find Respondent guilty of misrepresentation, he must make a finding that Respondent had the specific intent to do so. The Report of the Referee, which seems to merely track the Complaint as drafted by The Bar, makes no such finding of fact.

Case after case considered by this honorable court have indicated that in order for The Bar to prove that any of a Respondent attorney's actions constitute dishonesty, fraud, deceit or misrepresentation, pursuant to the import of Rule 4-8.4(a), they must show intent. The Florida Bar v. Neu, 597 So.2d. 266 (Fl.1992). In Neu, the Respondent was found not to have had the requisite intent to defraud anyone, and just on the facts of that case, his actions were clearly more egregious that those with which Weidenbenner has been accused. Neu took funds out of a guardianship account without the knowledge or consent of his client, or the court, and invested the money. The fact that he later replaced the money into the account, with interest, after the investments failed, was considered as a mitigating factor.

The Bar itself was not only unable to prove that Respondent, in this case, had the intention of misrepresenting his status to his Co-Trustees, it is questionable whether they even regarded his actions as misrepresentation. Bar Counsel, in opening and closing statement referred to Respondent's actions as, "misrepresentation basically by omission.." (TR.p4,l.20; TR.p.104,l.9). Respondent is also accused of being careless. (TR.p96,l.17). The Bar even suggested that Respondent's actions

may have been "a negligent omission," or "an inadvertent mistake." Bar Counsel asked for an alternative discipline, i.e. a ten(10) day Suspension if found guilty of misrepresentation, but a Public Reprimand, if found negligent. (TR.p.107,l.9-15).

The law does not support the Referee's finding, nor his recommendend discipline. There cannot be a finding of negligent misrepresentation, or misrepresentation by omission. It must be proven by clear and convincing evidence that Respondent had the requisite mental intent to deceive, misrepresent or defraud, and that intent was simply not shown.

The Florida Bar v. Burke, 578 So.2d. 1099 (Fl.1991) also held that in order to find that an attorney has acted with dishonesty, fraud, deceit, or misrepresentation, The Florida Bar must show the necessary element of intent. See also The Florida Bar v. Dougherty, 541 So. 2d. 610 (Fl. 1989) and The Florida Bar v. Lumley, 517 So. 2d. 13 (Fl. 1987).

Respondent Weidenbenner has openly, honestly and consistently maintained that he does not specifically recollect whether he informed his Co-Trustees at the Bank that his letters of administration as Personal Representative had been revoked. (TR.p.28,l.6), (TR.p30,l.23). The testimony of the deceased Trust Officer, Virginia Real, which was admitted into evidence at the Referee hearing, indicated that at the June 21, 1988 meeting she thought Respondent was acting as Personal Representative of the Estate of Willard Utley. (Exhibit 10) The fact is, however, that was the first meeting she attended and also the first time she met Respondent. He had dealt previously with another trust officer, Anita Blakesley. Virginia Real's testimony, which incidentally was entered into evidence over objection due to Respondent's obvious inability to cross examine her, is not in itself indicative, nor persuasive

as to what the other people attending the meeting of June 21, 1988 knew of Respondent's status. (TR.p35,l.6) No one else attending that meeting testified. Wycoff Myers and Judith Cowart professed to not even recall the meeting, therefore obviously being unable to indicate what they understood Mr. Weidenbenner's role at the meeting to be. (TR.p36,37).

The only evidence, therefore, that the Co-Trustees believed Mr. Weidenbenner was still acting as Personal Representative is the transcript of the testimony of Virginia Real from the will contest litigation. Respondent, however, testified that he was "certain" that the Co-Trustees knew exactly what his capacity was. (TR.p73,l.22). It seems very clear, in light of the fact that what the Co-Trustees did was to disburse the assets of the Trust and close it, all of their actions were Trust, and not estate, oriented. According to Respondent, the Trustees agreed that in light of the depreciation of some of the assets of the trust, they had a fiduciary responsibility not to delay closing the trust until the resolution of the will contest. (TR.p74.)

Paragraph 4 of Virginia Real's letter of June 23, 1988 according to Respondent, may have been phrased more accurately to state that "the estate of Willard Utley will not <u>be able</u>" (emphasis supplied) to make a claim against the trust, since there was, as of that date, no Personal Representative, that being the only person who could make such a claim.

Respondent stated under oath that during the ten years of the Trust administration, he had received many letters such as the referenced one, and he generally read them, signed or initialled them to indicate his agreement with the contents. During all of that time he had not found an error or misstatement, finding the letters to be consistent with whatever had transpired at the meeting. (TR.p78). He admitted freely

that he may have read this particular letter too quickly to grasp the potential, long-range problems which could, and did occur due to the wording of paragraph 4. (TR.p77). This admission flies in the face of any of The Bar's allegations of intentional misrepresentation.

The allegations of the Bar's complaint, as well as the Referee's Report, paragraphs 29, 30, and 31 find that Respondent's motivation for this fraud he allegedly perpetrated upon the bank was his greed for the $5000.00 which he received from the Trust. This is ludicrous. Patrick Weidenbenner produced Federal Income Tax returns for the year 1987, the year prior to the distribution of the Trust assets, which indicated that his income was in excess of $175,000.00 (TR.p80; R.Exhibit 1). Furthermore, his net worth at that time was approximately threequarters of a million dollars. In addition, Respondent attempted to renounce his bequests, both under the will and the trust but was not allowed to do so. (TR.p82.) Not only has the Bar not met the burden of proving intent, they have clearly failed to show any logical rationale or motivation on the part of respondent. The so-called proof of wrongdoing does not approach the standard of clear and convincing as set forth in The Florida Bar v. McClure, 575 So.2d 176 (Fl.1991)

It would appear that the Referee either misunderstood the necessary element of intent in declaring the Respondent guilty of perpetrating a fraud upon his fellow Co-Trustees, or in the alternative found it too easy to simply adopt, ver batim, the Bar's proposed findings of fact.

BASED UPON THE FACTS AND CIRCUMSTANCES OF THE CASE NO DISCIPLINE MAY BE JUSTIFIED

An important issue in the instant case is the nature of the relationship between Respondent and Willard Utley. Respondent did not regard Mr. Utley as his client, but rather, as a fellow attorney. (TR.p.68,69). Respondent had a great deal of expertise in the area of Probate, Will and Trust Drafting and in his opinion, was merely offering assistance to a friend.

This court has held that the Disciplinary Rules for attorneys create a hierarchy of culpability which weighs the severity of the lawyer's misconduct in terms of the impact on the lawyer's individual capacity to practice law competently and ethically and also the impact of the lawyer's misconduct on the professional reputation of the bar as an entity which must preserve the public trust. Consequently, the appropriate sanction must take into account whether the duty violated by the lawyer was owed specifically to a client, a judge, another member of the profession, or a member of the public. In order to discipline an attorney, one must consider the duty which has been violated. The Florida Bar v. Ward, 599 So.2d.650 (Fl.1992). Florida Standards for Imposing Lawyer Sanctions, C(3.0)

In Ward, the Respondent attorney was found guilty of making unauthorized withdrawals from his law firm's expense account. The court specifically stated that stealing money from one other than a client is an entirely different type of violation based upon the above referenced theory of the duty which has been violated. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact. Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities.

In addition to distinguishing to whom the duty is owed, the element of harm has frequently been considered by the Court in evaluating the appropriate sanction for an attorney found guilty of violating a disciplinary rule. Florida Standards for Imposing Lawyer Sanctions, C.(3.0)c, states in relevant part that after a finding of lawyer misconduct, (emphasis supplied), the court should consider the following factors: (c) the potential or actual injury caused by the lawyer's misconduct.

In the instant case, even if one assumes that Respondent erred in some way in not recognizing the potential import of paragraph 4 of the June 23, 1988 letter, there was: 1) no attorney-client relationship with Willard Utley and 2) there was no harm to anyone, be it client, judge, fellow attorney or member of the public.

It is Respondent's position that not only did he not commit the act of misrepresentation, but he was not even proven to be negligent, or in violation of any of the Rules Regulating Attorney Behavior. The Bar did not offer proof of negligence nor did the referee make a finding that there had been any negligent act on Respondent's part.

Even assuming, arguendo, that Respondent had violated one of the named Rules, a Public Reprimand is clearly too harsh a discipline. Respondent has no prior disciplines; he did not have an attorney-client relationship with Mr. Utley, and no one was harmed in any way. The money that Respondent received from the Trust was intended by Mr. Utley to be received by Respondent. There was no prohibition against naming oneself as a beneficiary of a will which one prepared as an attorney at that time, however, Respondent does not believe he was acting as an attorney to Mr. Utley. While the Bar concedes that "undue influence," is not an issue in their Complaint against

Respondent, their ultimate allegation, and the Referee's corresponding finding of fact, is that all of Respondent's evil acts were for the purpose of the monetary gain of the $5000.00 which he was perfectly entitled to receive. (TR.p.63, RR.par.29,30,31.

The Referee's recommendation that Respondent be disciplined by Public Reprimand is predicated upon his finding of guilt of fraud and misrepresentation. That may be an appropriate sanction under that scenario, or it may still be too severe in light of the previously mentioned mitigating factors. If, on the other hand, the Referee had determined that Respondent's alleged acts or omissions constituted Negligence then clearly a Public Reprimand may not be justified.

A review of cases in which Respondent attorneys in Bar cases have received Public Reprimands consistently involve not negligent acts, but more serious incidents of neglect or misfeasance. In The Florida Bar v. Alford, 400 So.2d.458 (Fl.1981) the Respondent attorney received a Public Reprimand for completelely failing to carry out his contract of employment and neglecting an uncontested custody case. He further failed to refund the retainer to the client after being fired. In The Florida Bar v. Price, 569 So2d.1261 (Fl1990) the attorney was found guilty of dismissing an action without the knowledge or consent of his client; of failing to advise them that the action had been dismissed, and failing to consult with the clients after dismissing the action. His discipline for three separate offenses was only a Public Reprimand. In justifying this discipline the court stated that the Respondent's conduct was not minor or insignificant. Had it been, the discipline would have been a Private Reprimand. The Florida Bar v. Kirkpatrick, 567 So.2d.1377 (Fl. 1990).

In Kirkpatrick, the attorney's offenses again were far beyond mere negligence. He failed to appear on several occasions following his arrest for resisting arrest on a traffic charge, as well as for failure to complete probationary obligations. The court stated that his offenses were not minor nor insignificannt and his discipline was a Public Reprimand.

Very recently, this court, in The Florida Bar v. Littman, 612 So.2d.582 (Fl.1993) stated that a private admonishment would be appropriate in a case of negligent advice resulting in little or no injury. The Respondent was ordered to receive a Public Reprimand, however, due to the aggravating circumstance of a prior discipline.

Cooperation with the Bar has, in addition to lack of harm, been considered as a mitigating factor. The Florida Bar v. Farbstein 570 So.2d.933 (Fl.1990).

In this case, Respondent has practiced law continuously in the state of Florida for over twenty-one years and has never had a complaint against him, nor any Bar investigation or disciplinary proceeding. He has cooperated fully, not only with the Bar proceeding, but in the litigation surrounding the will contest in Circuit Court.

In light of all of the factors in mitigation, including this attorney's impeccable record, his cooperation with the Bar and the nature of the alleged offense, a Public Reprimand may not be justified as the appropriate discipline. Respondent would point out that Florida Standards for Imposing Lawyer Sanctions, 6.14 states that an admonishment is appropriate when a lawyer is negligent in determining whether submitted statements or documents are false...and causes little or no adverse or

potentially adverse effect... In the instant case, it may not even be concluded that the statement at issue, specifically Paragraph 4 of Ms. Real's letter was false, or that Respondent was in any way negligent.

CONCLUSION

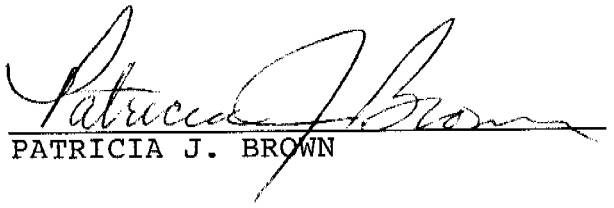
Respondent respectfully submits that the burden of proving him guilty of fraud or misrepresentation was not met, and the Referee's finding is cleary erroneous. The recommended discipline is a harsh one and would be inappropriate even had the substantive proof been made. It is requested that the Referee's Recommendations regarding Respondent's Guilt and Discipline be overturned, that he be found not guilty of any violation and that no disciplinary sanction be administered.

BY: Patricia J. Brown

PATRICIA J. BROWN
Attorney for Respondent
2666 McMullen Booth Road
#1015
Clearwater, Florida 34621
813 724-1360
Fl. Bar. # 315990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by regular U.S. Mail this 29th day of July, 1993, to LUAIN T. HENSEL, BAR COUNSEL, 5900 N. Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309.



PATRICIA J. BROWN