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IN THE SUPREME COURT OF FLORIDA
(BEFORE A REFEREE)

THE FLORIDA BAR,

Complainant,

v.

PATRICK H. WEIDENBENNER,

Respondent.

_____/

Case No. 80,756

RESPONDENT'S REPLY BRIEF

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

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ARGUMENT AND REBUTTAL

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

The Florida Bar and Respondent agree about the basic facts of this case. They agree about the standards of proof. They cite the same cases regarding "clear and convincing evidence," as well as about when the referee's findings should be upheld on review.

Their opinions diverge, however, with respect to the clear and cited facts of the case, as well as with respect to what certain precedential Supreme Court cases mean to the instant case.

Respondent's primary contention in his testimony as well as in his initial brief is that he has no clear recollection as to whether he specifically informed his Co-Trustees at The First National Bank in Palm Beach that his letters of administration as Personal Representative of the estate of Willard Utley has been revoked. (TR.p.28) He did, however, specifically recall discussing with the other trustees the litigation which had been initiated by Utley's nephew. (TR.p28) It seems abundantly clear that all of Respondent's meetings and actions regarding the Bank were oriented toward closing out the trust.

The Bar asserts, without citing to the record, on page 5 of its brief, that "he did not advise his co-trustee that he was no longer the personal representative." That assertion is not borne out by any of the testimony. The Bar refers to this as Respondent's first act of misrepresentation, by omission.

It is and has been Respondent's position throughout that the questionable paragraph four of the June 23, 1988 letter from Virginia Real which is the gravaman of the Bar's case, was not indicative of any misrepresentation to the bank about his status. He has stated quite frankly that he read the letter quickly and signed it, without digesting what the long-term

implications of the paragraph could be. (TR.p.32,77).

It should be noted that during the hearing in front of the Referee, Respondent pointed out an error in the Bar's request for admissions directed to Respondent. While his name was correctly used on the caption, another attorney's name, to wit; Kenneth Neal Metnick, was named in the first paragraph of the request The Request for Admissions had been signed by The top lawyers for the Florida Bar, and none of the four attorneys who approved the document noticed this error. Granted, the error was harmless, however it clearly illustrates how easy it is to miss an error on a pleading, or a letter, and it illustrates that even the most prestigious attorneys for The Florida Bar are not infallible. While the error was in this instance, harmless, before the changes in the rules regarding confidentiality of Bar proceedings, Mr. Metnick would undoubtedly have a serious issue with the Bar.(TR.p85,86,87).

In Respondent's initial brief, he cited several cases which stand for the proposition that The Florida Bar must prove, by clear and convincing evidence, that in order to find a lawyer guilty of misrepresentation, they must prove that he had the requisite intent to misrepresent. The Bar has attempted to distinguish these cases from Respondent's by stating that they all involved Trust Account violations. To the contrary, The Florida Bar v. Neu, 597 So 2d. 266 (Fl. 1992) involved one count of unauthorized withdrawals from client's trust accounts, but also involved a second count wherein the attorney withdrew funds, without authorization, from a Guardianship account.

Additionally, other cases which do not involve Trust Account violations have also required a standard of "knowingly" or "deliberately" misrepresenting facts, In The Florida Bar v. H. Eugene Johnson, 511 So.2d. 295 (Fl. 1987) the respondent was retained by a client to form a limited partnership. He drafted documents showing that he would contribute $5000.00 as a limited partner, knowing that he would not be making said $5000.00 investment and further, he filed this document in the Public Records with a false statement included therein. Respondent was disciplined by Public Reprimand for

"knowingly" filing a document in the public record which he knew to contain false information.

Similarly, in The Florida Bar v. Nuckolls, 521 So. 2d. 1120, (Fl. 19 89) the Respondent misrepresented the purchase price of condominium units to a lender from who he sought financing. The court stated that he "schemed" to obtain 100% financing by misrepresenting the purchase price to the lender. The court went on to refer to his act as a deliberate attempt to perpetrate a fraud on lenders, who based on his misrepresentations thought they were making an 80% loan. By stating that Nuckolls did not make a bad judgment, but rather a deliberate attempt to perpetuate a fraud, it would appear that the court is acknowledging that he had the "intent," to misrepresent.

In companion cases involving two law partners, The Florida Bar v. Siegel, 511 So. 2d. 995 (Fl.1987) and The Florida Bar v. Canter, 511 So.2d. 995 (Fl.1987) the court found that the two had made deliberate misrepresentations in in financial statements to lenders from whom they were attempting to get financing to purchase the building housing their law offices. They were found guilty of a "deliberate" scheme to misrepresent facts in order to secure full financing, and were disciplined by a thirty day suspension.

See also, The Florida Bar v. Van Stillman 606 So.2d. 360, (Fl. 1992) and The Florida Bar v. Beneke, 464 So.2d. 548 (Fl.1985), in both of which cases respondent was found guilty of knowing or deliberate misrepresentation.

In The Florida Bar v. Forbes, 596 So.2d 1051 (Fl. 1992) the Respondent was again found guilty of "knowingly and willfully making materially false statements in documents which he submitted to a bank, and filing false information on a loan application for a condo which he was developing.

To argue that Respondent can be found guilty of misrepresentation either negligently, or by omission cannot be supported by cases previously decided by this honorable court.

NO DISCIPLINARY ACTION AGAINST RESPONDENT MAY BE JUSTIFIED BASED UPON THE FACTS AND CIRCUMSTANCES OF THE CASE, AS WELL AS PRECEDENT SET BY THIS COURT

The cases which The Florida Bar cites in support of their recommendation that the Respondent be disciplined by a Public Reprimand may all be easily distinguished from the instant case.

In The Florida Bar v. Bratton, 389 So.2d. 637 (Fl. 1980) the respondent attorney was found guilty of two counts of misrepresentation, and the court specifically found that he "knowingly" made a false statement of fact. In the first count, he wrote a letter stating that he held a certain amount of money toward the purchase price of property, when in fact, he knew he did not have the money, nor did he ever receive the money. He further misrepresented the identity of which party he represented in a real estate transaction. Not only was the conduct more egregious than that with which Respondent is accused, but his actions were taken "knowingly.:

Similarly, in The Florida Bar v. Batman, 511 So. 2d. 558 (Fl. 1987) the Respondent, knowing that he was suspended from the practice of law for non-payment of Bar dues, testified falsely, under oath regarding his representation of clients. Even The Bar's brief acknowledges that in The Florida Bar v. Sax, 530 So. 2d 284 (Fl. 1988) the attorney submitted a notarized pleading to a court when he "know 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 its having been notarized.

Both Respondent and The Bar have argued The Florida Bar v. Littman, 612 So.2d. 582 (Fl. 1993) to support their respective positions. Respondent continues to assert that Littman supports his position that in a case where there is a prior discipline a Public Reprimand may be the appropriate discipline, assuming that the facts of the case have been proven.

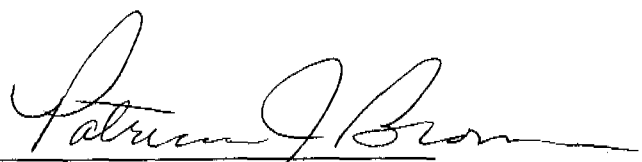
Littman's obvious similarity to this case is that there was no damage to the client other than embarrasment In Respondent's case, there was no harm to anyone, and in addition, there was particularly no harm to a client. Respondent, unlike Littman, has no prior discipline. Also, unlike Littman, there was no complaining party, other than a disgruntled nephew omitted from a fairly large estate. Clearly, even if Respondent had been proven guilty of a negligent act or ommission, a Public Reprimand is not warranted under the facts of the Littman case.

CONCLUSION

Respondent respectfully submits that the facts of this case do not support that there was any requisite intent to misrepresent, or defraud, nor was there any deliberate or knowing act of fraud or misrepresentation. The Bar did not meet its burden of proving that Respondent is guilty of any wrongdoing, other that perhaps missing a potentially problematic part of a letter. Clearly, mistakes or oversights are part of human nature, and while attorneys have a high standard of care, it has been shown herein that even the most prestigious attorneys may at times overlook an error in a pleading which they aver to be correct by affixing their signature thereto.

Respondent would request that, based upon the facts of this case, the charges against him be dismissed and the Referee's recommendation of guilt and discipline by Public Reprimand be rejected by this court as clearly erroneous.

Respectfully submitted:



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 U.S. Mail this 1st day of September, 1993 to LUAIN T. HENSEL, ESQUIRE, The Florida Bar, 5900 N. Andrews Ave., Suite 835, Fort Lauderdale, Fl. 33309.

PATRICIA J. BROWN