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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PETER L NILES, JR.,

Respondent.
_____/

Case No. 81,145
[TFB Case No. 92-31,975 (07C)]

THE FLORIDA BAR'S REPLY BRIEF
IN SUPPORT OF CROSS-PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

PAGE

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, will be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on December 28, 1993, will be referred to as "T," followed by the cited page number.

The Report of Referee dated January 6, 1994, will be referred to as "ROR," followed by the referenced page number(s) of the Appendix attached to the bar's initial brief. (ROR-A-____).

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

Please note that the "A Current Affair" reporter, Mr. Watkiss, was erroneously referred to as Mr. Watkins in certain documents, T-77.

ARGUMENT

POINT I

THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS THAT THE RESPONDENT BE FOUND GUILTY OF MISCONDUCT IN THIS CASE ARE FULLY SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND THEREFORE SHOULD BE UPHELD.

The respondent continues to argue that his conduct did not violate the Rules Regulating The Florida Bar as found by the referee. The record demonstrates, however, ample support for the referee's findings.

With respect to the referee's findings concerning the security breach at Broward Correctional Institution caused by the respondent gaining access to the prison by "A Current Affair" in order to conduct an impermissible media interview with his client, the record is fully supported. The respondent now argues that he did not give permission to "A Current Affair" for the media interview. Rather, he claims, he merely allowed them to accompany him on to death row to visit his client. This is unsupported by the record except for the respondent's own statements. The record reflects that the respondent was indeed well aware of the strict requirements imposed by the prison for gaining access to death row inmates. It was for this reason that the respondent had previously telephoned the superintendent and requested special permission to visit his client and bring with him his law clerk and a cameraman. It should be noted that this "law clerk" has never been identified or heard from in any manner

during these proceedings. Please note that it was the respondent's own testimony that he had called the superintendent requesting access for this law clerk and cameraman for a court deposition. If the respondent was aware that he had to gain permission for this access, he most certainly was aware that he had to gain permission for a media interview which of course would be more closely scrutinized.

In evidence as Bar Ex. 16 is The News-Journal article from December 7, 1990, in which the reporter contacted "A Current Affair" reporter Mike Watkiss and asked how he arranged for the interview of Deidre Hunt on death row. His response was, "I just never talk about the way I get interviews. We worked to get that interview for a full year. We made contacts with anyone we could get." It is very clear that the tabloid media's search resulted in Ms. Hunt's own attorney selling her out for the price of $5,000.00, the amount paid to him by "A Current Affair." The fact that media interviews were difficult, if not impossible, to arrange during this time period of orientation, as reflected by the testimony of The News-Journal's reporter Kathy Kelly, T-88, guaranteed the respondent that the program would air on television, the contingency upon which his payment rested.

The respondent also claims that the prison officials told him upon his arrival at the prison with the "A Current Affair" reporter and cameraman that "there was no problem with the media

interview," Respondent's Reply Brief And Answer Brief To The Florida Bar's Cross-Petition For Review, p. 5. A review of page 106 of the transcript of the final hearing indicates, however, that the respondent testified the correctional officers allowed access because the superintendent had authorized it through her previous memo. This is the memo that authorized access for the respondent's cameraman and law clerk on the same date. Conveniently, the respondent had arranged for it to appear as though access had been permitted for the two individuals present, one of whom was a cameraman and one of whom could have been a law clerk for all that the correctional officers knew.

Clearly, there is a conflict in the record. Just as clearly, it is the referee's position to determine and resolve these conflicts in the record, The Florida Bar v. Hooper, 507 So. 2d 1078 (Fla. 1987). The referee has reviewed the factual situation and found the respondent guilty as charged. This is appropriate and should not be overturned upon review.

The respondent also attempts to blame the Broward Correctional Institution correctional officers who were present for allowing the interview to take place. The respondent also took this contention with the superintendent at the final hearing. The superintendent's reply to the respondent's intimation that the security breach was caused by the prison official's actions rather than the respondent's deceit was an

unequivocal denial, T-81. It was noted that only the superintendent has the authority to give the authorization for the media interview of a death row inmate, T-84, and that this is a set policy throughout the state of Florida, T-76, 81. The superintendent acknowledged that Deidre Hunt's case had been the subject of a media frenzy, T-79.

Also at issue is whether or not the respondent made a misrepresentation to Kathy Kelly, the reporter for The News-Journal, concerning his receipt of payment for the media interview of his client and her mother. The respondent stated at the final hearing that he characterized the $5,000.00 payment as a "consulting fee." The Florida Bar contends that this is a mere semantics game which is not supported by the record or the evidence. By the respondent's own testimony, the $5,000.00 payment was contingent upon the airing of the interview, T-111. This fact alone presents the clear and convincing evidence upon which the referee's conclusions were based, ROR-A-6.

The respondent also contends there is no conflict of interest situation presented by his receipt of a $5,000.00 fee contingent upon the airing of his client's sensationalist media interview and lying to her about whether or not he had received any payment because Ms. Hunt had wanted to do an interview anyway. Ms. Hunt's affidavit is in evidence as Bar Ex. 1. It outlines her lack of knowledge that a media interview was going

to take place on the date of the "A Current Affair" interview. She notes that she never discussed with the respondent or authorized his having her interviewed and videotaped by "A Current Affair." She further outlines the respondent's deceptions to her concerning whether or not he had received any money. Clearly, the referee had more than adequate evidence on which to base his findings of guilt in this regard, ROR-A-2,3,6. The conflict situation presented by the respondent having personal financial interests in his client's case is clear. Even had Ms. Hunt desired to do an interview, she was not advised of the possible effects of her admissions of guilt upon her appeal of the case. Further, the respondent had entered into this deal during the time he was supposed to be giving legal advice to his client in regard to whether she should plead guilty to crimes in which the death penalty was a possibility. The conflict presented by this situation is truly chilling and should not be minimized.

As regards to Count II, once again the respondent makes contentions about previous conditions upon the cashing of his check to the county of Volusia which are unsupported by testimony other than his own. The record supports the referee's conclusion that the respondent violated the Rules Regulating The Florida Bar by allowing a check to the county on his personal account to be returned by his bank for insufficient funds. His conduct violated R. Regulating Fla. Bar 4-1.15 and 4-8.4(b), ROR-A-

3,4,7,8. The fact that previous case law involved attorneys who repeatedly wrote checks against insufficient funds does not excuse the respondent's behavior in this situation. The respondent's conduct in allowing a check made payable to the county for a significant sum of money, $5,000.00, to be returned due to insufficient funds is even more egregious considering that the funds were returned due to the question of whether they were improperly earned by the respondent in his role of specially appointed public defender.

ARGUMENT

POINT II

THE RESPONDENT'S CONDUCT WARRANTS DISBARMENT WHERE THE RESPONDENT HAS A SIGNIFICANT DISCIPLINE HISTORY, FAILS TO COMPREHEND THE NATURE OF HIS WRONGDOING AND ENGAGES IN EGREGIOUS BEHAVIOR TOWARDS HIS CLIENT AND THE JUDICIAL SYSTEM.

The respondent suggests that The Florida Bar seeks enhanced discipline merely because he sought an appeal of the referee's findings and recommendations. This is not the case. As clearly noted in the bar's petition for review, the standard review of the referee's report by the Board of Governors of The Florida Bar resulted in the board finding the egregious nature of the respondent's actions called for disbarment in order to assure the goals of consistency, protection of the public, and appropriate discipline.

In keeping with The Florida Bar v. Merwin, 19 Fla. L. Weekly S263 (Fla. May 12, 1994), disbarment is appropriate in cases involving deceit and misrepresentation. Although this case involved Mr. Merwin's misrepresentations to a judge concerning his client, the respondent's conduct was certainly as egregious as a misrepresentation to a court because his conduct involved a misrepresentation to his client and to prison officials that caused a security breach on death row. It also involved the serious conflict of interest situation with his client who faced a death sentence. Further, the aggravating factors of the

respondent's prior disciplinary record, selfish motives, pattern of misconduct, continued refusal or inability to perceive the wrongful nature of his conduct and the vulnerability of his client calls for disbarment in this case.

The Florida Bar relies on the case law cited in its initial brief which is fully appropriate and supportive of disbarment.

The respondent's citations suggesting that a public reprimand be imposed as discipline are inappropriate. "Public reprimand should be reserved for such instances as isolated instances of neglect; or technical violations of trust accounting rules without willful intent; or lapses in judgment," (citations omitted) The Florida Bar v. Welty, 382 So. 2d 1220, 1223 (Fla. 1980).

The respondent has exhibited a disregard for his client as well as the state. His conduct has attracted media attention. Serious discipline is indeed warranted.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court uphold the referee's findings of facts and recommendation of guilt, impose the discipline of disbarment, and order the respondent to pay The Florida Bar's costs, currently totalling $3,052.97.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing complainant's reply brief in support of cross-petition for review and appendix have been furnished by regular U. S. mail to The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. mail to Mr. William J. Sheppard, counsel for respondent, at 215 Washington Street, Jacksonville, Florida 32202-2808; and a copy of the foregoing has been furnished by regular U. S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 16th day of June, 1994.

Jan Wichl

JAN WICHROWSKI
Bar Counsel