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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JOHN H. BUSTAMANTE,

Respondent.
_____/

Case No. 82,884

TFB File No. 94-00390-02

ANSWER BRIEF

JAMES N. WATSON, JR.
Bar Counsel, The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney Number 0144587

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PRELIMINARY STATEMENT

References to the transcript of the Summary Judgment proceedings held June 15, 1994 shall be by the designation SJTr p. - _____. References to the transcript of the Final Hearing proceedings held on October 7, 1994 shall be by the designation FHTr - p. ___.

STATEMENT OF THE CASE AND FACTS

The Florida Bar filed a Notice of Determination of Guilt with the Supreme Court of Florida on October 8, 1993, based upon Respondent's felony conviction in the U.S. District Court for the Northern District of Ohio. Respondent was suspended by order of this Court on October 26, 1993.

A formal complaint was filed against Respondent on December 15, 1993 along with The Florida Bar's Request for Admissions. Respondent filed an answer to the Complaint on March 4, 1994 and a response to the Request for Admissions on March 15, 1994.

The Florida Bar filed a Motion to Deem Matters Admitted and Motion for Summary Judgment on March 29, 1994. After a hearing on June 15, 1994, the Referee entered an order on July 18, 1994 granting summary judgment for The Florida Bar. The summary judgment recommended Respondent be found guilty of violating Rules 4-8.4(a, b, c, and d) of the Rules of Professional Conduct of The Florida Bar.

A final hearing was held in this matter on October 7, 1994. Final arguments were made by written memorandum by the counsel for the respective parties.

On November 18, 1994, the Referee filed his report recommending Respondent be found guilty of violating Rule 3-4.4, Rules of Discipline of The Florida Bar and Rules 4-8.4(a, b and c), Rules of Professional Conduct of The Florida Bar. The Referee recommended Respondent be disciplined by disbarment.

Respondent filed a timely Petition for Review on March 3, 1995.

STATEMENT OF THE FACTS

On April 2, 1993, Respondent executed a plea agreement in United State of America v. John H. Bustamante, Case No. 1:90 CR 0240, U.S. District Court, Northern District of Ohio. Pursuant to this plea agreement, Respondent pled guilty to Count I of the indictment therein charging Respondent with the felony of devising a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses in violation of Title 18, Section 1343, United States Code. (Bar's Exhibit 1)

As part of Respondent's plea agreement, he agreed to cease practicing law in Ohio and any other state in which he is licensed to practice, and that he would not contest any subsequent action any state may institute as a result of the criminal case. (Bar's Exhibit 2 & 3)

Respondent was sentenced to five (5) years probation and ordered to make full restitution on June 11, 1993, after being found guilty and convicted of fraud by wire.

As set forth in Count I of the indictment, Respondent was found guilty of participating in a scheme to defraud Consumer's United Insurance Company of Washington, D.C. (Consumers) As set forth in Count I of the indictment (Bar's Exhibit A) Respondent was found guilty of the following conduct constituting a scheme to defraud:

- Respondent misrepresented the purpose of the initial loan request from Consumers.

- Respondent deceptively procured an inaccurate property appraisal on collateral property to meet the collateral needs of his loan request.
- Respondent used the initial loan proceeds for personal use rather than the stated purpose of drilling for oil in the original loan application.
- Respondent used embezzled funds from a client in July 1987 to repay interest to Consumers in an attempt to deceive Consumers into believing Respondent and his company were generating income.
- Respondent secured a note of $725,000 with Consumers with property that was collateralized by property that had been damaged by fire and had been condemned by Cleveland, Ohio. Respondent used a deceptively procured appraisal in obtaining this loan on November 25, 1987.
- Respondent continued to conceal the condemnation of the collateral property in Cleveland from Consumers and the building was demolished in September 1988.
- Respondent and his company, Bottom Line, received another $450,000 loan from Consumers on October 9, December 7 and 8, 1987 and proceeded to use the proceeds for personal uses, including the paying back of the embezzled client funds.
- Respondent was involved in obtaining a $2.6 million loan from Consumers for the benefit of Tusk Land Development Corporation (Tusk). Respondent aided Tusk

in representing to Consumers he would use his political influence to help develop the under-collateralized property, thereby increasing the land value securing the loan. Respondent never assisted in such development.

- Respondent, in late 1989, sold off timber on the collateral property for the Consumer loan, thereby reducing its value.
- After finally starting the oil drilling in 1990, Respondent established a corporation where he and his children owned 50% of the stock as a means of diverting proceeds from oil sales away from Bottom Line. These funds were then used for personal uses rather than to pay off the Consumers loan as promised by Respondent.
- Between June and August 1990, Respondent diverted and concealed large sums of money generated by his oil drilling activities.

As part of the plea agreement, Respondent made payment of $29,558.40, plus $2,216.88 interest to the sisters of Georgia B. Lightner (Bar's Exhibit 2).

In the sentencing memorandum of the U.S. Attorney's Office prosecuting the criminal case against Respondent, it is shown that the Respondent had received almost $30,000 from the Ohio Central Credit Union, for the account of the deceased Ms. Lightner. This money was held in a joint account with Ms.

Lightner's sisters, Eugia Turner and Arra Lawson. (Bar's Exhibit 4)

Upon receipt of the Lightner funds, Respondent deposited them into an account named "John H. Bustamante Trust Account." Respondent endorsed the credit union check, "The Estate of Georgia Lightner, John H. Bustamante, Attorney."

At the time of Respondent's deposit on June 24, 1992, there was only a balance of $600 in this "trust" account. Within days of depositing the Lightner funds, Respondent misappropriated these funds using them to make a condominium payment, pay legal bills from his criminal trial and help operate a family newspaper business.

On September 18, 1992, Respondent closed this account without having distributed any funds to the sisters of Ms. Lightner.

This misappropriation of funds of Ms. Lightner took place between the time Respondent was initially tried by the government and the entry of his guilty plea. At the time he received the credit union funds, his earlier conviction was being remanded for a new trial. (Bar's Exhibit 4)

Respondent's plea agreement took place after the trial judge granted a new trial, due to the inconsistencies in the jury verdict. (FHTr - p. 39) This was due to the fact the jury appeared confused as to the instructions. (FHTr - p. 55)

Before a re-trial was held on the original indictment, Respondent entered into a plea agreement whereby he plead guilty to Count I of the indictment. (Bar's #2) Prior to the entry of

Respondent's plea, he testified as to his daughter being ill and his youngest son committing suicide.

As part of the plea agreement, Respondent agreed to cease practicing law in Ohio and any other state where licensed and not to contest any subsequent proceedings against his law licenses.

At the final hearing in this matter, Respondent presented testimony and documentary evidence as to his character.

SUMMARY OF ARGUMENT

Respondent was convicted of a federal felony of scheming to defraud upon a plea of guilty. Respondent engaged in a scheme over a period of at least six (6) years where he lied to everyone that became involved in his attempt to obtain money for personal uses.

As part of his plea agreement in federal court, he agreed to cease his practice of law and not to contest any subsequent proceedings against his license. After being suspended in Florida on his Ohio conviction, Respondent has vigorously contested the proceedings before this Court.

While a felony conviction in and of itself does not mandate disbarment in Florida, it does serve as conclusive proof of the underlying misconduct.

In recommending the appropriate discipline, the Referee has the responsibility for finding facts and resolving conflicts in evidence. Unless clearly erroneous or lacking in evidentiary support, a Referee's findings of fact should not be overturned.

The Referee in this matter personally observed the character witnesses and the Respondent in testifying.

After hearing all the evidence, the Referee made a finding against Respondent as to the rule violations and recommended Respondent be disbarred. The evidence before the Referee was more than sufficient to sustain his recommendation of disbarment and such recommendation should be affirmed.

ARGUMENT

THE REFEREE'S REPORT IS SUPPORTED BY SUFFICIENT EVIDENCE TO AFFIRM THE RECOMMENDATION OF DISBARMENT

The Referee granted The Florida Bar summary judgment after finding Respondent guilty of the charged ethical violations. The final hearing was for the sole purpose of establishing the appropriate discipline to be recommended by the Referee to the Court.

After the final hearing, the Referee asked for written arguments from each side before entering his report of the referee. The final report of referee found Respondent guilty of violating Rule 3-4.4, Rules of Discipline and Rules 4-8.4(a, b, and c), Rules of Professional Conduct of The Florida Bar.

Respondent has argued that the Referee failed to consider any mitigating factors in reaching his recommended discipline of disbarment. In making his argument, Respondent cites to the presence of the specific aggravating factors of dishonest or selfish motive, a pattern of misconduct, refusal to acknowledge wrongful nature of conduct and substantial experience in the practice of law cited in the Referee's report. Respondent argues that the Referee failed to consider any mitigating factors since none were specifically cited.

At the end of the final hearing, each party was asked to submit written arguments as to the appropriate discipline in this matter. Respondent submitted his arguments on October 14,

1994 and therein argued eight factors in mitigation. (p. 6, Final Argument of Respondent)

In rendering his report, the Referee specifically states at the start of the second paragraph, "After considering all the pleadings and evidence before me...". From this statement, it is clear that the Referee considered the final written arguments of Respondent and therein the arguments as to mitigation.

In citing The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989) as establishing certain applicable mitigating factors, Respondent argues several points that should be held in his favor.

The first factor cited is Respondent's age. A review of the Referee's Report shows that this factor was considered. (RR - p. 4) The Referee also considered Respondent's tenure with The Florida Bar, citing his admission date of October 18, 1952. (RR - p. 4)

Respondent places great emphasis on the character testimony contained in written letters on behalf of Respondent and testimony given at the final hearing as mitigation.

A review of the testimony of the character witnesses and what they knew about the criminal charges shows a lack of their effectiveness due to Respondent having been less than candid with the witnesses.

Respondent called Jacques Bossert to testify on his behalf and as to his character. Mr. Bossert was instrumental in assisting Respondent in establishing the First Bank and Trust of Cleveland. (FHTr - p. 100)

Mr. Bossert retired to Florida in 1987 and testified he had little or no contact with Respondent after his retirement. Even when Respondent's bank closed and was unable to meet its retirement obligations to Mr. Bossert, Mr. Bossert never called to inquire of Respondent exactly what was happening. (FHTr - p. 123)

Mr. Bossert also testified that he had no knowledge of the criminal charges or had never even seen a copy of the federal indictment. (FHTr - pp. 126-127)

Respondent's next witness was Wesley Toles of Cleveland Heights, Ohio. Mr. Toles was also involved with Respondent in the venture of First Bank and Trust of Cleveland. (FHTr - p. 136) He testified that he had known Respondent for thirty years and up close for twenty-five of those years. (FHTr - p. 136)

Despite Mr. Toles' closeness to Respondent, he was unaware of Respondent's problems with the condemned St. Clair property (FHTr - p. 151), did not know of Respondent's company, Bottom Line, and its oil drilling (FHTr - p. 150) and had never discussed Respondent's pending criminal charges that resulted in Respondent's plea of guilty. (FHTr - pp. 144, 145)

Respondent's last character witness called at the final hearing was Mr. Oswald Bronson, Sr., President of Bethune-Cookman College of Daytona Beach, Florida. Mr. Bronson testified on direct examination that Respondent's character and reputation presented a good role model for the students of his college. He also testified that Respondent had received an

honorary doctorate of law degree from Bethune-Cookman College in 1985. (FHTr - p. 167-168)

While admitting on direct examination that he was aware that Respondent had pled guilty to charges in federal court (FHTr - p. 172) Mr. Bronson stated such knowledge was only in passing.

On cross-examination, Mr. Bronson admitted that he had no idea what the nature of the charges were that Respondent had pled guilty to in federal court. Mr. Bronson stated all he knew was that Respondent was having some legal problems and was asked to testify and to express his confidence in Respondent. (FHTr - p. 175) Mr. Bronson went on to admit that he had lunch with Respondent and Respondent's counsel and there was never any discussion or revelation as to the exact nature of the charges to which Respondent had pled guilty. (FHTr - p. 176)

The character witnesses have testified on behalf of a man they knew of for a time period up until the mid-1980's. This was about the time that the fraudulent scheme Respondent pled guilty to began. The common thread to these witnesses is that none of them had ever personally discussed the exact nature of the criminal charges with Respondent so as to be able to have the benefit of this knowledge in qualifying their testimony.

A prime example of Respondent's lack of character is the fact that he was less than thruthful with Mr. Bronson as to why he needed his testimony and given the opportunity to reveal a major character flaw over lunch, failed to advise or disclose the nature of his misconduct. (FHTr - p. 175)

Respondent argues that the testimony and evidence presented as to Respondent's good character should mitigate the Referee's recommendation to something less than disbarment.

After arguing that the character evidence in mitigation was not considered, Respondent next argues the circumstances surrounding his plea of guilty to show that disbarment is not an appropriate discipline.

The thrust of Respondent's argument is that the circumstances surrounding the entry of Respondent's guilty plea and the personal tragedies experienced by Respondent at this point in time are mitigating factors that would prevent the Referee from recommending disbarment.

In making this argument, Respondent has completely ignored the facts that were the basis for Respondent's indictment. Nowhere in Respondent's brief is there any mention of the continuing and repetitive nature of the facts to which Respondent pled guilty. These facts were properly before the Referee by way of the indictment (Bar's Exhibit 1) and properly considered.

A simple reading of the indictment in regards to Count I that Respondent pled guilty to clearly shows the seriousness of Respondent's misconduct, the continuing nature of fraud and misrepresentations and the deceitfulness that Respondent resorted to whenever it would benefit his selfish motives.

In addition to the charges in the indictment, Respondent was shown to have misappropriated funds from the Estate of Georgia B. Lightner. While not specifically cited within the

formal complaint, Respondent was required, as part of the plea agreement, to reimburse the sisters of Ms. Georgia Lightner for funds which Respondent had misappropriated in his capacity as a lawyer. The facts surrounding this misappropriation are set forth in the United States' Sentencing Memorandum. (Bar's Exhibit 4) Respondent makes no mention of these facts that were in front of the Referee.

The misuse of the funds of the Georgia Lightner estate transpired during the time Respondent was on pre-trial release, pending the re-trial for the criminal charges that he ultimately pled guilty to. The use of these funds was again for personal uses, such as a mortgage payment on Respondent's condominium, attorney fees for his criminal trial and use in the running of his newspaper. (Bar's Exhibit 4 - p. 11)

While Respondent has argued specific cases where individual lawyers have engaged in what is argued as similar misconduct and received discipline less than disbarment, Respondent has failed to show how the Referee's recommendation is clearly erroneous or not supported by the evidence.

A Referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not support by the evidence. The Florida Bar v. Niles, 644 So.2d 504, 507 (Fla. 1994)

The Referee did find aggravating factors based upon the evidence before him. These factors were a dishonest or selfish motive, a pattern of misconduct, refusal to acknowledge wrongful

nature of conduct and substantial experience in the practice of law.

Respondent has not argued or shown how any of the above aggravating factors found by the Referee were erroneous or lacked support by substantial evidence so these elements must stand unchallenged.

Respondent cites to various cases in support of his argument that disbarment is inappropriate; however, he has failed to relate the facts of this particular case to those cited, other than drawing a comparison between the cases dealing with felony convictions.

This Court has held that each case before it must be viewed solely upon its merits. The Florida Bar v. Jahn, 509 So.2d 285, 286 (Fla. 1987)

In the instant case, Respondent pled guilty to a federal felony of committing a scheme to defraud. The facts that serve as a basis for that charge are replete with numerous acts by Respondent where he actively lied, misrepresented factual issues, embezzled funds from a client, secreted and concealed monies due to his creditors--all for a selfish motive.

In The Florida Bar v. Nedick, 603 So.2d 502 (Fla. 1992) the lawyer pled guilty to filing false tax returns on six occasions. Nedick received a two year prison term, suspended after three months. Based upon these facts, The Florida Bar filed disciplinary charges against Nedick. After hearing the case, the Referee recommended Nedick be suspended for three years and cited as mitigation the fact that Nedick had no prior record,

had cooperated with federal officials, and had received other penalties for his misconduct.

In rejecting the Referee's recommendation in Nedick and ordering disbarment, the Court held that the mitigation was outweighed by the seriousness of the offense, its willful and repetitious nature, and the selfish and deceitful motive behind it. Id, at 503.

In the case before the Court, the Bar would argue Respondent's case is precisely aligned with the holding in Nedick. Here there is shown a participation by Respondent in a serious felony, Respondent's actions were willful and repetitious, and his motive was selfish and deceitful. These factors can be seen to outweigh the fact that Respondent had no prior discipline and support the Referee's recommendation of disbarment.

In the case of The Florida Bar v. Forbes, 596 So.2d 1051 (Fla. 1992) this Court affirmed a recommendation of disbarment where the lawyer was found guilty of making false statements in loan documents submitted to a bank so as to influence its actions in granting a loan. As in the instant case, Forbes had no prior disciplinary record. Despite a lack of any disciplinary history, the Court in Forbes felt disbarment was appropriate for such a serious felony. These facts are on point with Respondent's conduct herein and would support the Referee's recommendation of disbarment.

Another instance where this Court has held that disbarment is appropriate where an attorney participates in a fraudulent

scheme, is the case of The Florida Bar v. Levine, 542 So.2d 990 (Fla. 1989)

A review of Florida's Standards for Imposing Lawyer Sanctions would also support the Referee's recommendation of disbarment. Section 5.11(a) provides that disbarment is appropriate when "a lawyer is convicted of a felony under applicable law;" or (b) "a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft." Section 7.1 - provides that "disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

Another responsibility of the Referee in these proceedings is to weigh the evidence and judge the credibility of the witnesses. The responsibility for finding facts and resolving conflicts is placed with the Referee. The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994)

In this case, Respondent entered into a plea agreement (Bar's Exhibit 2) that initially required Respondent to surrender his license to practice law in Ohio and in any other state in which he held a license. This agreement was modified by letter dated May 21, 1993 (Bar's Exhibit 3) to read that "on or before the date of sentencing in the criminal case,

Respondent would cease the practice of law and would not contest any subsequent action by Ohio or any other state against his law license."

The reason for the change in language was explained by Respondent's criminal defense attorney, Clarence Rogers, at the final hearing. The need for the change was due to a rule in Ohio that prohibits the re-application for a law license by a lawyer that voluntarily surrendered his license. (FHTr - pp. 81-83)

At the hearing on the Motion for Summary Judgment by The Florida Bar, the Referee questioned Respondent's ability to contest the Florida proceedings under this plea agreement and directly commented on the effect such a stance had on the Respondent's credibility. (SJTr - pp. 14, 15) At this hearing, the Referee questioned the credibility of Respondent by his asking a Federal Judge to allow him to enter a plea to a single count of an indictment in exchange for his not contesting any subsequent action on his law license.

Nowhere in Respondent's pleadings or his testimony does he actually admit that he has done anything wrong of either a criminal or ethical nature.

Respondent makes a case of a man devastated by personal tragedies that took the will to contest these charges out of him. This position ignores the facts which serve as the basis for his criminal conviction and that the initial jury had convicted him on numerous counts of the indictment.

The only remorse shown by the Respondent is that he has been inconvenienced by his plea and has shown no concern for the problems created by his misconduct.

It has been clearly shown that there is competent, substantial evidence to support the factual findings and recommendation of disbarment by the Referee.

Respondent's argument against disbarment must fail due to his inability to show the recommendation of the Referee was clearly erroneous. The personal tragedies cited by Respondent came after the misconduct attributed to Respondent and such misconduct cannot be argued as being the result of these incidences. Respondent's character witnesses were not informed of the nature of Respondent's criminal conduct, and their testimony must be tempered by this fact and not considered as relevant.

CONCLUSION

The Referee's Report and recommendations are clearly supported by competent and substantial evidence and the discipline of disbarment should be affirmed.

Respectfully submitted,

JAMES N. WATSON, JR.
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. 82,884; TFB File No. 94-00390-02; has been forwarded by certified mail, #Z 751-830-579, to **RICHARD A. GREENBERG**, Counsel for Respondent, at his record Bar address of Post Office Box 925, Tallahassee, Florida 32302-0925, on this 15th day of May, 1995.

JAMES N. WATSON, JR.
Bar Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399
(904) 561-5845
Attorney Number 0144587

cc: John A. Boggs, Director
Lawyer Regulation