IN THE SUPREME COURT OF FLORIDA

CASE NO.: 82,884

THE FLORIDA BAR,

Complainant,

vs.

JOHN H. BUSTAMANTE,

Respondent.

_____/

FLA BAR NO. 0382371

REPLY BRIEF OF RESPONDENT

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C. STATEMENT OF THE FACTS

Respondent takes exception to a portion of the statement of facts contained in the answer brief of Complainant. The Florida Bar has stated as "facts" the uncharged and unproven allegations contained in a sentencing memorandum filed by the United States Attorney's Office in Respondent's criminal case. (Bar's Exhibit 4). (See Answer Brief at 6-7). As noted in the response filed to the United States Attorney's Office Sentencing Memorandum (Respondent's Exhibit 7), the government's memorandum was filed with the court in the hope of negatively influencing the court with regard to the defendant, even at the expense of inaccurately recounting the proceedings. (Respondent's Exhibit 7, at 3).

D. ARGUMENT AND CITATIONS OF AUTHORITY

Initially, Complainant asserts the Referee did in fact consider the mitigating factors set forth in *The Florida Bar v. Diamond*, 548 So. 2d 1107 (Fla. 1989). (Answer Brief at 11). A review of the factors set forth in *Diamond* shows the Referee did not, in fact, consider any of the factors as mitigating. Although the Referee's report does cite the Respondent's age and his date of admission to The Florida Bar, as Complainant well knows these two elements are merely biographical and are perfunctory elements of a Referee's report.

Complainant next attacks Respondent's character witnesses by showing instances in which Respondent did not fully discuss with these individuals his personal finances and the events going on in his life. In doing so, Complainant appears to have misstated the record. For example, Complainant asserts Respondent never discussed his pending criminal charges with his close friend, Wesley Toles. (Answer Brief at 12). The record indicates in several places that Respondent had talked to Mr. Toles throughout the period of time before the indictment, during his trial and subsequent to the trial. (Tr-140, 143, 145).

As noted above, Complainant also questioned Respondent's failure to disclose his personal finances and business ventures with his friends. Even the closest friends are not normally intimately familiar with each other's financial affairs.

Complainant also addresses Respondent's failure to discuss the nature of the criminal charges filed to which he had pled guilty with Dr. Bronson, President of Bethune Cookman College. (Answer Brief at 13). As the record indicates, Dr. Bronson had just arrived in town shortly before he was to testify and was leaving immediately after testifying to go to Washington D.C. (Tr-171). Also, Dr. Bronson had a very quick lunch with Respondent and then had to run back to his car because he left a bag in it. (Tr-175).

Dr. Bronson testified he had not actually been in Respondent's presence since the entry of Respondent's plea of guilty. (Tr-180). Also, Dr. Bronson testified as to how he had seen

many persons who were put in situations where they entered a plea of guilty due to some external pressure. (Tr-176).

Complainant next asserts Respondent's failure to discuss the criminal charges in depth with Dr. Bronson reveals a "major character flaw". Complainant's argument presupposes Respondent has a major character flaw. As the record clearly reflects, Respondent does not have any flaws in his character. The evidence is clear Respondent plead guilty for reasons other than an absolute admission of wrongdoing.

Complainant also argues Respondent has ignored the facts that were the basis for Respondent's indictment in arguing that disbarment is not the appropriate penalty. Respondent has not ignored any facts. What Respondent argues is not compelling, however, are the mere allegations contained within the indictment. An indictment may only be considered to be factual when the allegations contained therein have been proven in a court of law. As reflected by the jury's verdict and the granting of a motion for new trial, the United States Attorney's Office failed to prove many of the allegations contained in the indictment. Just as with the sentencing court in the United States District Court for the Northern District of Ohio, this Court should not judge Respondent "based upon unproven allegations and misstatements." (Respondent's Exhibit 7at 11).

As in the statement of facts, Complainant again refers to the allegations contained within the United States sentencing memorandum in its argument in chief. (Answer Brief at 14-15). Nowhere can it be "shown" that Respondent misappropriated funds from the estate of Georgia B. Lightner. This accusation was made in the United States sentencing memorandum (Bar Exhibit 4), but Respondent was never charged with any criminal offense or convicted in any forum for his handling of the estate.

Complaint asserts Respondent has failed to show the Referee's recommendation is clearly erroneous. The Referee's recommendation is clearly erroneous for its failure to consider any

mitigating evidence. A review of the Standards for Imposing Lawyer Sanctions (Standards) shows several mitigating factors which even Complainant should concede apply in the instant case. Specifically, Standards 9.32 (a) - "absence of a prior disciplinary record", (g) - "character or reputation", and (k) - "imposition of other penalties or sanctions" are all applicable to Respondent. Yet the Referee does not even cite as a mitigating factor Respondent's lack of prior disciplinary record. This is clearly erroneous.

Complainant then asserts the aggravating factors found by the Referee "must stand unchallenged." (Answer Brief at 16). On the contrary, Respondent does challenge several of the aggravating factors found by the Referee. Respondent asserts the aggravating factors of dishonest or selfish motive and pattern of conduct are clearly erroneous. These factors overlook the facts surrounding Respondent's plea of guilty. The nature of the charges may suggest these aggravating factors apply, but Respondent's hard fought challenge of the indictment negates this inference.

Respondent submits the Referee also failed to consider the testimony of James Gibbons, President of Consumers United Insurance Group. (Respondent's Exhibit 5). As noted by Complainant, the indictment against Respondent charged him with participating in a scheme to defraud Consumers United Insurance Company. Mr. Gibbons testified at trial and refuted several portions of the indictment. (Respondent's Exhibit 5 at 49-50). More significantly, Mr. Gibbons testified he believed Respondent had not defrauded Consumers in any way, that Consumers was not a victim in any way and that he would continue to loan money to Respondent. (Respondent's Exhibit 5 at 50).

The cases cited by Complainant in support of the recommended discipline of disbarment are not persuasive. *The Florida Bar v. Nedick*, 603 So. 2d 502 (Fla. 1992), for example, involved an entirely different scenario. The respondent in *Nedick* was consciously violating the law and plead guilty as soon as he was caught. Further, *Nedick* involved a knowing conspiracy

and agreement to submit false tax returns to the federal government. *Nedick*, at 503.

Respondent vigorously fought the charges brought against him and there was no evidence to support any belief Respondent was consciously violating the law.

Complainant also relies upon *The Florida Bar v. Forbes*, 596 So. 2d. 1051 (Fla. 1992). The respondent in *Forbes* was sentenced to two years in prison for admitting that he knowingly made false statements and misrepresentations. Respondent was sentenced to five years probation after an exhausting battle to clear his name.

The recent case of *The Florida Bar v. Garland*, 20 Fla. L. Weekly S119 (Fla. March 9, 1995), supports Respondent's position a period of suspension is the appropriate discipline in this case. The respondent in *Garland* altered time records and his fee per hour to justify the taking of unearned fees from an estate, made intentional misrepresentations to a residual beneficiary and gave the beneficiary a false accounting, misappropriated funds that were intended for the costs and expenses of the estate he was handling, falsely advised the Grievance Committee that certain estate funds had been deposited in a special savings account, and made false statements to the Bar's investigator. Despite these serious transgressions of the rules of professional conduct, including the instances within the disciplinary proceedings themselves in which the respondent engaged in acts of dishonesty and misrepresentation, this Court imposed a two year suspension. *Garland*, at S120.

Complainant then argues Respondent ignored the fact that the initial jury in his case convicted him on numerous counts of the indictment. Complainant ignores the fact that the jury's verdict was "totally inconsistent" and was obviously a compromise verdict after 3 1/2 days of deliberation. Complainant also ignores the fact Respondent was granted a new trial by the trial judge due to the jury's inconsistent verdicts.

Finally, Complainant argues the personal tragedies suffered by Respondent came after his alleged misconduct and, thus, "such misconduct cannot be argued as being the result of these

incidences." (Answer Brief at 20). While it is true the personal tragedies suffered by Respondent came largely after the indictment, their importance cannot be overlooked. Prior to his youngest son's suicide, Respondent was fighting the charges every step of the way. After his son's tragic death, Respondent "lost his fight" and agreed to anything to stop the pain. As Respondent testified at the final hearing, "I think if I had been in my right mind, I don't know what I would have done." (Tr-213). Respondent must live with the consequences of his plea of guilty, but Respondent should not be disbarred.

E. CONCLUSION

The Referee's report and recommendation is clearly erroneous and should not be accepted by this Court. Respondent should not receive the ultimate sanction of disbarment.

Respectfully submitted,

R. A. Bn

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F. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/Hand Delivery to James N. Watson, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 2nd day of June, 1995.

R. A. Bn

RICHARD A. GREENBERG