IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN LOBBAN MAYNARD,

Respondent.
_____/

Case No. 83,918
[TFB Nos. 93-30,761 (09C)
and 93-31,279 (09C)]

THE FLORIDA BAR'S REPLY BRIEF

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SYMBOLS AND REFERENCES

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

The transcript of the final hearing held on March 10, 1995, and March 24, 1995, shall be referred to as "T" followed by the transcript volume and the cited page number(s).

The Report of Referee dated April 6, 1995, will be referred to as "ROR" followed by the referenced page number(s).

The bar's exhibits from the final hearing will be referred to as "Bar Ex." followed by the exhibit number.

Respondent's exhibits from the final hearing will be referred to as "Resp. Ex." followed by the exhibit number.

ARGUMENT

DISBARMENT OR LONG TERM SUSPENSION IS APPROPRIATE GIVEN THE NATURE AND NUMBER OF DISCIPLINARY VIOLATIONS WHICH INCLUDE MISUSE OF CLIENT FUNDS, TRUST ACCOUNT IRREGULARITIES, PRIOR DISCIPLINARY HISTORY, PATTERN OF MISCONDUCT AND LACK OF REMORSE DESPITE THE FACT THAT RESPONDENT MAY HAVE BEEN SERIOUSLY IMPAIRED BY ALCOHOLISM FOR MUCH OF THE RELEVANT TIME PERIOD.

Respondent does not dispute the factual findings of the referee except for Count III and admits in his answer brief that he is not blameless. The bar, however, would submit that at no time during the final hearing did respondent demonstrate any remorse or regret for his actions, let alone take any responsibility for his conduct. Respondent's conduct herein included obtaining loans from clients for either himself or his friends without disclosing his conflicting interests or urging the clients to seek independent legal advice. Surely respondent knew or should have known that making a personal loan to himself from the Strausberg children's trust (hereinafter the "Trust") violated not only his duty to avoid placing himself in a position as an attorney where his personal interests could conflict with those of the trust beneficiaries but also violated the fiduciary

responsibility he held as trustee. He also knew or should have known that borrowing money from Dr. Matthew Seibel, a client, was improper.

> Of necessity, an attorney must be required to recognize those instances in which his or her professional judgment is impaired...the lack of this capacity itself is a serious indicator of unfitness to practice law. Dissenting opinion of Justice Barkett in The Florida Bar v. Wishart, 543 So. 2d 1250, 1253 (Fla. 1989).

Although respondent asserts his alcoholism may have been a factor in his exercise of poor judgment and thus should be considered a mitigating factor, the bar would submit that although it may explain respondent's misconduct, it is not an excuse for violating the rules, The Florida Bar v. Golub, 550 So. 2d 455 (Fla. 1989). While it is true the referee chose not to hold another hearing to entertain the bar's arguments as to the appropriate level of discipline and respondent's presentation of mitigating evidence, respondent never requested the referee reconsider his report. Nor did respondent seek a hearing to present mitigating evidence. The referee's report was served on April 6, 1995. Thereafter, the referee made two corrections to the report, with the last one being issued on May 1, 1995. Respondent had nearly one month to seek a rehearing but chose not

to do so. Instead he has presented his mitigation argument to this court. The bar does not dispute the fact that respondent is an alcoholic and that he has sought treatment. This court can determine the extent and weight of such mitigating circumstances when balanced against the seriousness of the misconduct. As this court has the ultimate responsibility for imposing sanctions, the bar submits that there is no good reason to remand this matter to the referee to make another disciplinary recommendation. The issue of whether or not respondent has recovered from his addiction to alcohol is a matter to be determined in a separate proceeding when he petitions for reinstatement if this court imposes a suspension of ninety-one days or more or during his application for readmission if this court imposes disbarment. Respondent's argument of recovery is not a matter for the disciplinary proceedings. A referee cannot transform a disciplinary proceeding into a reinstatement action because the requirements of rule 3-7.10 must be met, The Florida Bar v. Scott, 238 So. 2d 634 (Fla. 1970).

On one hand respondent asserts he had enough skills to assist Strausberg in locating tax havens in foreign countries (T.

Vol. IV, p.p. 425-426), to generate many loans out of his law office for various clients (T. Vol. III, p. 255) and to make property investments for himself over the years (T. Vol. IV, p. 400), yet argues that with his lack of experience in making investments he was left to do the best he could with respect to making prudent investments for the Trust. The bar submits that nevertheless respondent had a duty to prudently invest and safeguard the funds of the Trust. To assist him in making prudent investments he could have implemented the recommendations made by Strausberg. Further, Strausberg thought respondent would consider his recommendations regarding investments for the Trust and respondent admits that it was Strausberg who had the financial expertise. However, it is clear that respondent paid little or no attention to Strausberg's recommendations of good investments. Respondent depended on his own abilities to determine the investments to be made for the trust as he was allegedly under an obligation **not** to follow Strausberg's suggestions or instructions regarding the Trust (T. Vol. IV, p. 402). Thereafter, based on his abilities, respondent made loans to himself and his certified public accountant, secretary, friends and clients without adequate collateral, credit history

reviews or other safeguards. Even where a trust instrument grants broad discretion, a trustee is not relieved from the duty to exercise good faith in administrating the trust, Hoppe v. Hoppe, 370 So. 2d 374 (Fla. 4th DCA, 1978), cert. den. 379 So. 2d 206 (Fla. 1979). Respondent failed to exercise the standard of care a reasonable fiduciary would exercise, Fla. Stat. sections 518.11 and 737.302 (1993). This failure is exacerbated by the fact that respondent has been trained as an attorney and that he has practiced law since 1971.

Respondent also argues that the charges against him concerning the Trust are mitigated by the fact that he was serving as trustee at the request of Strausberg and that he was acting not as an attorney but as a friend. Respondent was Strausberg's legal advisor (T. Vol. IV, p. 396) and the record clearly reflects the confidence Strausberg had in respondent's legal abilities. The bar submits respondent had a duty to safeguard the assets of the Trust and to act in a reasonable and prudent manner in making investments with another's money. The rules require a level of competence which if an attorney does not possess he should decline representation or hire someone with the

necessary expertise. If respondent felt he lacked sufficient knowledge to be able to make prudent investments, he could and should have sought the advice of an investment professional. Even without this advice, respondent, by virtue of his legal training, certainly should have known better than to make uncollaterilized loans with another person's money. Further, respondent disregarded and violated his fiduciary duty as trustee by making a personal loan to himself from the Trust and by using the Trust funds to pay off his personal debt (ROR, p. 3, paragraphs 16 and 18). A conflict of interest exists where a trustee has a personal interest in a loan made by the trust and cannot act as trustee without the concurrence of a co-trustee in connection with the transaction, Bailey v. Leatherman, 615 So. 2d 810 (Fla. 3d DCA, 1993). To compound this breach of his fiduciary duty, respondent made representations to Strausberg to conceal his activities and conduct (ROR, p. 6, paragraphs 40 and 41).

Should respondent's misconduct be excused because he allegedly lost money "trying to save the trust"? According to repondent, said monies from his own personal funds were disbursed by checks made payable to Florida Federal Savings and Loan

Association, to respondent, to the children's orthodontist or to the children's mother to pay orthodontist bills (T. Vol. IV, p.p. 413-414). However, respondent's records for the Trust (Bar Ex.'s 1, 2 and 3) do not support that these payments, which respondent testified totalled over $40,900, were credited to the Trust. Further with respect to those checks made payable to Florida Federal Savings and Loan Association (Resp. Ex. 1), said amounts, if actually paid, were to settle a debt owed the bank by Timothy Meyers, respondent's client (ROR, p. 4, paragraphs 24 and 25). The bar submits that any losses incurred by respondent were the result of respondent's actions in using the Trust monies improperly and imprudently and without regard to the best interests of the Trust.

Respondent attempts to shift his fiduciary responsibility to Strausberg, who by virtue of his investment knowledge the respondent apparently believes should have closely supervised him. He also argues that his conduct should be excused because Seibel understood the risky nature of loaning money to a friend and that Seibel was satisfed with the terms of the $35,000 loan which had no interest provision or time for repayment. Although

the terms of the $35,000 loan may have been to Seibel's satisfaction, was it in his best interest and was he given the opportunity to understand what he was giving up (interest) to help out a friend? Did respondent explain the inherent conflict of interest with such a transaction? The bar submits this was not the case. The bar contends that respondent does not comprehend the nature of the attorney-client relationship. It is not the client's duty to supervise the attorney or for the client to protect his own interests from that of the attorney's. The Rules Regulating The Florida Bar are designed to protect the unsophisticated and unsuspecting public who rely on the attorney to navigate them around the rocks and through the shoals of unfamiliar seas. The rules and the spirit of the rules are also designed to protect those persons who, although are in familiar seas, have depended on their attorney to captain the ship.

It appears respondent also argues that his duty to the Trust to account for funds is a less stringent duty then that required by the Rules Regulating The Florida Bar. The referee recommended that respondent be found guilty of failing to use trust funds for the purposes for which they were entrusted to him and for failing

to follow the minimum required trust accounting procedures as they related to the funds he held on behalf of the Trust. The referee, during the final hearing, asked the following question: "..., is there a difference in the fiduciary responsibility of a trustee simply because he's a lawyer?" (T. Vol. IV, p. 467). The referee requested case law on the issue and invited both parties to submit written closing arguments. Respondent contends that the bar did not provide the referee with case law on the issue. The bar submits that respondent has forgotten the bar's written closing argument which was submitted by First Class mail and facsimile to the referee and respondent's counsel on April 3, 1995. The bar addressed in its closing argument the issue of whether respondent had a duty to comply with the attorney trust accounting rules with respect to his handling of the Trust and whether a trustee's fiduciary duty is higher if the trustee is an attorney.

Respondent was also cited for failing in his duty to report to Strausberg regarding the status of the Trust's assets. He now argues that such was improper because Strausberg had relinquished control and that by making such reports he may have subjected

Strausberg to an IRS investigation. Because the beneficiaries of the Trust were minors, one wonders whom respondent felt he should be accountable to for his handling of the Trust because according to him the Trust did not require him to furnish an accounting to "any human alive" (T. Vol. IV, p. 402). Respondent, when setting up the Trust and agreeing to act as Trustee, agreed to keep Strausberg informed of the status of assets in the Trust (ROR, p. 2, paragraph 5). The referee found respondent guilty of failing to keep Strausberg informed about the assets of the Trust and for misrepresenting the assets in the Trust. The bar, in its written closing argument, cited the referee to The Florida Bar v. Prevatt, 609 So. 2d 37 (Fla. 1992), wherein an attorney was disciplined for using funds he held in a fiduciary capacity to make loans to himself and clients. The attorney was found guilty of committing an act that was unlawful or contrary to justice, failing to keep his client reasonably informed, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and failing to preserve his client's funds. Further, in its closing argument, the bar submitted that rule 5-1.2 was applicable herein as there was no written trust, the funds of the Trust were not maintained in a segregated account as a portion of

said funds were kept in respondent's general law office account (ROR, p. 3, paragraphs 11 and 12), and the special trust position had not been created, approved or sanctioned by law or an order of a court that had the authority or duty to issue orders pertaining to the maintenance of such special trust accounts.

The issue in determining whether disbarment is appropriate is not merely whether the respondent has the ability to reform. Nor is disbarrment appropriate only for those situations where the attorney is found to have had bad motive in his/her actions. The purposes of attorney discipline are to protect the public, punish the attorney and deter like-minded attorneys. Another equally important goal of discipline is the creation and protection of a favorable image of the legal profession, The Florida Bar v. Larkin, 447 So. 2d 1340 (Fla. 1984). The appropriate level of discipline is determined by all of these goals, not the capacity for rehabilitation alone. The rules place "an emphasis upon the protection of the public and the image and integrity of The Florida Bar as a whole. The license to practice law is a privilege, not a right..." Petition of Wolf, 257 So. 2d 547, 548 (Fla. 1972).

Given the nature and pattern of misconduct and the case law, the bar submits the most appropriate level of discipline herein is disbarment, or in the alternative, a long term suspension. The Standards For Imposing Lawyer Sanctions support disbarment. Standard 4.11 is applicable because respondent took a loan from Seibel and did not repay it, made an unsecured loan from the Trust to himself and paid a personal obligation from the Trust. Standard 4.11 calls for disbarment when a lawyer intentionally or knowingly converts client property regardless of actual or potential injury. Standard 4.31(a) calls for disbarment when a lawyer represents a client where the lawyer's interests are adverse to the client's and with the intent to benefit himself or another and causes serious or potential serious injury to the client. In aggravation, respondent has a prior disciplinary history, engaged in a pattern of misconduct, had substantial experience in the practice of law and was indifferent to making restitution. In fact, he sought the protection of the bankruptcy court to discharge his debts to the detriment of his clients.

The respondent's actions indicate a lack of understanding of his responsibilities as an officer of the court and call into

serious question the integrity of his professional character.

> Integrity of character is the first prerequisite to dependability, to consistency of purpose, no single racial or economic group has a corner on it, it is found among the lowly as often as it is among the well-born. When a client has a real job to do it looks for the lawyer with character. No client worth having wants a lawyer without it, he is unstable, he is short of know-how, he will not stay put and he sometimes fails to distinguish the difference between his and his client's money. State v. Murrell, 74 So. 2d 221, 226 (Fla. 1954), emphasis added.

POINT II

THERE IS CONVINCING AND CLEAR EVIDENCE TO SUPPORT THE REFEREE'S FINDINGS AS TO COUNT III AND SUCH FINDINGS CARRY A PRESUMPTION OF CORRECTNESS.

Respondent challenges the referee's findings of guilt with respect to Count III. A referee's findings of fact and recommendations of guilt carry a presumption of correctness and will be upheld by this court absent a clear showing the findings were erroneous or not supported by the record, The Florida Bar v. De La Puente, Case Nos. 83,043 and 83,230 (Fla. June 29, 1995), at p. 6. Where the findings are supported by competent and substantial evidence, as the bar submits is the case herein, the court is precluded from reweighing the evidence and substituting its judgment for that of the referee, De La Puente, supra.

The party who challenges the findings carries a heavy burden. Said party must demonstrate that there is **no** evidence in the record to support the referee's findings or that the evidence clearly contradicts the conclusions, De La Puente, supra, emphasis added. Respondent has failed to meet this test.

After hearing the testimony of both Strausberg and respondent concerning respondent's alleged failure to timely forward to Strausberg's accountant certain demand letters for the purpose of deducting a bad debt and to keep Strausberg advised as to the status of the matter, the referee clearly chose to believe Strausberg's version of the events. Strausberg's position was supported by his letter to respondent dated April 18, 1991, where he wanted to know what was going on with respect to the Monieson debt matter (Bar Ex. 44). Strausberg testified that he periodically called respondent to check on his progress (T. Vol. I, p. 138).

As the fact finder, the referee has the duty of weighing credibility, something this court is at a disadvantage to do because it does have the opportunity to view the witness'

testimony. The referee has the opportunity to observe a witness' demeanor and credibility, The Florida Bar v. Fine, 607 So. 2d 416, 417 (Fla. 1992). Respondent never produced a letter from either 1990 or 1991 forwarding the demand letters to the accountant. The explanations put forth in his brief as to why the accountant might not have received the demand letters he allegedly mailed sometime before 1992 are not supported by any evidence other than his testimony. Strausberg asked respondent to send the demand letters and when he inquired as to the status, he received no satisfactory explanation from respondent. Further, even if respondent initially mailed the materials to the accountant in a timely manner, this does not explain why he failed to resend them until April 10, 1992, (Bar Ex. 46) or inquire earlier of the accountant as to whether the materials had been received given the fact that Strausberg was making inquiries.

POINT III

THE REFERREE DID NOT ERR IN REFUSING TO GRANT RESPONDENT'S MOTION IN LIMINE.

Respondent also argues the referee abused his discretion in

denying respondent's Motion In Limine made on March 9, 1995. Motion rulings are within the referee's sound discretion and, absent a showing of abuse of that discretion, will not be revisited by this court, The Florida Bar v. Vernell, 520 So. 2d 564 (Fla. 1988). The bar submits there is no evidence the referee abused his discretion in denying respondent's motion.

Respondent argues that his conduct should be excused because the bar allegedly lost his trust records and that he was unable to mount a defense to the charges. Respondent failed to offer to this court or to the referee these defenses or adequately identify the allegedly missing records which would have supported his defenses. Respondent, through counsel, raised this serious allegation at the final hearing (T. Vol. I, p.p. 9-10, 12-14). The bar advised the referee and steadfastly maintains that all of respondent's trust records were returned and absolutely none have remained in the bar's possession. Perhaps those documents respondent believes are missing are those he failed to provide to the bar pursuant to its request to produce filed on September 26, 1994, (see also the bar's motion to compel production of documents and things filed on October 5, 1994, the referee's

order of October 31, 1994, granting the bar's motion, the bar's motion for default with sanctions filed on December 21, 1994, and the respondent's response to the bar's request to produce served on January 13, 1995). Further, copies of all the trust records in the bar's possession were provided to respondent in connection with another, unrelated matter (T. Vol. I, p. 11).

Prior to ruling on the motion in limine, the referee allowed respondent the opportunity to review the copies of all respondent's trust records in the bar's possession. Other than one card relating to Seibel, respondent was unable to identify the other allegedly missing documents pertaining to this complaint (T. Vol. I, p. 30). Thereafter, the referee denied respondent's motion. He however allowed respondent to raise the issue of the missing documents as they became relevant in the proceedings (T. Vol. I, p. 31).

The bar presented into evidence three of respondent's trust records, each pertaining to the Strausberg children's trust (Bar Ex. 1, 2 and 3). The exhibits were respondent's ledger card for the Trust's funds held in the money market account and the ledger

cards for funds of the Trust held by respondent in his general law office account. Respondent did not object to these records as being incomplete.

Further, respondent admitted that a number of persons have had access to his records and accused others of not returning his records (T. Vol. III, p. 285). This court has not found the loss or destruction of trust records to be an inadequate defense, The Florida Bar v. Behrman, 20 Fla. L. Weekly (Fla. July 20, 1995). In Behrman, the attorney claimed his trust records and files that pertained to a client's business dealings were missing and the client, with whom the attorney shared office space, had intercepted his telephone messages, faxes and mail. The attorney was found guilty of, among other things, failing to preserve his trust account records.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will approve the referee's findings of fact and recommendation of guilt but review the referee's recommendation as to discipline and, instead, order a suspension in excess of 91 days or disbarment; restitution to Randy Strausberg and Matthew Seibel for the losses they incurred as a result of respondent's misconduct (or reimbursement to The Florida Bar Clients' Security Fund should Strausberg and/or Seibel make successful claims to the fund); and payment of the bar's costs in prosecuting this case which total $6,730.80.

Respectfully submitted,

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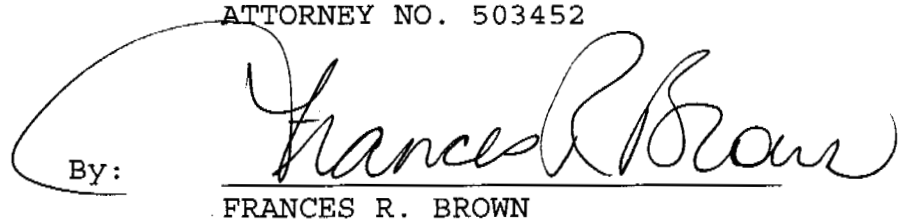
By: 

FRANCES R. BROWN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing reply brief have been furnished by First Class mail to The Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by certified mail No. P 917 722 014, return receipt requested, to Gavin D. Lee, counsel for respondent, at 230 Lookout Place, Suite 200, Maitland, Florida, 32751-4494; and a copy of the foregoing has been furnished by First Class mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 4th day of August, 1995.

FRANCES R. BROWN
Bar Counsel