

077

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

THE FLORIDA BAR,  
Complainant,

Case No. 86,777

v.

TFB File No. 96-00016-02

ARRON EDWARD BUDNITZ,  
Respondent.

**FILED**

SID J. WHITE

JUL 2 1996

7/17

ANSWER BRIEF OF THE FLORIDA BAR

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

JOHN T. BERRY, #217395  
Staff Counsel  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399  
(904)561-5600

JOHN F. HARKNESS, JR., #123390  
Executive Director  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399  
(904)561-5600

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PRELIMINARY STATEMENT

References to the official transcript of the final proceedings in this matter held on April 30, 1996 shall be designation Trp.-\_\_\_\_\_. References to the Report of Referee shall be by designation ROR.-\_\_\_\_\_.

STATEMENT OF THE CASE AND OF THE FACTS

I. *STATEMENT OF THE CASE*

On or about August 15, 1995, The Florida Bar petitioned the Court for an emergency suspension of Respondent based upon an order of disbarment against Respondent in the State of New Hampshire.

In response to the Bar's petition, Respondent filed a written response objecting to such action.

This Court subsequently entered an emergency suspension against Respondent on September 5, 1996. Respondent next filed a Motion for Rehearing on September 14, 1995 and a Motion for Summary Ruling on October 5, 1995. By order dated November 6, 1995, this Court denied both the aforementioned motions of Respondent.

Pursuant to Rule 3-3.2(b), Rules of Discipline, The Florida Bar filed a formal complaint against Respondent on November 2, 1995. Respondent was also served with a Request for Admissions at the same time as he was served with the complaint.

On November 16, 1995, the Honorable N. Sanders Sauls was appointed as Referee in this matter pursuant to this Court's order of November 9, 1995.

The Florida Bar filed a Motion to Deem Matters Admitted/Summary Judgment on February 7, 1996 after Respondent's not having served counsel of record with his replies to the

Request for Admissions. It was later learned that Respondent had responded on December 8, 1995, but mailed copies to the Clerk of the Court with unaddressed envelopes for distribution to the relevant parties. Upon knowledge of such response, The Florida Bar withdrew its Motion to Deem/Summary Judgment on March 7, 1996.

Respondent filed a response to the formal complaint and a motion to dismiss on November 16, 1995 and again failed to serve a copy on the attorney of record in this matter. Due to the late receipt of Respondent's motion to dismiss, a formal response was not filed with the Referee by The Florida Bar. As set forth in the order setting trial, this motion would be addressed at final hearing.

Respondent continued to file other motions subsequent to his Motion to Dismiss. Respondent filed a Motion to Dismiss for Lack of Findings on February 16, 1996; a reply to the Bar's Motion to Deem/Summary Judgment on February 16, 1996.

On February 22, 1996, The Florida Bar filed a Motion for Extension of Time for the Filing of the Referee's Report, citing Respondent's actions of failing to serve the counsel of record with responsive pleadings as a contributing factor for the inability of having a report filed within the specified ninety (90) days. Respondent objected by written motions and a Petition for Extraordinary Writ. The Motion for Extension of Time was

granted.

The Florida Bar filed a Motion to Set for Trial on March 19, 1996 and a formal hearing was noticed for trial on April 30, 1996. Respondent filed a Waiver of Hearing and Waiver of Personal Appearance for the Final Hearing on April 6, 1996.

A Final Hearing was held before the Referee on April 30, 1996. The Report of Referee was filed on May 2, 1996 recommending Respondent be disbarred. Upon Motion for Clarification filed by The Florida Bar, the Referee amended the report in regards to taxable costs. Respondent did not make an appearance at the Final Hearing.

On or about May 10, 1996, Respondent timely filed a Petition for Review (Exh. X-Two); however, Respondent again failed to properly serve such notice upon the counsel of record for The Florida Bar. By order of the Referee on April 2, 1996, Respondent had been specifically instructed as to proper service by the Referee.



STATEMENT OF THE CASE AND OF THE FACTS

II. STATEMENT OF THE FACTS

Respondent was at all times mentioned in the complaint a member of The Florida Bar and subject to the Supreme Court's jurisdiction. ROR. 1.

A petition for disbarment was filed against Respondent on March 23, 1993 by the New Hampshire Supreme Court Committee on Professional Conduct. Within the petition, Respondent was alleged to have made false statements of material fact to a grand jury; had made false statements of material fact to the disciplinary committee; and engaged in conduct involving fraud, deceit, dishonesty, or misrepresentation. ROR. 2; Bar's Exhibit 1.

On July 1, 1994, a Referee for the New Hampshire Supreme Court filed a report wherein Respondent was found guilty by clear and convincing evidence of making false statements of material fact to a grand jury, an investigator of the New Hampshire Attorney General's Office and the New Hampshire Supreme Court Committee on Professional Conduct; and, guilty by clear and convincing evidence of conduct involving dishonesty, fraud, deceit or misrepresentation. ROR-2, Bar's Exhibit 2.

On May 23, 1995, The Supreme Court of New Hampshire entered its opinion and order of disbarment of the Respondent from the practice of law in New Hampshire. ROR-2, Bar's Exhibit 3.

The New Hampshire Supreme Court Committee on Professional  
Conduct made the following findings:

That upon hearing and review of the complaint, Mr. Budnitz' response, and the testimony of witnesses and evidence presented the hearing panel recommended and the Committee made the following findings:

(a) that prior to March 5, 1985, Mr. Budnitz contacted one Carole Hebert and asked her to notarize certain documents;

(b) that on March 5, 1985, Carole Hebert, at Mr. Budnitz' request, notarized a document entitled Acknowledgement of Employment Termination;

(c) That the notarization took place at the apartment of Carole Hebert on Walnut Street in Manchester, New Hampshire;

(d) That Mr. Budnitz had come to her apartment to have the document notarized;

(e) that when Mr. Budnitz presented the document entitled Acknowledgement of Employment Termination to Ms. Hebert on March 5, 1985, it contained only the signature of David Williams;

(f) that it contained no witness signature;

(g) that Mr. Budnitz signed the document in the presence of Ms. Hebert;

(h) that when Mr. Budnitz signed and Ms. Hebert acknowledged the Acknowledgement of Employment Termination on March 5, 1985, she was cooperating with the new Hampshire Attorney General's Office and the Office of the U.S. Postal Inspector in an ongoing investigation of the so-called Blondheim Companies;

(i) that Mr. Budnitz had, at some time, represented David Williams who was a

principal of the Blondheim Companies, as well as certain of the Blondheim Companies;

(j) that Mr. Budnitz was unaware, on March 5, 1985, that Ms. Hebert was cooperating with the agencies and was further unaware that an agent of the Attorney General's Office and an agent of the Office of the U.S. Postal Inspector were present in Ms. Hebert's apartment on March 5, 1985, at the time of his execution of the Acknowledgement of Employment Termination and Ms. Hebert's notarization;

(k) that Ms. Hebert did not notarize the Acknowledgement of Employment Termination nor did Mr. Budnitz acknowledge his signature to Ms. Hebert on the document on any date other than March 5, 1985;

(l) that on August 25, 1987, Mr. Budnitz testified under oath before a Hillsborough County grand jury investigating the Blondheim Companies;

(m) that at the time of Mr. Budnitz' testimony before the grand jury, he was unaware that agents of the Attorney General's Office, or other public offices, knew of his meeting with Ms. Hebert on March 5, 1985, or knew of the notarization of the Acknowledgement of Employment Termination by her on that date;

(n) that during Mr. Budnitz' testimony before the grand jury, he testified that he executed the Acknowledgement of Employment Termination on January 18 or 19, 1985;

(o) that with reference to the execution of the Acknowledgement of Employment Termination, Mr. Budnitz testified on August 25, 1987, before the Hillsborough County Grand Jury, that he ratified his signature before Ms. Hebert on or about January 21, 1985 at the Blondheim offices;

(p) that Mr. Budnitz' grand jury testimony

was false, in that no ratification, acknowledgement, or notarization of signature of parties to the Acknowledgement of Employment Termination, before Ms. Hebert, was accomplished on the date, or at the place, or in the fashion described in said testimony;

(q) that Mr. Budnitz knew said testimony before the grand jury to be false when he gave it;

(r) that Mr. Budnitz further testified before the Hillsborough County grand jury on August 25, 1987, that David Williams' signature and his signature were notarized by Ms. Hebert on or about January 21, 1985;

(s) that the testimony was with continuing reference to the Acknowledgement of Employment Termination and was false in that the acknowledgement and notarization of the signatures did not occur in a fashion or upon the date described in said testimony;

(t) that Mr. Budnitz knew the testimony to be false when he gave it;

(u) that Mr. Budnitz further testified on August 27, 1987, that he had to reratify it on or about January 21, 1985 and that Ms. Hebert's signing of the document occurred at that time because no notary was available on January 19, 1985;

(v) that Mr. Budnitz' testimony was false in that there was no signing of any Acknowledgement of Employment Termination agreement by Ms. Hebert or ratification thereof before Ms. Hebert on or about the date described in said testimony;

(w) that Mr. Budnitz knew said testimony to be false when he gave it;

(x) that in May of 1988, Mr. Budnitz made certain statements to the investigator of the Attorney General's Office;

(y) that among the statements that the Acknowledgement of Employment Termination in question had been notarized sometime between January 21, 1985 and February 12, 1985 in Amherst, New Hampshire at the Blondheim Company headquarters, that Mr. Budnitz had not seen Ms. Hebert from the time she started her new job until December of 1985 and that Mr. Budnitz had not been at Ms. Hebert's apartment during March of 1985 any reason;

(z) that those statements by Mr. Budnitz were false and he knew them to be false at the time they were made;

(aa) that at page 25 of his answer to the initial complaint before the Committee, Mr. Budnitz stated that "Respondent's alleged statement as to lack of presence at Hebert's apartment located at the fictitious address is, therefore, believed to be a truthful statement;"

(bb) that the said statement, taken together with the representations and argument preceding it on page 25 and 24 of Mr. Budnitz' answer to the initial complaint, amount to a representation to the Committee that Mr. Budnitz was relying upon a mistake of address in the initial district court complaints when he denied to the Attorney General's Office investigator that he had been at Ms. Hebert's apartment during March of 1985 for any reason;

(cc) that Mr. Budnitz' representation to the Committee in that regard is false, and further that he knew that representation to be false at the time it was made.

These findings were affirmed by the Referee in New Hampshire (Bar's Exh. 2, p. 8,9) and in the New Hampshire Supreme Court's order of disbarment of May 23, 1995.

The order of the Supreme Court of New Hampshire addressed

only the charge of Rule 8.1(a), New Hampshire Rules of Professional Conduct which states in part: "A lawyer in connection with ... a disciplinary matter, shall not: (a) knowingly make a false statement of material fact ..."

In the instant matter, the Referee found Respondent guilty of violating the following rules: 4-3.3(a)(1), 4-8.1(a), 4-8.4(c). ROR-2.

The Referee found numerous aggravating factors and an absence of mitigation. ROR-2. Citing to sections 5.1, 5.11(b), 5.11(f); 6.0, 6.1 and 6.11 of the Standards for Imposing Lawyer Sanctions, the Referee recommended Respondent be disbarred from practicing law in Florida.

SUMMARY OF ARGUMENT

The Report of Referee was filed in a timely manner and met the requirements under the Rules of Discipline.

Respondent's failure to attend the Final Hearing and his attempt to appeal the Referee's findings without review of the official transcript has caused Respondent to make spurious allegations and make arguments based upon mistaken facts.

The disbarment order and the findings of the New Hampshire Supreme Court in disbarring Respondent from the practice of law in New Hampshire stand as conclusive proof of such misconduct by Respondent under Rule 3-4.6, Rules of Discipline.

Respondent's argument referencing the unlawfulness of the Referee's report and his reliance upon his opinions as beliefs for which he cannot be disciplined are frivolous and unfounded.

ARGUMENT I

*NO PROCEDURAL ERRORS EXIST  
SUCH AS TO NEGATE ADHERENCE  
TO THE REPORT OF REFEREE*

Respondent first argues that the Report of Referee should not be considered since it was allegedly not filed in a timely manner.

Under the provisions of Rule 3-5.2(f), Rules of Discipline and the appointment of the Referee, a Report of Referee is to be issued within ninety (90) days of the appointment of the Referee.

The Florida Bar filed a Motion of Extension of Time in which the required report of referee was to be filed. Over objection by Respondent a sixty (60) day extension was granted by order of this Court on February 23, 1996. The Referee herein was given until May 20, 1996 to file his report. The Report of Referee was filed May 2, 1996; well within the extension granted.

Respondent attempts to argue that the extension sought by The Florida Bar was in some way in concert with the Referee. No where within the Bar's motion is there a basis for such conjecture by Respondent. The Florida Bar was attempting to demonstrate good cause for the extension of the time periods provided within the rule.

Respondent's attempt to argue that counsel for The Florida Bar was the legal representative of the Referee is unsupported and frivolous.



Since the Referee filed his report within the extended time period, the attempt by Respondent to suggest Judge Sauls was in contempt of this Court is spurious.

Respondent's reliance upon the time guidelines as a basis for dismissal is also misplaced. He fails to include or acknowledge that a full reading of the provisions of Rule 3-5.2(f) provides that even if there is a failure to issue a timely report of referee, the appropriate disciplinary action may still be taken. In such instances, without a showing of good cause, the suspension may be dissolved.

Respondent's next procedural issue involves an argument that the report of referee is defective under Rule 3-7.6(k) (A), Rules of Discipline. This rule states a report of referee shall include a finding of fact as to each item of misconduct of which a respondent is charged. Respondent argues that the report fails to make a finding as to the charged rule violation under Rule 4-3.3(a) (3), Rules of Professional Conduct. Respondent goes further to say he had never been placed on notice of any amendment to the complaint.

By choosing not to attend the final hearing or reviewing the official transcript, Respondent is unaware that this rule was withdrawn from consideration by The Florida Bar and was not under consideration by the Referee. (Trp. 15).

For Respondent to make such an argument without full

knowledge of the facts is reckless negligence. Respondent then attempts to carry his mistake to an even higher level by labeling the Referee's findings as unlawful and charging the Referee of commission of a felony under federal law. Such an argument only lends credence and believability to the facts established against Respondent and his attempted scam in New Hampshire.

Having chosen not to attend the final hearing, it is absurd for Respondent to argue as procedural issues actions taken in open court and on the record, such as the dismissal of a rule violation.

Respondent next attempts to argue that the actions by the Referee are defective under the provisions of Rule 3-7.16(a) and (c), Rules of Discipline providing for a statute of limitations in discipline matters. The issue of a statute of limitations problem was raised in Respondent's Motion to Dismiss and this was denied by the Referee.

Respondent's reliance upon Rule 3-7.16 is misplaced. Since The Florida Bar is the complainant in this matter, there is no way the Bar could have been privy to the happenings of Respondent prior to its receipt of information regarding Respondent's disbarment in New Hampshire.

Since Respondent was not disbarred until May 23, 1995, this matter is well within the time limits prescribed by Rule 3-7.16, Rules of Discipline.

A review of the order of disbarment by the New Hampshire Supreme Court, (Bar Exh. 3), sets forth a finding of undisputed facts. Those facts which substantiate the finding of misconduct under Rule 8.1(a), were also found by the Referee to support a finding of guilt on the other rule violations cited in his referee report. The conclusive proof of Respondent's conduct allows for the consideration of the established facts of the New Hampshire Supreme Court. The facts found as undisputed can clearly be seen as establishing clear and convincing evidence of the violations of which Respondent has been found guilty.

## ARGUMENT II

### *THE FINDINGS AND RECOMMENDATIONS OF THE REPORT OF REFEREE ARE CORRECT AND SUPPORTED BY CLEAR AND CONVINCING EVIDENCE*

Respondent begins his second argument revisiting several issues previously presented and fully agreed.

In regards to the findings of the New Hampshire Professional Committee and the Referee, only the rule violations were not fully sustained by the New Hampshire Supreme Court. A comparison of the factual findings shows that the findings below were used to establish an undisputed scenario upon which Respondent was disbarred.

The New Hampshire Supreme Court order of disbarment specifically finds that Respondent had lied to a grand jury and perpetuated this lie to the disciplinary committee. Bar Exhibit 3, page 2. The Referee found such conduct is in violation of Rule 4-3.3(a)(1), Rules of Professional Conduct.

Respondent next tries to reargue the question of whether false statements to a grand jury is to a tribunal. In Florida, it has been held that perjury before a grand jury is considered a crime committed in an judicial proceeding. Rivers v. State, 121 Fla. 887, 164 So. 2d 749 (Fla. 1935).

Respondent's second argument under this section found in the third paragraph on page two of the Initial Brief have been addressed previously and require no additional comment.

Respondent next argues against the aggravating factors found by the Referee. The first factor addressed is that of dishonest motive. Respondent argues that this should be discarded since the New Hampshire Referee was unable to determine the motivation behind Respondent's behavior. From the facts it can be clearly argued that Respondent's desire to have a document notarized in a misleading manner is contrary to honesty.

Respondent would next challenge the Referee's findings of aggravation for a pattern of misconduct and multiple offenses. As found by the New Hampshire Supreme Court, Respondent lied not only to the grand jury, but perpetuated this lie to the disciplinary committee. Such action clearly supports the Referee's findings.

By providing false testimony to the grand jury and perpetuating this deception to the disciplinary committee, the Referee's findings as to Factors 4 and 5 are sufficiently supported.

In regards to aggravating factors 6 and 7, regarding Respondent's refusal to acknowledge his wrongful conduct and substantial experience, the record clearly shows that Respondent has never admitted his misconduct, but has chosen in both venues to argue semantics and play word games. Respondent argues that his mere concurrence with an opposing witness shows evidence of his acknowledging the wrong nature of his conduct. One only has

to review the pleadings and arguments submitted herein by Respondent to see that at no time has Respondent acknowledged that his conduct violated the Rules of Professional Conduct.

In arguing about the appropriateness of the Standards for Imposing Lawyer Sanctions cited by the Referee, Respondent again relies on his position that the Report of Referee is fraudulent and therefore the application of any standard is unjustified and hypocritical.

Pursuant to the Rules of Discipline of The Florida Bar, Respondent's disbarment is conclusive proof of the misconduct in New Hampshire. The standards cited by the Referee are each appropriate to apply to conduct upon which Respondent had been disbarred in New Hampshire.

Respondent next argues that the Referee's reliance upon the cases of The Florida Bar v. Rightmyer, 616 So. 2d 953 (Fla. 1993) and Office of Disciplinary Counsel v. Tumini, 453 A. 2d 310 (Pa. 1982) is erroneous.

It is clear that Respondent has failed to review the full text of The Florida Bar v. Rightmyer since he failed to note the incorrect citation contained in the Referee's report. The Florida Bar v. Rightmyer is reported in volume 616 Southern 2nd, not volume 617 as cited by Respondent.

In disciplining Rightmyer, this Court cited The Florida Bar v. Dodd, 118 So. 2d 17, 19 (Fla. 1960) which held:

"No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty".

Rather than limiting the extent of the opinion in The Florida Bar v. Rightmyer to the phrase "lying under oath" as done by Respondent, the most important aspect of the text cited by the Referee is the court's statement that an officer of the Court who knowingly seeks to corrupt the legal process can logically expect to be excluded from that process. Rightmyer, p. 955.

Respondent's attack on the relevance of the Referee's citation of Office of Disciplinary Counsel v. Tumini, 453 A. 2d 310 (Pa. 1982) argues the rules cited therein are not similar to the violations against him. Respondent does not attempt to raise any other argument of relevancy. The problem Respondent faces is to figure out how to negate the fact that he was found to have lied before a grand jury and then perpetuated that lie to a discipline agency. Respondent again chooses to select only a narrow part of the opinion of the cited authority. In arguing against Tumini, Respondent has limited his attack only on the term "judicial proceedings".

He chooses to ignore what is being done in the judicial proceeding which is false swearing.

Under the rules of The Florida Bar the grievance committee

is specifically viewed as an agency of the court and it naturally follows that any proceeding by the grievance committee would be judicial in nature.

The thrust of Tumini is the action of the attorney, to wit: false swearing, and not a limitation upon where it occurred. Upon being admitted to The Florida Bar, Respondent took an oath which in part, he swore that he "will never seek to mislead the judge or jury by any artifice or false statement of fact or law". Rules Relating to Ethics Governing Bench and Bar, 145 Fla. 797, 798 (Fla. 1941).

Lastly, Respondent argues that he cannot be disciplined or excluded from the practice of law for his beliefs. In making this argument, Respondent asks this Court to view his testimony before the New Hampshire authorities as a "belief". Respondent refers to his Exhibit Nine (Bar's Exhibit 3), page 3 as acknowledgement that his testimony was a "belief". A full reading of that exhibit shows that the Supreme Court of New Hampshire also rejected Respondent's attempt to characterize his false testimony as a belief or opinion and therefore not actionable.

A review of Ibanez v. Florida Board of Accountancy, 129 Led. 2d 118 (U.S. 1994) shows the primary thrust of the United States Supreme Court's opinion deals with the First Amendment privilege of free speech. This case deals with protected "commercial" free



speech and any reliance upon Ibanez to protect his testimony is misplaced.

In Baird v. State of Arizona, 401 U.S. 1 (U.S. 1971), an applicant to the Arizona Bar was denied membership because of her refusal to answer on her application a question regarding membership in the communist party or any organization advocating the overthrow of the U.S. Government by force or violence. The essence of this case is that the discussion centers upon a person's right of association or political beliefs. Respondent is asking that his testimony wherein he states what he believes is to be his recollection of certain facts be given the same definition of a political or religious belief. Such is absurd.

Once again Respondent has taken the narrowest of words, plucked it from an entire ruling and without discussion of the opinion made a frivolous argument that his narrow interpretation must replace that of the Referee.

Respondent's reliance upon Baird has no rational or competent basis. How Respondent could argue that his testimony as to what he believes certain facts to be can transcend to the level of a First Amendment right to free speech and association is beyond reason. To put forth such argument as a basis for reversing the Report of Referee can only be seen as another attempt by Respondent grasp at any available straw to keep from having to acknowledge the fact that he violated his oath as a

member of this Bar by his unethical conduct.

The findings of the Referee are seen to be based upon clear and substantial evidence and should be affirmed.

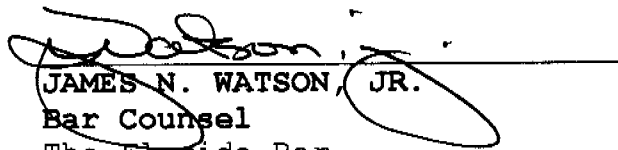
CONCLUSION

Respondent has attempted to argue against the validity of the report of referee without full knowledge of the circumstances surrounding the final hearing.

The report of the referee is procedurally correct and the findings are supported by clear and substantial evidence.

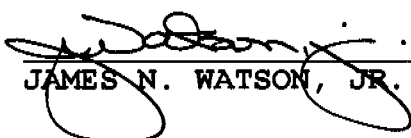
The arguments made by Respondent are to be seen as reckless and frivolous in content and nature. The findings of the Referee should be affirmed and Respondent should be disbarred from practicing law in the State of Florida.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of The Florida Bar regarding Case No. 86,777; TFB File No. 96-00016-02 has been forwarded by regular U.S. Mail to Arron Edward Budnitz, Respondent, at his record Bar address of 65 Williams Road, Lexington, MA 02173-3235 this 2nd day of July, 1996.

  
\_\_\_\_\_  
JAMES N. WATSON, JR., Bar Counsel

Copies provided to:

John Boggs, Director/Lawyer Regulation