IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOSEPH SCOTT LANFORD,

Respondent.
_____/

Case No. 86,927
[TFB Case No. 95-31,311(18C)]

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 appellant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on April 25, 1996, shall be referred to as "T," followed by the cited page number.

The Report of Referee dated May 15, 1996, 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 B-Ex.___, followed by the exhibit number.

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

ARGUMENT
POINT I

THE REFEREE'S LEGAL CONCLUSION THAT THE RESPONDENT DID NOT VIOLATE RULE 4-8.4(C) IS ERRONEOUS AND UNJUSTIFIED GIVEN THE EVIDENCE AND TESTIMONY.

The bar submits that B-Ex. 4 and B-Ex. 6 submitted into evidence at the final hearing support the bar's argument that the respondent intentionally attempted to charge his client's credit card, without her authorization, in hopes of collecting the fee he was due, and that the client appeared unwilling to pay, thus engaging in dishonest conduct. For ease of reference, the aforementioned exhibits are attached in the appendix. These two letters were written early on in the bar's investigation of Ms. Johnson's grievance. The respondent wrote B-Ex. 4 in direct response to Ms. Johnson's grievance. In it, he stated that she had "elected to provide [him] with [her] Visa and authorized [him] to bill same. After several months of billing . . . [her] Visa was charged the outstanding balance per [her] prior authorization." This was not a correct statement in that Ms. Johnson never authorized the respondent to charge her credit card for the balance owed. At the very least, the respondent's assertion was misleading to the bar in its initial investigation

of the charges. Staff counsel must decide based upon the complaining witness's documentation and the accused attorney's response as to whether or not it appears a rule violation may have occurred. The respondent's statement that the charge was authorized by the client could have, absent Ms. Johnson's rebuttal, resulted in the matter being dismissed at this initial stage.

B-Ex. 6 was written on March 30, 1995, to bar counsel. The matter was still pending at the initial inquiry stage and had not yet been referred to the grievance committee. The respondent provided the bar with a copy of what purported to be Ms. Johnson's authorization for the $467.16 charge. The copy provided by the respondent showed the merchant's deposit slip copy in full showing the amount of the charge. The copy of the customer charge slip was not copied in full. The respondent only copied the portion of the slip that showed Ms. Johnson's signature. The slip did not show the date or the amount of the charge. Ms. Johnson rebutted this in her letter of April 3, 1995, B-Ex. 7, copy attached in the appendix, where she provided a copy of the charge slip to show she signed it on June 24, 1994,

for an amount of $120.00. It was only after the matter proceeded to a hearing before the grievance committee the respondent stated the charge had been made to Ms. Johnson's Visa card by mistake (B-Ex. 2 p.p. 13, 19-20). In his statement of the facts in his Answer Brief, the respondent now argues that his nonlawyer employee, Jane Tartaglione, charged Ms. Johnson's card by mistake, however, at the grievance committee and final hearings, the respondent stated he made the decision himself to charge the card and directed Ms. Tartaglione to take the appropriate steps to make the charge (B-Ex. 2 p.p. 16, 28; T p. 64). Ms. Tartaglione testified at the final hearing that the respondent directed her to collect Ms. Johnson's past due bill by charging the balance to Ms. Johnson's credit card (T p.p. 46, 53).

The respondent's intent to engage in deceitful conduct was shown by his actions. He made the charge to Ms. Johnson's credit card without first contacting her (T p. 32) or reviewing her file (T p.p. 61-64). Instead he billed her simultaneously with making the charge (T p. 65; B-Ex. 2 p.p. 29, 47). The respondent then attempted to mislead the bar during its initial investigation by stating Ms. Johnson had authorized the charge and provided a copy

of a partial charge slip with her signature as proof. The respondent did not advise the bar that the copy he provided was a charge slip Ms. Johnson signed in June, 1994, for another charge nor did her advise the bar there was no charge slip prepared for the January, 1995, charge (B-Ex. 2 p. 38). Since this matter has proceeded from the grievance committee hearing forward, the respondent has asserted he mistakenly believed he had the authorization to make the charge. Yet the Merchant Member Agreement the respondent entered into with Charge Card Center, B-Ex. 11, clearly states in paragraph F that the respondent could not make such a charge. "Each transaction made by Member Merchant with a Qualified Card will be evidenced by a sales draft . . . [and] Member Merchant shall obtain the signature of the customer . . . Only when a transaction is based on a telephone order, mail order, or preauthorized order, may the Sales Slip be completed without a cardholder signature or card imprint . . . **If Member Merchant agrees to accept a preauthorized order, the cardholder shall execute and deliver to Member Merchant a written request for such preauthorization** . . . " (emphasis added). As an attorney, the respondent presumably read and understood the terms of this agreement he executed on August 23, 1991. Clearly

he knew, or should have known, that in order to charge Ms. Johnson's card for the balance due on his fee, he had to have a written request from her for a preauthorization. Otherwise, she had to be contacted about the charge before it was made.

Misrepresentation does not always involve an actual statement. It can occur through a failure to make a statement. Such a misrepresentation occurred in The Florida Bar v. Webster, 662 So. 2d 1238 (Fla. 1995). The attorney was found to have made a "misrepresentation by omission" when he failed to advise two foreign bars where he was applying for admission that he had been suspended by this court and was not a member in good standing with The Florida Bar. The attorney never advised either foreign bar that he was a member in good standing or made any type of direct misrepresentation. By failing to clarify to the bar that the copy of the signed charge slip he provided to refute Ms. Johnson's allegations related to the June, 1994, charge, the respondent made such a "misrepresentation by omission." Had he provided a copy of the entire signed charge slip, it would have been clear it related to the June, 1994, charge and not to the January, 1995, charge. The respondent never stated to the bar

before the matter was heard by the grievance committee that he was operating under the belief that because Ms. Johnson had authorized the June, 1994, charge, he had her standing authority to charge her card for all further fees incurred.

At the very least, the respondent's conduct lent itself to the appearance of impropriety. In The Florida Bar v. Vernell, 502 So. 2d 1228 (Fla. 1987), the accused lawyer added his name as payee to a settlement check he had received on behalf of a client. He was found guilty of making a material alteration to a negotiable instrument, although under the particular circumstances of the case the conduct was more of a technical violation than one involving an intent to misappropriate the money. He added his name only so he could deposit the check to his trust account and he took no more of the funds than he was entitled to as his fee and costs. However, Justice Boyd, in his opinion where he concurred in part and dissented in part, noted that the attorney's conduct created the appearance of impropriety.

This court has the power, in its review of a matter, to find

a lawyer has violated rules not found by the referee. In The Florida Bar v. Weidenbenner, 630 So. 2d 534 (Fla. 1993), this court found a lawyer had not engaged in fraud, deceit or misrepresentation because there was no evidence he intended to deceive the bank concerning the revocation of his letters of administration. Instead, this court found the attorney's conduct was grossly negligent. Although in his report the referee did not address any violation of the rules concerning neglect, this court found the lawyer had violated the rules concerning neglect and inadequate communication and imposed a public reprimand.

The bar submits it would be proper for this court to impose discipline based upon misconduct found, and noted, but not specifically charged by the bar. See The Florida Bar v. Vaughn, 608 So. 2d 18 (Fla. 1992), where a lawyer was disciplined for failing to cooperate with the bar in its investigation of an unfounded grievance. The referee found there was no evidence the attorney had violated any of the rules charged by the bar based on the underlying grievance. However, the referee found the lawyer had failed to cooperate in the bar proceedings and thus violated a rule not charged. The referee made this finding based

upon the authority of The Florida Bar v. Stillman, 401 So. 2d 1306 (Fla. 1981), which provides that a referee may include evidence of unethical conduct not alleged in the bar's complaint. In this case, the referee noted the respondent's lack of communication with Ms. Johnson in failing to properly handle the billing (T p. 79). Discipline by a public reprimand is appropriate based upon the referee's erroneous legal conclusion that the respondent did not violate the Rules Regulating The Florida Bar.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's legal conclusion and recommendation of not guilty and instead impose on the respondent a public reprimand and payment of costs now totaling $1,213.34.

Respectfully submitted,

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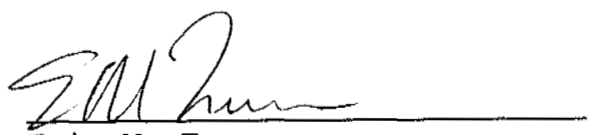
By: 

Eric M. Turner
For
Rose Ann DiGangi-Schneider
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Reply Brief have been sent by overnight express delivery 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 R. Keith Williams, Counsel for Respondent, 3125 West New Haven Avenue, Suite 200, Melbourne, Florida 32904-3533; 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 1 day of November, 1996.

Respectfully submitted,

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APPENDIX TO COMPLAINANT'S INITIAL BRIEF

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