

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

**Supreme Court Case
No. 83,401**

Complainant,

v.

JAMES F. DOUGHERTY, II,

Respondent.

ANSWER BRIEF OF THE FLORIDA BAR

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INTRODUCTION

I HEREBY CERTIFY that this brief is typed in Times New Roman, 14 Point type.

RANDI KLAYMAN LAZARUS
Bar Counsel

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar filed a ten count complaint against the respondent. By stipulation counts VI-X were severed from the instant action. The remaining counts, I through V, were heard. Those counts encompassed the facts contained in a ten count federal indictment of the respondent.¹

Following a federal jury trial, respondent was convicted of executing a scheme to defraud his client, Lloyds of London, through over billing and the acceptance of funds from wire transfers in violation of 18 U.S.C. Section 1343.²

During the course of the trial, the respondent took the stand. After the respondent was found guilty by the jury, the trial judge stated on the record that respondent had committed perjury by testifying that Lloyds knew and approved of the basis for the over billing. (A-5). The over billing scheme was based upon specifying associates and falsely claiming that they had worked in behalf of the client, as well as false hourly claims attributed to the respondent.

The referee found the respondent guilty of the first five counts of The Florida Bar's complaint. The first count dealt with over billing during 1989. The referee found the that sums attributable to fraudulent billing by the respondent during 1989

¹ This is conceded by respondent in his December 23, 1997 "statement".

² Pursuant to 18 U.S.C. 2, respondent was found guilty as a principal.

were \$162,800.00 claimed as billing by respondent and \$116,800.00 of billing in the name of attorney John Batman.

Count II over billing by the respondent included the sum of \$295,000.00 attributed to the respondent; \$186,000.00 for work allegedly done by attorney Jonathan Fordin and \$138,000.00 identified as billing by attorney Oscar Syger.

Count III findings included over billing of \$549,000.00 by respondent for work supposedly done by him; \$127,000.00 attributed to attorney June Baker; \$108,000.00 attributed to Oscar Syger; and \$205,500.00 attributed to Jonathan Fordin. In regard to Count IV, the referee found that \$201,600.00 had been over billed by the respondent.

Count V pertains to respondent's submission of invoices during 1992 which unilaterally increased his hourly rate in an effort to justify the fraudulent billings. The referee found that the unauthorized increases established violations of Rules 4-1.5 (excessive fees) and 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The same rule violations were found in relation to Counts I-IV.

The Florida Bar offered evidence from the federal proceedings that the respondent had committed perjury, had obstructed justice and had been responsible for a fraud totaling \$2,500.00. (A-2, A-5). The referee recommended disbarment.

Respondent served his petition for review on June 12, 1997. On January 6, 1998, this court granted respondent leave to file a statement in lieu of a brief. The

respondent had served his statement on December 23, 1997 and The Florida Bar replied briefly on January 14, 1998. Subsequent to the order entered by The Eleventh Circuit United States Court of Appeals affirming respondent's conviction, this court ordered the filing of simultaneous briefs by January 5, 2000. Therefore, The Florida Bar's brief is designated as an answer.

SUMMARY OF ARGUMENT

The respondent was convicted of a federal felony. That conviction constitutes conclusive proof of the offenses charged. Both case law and the applicable Florida Standards for Imposing Lawyer Sanctions mandate disbarment.

Disbarment was deemed appropriate in those cases in which the respondent violated the same federal fraud by wire statute. Likewise, cases involving misuse of client funds, including grand theft convictions, have resulted in disbarment.

Also, the trial judge in respondent's federal trial emphasized on the record the large amount of money, \$2,500,000.00, which was the subject of the fraud, respondent's perjury and obstruction of justice. (A-3, A-5)

Disbarment is the proper discipline in this case.

ISSUE ON APPEAL

I

**WHETHER DISBARMENT
IS THE APPROPRIATE DISCIPLINE
FOR THE RESPONDENT**

ARGUMENT

**DISBARMENT IS THE APPROPRIATE
DISCIPLINE FOR THE RESPONDENT**

Respondent's criminal conviction is conclusive proof of the offenses encompassed by the indictment. Rule 3-7.2, Rules Regulating The Florida Bar. Additional factual findings come before this court with a presumption of correctness. The Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986).

Disbarment is clearly the appropriate discipline. As stated in The Florida Bar v. Shanzer, 572 So. 2d 1382, 1383 (Fla. 1991):

This Court has repeatedly asserted that misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate discipline.

Clearly, over billing is a form of misuse of client funds. The extreme over billing in this case, sufficient to support a criminal conviction, undermines the foundation of trust which is necessary in attorney client relationships.

Misuse of client funds was the basis for disbarment in The Florida Bar v. Margadonna, 511 So. 2d 985 (Fla. 1987) and The Florida Bar v. Newman, 513 So. 2d 656 (Fla. 1987). Those cases involved misappropriation by a receiver and from a trust account, respectively.

As pointed out in the statement of case and facts, the over billing took place over a period of several years. In that regard this Court's pronouncement in The Florida Bar v. Whitney, 237 So.2d 745, 748 (Fla. 1970) is germane:

The charges made in the Complaint go to the very heart of a lawyer's qualification to be entrusted with the great responsibilities of his profession and when -- as here -- there is shown a total disregard, over an extended period of time, of basic concepts of honesty and reliability and a flagrant violation of trusts reposed in him, a judgment of disbarment is fully warranted.

Furthermore, serious fraud involving large sums of money calls for disbarment. The Florida Bar v. Isis, 552 So.2d 912 (Fla. 1989).

Also, disbarment is the proper discipline for a federal felony conviction for wire fraud, the basis for respondent's federal convictions. The Florida v. Bustamante, 662 So. 2d. 687 (Fla. 1995). Federal felony convictions based upon violations of the income tax statutes also resulted in disbarment in The Florida Bar v. Horne, 527 So. 2d. 816 (Fla. 1988).

Respondent's federal conviction is equivalent to (grand) theft (formerly grand larceny) under Florida law. The federal statute, follows:

§1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both, If the violation affects a financial institution, such person shall be fined not more than \$1,000.00 or imprisoned not more than 30 years, or both.

The applicable state statute, in proper part, states:

§812.014. Theft

(1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom.

(b) Appropriate the property to his own use or to the use of any person not entitled thereto.

(2)(a) If the property stolen is valued at \$100,000 or more, the offender commits grand theft in the first degree, punishable as a felony of the first degree, as provided in s. 775.082, s. 775.083, or s. 775.084.

Disbarment was the discipline imposed subsequent to felony theft convictions in numerous cases. The Florida Bar v. West, 149 So.2d 557 (Fla. 1963); The Florida Bar v. Newman, 215 So.2d 308 (Fla. 1968); The Florida Bar v. Scott, 165 So.2d 167 (Fla. 1964); The Florida Bar v. Layton, 476 So.2d 667 (Fla. 1985).

Florida Standards for Imposing Lawyer Sanctions also support disbarment.

Standard 5.11(a) declares that disbarment is appropriate for a felony conviction. Also, Standard 4.11 states:

4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

The case for disbarment is even more compelling in view of the federal judge's

declaration that respondent had clearly lied when he claimed that Lloyds had approved of the basis of the billing. (A-3, A-5). As this court stated in The Florida Bar v. Rightmyer, 616 So.2d 953 (Fla. 1993).

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.

The federal judge had also stated on the record that the respondent had obstructed justice by concealing his assets and that the amount of the fraud was huge, namely two and one half million dollars. (A-3, A-5).

CONCLUSION

Based upon the foregoing the referee's report should be approved and respondent should be disbarred.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Answer Brief of The Florida Bar was forwarded Via Airborne Express to DEBBIE CAUSSEAU, Acting Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to respondent's counsel, LOUIS M. JEPEWAY, JR., 19 West Flagler Street, Suite 407, Miami, Florida 33130, on this _____ day of January, 2000.

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