

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN A. YANCHEK, III,

Respondent.

CASE NO. SC07-1442

TFB NO. 2004-11,855(12A)

2007-10,270(12A)

2007-10,735(12A)

SUPPLEMENTAL BRIEF OF THE FLORIDA BAR AS TO SANCTIONS

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SYMBOLS AND REFERENCES

In this Supplemental Brief, The Florida Bar will be referred to as “The Florida Bar” or “The Bar.” The Respondent, John A. Yanchek, III, will be referred to as “Respondent.”

“SH” will refer to the transcript of the sanctions hearing before the Referee held on June 27, 2008. “RR” will refer to the Report of Referee dated August 7, 2008. “R” will refer to the Index of Record dated August 7, 2008.

“Rule” or “Rules” will refer to the Rules Regulating The Florida Bar. “Standard” or “Standards” will refer to Florida Standards for Imposing Lawyer Sanctions.

SUMMARY OF THE ARGUMENT

The Referee recommended a two-year suspension as the appropriate sanction in the instant case. This Court has held that a two-year suspension is the appropriate sanction for attorneys who counsel or assist their client in conduct that the lawyer knows to be fraudulent. Florida Bar v. Feige, 596 So. 2d 433, 435 (Fla. 1992).

Disbarment is also an appropriate sanction in the instant case. This Court has held that disbarment is the appropriate sanction for attorneys who received a felony conviction for bank fraud. Florida Bar v. Forbes, 596 So. 2d 1051, 1052 (Fla. 1992). Disbarment has also been held to be the appropriate sanction for attorneys who have a pattern of misconduct and have engaged in fraudulent misconduct involving a financial institution. Florida Bar v. Cramer, 678 So. 2d 1278, 1282 (Fla. 1996).

Accordingly, The Florida Bar respectfully requests that this Court approve the Referee's findings of fact and impose a sanction in the range of a two-year suspension to disbarment, and assess the costs of these proceedings against the Respondent.

ARGUMENT

ISSUE: WHETHER DISBARMENT IS THE APPROPRIATE SANCTION

This Court gives greater scrutiny to a Referee's recommendation of discipline than to a Referee's findings of fact. Florida Bar v. Cox, 794 So. 2d 1278, 1281 (Fla. 2001). Pursuant to this Court's order, under consideration is whether disbarment should be the appropriate sanction in the instant case. The Referee found Respondent to have violated Rules 4-1.1, 4-1.2(d), 4-4.1, 4-8.4(b), 4-8.4(c), and 4-8.4(g), by clear and convincing evidence. (RR 5-6). The Referee recommended a two-year suspension, which is supported by existing case law as applied to the Referee's recommended findings of fact. See Florida Bar v. Feige, 596 So. 2d 433, 435 (Fla. 1992).

This Court has disbarred a lawyer for engaging in conduct similar to Respondent's. In Florida Bar v. Forbes, 596 So. 2d 1051 (Fla. 1992), the Court held that Forbes' felony conviction for bank fraud warranted disbarment. Forbes was the developer of a real estate project which was financed by a \$750,000 loan made individually to Forbes from First Federal Savings and Loan Association of Jacksonville ("First Federal Savings"). Id. at 1052. On November 3, 2004, a meeting occurred between Forbes, Harvey Manss (project architect), Michael Miller (project developer), and Miller's wife. Id. Later in the week, after several

discussions on what items to include and omit, Manns prepared two contracts – one for \$350,000 for Michael Miller and one for \$75,000 for Forbes. Id. When the \$350,000 contract was prepared it was backdated to November 3, 2004 for submittal to the bank. Id. There was another set of contracts with different dates and different forms to make them appear more authentic. Id. The \$350,000 contract was fraudulent in price, as to the date, and the scope of the work to be completed. Id. The \$350,000 contract included items, worth \$547,000, which the parties agreed would be removed from the scope of work. Id. The bank determined and confirmed that these false statements in the loan contract were material to their loan decision. Id. Forbes was found to have violated Rules 3-4.3, 4-8.4(a), 4-8.4(b), and 4-8.4(c). Id. In Forbes, the Court found that “Forbes was ... aware of the fact that there were two contracts reflecting different costs and that the contract submitted to First Federal improperly reflected the lower contract cost.” Id. Additionally, Forbes pled guilty “to knowingly and willfully making materially false statements in a document submitted to First Federal so as to influence its actions for granting a loan.” Id. This was a felony under Count II of the federal indictment. Id. Forbes argued for three-year suspension. Id. at 1053. This Court imposed disbarment upon finding that the felony conviction justifies disbarment. Id. at 1053.

In Florida Bar v. Cramer, 678 So. 2d 1278 (Fla. 1996), this Court held that Cramer “perpetrated a fraud upon a financial institution” and that such conduct, coupled with his disciplinary history, warranted disbarment. Id. at 1282. Cramer was involved in a complicated business transaction in which he induced a bank to loan money for the lease of office equipment by using and signing another person’s name and purporting to have authority to do so. Id. at 1279. The Referee found that “Cramer as an attorney should have known that he was acting improperly when he signed Owen’s name to the leases.” Id. at 1281. The Referee further found that “Cramer’s conduct was fraudulent misrepresentation.” Id. The Referee then determined that Cramer “had perpetrated a fraud on a lending institution.” Id. Cramer was found to have violated Rules 3-4.3, 4-4.1(a) 4-8.4(b), 4-8.4(c), and 4-8.4(g). Id. The Court agreed with the Referee’s findings and conclusion that “Cramer participated in a fraudulent scheme.” Id. at 1281. The Court granted disbarment stating that Cramer’s “total conduct in this incident coupled with his prior disciplinary record evince a pattern of misconduct warranting disbarment.” Id. at 1282.

In the instant case, the Bar did not petition for review of the recommended sanction. However, during the sanctions hearing, the Bar argued for a severe suspension or disbarment using the Florida Standards for Imposing Lawyer Sanctions as a guide along with existing case law. SH 58-72. The Bar advised the

Referee that “although the case law that [was] provided to the Court does not provide a basis for recommending disbarment, [it is] believe[d] based on the aggravating circumstances... that disbarment is within the realm of possible sanctions that the Court would approve.” SH 61. In addition to providing the Standards that support suspension, the Bar also presented Standards supporting disbarment to the Referee. SH 58-69.

The Bar argued that Standard 5.11 (Failure to Maintain Personal Integrity) is applicable to Respondent’s case. Under 5.11, disbarment is the appropriate sanction because Respondent committed a criminal act that reflects adversely on his honesty, trustworthiness, or fitness to practice law, and he engaged in dishonesty, fraud, deceit or misrepresentation by submitting a false affidavit under penalty of perjury. SH 59-62. During the proceedings, Respondent did not claim that he was not aware of the law, that he had made a mistake, or that he was inexperienced in that practice area. SH 59-60.

The Bar further argued that Standard 6.11 (False Statements, Fraud, and Misrepresentation) is applicable in this case. Under 6.11, disbarment is the appropriate sanction because Respondent withheld material information and caused serious injury to a party. SH 63-66. Respondent made an “affirmative misrepresentation that he was in possession of escrow funds” and further Respondent “did not affirmatively advise those parties [that he did not] have the

funds. SH 63. Respondent only revealed this information after litigation ensued. SH 63. Parties were harmed because they lost the opportunity to sell property at a higher price, lost the benefit of receiving escrow funds upon breach of contract, and incurred legal expenses, time, and effort to pursue litigation and a judgment on the real estate contracts. SH 63-66.

The Bar further argued that Standard 7.1 (Violations of Other Duties Owed as a Professional) is applicable in this case. Under 7.1, disbarment is the appropriate sanction because Respondent engaged in “conduct that is a violation of a duty owed as a professional with the intent to obtain [a] benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.” SH 66-67; Standard 7.1. Respondent’s actions have “tarnished the reputation of the legal system” because there has been extensive news coverage which only strengthens a misperception that attorneys “lie, steal, and cheat.” SH 67. Respondent gained the benefit of continued business with his client. SH 68. Respondent’s client gained the benefit of additional time to make the escrow deposit; the benefit of taking the property off the market; and the benefit of not losing any money for failure to perform the requirements of the contract since no deposit was ever made. SH 68-69.

The instant case is similar to Forbes and Cramer because Respondent’s conduct involved fraudulent conduct involving a financial institution. The instant

case is distinguishable from Forbes and Cramer because Respondent was not convicted for any criminal conduct in this case and Respondent does not have a prior disciplinary history. The Referee found two mitigating factors and six aggravating factors. In mitigation, the Referee found 1) Respondent had an absence of prior disciplinary record; and 2) Respondent presented character evidence from attorneys familiar with Respondent's law practice. (RR 11; Standard 9.32 (a); Standard 9.32(b)). As aggravation, the Referee found that 1) Respondent acted with a dishonest or selfish motive; 2) Respondent demonstrated a pattern of misconduct; 3) Respondent committed multiple offenses; 4) Respondent had substantial experience in the practice of law; 5) Respondent failed to appreciate his duties to the legal system and the public (specifically that Respondent's actions were directed by his client and/or someone other than himself, that Respondent allowed others to guide his conduct in violation of his duties to the legal system and the public, and that Respondent did not adequately appreciate these duties); and 6) Respondent caused substantial harm to third parties. (RR 10-11; Standard 9.22(b); Standard 9.22(c); Standard 9.22(d); Standard 9.22(i)). The aggravating factors cited by the Referee significantly outweigh the mitigating factors.

CONCLUSION

The Florida Bar respectfully requests that this Court approves the Referee's findings of fact and impose a sanction in the range of a two-year suspension to disbarment, and assess the costs of these proceedings against the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by UPS Ground #K 148 628 677 6 to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to **Robert E. Turffs, Esq., Counsel for Respondent** 1444 First Street, Suite B, Sarasota, Florida 34236; and a copy by regular U. S. mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-2300, all this 3rd day of April, 2009.

Jodi Anderson Thompson
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CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

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