

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BRIAN MCKENNA O'CONNELL,

Respondent.

Supreme Court Case
No. SC-

The Florida Bar File
No. 2020-50,181(17I)

_____/

COMPLAINT OF THE FLORIDA BAR

The Florida Bar, complainant, files this Complaint against Brian McKenna O'Connell, respondent, pursuant to the Rules Regulating The Florida Bar and alleges:

1. The respondent is and was at all times mentioned herein a member of The Florida Bar admitted on November 10, 1980 and is subject to the jurisdiction of the Supreme Court of Florida.
2. The respondent resided in and practiced law in Palm Beach County, Florida, at all times material.
3. The respondent was Board Certified by the Florida Bar from August 1, 1990 until July 31, 2020 in Wills, Trusts and Estates.
4. The respondent was an attorney with the law firm of Ciklin Lubitz, at all times material.

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5. The Seventeenth Judicial Circuit Grievance Committee “I” found probable cause to file this complaint pursuant to Rule 3-7.4, of the Rules Regulating The Florida Bar, and this complaint has been approved by the presiding member of that committee.

COUNT I – THE MISAPPROPRIATIONS

6. The respondent represented Nancy C. Brown, hereinafter referred to as “Brown.”

7. The respondent prepared the Nancy C. Brown Amended and Restated Revocable Trust, hereinafter referred to as “The Trust.”

8. Brown, as settlor, executed The Trust on February 6, 2009.

9. The respondent, together with Wachovia Bank were named as the trustees of The Trust.

10. Subsequent to the execution of The Trust, Wachovia Bank resigned as the corporate trustee leaving respondent as the sole trustee, as reflected in the First Amendment to The Trust, dated December 8, 2011.

(The Trust and First Amendment to The Trust are attached hereto and incorporated herein as The Florida Bar’s Exhibit 1.)

11. The First Amendment to The Trust required respondent, as the sole trustee, to distribute to the following beneficiaries, as specific devises:

The sum of ONE THOUSAND FIVE HUNDRED (\$1,500)

DOLLARS shall be distributed to JOHN OLSON, if he survives Settlor.

The sum of FIVE THOUSAND (\$5,000) DOLLARS shall be distributed to SCHENELL M. FINN, if he survives Settlor.

12. The First Amendment to The Trust also required respondent, as the sole trustee, to distribute all the rest, residue and remainder of the residuary Trust Estate as follows:

[T]o such one or more charitable organizations qualified under Section 501(3)(c)(sic) of the Internal Revenue Code of 1986, as amended, as the Trustee, in the Trustee's sole discretion, shall determine".

(See The Florida Bar's Exhibit 1, page 2 of the First Amendment.)

13. Brown died on January 28, 2014.

14. The respondent administered Brown's estate and The Trust.

15. On or about March 6, 2014, respondent represented The Trust in the sale of Brown's home, with the sales proceeds of \$538,342.73, disbursed at closing to The Trust.

16. On or about March 7, 2014, respondent caused the proceeds of \$538,342.73 to be deposited into the trust account maintained at IberiaBank, Account ending in 9513, which respondent opened on or about the date of the sale of Brown's residence.

17. The respondent opened the IberiaBank account ending in 9513, on or about March 7, 2014, despite the existing account at Wachovia Bank, entitled "Nancy C Brown Rev Trust."

18. The respondent's personal bank account was also maintained at IberiaBank.

19. Ciklin Lubitz did their banking primarily at Wachovia Bank and Citibank, at all times material.

20. The respondent was the sole signatory on the IberiaBank Account ending in 9513 for The Trust.

21. A federal tax lien was filed in June of 2012 in the combined amount of \$1,006,240.00 against respondent's former residence located at 132 Cortez Road in West Palm Beach, Florida. That combined lien was finally paid and satisfied in 2021.

22. Multiple tax liens were also levied on properties owned by the respondent in Berrien County, Michigan by March of 2014.

23. From March 7, 2014 through June 4, 2014, in thirteen separate transactions, respondent misappropriated a total of \$506,455.30 from Brown's trust proceeds held in IberiaBank Account ending in 9513.

24. The following dates and amounts of the respondent's misappropriations are listed below:

03/07/2014 \$42,000.00 (payable to Brian O'Connell)
03/27/2014 \$40,575.00 (withdrawal for "Berrien County Treasurer")
03/30/2014 \$36,000.00 (payable to Brian O'Connell)
04/02/2014 \$19,000.00 (payable to Brian O'Connell)
04/14/2014 \$250,000.00 (payable to Brian O'Connell)
05/02/2014 \$40,000.00 (payable to Brian O'Connell)
05/09/2014 \$3,188.50 (withdrawal for "Zazz Events")
05/09/2014 \$10,000.00 (payable to Brian O'Connell)
05/19/2014 \$40,000.00 (payable to Brian O'Connell)
05/30/2014 \$15,000.00 (payable to Brian O'Connell)
06/02/2014 \$2,500.00 (payable to Flagler Bank)
06/02/2014 \$6,691.80 (payable to Flagler Bank)
06/04/2014 \$1,500.00 (phone/in-person transfer)
Total \$506,455.30

25. All of the thirteen separate withdrawals made by the respondent from the IberiaBank Trust Account ending in 9513 were for the personal benefit of the respondent and not for the interests of the beneficiaries.

26. Not a single one of the thirteen separate withdrawals from The Trust account was for the interests of the beneficiaries.

27. On or about June 10, 2014, a paralegal with the Ciklin Lubitz Firm questioned the withdrawals from The Trust's Account ending in 9513

with an email to the respondent with the subject line “The Brown Trust Account is down to \$30,000” which stated:

“What is going on with all of these checks and withdrawals?”

28. On or about June 14, 2014, the managing partner of the Ciklin Lubitz Firm and others met with the respondent and confronted him concerning the withdrawals from The Trust’s account at IberiaBank ending in 9513.

29. During the June 14, 2014, meeting the respondent told those present that he had “borrowed” the funds.

30. The respondent did not have any right or basis to “borrow” funds for his own personal benefit and not for the interests of the beneficiaries.

31. But for the intervention of the Ciklin Lubitz’ Firm’s paralegal, the respondent’s misappropriations would have gone undetected.

32. The Ciklin Lubitz Firm hired an attorney who concentrates his practice handling matters concerning ethics. That attorney advised members of the Ciklin Lubitz Firm that if the respondent replaced the misappropriated funds, the firm was not required to report the misconduct to The Florida Bar.

33. The respondent repaid the misappropriated funds, plus interest, over a six-month period. The first payment of \$252,294.53 was paid by the respondent on June 19, 2014. The final payment of \$265,604.87 was paid by the respondent on December 31, 2014.

34. The fact that respondent eventually paid back the misappropriated funds with interest does not excuse or mitigate the misconduct.

35. After several years, another member of the Ciklin Lubitz Firm filed a bar grievance after learning of the respondent's misappropriations and deceptions.

36. In his November 26, 2019 and July 14, 2020 responses to The Florida Bar, respondent claimed for the first time that his right or authority to "borrow" \$506,455.30 from The Trust for his personal benefit and not for the interests of the beneficiaries was permitted under sections 11.1 (A) and (D) of the trust. Those sections are set forth below:

(A) With regard to both real and personal property, for the purpose of obtaining funds for payment of taxes, claims and the costs of administration of Settlor's estate, if authorized, and for making distributions, conversion into cash, management of the property, and for every other proper purpose, they may acquire, invest, reinvest, exchange, lease, sell, borrow, mortgage, pledge, transfer and convey in such manner and on such terms without limit as to time as they may deem advisable, even for terms

beyond the expected term of the estate or any trust, and no purchaser or lender shall be liable to see to the propriety of the transaction, nor to the application of the proceeds.

(D) To cause any property, real or personal, belonging to the trust to be held or registered in the Trustee's name or in the name of a nominee or in such other form as the Trustee deems best without disclosing the trust relationship.

37. Section 11.1 of Brown's trust absolutely does not provide the respondent any right or authority to "borrow" funds from The Trust for his personal benefit and not for the interests of the beneficiaries.

38. In his November 26, 2019 and July 14, 2020 responses to The Florida Bar, respondent claimed for the first time that his right or authority to "borrow" \$506,455.30 from The Trust for his own personal benefit was also derived from the following Florida Statutes:

736.0802(2)(a) Subject to the rights of persons dealing with or assisting the trustee as provided in s. 736.1016, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(a) The transaction was authorized by the terms of the trust;

736.0814(1) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good

faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. A court shall not determine that a trustee abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

736.0815 General powers of trustee. —

(1) A trustee, without authorization by the court, may, except as limited or restricted by this code, exercise:

(b) Except as limited by the terms of the trust:

1. All powers over the trust property that an unmarried competent owner has over individually owned property.

736.0816(19) Make loans out of trust property, including, but not limited to, loans to a beneficiary on terms and conditions that are fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans.

39. Those statutes do not provide the respondent with any right or authority to “borrow” funds from The Trust for his own personal benefit and not for the interests of the beneficiaries.

COUNT II – THE DECEPTIVE CHARITABLE CONTRIBUTIONS AND INCOME TAX RETURNS

40. The charitable contributions were ultimately paid by respondent as follows:

6/19/14 Cardinal Newman - contribution to art room -	\$75,000.00
6/19/14 Catholic Charities Elder Affairs Program	\$175,000.00
12/30/14 Cardinal Newman High School	\$199,588.03

12/30/14 St. Juliana Catholic School	\$40,000.00
12/30/14 University of Florida	\$20,000.00
12/30/14 Rosarian Academy	\$15,000.00

41. On or about December 30, 2014, the respondent forwarded a \$20,000.00 check to the University of Florida as a Law Review pledge on a starter check from the Trust's IberiaBank Account ending in 9313. The check was sent without a cover letter.

42. The respondent's file at the Ciklin Lubitz firm did contain a cover letter, which clearly identified the pledge as being a charitable contribution from the Trust. **(The cover letter and check maintained in the Brown file is attached hereto and incorporated herein as The Florida Bar's Exhibit 2.)**

43. The respondent caused that \$20,000.00 check to the University of Florida to be considered as his own personal contribution to the Law Review, as opposed to a contribution from The Trust.

44. After being confronted by The Florida Bar through its investigation, the respondent took action to "change" the name of the benefactor from his own name to the actual contributor – Nancy C. Brown concerning the contribution to the University of Florida.

45. Respondent's conduct of misrepresenting the \$20,000.00 bequest to the University of Florida as his own charitable contribution was dishonest, deceitful and a misrepresentation.

46. Consistent with respondent's misrepresentation to the University of Florida as to the true contributor, the respondent additionally took the \$20,000.00 bequest by Brown to the University of Florida as a charitable deduction on his own 2014 tax return. **(A copy of the relevant pages of Brian O'Connell's 2014 tax return provided by him to The Florida Bar upon request is attached hereto and incorporated herein as The Florida Bar's Exhibit 3.)**

47. When an individual submits his or her income tax return, he or she does so allege under penalties of perjury that he or she has examined the return and to the best of his or her knowledge and belief, the return and accompanying schedules are true, correct and complete.

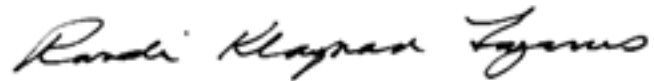
48. Respondent's conduct of misrepresenting the \$20,000.00 bequest to the University of Florida as his own charitable contribution qualifying as a deduction on his 2014 Federal Income Tax return was not, "true, correct and complete", rather it was clearly dishonest, deceitful and a misrepresentation.

By the conduct set forth above, respondent violated R. Regulating Fla. Bar 3-4.3 [Misconduct and Minor Misconduct. The standards of professional conduct required of members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration of certain categories of misconduct as constituting grounds for discipline are not all-inclusive, nor is the failure to specify any particular act of misconduct to be construed as tolerance of the act of misconduct. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline whether the act is committed in the course of the lawyer's relations as a lawyer or otherwise, whether committed within Florida or outside the state of Florida, and whether the act is a felony or a misdemeanor.]; 3-4.4 Criminal Misconduct. A determination or judgment by a court of competent jurisdiction that a member of The Florida Bar is guilty of any crime or offense that is a felony under the laws of that court's jurisdiction is cause for automatic suspension from the practice of law in Florida, unless the judgment or order is modified or stayed by the Supreme Court of Florida, as provided in these rules. The Florida Bar may initiate disciplinary action regardless of whether the respondent has been tried, acquitted, or convicted in a court for an alleged criminal misdemeanor or felony offense. The board may, in its discretion,

withhold prosecution of disciplinary proceedings pending the outcome of criminal proceedings against the respondent. If a respondent is acquitted in a criminal proceeding that acquittal is not a bar to disciplinary proceedings. Likewise, the findings, judgment, or decree of any court in civil proceedings is not necessarily binding in disciplinary proceedings.]; 4-8.4(b) [A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.]; 4-8.4(c) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.] and 5-1.1(b) [Application of Trust Funds or Property to Specific Purpose. Money or other property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for attorney's fees, and a

refusal to account for and deliver over the property on demand is conversion.].

WHEREFORE, The Florida Bar prays respondent will be appropriately disciplined in accordance with the provisions of the Rules Regulating The Florida Bar as amended.



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CERTIFICATE OF SERVICE

I certify that this document has been e-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, with a copy provided via email to Michael Edward Dutko, at michael@dutkoandkroll.com; and to John R. Howes, Esquire, at johnrhowes@gmail.com; a copy has been furnished by United States Mail via certified mail No. 7020 1810 0000 0813 8537, return receipt requested to Michael Edward Dutko, whose record bar address is Dutko & Kroll, P.A. 600 S. Andrews Avenue, Ste. 500, Fort Lauderdale, FL 33301-2851; and furnished by United States Mail via certified mail No. 7020 1810 0000 0813 8544 to John R. Howes whose record bar address is Howes Law Group, P.A., 633 S. Andrews Avenue, Fort Lauderdale, FL 33301 and via email to Randi Klayman Lazarus, Bar Counsel, rlazarus@floridabar.org and smiles@floridabar.org, on this 24th day of May 2022.



Patricia Ann Toro Savitz
Staff Counsel

NOTICE OF TRIAL COUNSEL AND DESIGNATION OF PRIMARY EMAIL ADDRESS

PLEASE TAKE NOTICE that the trial counsel in this matter is Randi Klayman Lazarus, Bar Counsel, whose address, telephone number and primary email addresses are The Florida Bar, Fort Lauderdale Branch Office, Lake Shore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323, (954)835-0233 and rlazarus@floridabar.org and smiles@floridabar.org. Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Staff Counsel, The Florida Bar, 651 E Jefferson Street, Tallahassee, Florida 32399-2300, psavitz@floridabar.org.

MANDATORY ANSWER NOTICE

RULE 3-7.6(h)(2), RULES REGULATING THE FLORIDA BAR, PROVIDES THAT A RESPONDENT SHALL ANSWER A COMPLAINT.