IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs

JOHN L. JAMES,

Respondent /

Case NOS.: 62,951
63,652
65,143

PETITION FOR REVIEW

COMES NOW Respondent and petitions this court to review the above-styled cases and the findings of the referee and alleges:

1. The grounds for review are set forth within the issues section of the Respondent's Brief.

2. Oral argument is hereby waived.

WHEREFORE Respondent hereby petitions this court to review the above-styled cases.

Respectfully submitted on this 28th day of May, 1985.

John L. James
For Respondent
Post Office Box 854
Havana, Florida 32333
(904) 539-6917

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JOHN L. JAMES,

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Case Nos.: 62,951
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PETITION FOR REVIEW AND BRIEF
(with Affidavit)

BRIEF OF RESPONDENT

I HEREBY CERTIFY that a true and correct copy of the enclosed has been served by U.S. Mail to the FLORIDA BAR, Tallahassee, Florida 32301 on this 28 day of May, 1985.

John L. James

Prepared By:

John L. James,

For Respondent
Post Office Box 854
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ISSUES

Respondent would have this court decide the following issues:

1. Does allowing a client who has negotiated a settlement with the opposing party to carry the written settlement agreement prepared by counsel to the opposing party without notice to counsel for the opposing party constitute communication within the meaning of DR 7-104(A)(1), and is DR 1-102(A)(2) violated by allowing delivery of the agreement?

2. Did respondent violate DR 1-102(A)(5) by failing to notify opposing counsel of an agreement of the parties which he reduced to writing and which one of the parties submitted to the court by the Judgment of the court being set aside and further proceedings being held in the same case where counsel in good faith believed that the opposing counsel had been discharged by the opposing party?

3. By allowing a party to present an agreement of the parties to the court did respondent violate DR 7-104(A)(1) when there was no discussion of the facts or law of the case, but rather a disposition of the case?

4. When the parties in a case enter into a written agreement resolving their dispute does a case continue to be an adversary proceeding as set forth in DR 7-104(A)(1)?

5. Does DR1-102(A)(4) apply to failing to explain matters to a client, and in to presenting a bill disputed by a client.

6. Is DR 5-107(B) violated by an attorney acting through a delegated agent in proceedural matters and accepting employment from an agent?

7. Is DR 7-101(A)(3) vilated by Dismissal of an unsupportable case, where the court thereafter awards attorney's fees against the client?

8. Is DR 3-101(A) violated by facts which fail to show direct or knowing assistance, but rather show a failure to warn against the inauthorized practice of law by a client who is a collection agent with authorization to take messages for respondent on his telephone?

9. Does having a profit motive in the referral of causes of action solicited from others constitute the practice of law?

10. Does a business relationship founded upon a contract constitute a partnership where a collection agency solicits business, refers cases, founded on a contract with its clients, to an attorney and anticipates keeping all profits which accrue from litigation, and the attorney keeps all awarded fees and is paid additional amounts for time and a contingency fee for representation?

11. Does direct benefit from a business relationship constitute evidence of partnership absent sharing of profits?

12. Can a partnership exist where there is no evidence of a sharing of profits?

13. Absent a showing that a non-lawyer is engaged in advising others regarding their legal rights and that respondent knows of such advising, can respondent be found to have aided in the unauthorized practice of law?

14. Is profiting from litigation law equivalent to practicing litigation law so that a business which profits as an integral part of its operations from litigation is engaged in the practice of law?

15. Under the totality of the circumstances of these cases, including accumulation of allegations and delay by the Florida Bar in prosecuting complaints filed, what is a proper penalty to assess an attorney who was a new bar admittee at the time; who had problems soon after his admission; who has had no further complaints filed against him in this court, and who left the questionable or improper practice in which he was involved and has suffered loss of employment and embarrassment by the continuance of the cases by the bar and where there is no evidence that respondent constitutes a present danger to the public or the profession by continuing practice, in view of the intent proven by the bar at hearing, and the aggrevating circumstance of multiple complaints?

PRELIMINARY STATEMENT

The statement of the case, statement of the facts, and argument as to each case is included within each case heading. The discussion of penalties is set forth seperately at the end of the brief. The order of this brief is the same as that set forth by the bar memorandum in support of discipline submitted to the referee.

Due to the fact that the report of the referee does not contain any substantive discussion, the brief is directed primarily at the position of the bar as set forth by memorandum.

ARGUMENT

Statement of the case and facts, Case No. 63,652.

By complaint filed May 11, 1983, the bar charged that respondent had violated DR 1-102(A)(2), (5) and (6), DR 7-104(A)(1), DR 7-106 (C)(5) and (7) and DR 7-110(B). The referee upheld the violations as alleged. Respondent denies that his actions constitute a violation, that the evidence shows a lack of intent to violate the cited provisions and that if a violation occurred it was not of a wilful or malicious nature.

The factual basis of the complaint is that respondent was retained by a Mr. Foulke to represent him in a child custody matter. Respondent filed a motion seeking a change in custody from Mrs. Foulke to Mr. Foulke and a hearing was held before Judge Hall of the Second Judicial Circuit. The court ordered a home study which was commenced, and respondent, by phone, inquired of the status of that study, learned that the home study, although not complete, contained information favorable to Mr. Foulke. Mr. Foulke was so informed. Mr. and Mrs. Foulke, without knowledge of counsel for either party, entered into discussions regarding settlement and agreed to settlement favorable to Mr. Foulke, conditioned upon him catching up certain child support arrearage, and providing custody to Mr. Foulke with reasonable visitation to Mrs. Foulke. Mr. Foulke advised respondent of the agreement and further informed respondent that Mrs. Foulke did not desire to continue representation by her attorney, Mr. Rome, and that she did not want him involved in the settlement as she had fired him. Respondent, based upon the representation that Mrs. Foulke was not

represented, prepared a stipulation setting forth the agreement of the parties and waiving notice and hearing. Respondent called the office of Judge Hall, arranged time for hearing, prepared an appropriate order and informed Mr. Foulke that he could not present an agreement to the court due to the unconfirmed status of opposing counsel and the fact that he was not a party to the agreement, its negotiation, or execution, and considered that the most that he could do was provide services in reducing matters to writing. Mr. Foulke presented the agreement of the parties to the court and the modification of custody was entered.

Respondent was notified by motion that Mrs. Foulke sought review of the modification and that the modification be set aside due to lack of notice to counsel. Respondent notified Mr. Foulke that since he would be a witness in this matter he could not act as counsel, and furthermore, that he had already advised Mr. Foulke that he would not continue with any adversary proceedings due to his being requested to act as scrivenor for the parties, which might influence Mrs. Foulke to believe that she had some relationship to Respondent. Respondent thereafter withdrew as counsel and substitute counsel was approved.

Argument, Case No. 63,652.

The bar argues that respondent violated DR 1-102(A)(2) in that he allowed Donald Foulke to carry a stipulaiton agreement to his ex-wife for signing; and that that conduct constitutes communicating directly with a represented adverse party.

The generally recognized purpose of DR 7-104(A)(1) which prohibits communication with an adverse party is to prohibit soliciting a settlement and to prohibit questioning of an adverse party for purposes of obtaining an advantage in litigation.

Several factors require consideration:

1) Respondent had been informed that Mrs. Foulke had discharged her attorney and she did not want the agreement to go through her attorney.

2) The agreement of the parties, reached without the knowledge of counsel, appeared to resolve the matter in litigation; therefore, Mrs. Foulke was no longer an adverse party if the dispute was resolved.

3) Communication is usually defined as the transmission of information, thought or feeling, so that it is satisfactorily received or understood (es) Websters New Collegiate Dictionary, 1977. Respondent acted upon his understanding that reducing to writing an agreement previously entered into by the parties did not constitute a communication, where returned to a party to the agreement. The bar assumens that reducing the agreement to writing and allowing its forwarding to a party to the agreement constituted communication.

Respondent insisted that he was merely reducing the "information, thoughts and feelings" of the parties to writing, and allowing their return to the other party to the agreement. He refused to become involved in questioning her regarding representation, understanding,or

anything else. The construction of this rule by respondent was literal. He would not transmit his information, thoughts and feelings to a possibly represented adverse party; but if, as represented, the wife had not desire to continue the representation, then she would execute the proffered agreement, which was a communication between the parties reduced to writing by respondent.

Respondent's client, by returning the agreement executed by the parties, confirmed the truth of the representation that the other party desired to proceed without representation to the agreed resolution.

Respondent's construction may be incorrect, that "communication" deals with a transmition of substantive information. The construction is not strained or artificial and confirms a lack of intent to violate the DR.

The bar argues that by failing to notify opposing counsel of the settlement of this dispute by the parties, respondent caused additional court actions to be taken in violation of DR 1-102(A)(5).

It is as reasonable to argue that by having the agreement of the parties set aside and then essentially the same result being ordered by the court, that Mr. Rome caused additional court actions to be taken. The argument that DR 1-102(A)(5) is proven simply by a court having to hold an additional hearing is clearly falacious, otherwise, the loser of each motion hearing would be before this court for wasting the time of the court.

The "something more" than merely an additional time use is that the court has been misled into taking an improper or improvident action.

An examination of the documents in this case clearly shows that the court was not misled by respondent. The court file shows appearance by attorney's for both parties, yet no certificate of service was shown by the documents prepared, nor was a copy shown as having been mailed to opposing counsel. Neither respondent nor opposing counsel appeared at hearing.

Respondent, had he intended to mislead the court would have conformed the pleadings and hearing proceedure to the norm rather than preparing documents which on their face show that the matter is before the court in an unusual posture. Respondent attempted to draw attention to the unusual posture of the case before the court.

This court has defined this rule to apply to "hindering witnesses from appearing, assaulting process server [sic], influencing jurors, obstructing court orders or criminal investigations... misrepresentations to a court or any other conduct which undermines the legitimacy of the judicial process..." Bar v. Pettie 424 So2d 734 at 737 (Fl.1983). The result cited by the bar, causing additional court actions, does not comport with the wilful or malicious classes of conduct cited by this court.

Respondent is, at most, guilty of a technical violation of the aforementioned rule. Furthermore, this court should not utilized a technical construction of this rule causing every additional action by a court to verge on a disciplinary violation.

The bar alleges violation of DR 7-110(B) communicate or cause another to communicate as to the merits of the cause with a judge or official before whom an adversary proceeding is pending.

The facts are clear that the settlement agreement of the parties was presented to the court by Mr. Foulke with respondent having

prepared the documents and scheduled hearing; all without notice to Mr. Rome. Respondent denies that this section was violated because:

1) There was no adversary proceeding pending when the parties had settled the dispute in writing and notorized;

2) There was no communication as to the merits of the cuase. The documents which respondent prepared disposed of the mertis of the cause, as agreed by the parties; they did not deal with factual determinations. The usual construction of this section is that it prohibits exparte communication or any discussion of the facts of the case in order to avoid one party gaining advantage over the other by a non-adversarial presentation of evidence/argument.

The construction urged by the bar is that the client, by proceeding with the settlement, as agreed by the parties, and with the execution of the settlement agreement tending to confirm that the wife had in fact fired her attorney, as the facts before him, respondent was trying to engage in exparte communication to the court by the simple act of having prepared the documentation necessary to implement the agreement of the parties.

As motivation for violating these rules the bar argues that respondent merely sought an early resolution to the case. This stipulation fails, of course, to consider the method by which respondent was paid. If respondent was being paid on an hourly basis, as was his custom, then an early, minimum time resolution was contrary to the financial interests of respondent. Certainly, creating a situation in which respondent would be a witness (which occurred) was not in respondent's interest if he knew or understood that his actions were improper, the course of reasonable action would be other than

that taken. At most the violations, if any, were inadvertant.

The bar alleges violation of DR 1-102(A)(6) which prohibits generally any other conduct which adversely reflects upon respondent's fitness to practice law. Essentially the bar alleges negligence on the part of respondent in failing to further investigate wife's discharge of here attorney, and realleges the failure to notify opposing counsel of the "turn of events and proceedings." The bar alleges also that "allowing his client to proceed to a disposition hearing" without having withdrawn constitutes a violation.

The last two parts of this allegation are the subject of specific allegations of misconduct and if the specific violations are not shown, this catch-all provision should not be allowed to serve as a substitute. As to the failure to investigate the allegations that the wife had discharged her attorney; this provision, which is usually applied to intentional actions should not become the basis for discipline for alleged negligence. The negligence alleged -- failing to further investigate to the bar's satisfaction -- is simply a weak basis to act upon in a disciplinary proceeding.

The bar attempts to twist respondent's testimony. Respondent was asked if he knew that child custody was a volitile and emotional area of practice. The answer was "I do now." The bar, by this statement, attempts to attribute malice to respondent in a proceeding which respondent testified was his second domestic relations case. The bar alleges that such experience as respondent had allows an interpretation of "reckless disregard" for the rules of discipline. The facts that respondent was inexperienced, a recent bar admittee and that he engaged in an unusual handling of this case when confronted with a perceived dilemma does not support such a finding. The violations, if any, were

inadvertant and caused by inexperience and misconstruction of the applicable Disciplinary Rules.

Abandoned Cases.

By memorandum, the bar did not argu violation of DR 7-106(c)(5) and (7), and respondent believes the bar thereby abandoned those cases , as alleged in Case No. 63,652.

DR 7-106(C)(5) deals with failuure to comply with known local customs of courtesy or practice. No showing of a local custom was made, much less knowledge of it.

DR 7-106(C)(7) deals with habitually or intentionally violating any established rule of proceedure or of evidence. No rule is plead nor is habitual or intentional violation of any rule shown.

Statement of the case and facts; Case No. 62,951.

By complaint filed December 10, 1982, the bar alleges violation of DR 1-102(A)(4), DR 5-107(B) and DR 7-101(A)(3).

The relevant facts are that Mr. Hampton, upon solicitation, received a group of checks for collection, upon execution of a contract. The checks were received from a Mr. Chester.

Later on the same day Mr. James went to Mr. Chester's business, and requested $135.00 for filing fees and posting of bond for possible prejudgment garnishment. Mr. Chester refused to post that cash.

Respondent also discussed a check endorsed by and payable to Lee Ward which would require that Chester identify Mr. Ward. Respondent was assured this could be done, and respondent had identified himself to Mr. Chester and indicated to him that all legal work would be performed by him in accordance with his contract with Mr. Hampton. The contract between these parties (Chester and Hampton) is not in evidence, nor is the agreement between Mr. Hampton and respondent.

Respondent filed suit on behalf of Mr. Chester against Mr. Ward upon referral by Mr. Hampton, and as authorized by contract. Trial was set and a counterclaim for $4,500.00 made against the Chesters. Immediately preceeding the trial date, Respondent contacted Chester to confirm his testimony and secure witness attendance. Respondent was then informed that Mr. Chester could not identify Mr. Ward. The case against Mr. Ward was voluntarily dismissed and the court awarded Mr. Ward $500.00 in attorney's fees against Mr. Chester.

Respondent prevailed upon Mr. Hampton to pay the aforementioned attorney's fees, which was done.

Respondent was then notified by Chester that his services were terminated. Judgment in several cases were surrendered and respondent

billed Chester for services rendered based upon work done but not compensible due to loss of the judgments and for work caused as a result of Chester lying to respondent about being able to identify Mr. Ward.

Argument; Case No. 62,951.

The bar alleged violation of DR 1-102(A)(4) by the following facts, as set forth by Memorandum of the Bar:

1) The Chesters were "led to believe that if they hired the (collection) agency, they would receive the face value of any checks collected and the agency would make its money from service charges. It was never explained by the agency or James that the Chesters would be billed for James' work separately or would be responsible for posting costs and bonds." This allegation is an allegation of negligence (failure to explain) not an allegation of misrepresentation. Factually this position was rejected by the referee.

2) The bar further alleges that "at no time did James ever consult with the Chesters concerning the collection of punitive damages or the retention of the same by the agency." The source of this duty, given the acknowledgment of the bar that there was an agency relationship contractually established between the Chesters and the agency is ambiguous. Furthermore, the allegation is negligence (failing to explain) rather than a violation of the section allegedly violated.

The bar disputes the validity of respondent's bill for services when he was discharged by the Chesters. First, this court should avoid entanglement in a forthright fee dispute based upon the value of services rendered and based upon the loss of income from work done on

cases taken for the Chesters and for which income was reasonably expected, and for work caused as a result of the lie told by the Chesters regarding their ability to identify a certain Lee Ward.

3) The bar further alleges that attempting to obtain funds for a bond posting and filing fees shortly after the agency received these cases constitutes a violation of DR 1-102(A)(4).

The case law regarding DR 1-102(A)(4) is that the section prohibits lying, cheating, defrauding; untrustworthiness; lack of integrity. Bar v. Pettie, 424 So.2d 734 at 737 (Fl. 1982). Pettie, Supra, indicates that DR 1-102(A)(4) applies to clearly untruthful statements made by a respondent. The basis of the allegations by the bar is "failed to." The bar alleges respondent failed to inform; failed to advise. Then the bar alleges that by billing the Chesters in a disputed matter, that respondent engaged in lying, deceit, cheating, defrauding or untrustworthiness. The bar clearly seeks to reach new law by this allegation.

The bar argues that "Mr. James' allegiance was, after the filing of suit, to the Chesters". DR 5-107(B) Respondent agrees. The bar, however, without presenting the contract between the Agency and the Chesters, argues in essence that by reporting to the delegated agent rather than directly to the Chesters, respondent allowed Mr. Hampton to control his professional judgment. No instance of such control is shown. In fact the record is replete with instances where, when professional judgment was involved, respondent involved the client (principle) directly; otherwise respondent dealt through the agent. The bar denies that such an agency relationship existed, but the employment contract was not presented by the bar, therefore the evidence is at most inconclusive.

The bar next alleges violation of DR 7-101(A)(3) which provides that an attorney shall not intentionally damage or prejudice his clients. The bar assumes that the dismissal in the Ward case resulted in damage to the Chesters. The Ward case was based upon a check wherein the Chesters who held the check assured counsel that they could identify Ward. The case was filed and pursued, trial set and the respondent went to the Chesters to confirm the identification. It developed that such could not be done and the case was dismissed. The court assessed attorney's fees of $500.00 to Ward.

The Disciplinary Rules clearly prohibit maintaining a cause of action without any merit; and specifically the maintenance of a cause based upon fraud. Absent identification of Ward, no cause of action existed and respondent had a duty to so advise the Chesters and/or their agent and act to either disclose the fraud to the court or terminate the action as directed. The action was voluntarily dismissed.

It is clear that no restitution was alleged to be due, shown to be due, or ordered. If the client was financially damaged, where is proof of his loss. The simple fact is that there was no loss, no order of restitution, no proof of loss, nothing beyond the bar's speculation that there was a loss. There was an order of attorney's fees entered because the Chester's lied to their attorney.

If respondent is to be disciplined for dismissing a case based upon fraud upon the court, so be it. Respondent, at least will have no problem with his conscience.

Statement of the case and facts, Case No. 65,143.

By complaint filed April 6, 1984, the bar alleges a course of business practice by respondent as they relate to a Mr. Hampton and Consumer Credit Collections, Inc.

Respondent was approached by Mr. Hampton regarding establishing a collection agency. The purpose of the agency was to collect dishonored checks, and, if necessary, to litigate, by counsel, for recovery, together with all collectable profitability for the agency.

Respondent incorporated the corporation and transferred ownership to Mr. Hampton, and assigned all interest and resigned any office, so that, at the organizational meeting Mr.Hampton took sole ownership of the corporate shell. Licensing was obtained and Mr. Hampton proceeded with developing business and respondent drafted documents including contracts for the corporation. Mr. Hampton, by contract with respondent agreed to pay respondent certain fees in cash or in kind, by clerical assistance. The Corporation headquartered at the same site utilized by respondent and utilized respondent's services exclusively for legal work. There was a close mutually beneficial relationship between Mr. Hampton and respondent regarding business operations. Mr. Hampton answered respondent's phone when respondent was out, and took messages. Collections from referred cases from the corporation were surrendered as received. Fees earned were paid monthly to respondent net of expenses incurred and payable through an agency.

The complaint then alleges certain dealings with Furman E. Derrick. The relevant part of the allegation is that Mr. Derrick contacted respondent's office, probably talking to Mr. Hampton, and once certainly talking to Mr. Hampton, and was told that a certain matter

would be dismissed, or that he need not worry about a certain document filed. Knowledge of the conversations between Mr. Derrick and Mr. Hampton by respondent is not shown.

The facts also show that a satisfaction prepared by respondent which needed to be filed and a copy of which was mailed to Mr. Derrick, was lost by or not filed by an employee of Mr. Hampton who had been requested to file that document.

Argument, Case No.; 65,143.

The bar alleges violation of DR 3-101(A) and DR 3-103 based upon these facts.

The definition of the practice of law is set forth by Fla. Bar v. Town, 174 So.2d 395 (Fla.1965). The definition is in two parts:

1) that the advice affects important rights and

2) that a knowledge greater than that required of an average citizen is required.

The bar states that respondent allowed Mr. Hampton access to his phone calls concerning litigation matters.

The testimony is clear that Mr. Hampton took messages for respondent and in a matter concerning Furman Derrick, advised Mr. Derrick that a case against him would be dismissed.

Taking messages is hardly the practice of law; nor is maintaining a calendar or any other clerical assistance practicing law.

Advising Mr. Derrick regarding his rights may well constitute practicing law. No proof that respondent aided Mr. Hampton in that matter is shown. Respondent was not present; nor is there any showing of this occurrance being repetitive. The thrust of the bar's

allegation is that respondent failed to forewarn or counsel Hampton regarding acceptable limits of his behavior. Negligence, even if proven hardly constitutes aid. Mr. Hampton was clear that what he was authorized to do was take messages.

The bar states:

"While there is no direct evidence presented that Mr. Hampton received any specific attorney fees from any one case, Hampton was able to use these fees at least for a month, and there were no safeguards that would assure James of recovering all attorneys fees forwarded to Hampton."

If this constitutes sharing a fee, so does depositing money in the bank, which uses the money. As to safeguards; respondent hardly believes that the bar is in the business of requiring that attorneys assure the safety of earned fees. The bar is clearly reaching.

The bar argues that DR 3-103 was violated as follows:

The incorporation of Consumer Credit Collections created a "quasipartnership."

The bar then characterizes the collection agency as a feeder system.

"The agency was actually a quasipartnership between an attorney and a non-attorney."

"The physical surroundings... allowed the close cooperation between (respondent) and Mr. Hampton which was essential to the effective operation of the agency."

"The agency may have retained all profits but Mr. James obviously benefitted from the business referred to him. His part in the partnership was the referred cases rather than just profits. He directly benefitted from Mr. Hampton's solicitation."

The allegation is forming a partnership when the partnership business is the practice of law. The bar has not alleged solicitation or a feeder practice, and argues these conclusions from no basis.

The bar does not even argue that the agency was involved in the actual practice of law; the bar argues that the agency was a quasi-partnership (that which had characteristics of a partnership).

The bar argues that the "concept of profitability (for the agency) was based upon the need to collect punitive damages on small claims. To make this concept functional, the agency had to seek litigation in order to ask for such damages. In this manner, as an integral part of the agency's business was the practice of litigation law in debt matters."

The bar argues that by representing a client which seeks litigation for profit, as an integral part of its business, that respondent is a partner in a business in which he holds no ownership interest and from which he does not participate in profits. The bar, by this argument rejects the cited definition of the practice of law; the giving of advice and counsel to another in legal matters... if the advice affects important rights of another under the law and if reasonable protection of rights and property of those advised requires legal skill and knowledge of the law greater than that possessed by an average citizen. Fla. Bar v. Town, 174 So.2d 395 (Fla. 1965).

The bar begins by describing a collection agency which respondent admittedly incorporated, and transferred all interest to Mr. Hampton. The bar describes close physical proximity and a close working relationship. The bar describes a collection agency seeking to profit from cases referred to counsel for litigation based upon

punitive damages. The bar then argues that even though respondent had no right to agency profits and the agency had no right to respondent's earnings, a partnership existed.

The bar cites a community of interest. If this court holds that a community of interest or commonality of success is the basis for finding a partnership, respondent suggests that attorney's who own and operate both banks and a law office which does work for the banks would be guilty of unethical conduct.

The test which the bar urges is facially defective. What is prohibited is a partnership for the practice of law. No allegation is even made that the agency was involved in the actual practice of law. The bar alleges a seeking of profit from litigation as a new definition of the practice of law.

No partnership existed; and certainly no facts even are alleged that respondent allowed any partnership or even quasipartnership regarding his practice of law. The bar has tried to stretch definitions beyond recognition in an unsuccessful effort to infer that a partnership between respondent and the agency existed and then to create a new definition for the practice of law; namely, that a business which profits from litigation is in the practice of law. Such a definition is unsupported by any cases. It should be rejected.

The factual allegations regarding misconduct set forth in paragraphs 48 through 66 have been admitted. The conclusion that the client was damaged thereby deserves comment. If, as the referee found, respondent's client was damaged by the admitted conduct of respondent, then the court should note that on the facts alleged, the trial court acted without just cause to set aside a lawful judgment and did so entirely because of prejudice toward the attorney of a

party. That hardly seems ethical. There is no evidence in this record to show that such in fact occurred, in fact there is no reason for the court's action setting aside the judgment other than that the court believed that the judgment had been entered erroneously. That belief is not linked to respondent's behaviour and any suggestion that the result would have been different "but for" respondent's admittedly improper conduct has not been shown. The allegation of violation of DR 7-101(A)(3) is not justified because there is no showing of prejudice due to respondent's conduct. The remaining violations are correct if the element of intent is not relevant.. On the face of the pleadings and proof it is clear that respondent lost his temper. By definition a loss of temper is a loss of control or unintended conduct. This court, on examination of the record, can and should determine whether and to what extent intent is and should be an element of the violations urged. The record, at most shows a loss of temper which respondent was attempting to control. This court should be well aware that such conduct, although regretable, is certainly not "intentional" in the usual sense of that word. Respondent seeks clarification of whether mens rea, clear forethought and evil intent are elements of the sections aforementioned.

Penalty.

The penalty assessed is clearly excessive under the facts as submitted to the referee. The facts are undisputed that the events alleged occurred in 1980, and 1981. The complaints were not filed until 1982 through 1984, and were obviously collected for hearing.

Hearing was finally held in late 1984, three to four years after the events complained of, and only after an order to show cause was issued to the bar because of the delay involved. The bar correctly argued at hearing that the "penalty" to be assessed against the bar was mitigation of penalty against respondent, rather than dismissal, and that the cases should be heard. Thereafter the bar set and held hearing in an expeditious manner.

It is elementary that collecting violations, and delaying hearing in order to do so are factors which this court will consider as mitigating factors in a disciplinary matter.

The bar seeks an offsetting aggrevation of discipline for cumulative violations. Where, as here, the bar is at fault for the accumulation of violations, no such aggrevation should be allowed.

An analysis of the findings of the referee and of the complaints made, together with exhibits and testimony show the following:

1) Respondent clearly lost his temper before a county judge. His statement as quoted show a loss of his temper and his good faith effort to control that. He said that he was so mad he could spit nails and could not control himself, but that he would try to control himself. Complaint 65,143, Paragragh 60, admitted by transcript. Such conduct is improper and subject to this court's sanction, but it is conduct of a kind which would routinely be punishable by a private reprimand,

and less serious than conduct which has been punished by a public reprimand. An example of such conduct is Bar v. Carter, 410 So.2d 920 (Fl. 1982) where an attorney who made derrogatory remarks about a judge in a pleading, and comingled client and personal funds received a public reprimand.

It is clear that if respondent's only violation had been losing his temper in court, a reprimand is the maximum penalty which would be assessed.

The first count of Complaint 65,143 alleges or purports to allege a business relationship which was improper in that it was a partnership with a non-attorney for purposes of assisting the non-attorney in the practice of law, and sharing fees with him. The proofs are that the non-attorney received all monies from certain cases, deposited those monies in his account, gave respondent credit for them, acted as an intermediary with clients and was involved in a set of conversations and proceedings involving a Furman Derrick. These relationships and practices have long since been discontinued by respondent. If there was a violation it does not appear as flagrent as those noted in Bar v. Shapiro, 413 So.2d 1185 which included trust violations and communicating a settlement offer to an adverse party, practicing under a trade name and electing a non-lawyer president of the clinic. However, in that case, the recommendation of the referee was a reprimand and the ultimate disposition was a 91 day suspension. This penalty was imposed in view of the apparent testimony that the respondent suffered from severe emotional disorders and that that respondent would not be under obviously needed supervision. In another case involving having a non-lawyer as president of a legal clinic, and also an allegation of false advertising, the opinion shows that this court recognized as

serious the allegation of false advertising, and imposed a penalty of public reprimand based primarily on that factor. The court seemed to indicate that a private reprimand is appropriate where the internal organization of a law office is the primary consideration. Bar v. Burdish, 421 So.2d 501 (Fl. 1982).

It is interesting to note that although the bar alleged that respondent was in partnership with a non-lawyer and that non-lawyer was soliciting business of a collection agency, there is no allegation of solicitation on respondent's part, the bar argues a feeder system, but no such allegation is made. If there was, as alleged, a true partnership, then applying partnership principles, respondent would be guilty of solicitation. The absence of that allegation shows the ambiguity of the relaitonship between respondent and his alleged partner, at least as shown by the evidence submitted by the bar. This ambiguity tends to show a lack of intent by the parties to form a partnership, and intent is always an element in a disciplinary proceeding.

In view of past decisions, and in view of the minimal proof of a partnership, and of a non-lawyer practicing law in that partnership; if the violations are found, the appropriate penalty is no more than a reprimand.

Complaint No. 63,562 alleges many of the same facts as those set forth in Hanley v. Hanley, 426 So.2d 1230 (Fl. 1983, DCA). Apparently respondent is not the only attorney who has addressed these facts less than perfectly. However, Respondent at least tried to solve the problem and recognized a problem. Respondent refused to participate in hearing and tried to allow the parties no advantage over one another.

In Hanley, the attorney cooperated fully in presenting the case to the court, without notice, and without mention of the lack of notice. The attorney involved has, at least to date, not been the subject of any public proceeding before this court.

Since no drastic action seems to have occured to counsel in that case, and it was accepted by the DCA that he had not acted according to the letter of the law, respondent assumes that the attorney was censured by at most a private reprimand, and probably not at all. The action in Hanley and in the instant case are matters which involve rarely encountered situaitons involving a quick judgment call which is sometimes incorrect. Respondent tried to solve what he perceived as a dilemma, and was wrong. That does not indicate any intent to violate the Rules of this court, it indicates a lack of detailed understanding of the Rules which could be cured by a course in ethics and a retake of the ethics section of the bar, as this court has ordered in other cases.

Respondent is accused of engaging in dishonesty, fraud and misrepresentation or deceit in his dealings with Leonard Chester. The referee concluded that such was proven even though any specific facts alleging that conduct deal with failures to act rather than a false statement. Such a finding is among the most serious which can come before this court because they strike at the very fabric of this honorable profession. Respondent would encourage this court to look at the facts alleged and found and note that the bar could not prove that respondent acted without the knowledge or consent of his client.

The exact nature of the dishonesty, fraud, misrepresentation or deceit is therefore, not apparent from the pleadings. Based upon the bar's argument, this charge is supported by respondent's failure to

act. Since respondent adamently denies that he engaged in any conduct which constitutes a violation of the section allegedly violated, analogy is difficult. The following cases may be relevant to showing some mitigation. Bar v. Hawkins, 450 So.2d 483 (Fl. 1983) shows that a respondent who was then a recent law school graduate and bar member is entitled to mitigation due to that fact. Failing to provide information to a client resulted in a private reprimand and after failing to provide the information pursuant to order; a public reprimand. Bar v. Porter, 458 So.2d 768 (Fl. 1984). Incompetent representation not involving fraud or deceit warrants a reprimand. Bar v. Hotaling, 454 So.2d 555 (Fl. 1984).

This court should note that the Chesters were not financially harmed by respondent's representation, except for receiving a bill from respondent which has not been paid; and that this case is at its very root a case of a client who lied to his attorney, and the attorney successfully avoiding the consequences of that action to the client; no restitution was requested, argued or ordered, yet the bar insists that the client was harmed by an award of attorney's fees not paid by the client.

This court has consistently maintained a policy that punishment should consider both the public and the attorney. Disbarment has been reserved for the incorrigible. C.f. Bar v. Powers, 458, So.2d 264 (Fl. 1984). Extensive suspensions have involved serious wrongdoing which show willfulness, mens rea or a pattern of disregard so serious and consistant that the attorney endangers the public. C.f. Bar v. Abrams, 402 So.2d 1150 (Fl. 1981), Bar v. Lancaster, 448 So.2d 1019, (Fl. 1984).

The court has suspended attorneys for 91 days or more where the facts show some possibility of rehabilitation, but the violations have been serious, involving losses to their client or other serious misconduct. C.f. Bar v. Kirtz involving an excessive fee and communicating a settlement offer; Failing to file tax returns resulting in a misdemeanor conviction in federal court, Bar v. Lord, 433 So.2d 983 (Fl. 1983); trust account violations, Bar v. Gentry, 447 So.2d 1342 (1984); with finding of giving false testimony, issuing trust checks for personal expenses, appearing at a deposition without records, drafting a rental agreement which the attorney then opined was unenforceable. This case does not equate with the aforementioned cases in that the following factors do not appear;

1) Criminal intent or mens rea. There is no evidence that respondent intended to violate any DR. The evidence is clear that he may have willingly become involved in a questionable business relationship. But it is not clear that he intended for that relationship to be violative of the rules of this court.

Respondent clearly did not intend to mislead Mr. Chester during their dealings, nor did respondent intentionally misrepresent anything to him.

Respondent clearly made a mistake, at most, in his dealings regarding Mr. Foulke. There is clearly no showing of intent.

Respondent lost his temper which is clearly an unintended event. There is no showing that respondent knowingly or willfully violated any DR.

This court should always consider the motive which an attorney would have to violate a DR. What motive would respondent have to lose

his temper. Such an act could only cause difficulty, embarassment and possible loss of a case. No benefit could be derived. What benefit could respondent have from the Foulke case. If, as occurred, the mother was still represented and did not want the agreement of the parties to continue in effect, respondent would clearly have at most an unenforceable agreement and be attending hearings as a witness, without fees (which is what occurred). If he was engaged in a knowing subterfuge, counsel would have placed a certificate of service on the documents, and tried to pass them off as served on opposing counsel. If he had been trying to deceive he would have set up a hearing and attended it, as the attorney in Hanley, Supra, did, rather than doing something obviousely unusual, require the client to continue in person. That appearance in court by a client, with an agreement and without counsel, and without a certificate of service on anything should place any reasonable judge on notice that the drafting attorney has something on his mind. It is, therefore, obvious that respondent was not trying to conceal anything, but rather was seeking the courts approval of his solution of what he perceived to be as a dilemma. No intent to violate any of the rules which respondent is charged with violating is apparent, and the violations, therefore, should be mitigated by that lack of intent.

2) Financial loss to the client. There is no allegation in the complaints; nor is there any proof that respondent caused any financial loss to a client. The violations involve a custody case, which was settled and the settlement set aside; a collection of a check wherein the client was countersued unsuccessfully, but attorney's fees were assessed, a collection of a debt which the court ruled had been paid and a collection of a debt which the pleadings show was paid. No

actual loss to any client is alleged or shown, except the attorney's fees assessed against a client who lied to counsel and caused an unsupportable case to be pursued.

3) Multiple repeat violations. This case constitutes the first time, and hopefully the last time, that respondent will be before this court. The violations do not show a pattern of violations or wilful disregard of the oath of respondent. Each violation individually would warrant no more than a reprimand.

This court has ruled that proof of rehabilitation is not relevant testimony before a referee. Bar v. Routh, 414 So.2d 1023 (Fl. 1982), therefore, respondent did not present proof of his conduct in the four years subsequent to the events which are before this court. It is reasonably sure that had respondent been engaged in any conduct which would endanger the public, this court would be well aware of it from the bar. The bar, by its silence, admits that the events complained of have been shown by subsequent events to be abnormal and inconsistent with respondent's practice since the events complained of. There is attached hereto an affidavit which sets forth repondents practice since the time of these events.

As set forth by affidavit, respondent has been the subject of severe punishment within the legal community as a result of these allegations and has probably been punished more than anything which this court would have ordered. The proper punishment under the totality of the circumstances of this case is a reprimand if the cases are considered separately, or, if aggrevation is shown by the cumulative nature of the violations, then by a penalty from a public reprimand to suspension up to not more than 30 days, with respondent being required to take and pass the ethics course, as the court shall

order. The penalty set by the referee is clearly excessive in view of the nature of the complaints and past actions of this court in similar disciplinary cases.

Conclusion.

Respondent admittedly lost his temper. He misbehaved badly. The remaining allegations are in essence a statement by the bar that the bar disapproves of respondent's relationship with Mr. Hampton; and respondent seeking to literally apply the Disciplinary Rules in such a way that an attorney was not kept informed of the status of a case.

Respondent may have exercised bad judgment. There is no showing of disregard of the Rules, at most there is a showing of misunderstanding or misreading.

These cases, based upon occurances three to four years ago, show long since terminated relationships and behaviour which has not recurred.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs

JOHN L. JAMES,

Respondent.
_____/

Case Nos.: 62,951
63,652
65,143

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF GADSDEN

COMES NOW Respondent who first being duly sworn does depose and say:

1. Respondent terminated services to Consumer Credit Collections, Inc., and sought employment with the State of Florida in mid 1981.

2. Respondent obtained employment with the Department of Professional Regulation as a Staff Attorney.

3. Shortly after employment and while the proceedings were supposedly confidential Respondent was quieried by his employer regarding these allegations. Respondent was thereafter asked to resign because, in whole or in part, of his refusal to divulge the basis of complaint against him.

4. Respondent was not gainfully employed during the remainder of 1982, a period of approximately nine and one half months.

5. Respondent opened a private law office in Havana, Florida on January 2, 1983, and has been engaged in the practice of general law since that date.

6. Respondent's practice in Havana, Florida involves primarily litigation of domestic relations, some state administrative practice and some probate work, a little criminal law and real estate law.

7. Respondent was unable during 1982 to secure other employment primarily because of the pendancy of these proceedings and the fact that the pendancy of these proceedings had become public knowledge.

Further Affiant Sayeth Not.

John L. James

Sworn to and subscribed before me on this 28th day of May, 1985.

Notary Public

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Aug. 7, 1986
Bonded Thru Troy Fain - Insurance, Inc.