IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE
SUPREME COURT CASE NO. 65,819
FLORIDA BAR CASE NO. 17E81F16

THE FLORIDA BAR,

Complainant,

vs.

DONALD J. SWANSON,

Respondent.

PRELIMINARY REPORT OF REFEREE

This cause was presented to the Referee for resolution on November 2, 1984 in Palm Beach County, Florida; the Respondent having waived venue. Present were Donald J. Swanson, Respondent, represented by Robert J. O'Toole, attorney, and Jacquelyn Plasner Needelman, Attorney for the Florida Bar.

The Referee received the testimony and documentary evidence. The complaint and request for admissions by the Florida Bar and the answers by the Respondent narrow the fact issues to be resolved by the Referee and they are:

1. Did an attorney/client relationship exist between the Respondent, Donald J. Swanson, and Mary Joyce Rogers, now known as Mary Joyce Miller?

2. Was the mortgage in question intended to be a mortgage and did the Respondent represent to Mary Joyce Rogers it would be recorded in the public records upon which she relied to her detriment?

3. Did the Respondent intend to record the mortgage in question when the alleged representations were made to Mary Joyce Rogers?

4. Did the Respondent intentionally try to avoid or delay repaying the indebtedness?

5. Did the Respondent knowingly, wilfully and intentionally make a false statement in the bankruptcy proceedings?

The Referee answers Issues Numbered 1, 2 and 4 in the affirmative and Issues Numbered 3 and 5 in the negative.

As to Count One, Donald J. Swanson, the Respondent, was a general practitioner in the State of Illinois for approximately 15 years and subsequently came to Florida to commence his practice of law.

The Respondent met Mary Joyce Rogers in 1973 or 1974 and they began dating. This relationship matured and they began living

together in the year 1977, until some time during the year 1978. During this period of time there was some discussion concerning marriage which never came to fruition.

Ms. Rogers owned real estate in the State of Texas and the sale of that property took place in mid-April, 1978. Prior to the sale, the Respondent was in dire financial straits, resulting from severe medical problems involving heart and two artificial hip procedures, together with other matters not fully made known to the Referee.

It was in this atmosphere the Respondent offered to assist Ms. Rogers in the closing relating to her Texas real estate and did request she lend him approximately $22,500 from the proceeds of the sale. This was done.

Originally, a promissory note evidencing the loan was made on April 20, 1978 for $22,500, however, one week later, on April 26, 1978, a substitution note was made for $24,300, secured by a mortgage. The variance in the two face amount figures in the promissory notes results from the latter note including the accrued interest for the first year which was deferred.

The Respondent's testimony that he never delivered or signed the note, or intended the mortgage to be a mortgage, is rejected by the Referee as being not worthy of credibility.

The Respondent's explanation of the preparation of the mortgage deed (Exhibit 3 in Evidence) as evidence of an indebtedness and method of payment as distinguished from what the documents purport to be, is rejected. Being a practicing attorney in the State of Illinois for many years, and a Florida attorney, he certainly knows the difference and is charged with knowing the difference between the promissory note and the mortgage deed. He certainly is well aware of the effect of recording a mortgage deed in the public records, as well as the preparation of such a document, which would not qualify for recording.

Ms. Rogers testified concerning her relationship with Donald J. Swanson, the Respondent, and the loan in question. The real estate in Texas represented her only substantial asset and she desired security for the loan.

The Respondent represented to her the value of the Florida home was $90,000, subject only to a $7,000 mortgage. If the promissory note was not paid, she would receive the home and the mortgage would be recorded in the courthouse. Relying upon those representations, Ms.Rogers loaned the money to the Respondent.

The promissory note and mortgage in question were prepared in Respondent's living room. He told Ms. Rogers what to place in the documents and she physically typed them. He signed the documents and explained they would be recorded at the courthouse. He then placed them in her folder in his office filing cabinet in a bedroom.

Ms. Rogers subsequently asked many times whether the documents had been recorded and the Respondent represented he would see to it, but later admitted they had not been recorded.

Donald J. Swanson's contention that he was not involved in an attorney/client relationship with Ms. Rogers is rejected. Neither contractual formality, nor compensation, nor expected compensation, is necessary to create such a relationship. The Respondent's willingness to assist Ms. Rogers in the sale of her property in Texas; his directions relating to the preparation and execution of the promissory note and mortgage in question, together with his representations to her as to their legal efficacy which resulted in Ms. Rogers lending him $22,500, is more than sufficient to impose upon him the duties owed by an attorney to his client. See Tormo v. Yormark, 398 Fed.Supp.1159 (1975), found in U.S.Dist.Ct. in New Jersey, page 1169.

After certain payments were not made pursuant to the note, Ms. Rogers sought independent counsel and legal proceedings were instituted in Broward County, Florida, Case No. 80-16426, wherein Ms. Rogers was successful in establishing an equitable lien upon

the real estate as security for the loan made to the Respondent and it was to be sold at a judicial sale.

To avoid and delay the forced sale, the Respondent initiated in the Federal Courts a Chapter 7 Proceedings, which was subsequently amended to a Chapter 13 Proceedings. It was during the pendency of the two proceedings in federal court where the alleged false statement arises, in that, two inconsistent statements were made by the Respondent under the penalties of perjury.

Count Two of the Complaint by the Florida Bar charges a violation of disciplinary rules relating to conduct proscribing dishonesty, fraud, deceit or misrepresentation and conduct adversely reflecting upon a member's fitness to practice law.

The gravamen of the conduct of the Respondent relates to documentation he filed in the United States Bankruptcy Court for the Southern District of Florida in Case No. 81-00272; the pertinent portions of which are set forth in Exhibit 1 in these proceedings.

In the "Statement of Affairs For Bankruptcy Not Engaged In Business," Question 3-A provides:

> "Where did you file your last federal and state income tax returns for the two years immediately preceding the filing of the original petition herein?"

The Respondent's answer was:

> "None, - income less than $500 per year."

This action was convered to a Chapter 13 action on August 25, 1981, and in the appropriate schedules, the inquiry is made:

> "What was the amount of your gross income for the last calendar year?"

Answer:

> "$18,000",

which was later amended to $10,000.

The Respondent is not accused of any wrongful conduct concerning the failure to file federal income tax returns. The misconduct relates to his inconsistent statements concerning his income and his corresponding intent.

The Respondent's explanation of his answers which are facially in conflict is the answer to Question 3-A refers to net taxable income and had no relationship to his gross income. Both he and his attorney were working under pressure because of the impending judicial sale seeking to delay it and he misunderstood the question.

It must be remembered that Donald J. Swanson is not being charged with perjury by contradictory statements pursuant to F.S.837.021. The Florida Supreme Court has ruled pursuant to that statute and the court held:

> "To the argument that the statute admits of a construction which would permit a conviction where one of the statements was made through error, mistake or inadvertence, we respond that the statute requires a statement to have been made 'willfully,' which we construe to signify that the statement was knowingly false when made. We do not construe a statement made through error, mistake or inadvertence to be one made willfully within the purview of the statute." Brown v. State 334 So.2d 597, at 599 (Fla.1976)

The Respondent's alleged violation of the disciplinary rule in Count Two relates to engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Referee equates the intent of the disciplinary rule to being analogous to the interpretation of the above Florida Statute by the Supreme Court; for were it otherwise, any material representation by an attorney to a court which was subsequently discovered to be untrue, would subject the attorney to disciplinary measures. The provisions of this disciplinary rule concerns itself primarily with intent, not intelligence. If it were the latter, the Respondent would not prevail. The criteria of guilt in matters such as this is by clear and convincing evidence and the Florida Bar has not furnished sufficient evidence to carry its burden as to Count Two.

The Referee finds the Respondent, Donald J. Swanson, Guilty of Count One as to each ethical violation.

> (Disciplinary Rule 1-102(a)(1) - A lawyer shall not violate a disciplinary rule)
>
> (Disciplinary Rule 1-102(a)(4) - A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, and

(Disciplinary Rule 1-12(a)(6) - A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law.

The Referee finds the Respondent, Donald J. Swanson Not Guilty as to Count Two as to each of the same ethical violations. See State v. Delves, 160 So.2d 114 (Fla.1964)

Counsel for each party, at the conclusion of their presentation and argument, requested the recommendation portion of the Referee's report be deferred until after the findings of fact were made, as there were additional matters the parties wished to present to the Referee, depending upon the matters contained in this report.

The Referee granted the parties' request and the recommendation portion is set before the Referee on FRIDAY, DECEMBER 14, 1984 AT 9:30 A.M. IN ROOM 333, PALM BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA. All parties are to be present at this time and date.

A copy of this report is being mailed this date to the Supreme Court. Upon the conclusion of this cause, the recommendation portion and the original file will be submitted to the Supreme Court

Respectfully submitted,
November 30, 1984
at West Palm Beach, Florida

VAUGHN J. RUDNICK
Referee

xc:

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