IN THE SUPREME COURT OF FLORIDA

BEFORE A REFEREE

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CONFIDENTIAL

CASE NO. 67.544

TFB CASE NO. 17C85F27

THE FLORIDA BAR,

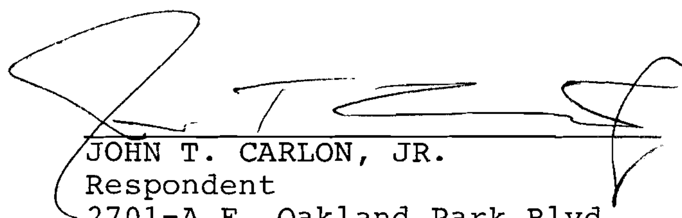
Complainant

vs.

JOHN T. CARLON, JR.

Respondent

INITIAL BRIEF OF PETITIONER-RESPONDENT



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PREFACE

This is the Initial Brief of Petitioner-Respondent JOHN T. CARLON, JR., and submitted in support of said Petitioner's Petition for Review, Motion to Dismiss and Motion to Strike which accompany this Brief.

In this Brief as well as in any subsequent Brief of Petitioner-Respondent, the following symbols will be used:

Bi - Initial Brief of Petitioner

App - Applendix of Petitioner

Tr - Transcript of Testimony taken at hearing herein.

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STATEMENT OF THE CASE

The Florida Bar served its Complaint herein on August 26, 1985.

On September 5, 1985, this Court appointed Hon. Philip Cook as referee pursuant to The Florida Bar Integration Rule, Article XI in which the report of said referee was ordered filed in the Supreme Court of Florida within 180 days of September 5, 1985, "unless these are substantial reasons requiring delay."

The Report of Referee is dated August 18, 1986, and was transmitted to the Supereme Court of Florida for filing on that date.

No excuse for the delay in the filing of the Report of Referee appears of record and no application for extension of time was ever filed or served by either the Referee or the Florida Bar.

Respondent has filed his Petition for Review pursuant to Rule 11.09 as well as Motion to Strike Report of Referee and Motion to Dismiss this proceeding for flagrant non-compliance with The Florida Bar Integration Rule.

STATEMENT OF FACTS

After engaging in the full time practice of law in Florida from 1955 through 1976, by 1979, Respondent was substantially engaged in private projects and practicing law only part time.

In 1979 or 1980 Respondent became associated in a limited capacity with then Attorney Marie Hotaling which relationship continued through 1983. During that time Respondent received mail at Marie Hotaling's office, his telephone messages were received there and relayed to him, and Respondent listed the address of Marie Hotaling with the Florida Bar as his address of record.

Although Respondent did perform limited legal services on various matters as requested by Marie Hotaling during that time, neither Respondent nor Marie Hotaling ever represented themselves to the public either by signs, stationery, professional cards, or telephone listing as being anything other than two attorneys located at the same address at least partially sharing office space.

In early 1982 (either March or April) Marie Hotaling was representing a group of individual unit owners of Tam O'Shanter Condominium Association, three of whom had been apparent victors in a disputed election that had previously taken place, and being admittedly an unfamiliar ground, Marie Hotaling asked Respondent to accompany her to a Saturday morning meeting with her clients to discuss their current problems.

Respondent attended one or two such meetings with Marie Hotaling and conferred with the condominium owners present. None of the

owners claiming to be present at the meeting in question was able to recall the subject of any discussion at that time with the sole exception that it was agreed that Respondent would bill for his rendered legal services through Marie Hotaling.

Although none of the clients could recall the nature or scope of the discussions with Respondent, they are in agreement that Respondent did make certain recommendations to them which were followed.

Several weeks later after the new officers assumed their offices, they held their first Board of Directors meeting and at that time adopted a resolution employing Marie Hotaling and Respondent as "attorney" for the association with no mention of compensation for counsel in the resolution. Respondent was not in attendance at that or any other Tam O'Shanter meeting, although he was given a copy of the minutes of the meeting wherein he was employed.

Respondent never billed any of the Tam O'Shanter members individually for any of his services rendered prior to the resolution employing him to represent the Tam O'Shanter Condominium Association (a non-profit Florida corporation) and thereafter continued to perform such services for Tam O'Shanter as requested by Marie Hotaling.

Pursuant to the direction of Marie Hotaling, Respondent billed the condominium association for his services, and was never contacted by any of the members voicing any objection that that billing, but never received any payment on account either. After advising Marie

Hotaling of his problem with the account and being told that Marie Hotaling would not be embarressed if he sued for his fees and expenses, Respondent instituted a suit in the County Court of Broward County for his fees and costs. That suit was against the condominium association corporate entity only and not against any individual members of the association.

Some time after a default had been entered in that proceeding, Marie Hotaling filed an Answer on behalf of the association, but did not move to vacate the default.

Thereafter a final hearing on the question of attorney fees receivable was held before Hon. Alfred Skaf, County Judge, wherein vigorous and aggressive cross-examination was conducted by Marie Hotaling on behalf of Defendant Tam O'Shanter of both Respondent and of Respondent's expert witness after which, on April 5, 1983, a final judgment was entered by Judge Shaf awarding Respondent a total recovery of $1,048.00. (Respondent's initial claim was reduced by a $500 cost payment direct to the abstract company by the corporate defendant which payment was made only after the Respondent's suit was filed.) That judgment was satisfied by garnishment of a corporate bank account and Satisfaction of Judgment was subsequently properly delivered in May, 1983.

Respondent's next contact with reference to this matter occurred with his receipt of a notice from the Florida Bar of a complaint by Ms. Virginia Speier of Tam O'Shanter condominium association which notice was dated October 11, 1984, a notice of hearing on the complaint for November 5, 1985, at 6:00 P.M. and a

witness subpoena to appear at that time (App - 1, 3, and 7).

Following that hearing, which was held jointly with the hearing on the complaint by the same persons against Marie Hotaling, this proceeding ensued.

SUMMARY OF ARGUMENT

The Florida Bar and the Referee are guilty of various derelictions which are both unexplained and unexcused. Neither The Florida Bar nor the Referee have offered any explanation nor have they sought any order excusing their non-compliance with orders of Court and/or their other derelictions.

If the Orders of this Court are to be afforded the respect to which they are entitled, the requirements must apply equally to all affected parties, and therefore the Motion to Dismiss and Motion to Strike of Respondent should be granted.

There is no credible evidence to support the recommendation of the Referee that Respondent be found guilty of any ethical violation, and in fact there is irrefutable evidence that The Florida Bar has attempted to mislead the Court and the Referee by demonstrably false allegations in its Complaint.

Finally the recommended discipline is wholly inappropriate considering all the facts and circumstances.

ARGUMENT

I. WHAT EFFECT SHOULD BE GIVEN VIOLATIONS BY THE FLORIDA BAR OF MANDATES CONTAINED IN THE INTEGRATION RULE

This proceeding apparently was initiated March 10, 1984, by a complaint form directed against attorney Marie S. Notaling, by members of the Tam O'Shanter condominium association. On October 11, 1984, the Florida Bar furnished Respondent with a letter notifying him of the "opening of a file" but no copies of prior statements affecting the Respondent were furnished until the hearing before the Grievance Committee on November 5, 1984. (App - 6).

Florida Bar integration Rule 11.04 (2) (C) mandates that an investigation not be deferred or suspended without the approval of the Board of Governors even though independent civil or criminal proceedings may be pending, and the record is devoid of any such approval in this case.

Further Rule 11.04 (3) confers upon the accused attorney certain rights upon being advised of the nature of the conduct being investigated, and the initial notification given Respondent two weeks in advance of the hearing is misleading in the extreme. There is nothing to suggest any improper billing by Respondent, or any impropriety on the part of Respondent in invoking the assistance of the Court of Record of Broward County, Florida, to collect an account.

Thus, Respondent was unable to determine whether to exercise any of the options supposedly afforded him by Rule 11.04 (3), and, if so, which ones. Further Respondent was, by this conduct, pre-

vented from effectively preparing any defense to any specific charges The Florida Bar obviously had planned to press.

Further, The Florida Bar has subverted the confidential nature of these proceedings by unnecessarily referring to Respondent by name at every available opportunity in the earlier proceedings against attorney Marie Hotaling and thereby created at least an impression or connotation of Respondent's somehow being an active accomplice of Marie Hotaling in her misconduct when nothing could be further from the truth.

Further, no extensions of time for the filing of the Report of the Referee herein have been sought, and no cause of any nature, not to mention valid cause, has been advanced for that delay.

Finally, no notice of the meeting (or termination thereof) of the Board of Governors meeting affecting Respondent's right to review has been given as required by Rule 11.09 (3) (a) Integration Rule of The Florida Bar.

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct." The Florida Bar v. Rubin, 362 so. 2d 12, 16 (Fla. 1979)

In the instant case, the Report of the Referee was due within 30 days after conclusion of the trial, or in any event within 180 days of the order appointing him. Fla. Bar Integr. Rule, art XI of Rule 11.06 (9) (a). The Referee recites in his Augsut 18, 1986 Report the hearing date of April 16, 1986, and offers no explanation for an obvious delay substantially beyond the time limitations imposed both by the Integration Rule itself and this Court. Neither has The Florida Bar sought any extension of the time limitations.

It is respectfully submitted that the Court should not permit either the Referee or The Florida Bar to violate either their obligations under the Integration Rule or to ignore a lawful order of this Court with impunity.

Accordingly, Respondent's Motion to Dismiss and Motion to Strike should be forthwith granted.

II. WHAT EFFECT SHOULD BE GIVEN VIOLATIONS BY THE REFEREE OF MANDATES CONTAINED IN THE INTEGRATION RULE AND OF PRIOR ORDER OF THIS COURT.

The trial reported by the referee taking place on April 16, 1986 took place after the expiration of the time prescribed by the September 5, 1985 Order of this Court for the filing of the Report. No justification of any nature for these flagrant violations of both the Order of this Court and the mandates of the Integration Rule have been offered by the Referee.

It is respectfully submitted that the same reasoning advanced by Respondent in Issue I above is applicable here, and the Respondent's Motion to Dismiss and Motion to Strike should therefore be granted forthwith.

III. WHETHER SUFFICIENT EVIDENCE EXISTS TO JUSTIFY A JUDGMENT OF GUILT OF ANY VIOLATION OF DR 1-102(A) (4)

The evidence showed only that Respondent accompanied Marie Hotaling in early April, 1982, to a meeting at which several individual owners were present and that Respondent was introduced as Marie Hotaling's <u>associate</u>. The only discussion at that meeting specifically recalled by the witness in attendance was the nature of the billing for services, but since one of the problems involved

the validity of their election to office, the relevant activity at that meeting could only have related to individual problems of the attendees as opposed to condominium association problems (and billing procedures therefor). Since the attendees were never billed personally by Respondent, there could hardly be any misrepresentation, fraud, deceit or dishonesty.

The problem appears to have arisen from a formal resolution of the Directors of the condominium association dated April 30, 1982, reciting the hiring of Marie Hotaling and Respondent as Counsel (App - 4). Respondent was not present at that or any other director's meeting, no rate of compensation for the attorneys was specified in those minutes (App - 4) and the law is clear that in the absence of a contract fixing an amount of compensation, an attorney is entitled to receive the reasonable value of his services. 4 Fla. Jur. 2d, Attorneys at Law, 295.

After Respondent's billings were ignored by Tam O'Shanter, Respondent filed suit in the Court of Record to recover the reasonable value of his services, first discussing the problem with Marie Hotaling and receiving no objection from her to that procedure.

Contrary to the outright misrepresentation and totally false allegation contained paragraph 11 of the Complaint filed by The Florida Bar herien that Marie Hotaling did not appear in court on behalf of the clients sued by Respondent, the testimony of Judge Skaf, the Judge who heard the case and who signed the final judgment (and whose voluntary attendance at the hearing was procured by Respondent over the objections of The Florida Bar) Marie Hotaling did appear and conducted what Judge Skaf described as an aggressive cross-examination

of both Respondent and of Respondent's expert witness.

Certainly The Florida Bar had sufficient time between April 15, 1982, when it received the initial complaint form against Marie Hotaling and October 11, 1982, when Respondent was first notified of the opening of a file, within which to conduct the investigation mandated by the Integration Rule and a proper investigation would have revealed the complete falsity of that allegation.

It therefore follows that either the investigation itself was improper, or, if proper, the false allegation was made by The Florida Bar with full knowledge of its falsity for the improper purpose of misleading the Referee and this Court.

Finally, the Referee concluded in his Report that "there was overreaching" by Respondent in spite of the fact that

1. There was a complete absence of testimony at the hearing before the Referee as to the nature, amount or value of the legal services performed by Respondent for Tam O'Shanter, and

2. Judge Shaf had entered a final Judgment for a fee he determined Respondent to be entitled to and no appeal was ever taken from that Judgment, and

3. Respondent was never charged with overreaching or any violation of Fla. Bar Integr. Rule, art. XI, Rule 11.02.

Subsection (4) of that rule provides in part:

> Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is excessive, extortionate or the demand is fraudulent.

The requirements for allegations of a Complaint are discussed in The Florida Bar v. Vernell, 374 So. 2d, 473 (Fla., 1979) at pages 475 and 476. There the minimum requirement announced by the Court is the requirement both of notice (1) of the charge and (2) the facts underlying that charge. Here, neither requirement was present, and the finding contained in paragraph 13 cannot be sustained.

Further a major material conflict exists in the testimony of the witnesses testifying on behalf of The Florida Bar. Virginia Speier specifically denied ever being advised by Marie Hotaling of the date of trial of Respondent's suit for fees (Tr - 12, line 7) while Felicia Atkinson testified that Marie Hotaling did in fact advise of the date of trial, but said that their presence was not necessary (Tr - 45, lines 3-7). Although that testimony is clearly immaterial to the issues properly before the court, the existence of such a major conflict should be material in assigning what weight, if any, to afford other portions of their testimony.

Thus not only does insufficient evidence exist to justify the Referee's Report, there is a complete void of evidence as to some portions while other portions directly and irreconcilably conflict with other evidence.

Finally, the Referee is even in error as to the age of Respondent. As of August 18, 1986, Respondent was still 57 years of age. It is submitted that this error in calculating Respondent's age is simply another illustration of the lack of care exhibited by the Referee in this matter.

IV. APPROPRIATENESS OF DISCIPLINARY MEASURES RECOMMENDED BY REFEREE.

Even if Respondent is somehow determined to be guilty of misconduct in this matter, the conduct is not cumulative, and it is cumulative miscounduct of a similar nature that justifies more severe discipline. The Florida Bar v. Bern, 425 So. 2d 526, (Fla. 1982).

The previous private reprimand received by Respondent was imposed as the result of a fee dispute between Respondent and client that The Florida Bar interjected itself into in spite of the existence of civil litigation seeking only a reasonable fee and in spite of Respondent's repeated offers to arbitrate the matter. It should also be noted that the reprimand came as a result of no review being sought by either side and was not based upon any consideration by this Court of the merits of Petitioner's contentions.

Violation of DR 1-102 (A) (4), at least in Respondent's mind, is a major and substantial departure from acceptable standards, and the public branding of an attorney with that stigma should not occur without clear supporting evidence of the facts constituting such conduct. Here, not only did no such evidence exist, substantial exculpatory matter was established beyond any doubt.

What is at the most a misunderstanding over billing procedure that the client never sought to correct by any direct contact with Respondent does not justify the discipline here sought.

To the effect that the effect of discipline upon the attorney is a proper factor for consideration in determining appropriate punishment, see The Florida Bar v. Lord, 433 So 2d 983 (Fla. 1983).

In the instant case, such discipline could very well have a much greater than normal impact upon Respondent in view of the pendency of substantial claims of Respondent wherein he expects to give testimony as well as fact that Respondent would be effectively prohibited from association with any company planning a public offering, disclosure requirements being what they are in those cases.

CONCLUSION

The conduct of both The Florida Bar and the Referee clearly is in violation of the mandates of the Integration Rule requiring prompt investigation of complaints as well as the time prescribed for conducting the hearings and filing the Report of Referee. Ignoring those violations necessarily deprives the rules and the prior Order of this Court of any real effect, and just as clear violations of Disciplinary Rules by attorneys are presumably not tolerated, neither should misconduct of The Florida Bar and/or the Referee.

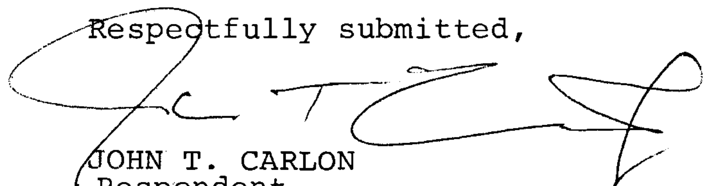
Further, no credible evidence exists of any violation of any Disciplinary Rule by Respondent in this matter. The evidence that is not in irreconcilable conflict is exculpatory as to Respondent.

It is not charged that Respondent's rendering of assistance to Maire Hotaling imposes responsibility on Respondentfor the conduct of Marie Hotaling - nor could it be. Vicarious disciplinary liability does not exist whatever The Florida Bar may contend.

Finally, the public reprimand sought to be imposed is totally inappropriate when all the circumstances are considered including the permanent effect such a measure would have on Respondent.

Respondent's Motion to Dismiss and Motion to Strike should be granted forthwith, or in the alternative Respondent should be adjudged not guilty of any ethical violation or other misconduct.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have furnished a copy hereof by mail to each of the following:

JACQUELYN PLASNER NEEDELMAN, Bar Counsel
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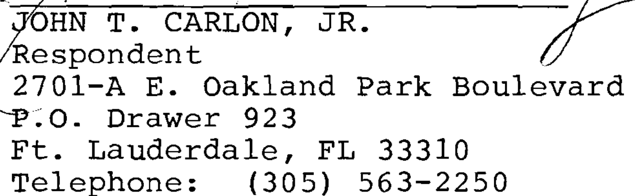
and

JOHN T. BERRY, ESQ., Staff Counsel
The Florida Bar
Tallashassee, FL 32301-8226

this 16th day of September, 1986.



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