4-16

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

J. B. HOOPER,

Respondent.
_____/

Case No: 68,954

(Florida Bar
Case No: 13D86H17)

FILED
SID J. WHITE
MAR 28 1987
CLERK, SUPREME COURT
By _____ Deputy Clerk

RESPONDENT'S INITIAL BRIEF

B. ANDERSON MITCHAM
MITCHAM, WEED, BARBAS, ALLEN & MORGAN
1509 East Eighth Avenue
Tampa, FL 33605
Tel: (813) 248-3601

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "The Bar." The Respondent, J. B. Hooper, will be referred to as the "Respondent." The Disciplinary Rules of the Code of Professional Responsibility of the Florida Bar will be referred to as the "Disciplinary Rules" or "DR." The symbol "R" will denote the record from the referee hearing of October 10, 1986. "TR(1)" will denote the transcript of proceedings from the grievance committee hearing of February 6, 1986, and "TR(2)" will denote the transcript of proceedings from the grievance committee hearing of April 10, 1986.

STATEMENT OF THE CASE AND FACTS

The Respondent was retained by a Dr. S. Victor Kassels, a medical doctor, on or about September 21, 1983, following the withdrawal of prior counsel, to represent him in a partition action filed by a former wife. Case No. 82-17335, Thirteenth Judicial Circuit. The subject property was approximately thirty-six acres in Northwest Hillsborough County, which had been purchased by Dr. Kassels and his former wife during their first of two marriages to each other. TR(1)-10-12, R-202.

The Respondent represented Dr. Kassels for approximately seventeen months until late March 1985. As per the fee arrangement, the Respondent billed Dr. Kassels at an hourly rate of $85.00. Dr. Kassels paid the Respondent a retainer of $400.00 within a month of his engagement, TR(1)-9, and was billed an additional $1,906.70 for fees and costs -- none of the latter of which was ever paid. Based upon the refusal of the client to pay any additional sums over a period of one and one-half years, the Respondent filed and had heard an appropriate Motion to Withdraw, which was granted by the Circuit Court. A complaint was filed by Dr. Kassels with The Florida Bar based upon his allegation that the fee was excessive. The Grievance Committee did not find the fee unreasonable so that question was not an issue before the Referee.

The Respondent voluntarily turned over his entire case file for review at the request of Mr. Bob Bolt, the grievance committee member assigned. It was during this review that Mr. Bolt found and brought to the attention of the committee the subject matter of this proceeding, i.e, the fact that the Respondent had filed a "Claim of Lien" on the subject property following the refusal of Dr. Kassels to pay a reasonable attorney's fee after the withdrawal by the Respondent. TR(1)-17-19.

A Grievance Committee held a hearing on February 6, 1986, and therein took testimony from the Respondent, Dr. Kassels, and former opposing counsel for the former wife of Dr. Kassels, Mr. A. J. Musial. Being unable to reach a decision on whether the Claim of Lien was appropriate, the Committee, i.e., the Bar's "grand jury" referred the matter back to the Bar for instructions. TR(1). (Note: One must surely question the purpose of grievance committees if they must look to the Bar prosecutors for direction as to what constitutes wrongdoing.) At a subsequent meeting two months later on April 10, 1986, and following an opinion by Bar counsel that such action by the Respondent was inappropriate, the Committee in a split decision voted to find probable cause. TR(2).

In this regard, it is very important to note the following:

1. Neither Dr. Kassels nor anyone else has ever filed any complaint regarding the filing of the Claim of Lien by the Respondent.

2. No "Notice of Contest of Lien" was ever filed by Dr. Kassels. R-216.

3. The Respondent made no attempt to foreclose the lien. R-216.

4. The Claim of Lien became void by operation of law after one year pursuant to §713.22, Florida Statutes (1983). R-215, R-242.

5. The Respondent has never been paid by his former client.

6. Testimony by the Respondent's witnesses as to the legality of the lien has never been controverted by Bar prosecutors.

7. In fact, absolutely no evidence of wrongdoing by the Respondent has ever been presented by Bar prosecutors other than the bare allegation itself.

The matter was assigned by this Court to Gerald J. O'Brien, Circuit Judge, for formal hearing. The Respondent filed a Motion to Disqualify. The Referee denied the motion, proceeded with the hearing, freely assumed the interrogation of witnesses, found the Respondent guilty of multiple disciplinary rule violations and recommended to this

Court that the Respondent be suspended for one year. All of this occurred even though the Bar has never produced even so much as a single witness, a single case, a single statutory rule or regulation or even a minute piece of legislative history which would tend to prove that the filing of a Claim of Lien for attorneys fees under the facts of this case would even remotely approach, much less rise to, the level of dishonesty, fraud, deceit or misprepresentation alleged by the Bar or reflect on this attorney's fitness to practice law.

SUMMARY OF ARGUMENT

The primary purpose of discipline of attorneys is the protection of the public, and the administration of justice, as well as protection of the legal profession through the discipline of members of the Bar. Rule 11.02, Integration Rule of the Florida Bar.

The Respondent seeks review of the findings by the Referee and the recommended discipline of a one year suspension in that both are erroneous, unjustified and totally unsupported by the evidence. The charges against the Respondent are not based upon any misdeeds involving client matters, trust fund violations, criminal conduct, allegations of misconduct by any trial court or a complaint by any citizen of wrongdoing except that of a former client who has successfully utilized the Bar to shield him from paying an attorney's fee found to be reasonable by the grievance committee. To the contrary, the Respondent utilized in good faith a method which he believed was appropriate in an attempt to collect his fee. To this date, the Bar has failed to show that such action was illegal, improper, unethical, immoral or unjust.

Even if the Bar had successfully shown through competent testimony or evidence that the action by the Respondent was improper, (which it clearly hasn't since no evidence was produced to support its allegations except the bare allegation itself), the recommendation by the Referee of a one year suspension is clearly not warranted and reflects the Referee's strong prejudices against the Respondent.

The Respondent presented unrebutted testimony showing that the mechanic's lien law is a complex and prolix piece of legislation which is completely understood by few attorneys. R-238. The Bar, over the objection of Respondent, took portions of the statute out of context and utilized poor photocopies of other sections as its only evidence during the referee's hearing, R-219, 226, without <u>any</u> corroborating evidence,

to support the Referee's finding that "such statutory provision clearly does not apply to attorneys." Report of Referee. (Emphasis added.) If the law is so clear on this single point, one must question why the Grievance Committee sought the opinion of the local bar office prior to its **split decision** finding probable cause two months after the grievance committee hearing. TR(2).

It should be quite obvious that none of this has very much to do with ferreting out immoral conduct among our ranks. What it does have to do with is prosecutorial abuse and judicial prejudices so strong that they cannot be overlooked as reflected by the referee's recommended discipline, by his refusal to remove himself and by his conduct during the referee's hearing.

How the prosecution of this case against the Respondent satisfies the purposes set out in Rule 11.02 above and the related Code of Professional Responsibility is beyond comprehension. It would seem that the power of the Bar to bring a cloud of uncertainty upon the privilege of one to practice law, and the resulting costs to the attorney of time and money, would be better utilized where there is at least a thread of evidence of wrongdoing. Here, there is not even that thread.

POINT I

"WHETHER THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED RULES 1-102(A)(4), 1-102(A)(5) and 1-102(A)(6) OF THE DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR."

ARGUMENT

The Respondent is accused of "conduct involving dishonesty, fraud, deceit or misrepresentation," [DR 1-102(A)(4)], but the Bar has failed to produce a single witness or offer the first piece of evidence supporting such allegations. Nowhere is there offered a word of testimony, an ordinance, a statute or any related proof which would suggest that the filing of a Claim of Lien against property which had been enhanced by a related partition action somehow involves dishonesty, fraud, deceit, or misrepresentation.

The Respondent is accused of "conduct prejudicial to the administration of justice," [DR 1-102(A)(5)], but the Bar has not pointed to even <u>one</u> individual or any entity which has somehow been prejudiced by the actions of the Respondent. Certainly, Dr. Kassels was not prejudiced for he has successfully utilized the grievance process of The Florida Bar to avoid paying a reasonable attorney's fee. As Mr. Bolt stated before the grievnce committee, "Dr. Kassels told me that he did not want to hire an attorney to pursue the fee dispute, instead pursuing it before this -- in this forum." TR(1)-20. It is clear that Dr. Kassels never intended to pay for the eighteen months of representation in what was characterized by opposing counsel as "a very difficult case," R-214, and has succesfully utilized the Bar grievance process to avoid that obligation.

The Respondent is accused of "conduct adversely reflecting on his fitness to practice law," [DR 1-102(A)(6)], for using what he

believed in good faith was a proper tool to assist in the collection of a just and due debt -- a fee for legal services earned over a period of almost eighteen months. To suggest that the Respondent's good faith actions somehow adversely reflected upon his fitness to practice law is extremely bizarre.

Among those privileges long recognized at common law as essential to the orderly pursuit of happiness is the right to follow a chosen profession, Greene v. McElroy, 360 U.S. 474, including the practice of law. Schware v. Board of Bar Examiners, 353 U.S. at 238.

It may be presumed that since the Bar has a large staff of lawyers who specialize in the business of prosecuting other lawyers, it could have produced just one piece of evidence which supported its accusations. This, it clearly failed to do. Even the most liberal reading of the Code of Professional Conduct and its underlying history and related case law cannot support the conclusions reached by the Bar and the Referee. What is missing? Proof through properly documented evidence of wrongdoing. In its place, the Bar attempts to use the disciplinary rules as a catch-all to remove the Respondent's constitutional privilege when the alleged wrongdoing will not fit elsewhere.

In this regard, the Respondent would submit that these rules should not be used promiscuously as a convenient tool for lawyer discipline where the facts do not fit within the rubric of other specific ethical and disciplinary rules. Simply alleging bare facts is not enough. The facts must be proven as in any other legal proceeding. The quantum of proof necessary is more than the mere "preponderance of the evidence." It must be clear and convincing, The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973), and free from doubt. Charlton v. F.T.C., 543 F.2d 903. Such is the touchstone of judicial decisions from across

the nation. Id at 907. "Charges of unprofessional conduct are not intricate or difficult to fathom." The Florida Bar v. Murrell, 122 So.2d 169 (Fla. 1960). Once a proceeding is instituted the lawyer's professional reputation is shadowed and is in danger of becoming permanently impaired. Therefore, if the charges are found to be without merit, the lawyer should be exonerated. Id. at 174. For as clearly stated in Bennett, "There must be **proof of a breach of the Code of Professional Conduct** before discipline will result." The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973). (Emphasis added.)

More specifically then, the question before the grievance committee, the Referee and now this Court is as follows: **Was it proper conduct for the Respondent to file a Claim of Lien for legal fees against real property the value of which was enhanced by his services?** This would certainly appear to be an appropriate issue which might come on before any circuit civil court in Florida, but is hardly one which belongs within the arena of attorney discipline.

The Respondent would contend that his conduct was proper for several reasons. **First** of all, the Code is clear on one very important point. "[I]t is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens." EC 5-7, Code of Professional Responsibility. The Code further states that a lawyer may "Acquire a lien granted by law to secure his fee or expenses." DR 5-103(A)(1), Code of Professional Responsibility. **Secondly,** there is certainly no statute or ordinance prohibiting such activity where the value of the real property was "enhanced" as in this case. **Thirdly,** two very credible expert witnesses appeared on behalf of the Respondent and testified that in their opinion there was no prohibition against the filing of a claim of lien in this case. R-212,

R-218, R-241. Both witnesses have several years of experience in the area of real property law and were extremely well qualified to testify. One witness, Mr. Marshall Deason, is a former president of a title company, has written over 400 million dollars of title insurance, is designated in real property law, has taught real estate courses, has written articles for The Florida Bar Journal, and is licensed to practice in another State and the District of Columbia. R-235-237. The other witness, Mr. A. J. Musial, was opposing counsel in the partition action with extensive real estate experience as well. R-200. Although the Bar offered no rebuttal testimony,or made any attempt to impeach Rspondent's witnesses, the Referee improperly rejected the testimony of both of these individuals in reaching his conclusions in this matter. **Finally,** not only was the grievance committee unable to reach a decision on the question without Bar counsel input, but the Bar has yet to present any evidence to support its allegation of wrongdoing and totally failed to rebut <u>any</u> testimony or evidence presented by the Respondent.

It is certainly undisputed that the Florida Lien law is a complex and prolix piece of legislation. This Court, along with the other appellate courts of our state, has ruled on literally hundreds of cases brought under §713 of the Florida Statutes. Therefore, the question which logically follows is whether the lien which the Respondent filed was one granted by law. The answer to this question is found in the statutes and the underlying case law. To state as the Referee did in his report that, "The Respondent chose a Mechanic's Lien to force the payment of attorney fees, when such statutory provision <u>clearly</u> does not apply to attorneys," is not only a gross oversimplification of the statute but a misstatement of what conduct attorneys should avoid. (Emphasis added.) Specifically, §713.30 does not bar other existing

remedies and even though not among those professionals listed under §713.03, this lien would certainly have been appropriate to establish an equitable lien. R-225. Why? Because the Respondent by his services enhanced the value of the real property through improved marketablity. Greenblatt v. Goldin, 94 So.2d 355 (Fla.1957), R-206.

Therefore, even if the Respondent were unable to prevail in his contention that he had a right to maintain a regular mechanic's lien action because the statute does not specifically name attorneys under §713.03, there should be no question but of his right as an individual furnishing services related to the enhancement of realty to seek an equitable lien thereon as security for the debt. O. H. Thomson Builders' Supplies, Inc. v. Goodwin, 153 So.2nd 797 (1st DCA 1963). R-239.

Our courts have often stated, the right to impress and foreclose an equitable lien is not limited to just a particular set of circumstances. It may arise from any combination of facts and circumstances. Equity may declare the existence of an equitable lien upon equating basic concepts of that which is right and justice as applied to the relations of the parties and the circumstances of their dealings in the particular case. Crane v. Fine, 221 So.2d 145 (Fla.1969), as cited in 36 Fla.Jur.2d, §84, Mechanics' Liens. It is a remedial tool used by chancery to prevent inequity or unjust enrichment of one party as against another. Green v. Putnam, 93 So.2d 378 (Fla.1957). Mechanic's Lien law must be so construed and applied as to reasonably and fairly carry out its remedial intent. Warren v. Bill Ray Construction, 269 So.2d 25 (App.1972). Mechanic's lien exists for the benefit of those "enhancing" realty and must be construed according to general equitable

principles to best protect the interest of that class. Ceco v. Goldberg, 219 So.2d 475 (4th DCA 1969).

The Bar would suggest that because the statute does not list attorneys specifically, they must, therefore, be excluded and to argue otherwise is unethical. Nonsense! Clearly, an attorney's "conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law." EC 7-4, Code of Professional Responsibility. Having enhanced the value of the real property through the partition action, the Respondent certainly had a basis for a good faith argument for the right to impress a lien for his services upon the property. The Bar has failed to show otherwise.

For example, the 1967 Statute did not specifically mention "sub-contractors" as a class of potential lienors. Did that mean that sub-contractors were excluded when they "enhanced" real property? Did that mean that the attorneys which put forth the argument to include sub-contractors within the meaning of the statute were subject to discipline? The answer is obviously a common sense **no** as reflected in Ceco v. Goldberg. The Court stated that the act must be construed according to equitable principles to protect the interest of those "enhancing" realty, and further, that the statute must be construed "as a whole entity, not by its separate parts, in order to arrive at a construction which avoids illogical results." Id. Having enhanced the value of the real property through the partition action, the Respondent certainly had a right to impress a lien for his services on that property when his former client made it clear that he did not intend to pay for services rendered.

The Referee's "monday morning quarterbacking" in this matter is misplaced. He states in his report that "Respondent made no attempt to seek a retaining or charging lien in reference to his fee." While this is true, it must also be stated that since the pending Circuit Court case was to be settled between the parties, R-203-207, the charging lien would have been of little value. The Referee even suggests that the Respondent "can sue his client." R-258. Would not the Bar and the Referee have then claimed an ethical violation of EC 2-23, Code of Professional Responsibility, which advises against suing a client except in certain limited circumstances?

The Referee also states that Respondent did not seek attorney fees from the presiding judge prior to his withdrawal. Unfortunately, the Referee failed to cite any rule or case allowing for such actions. The Respondent knows of none. In fact, as stated above, not only did the Referee fail to cite any rule or case supporting his finding of wrongdoing, but improperly misstated the law to this Court when he stated that the selection of a mechanic's lien to collect attorney's fees "clearly does not apply to attorneys." If the law is so "clear," why then did the Referee make the following personal inquiry during the several times when he asssumed the interrogation of witnesses?

THE COURT: How does an attorney normally protect himself where he may have a dispute with his client over the amount of his fee, and he is in court in litigation? R-227.

THE COURT: What would happen during that "one" year? [The witness just having testified that after one year, the lien would have become a nullity in this case since no action to foreclose the lien was ever initiated.] R-242.

THE COURT: What does that [i.e., the filing of a mechanic's lien] do at a closing if there is a Mechanic's Lien on file? R-244.

And finally, during one period of interrogation, the Referee asks: "[I]f there is a single case in the State of Florida that permits

a lawyer to file under the Mechanic's Lien where his legal fee is concerned." R-227. Does the Bar now have the luxury of joining with the Referee in the examination of the Respondent's witnesses in order to prove a case otherwise totally without substance? It would appear that we now have the unusual circumstances of a Referee making inquiry to Respondent's expert witnesses on the exact same issues for which he has been appointed as fact-finder and then disregarding all testimony which supports the absence of wrong doing. While such actions by the Referee are reflected throughout this case, (as discussed in the next section), they can only be characterized as improper, unfair and unjust.

POINT II

"WHETHER THE REFEREE IN THIS MATTER ACTED IMPROPERLY AND IN VIOLATION OF THE CODE OF JUDICIAL CONDUCT IN REFUSING TO REMOVE HIMSELF FROM THESE PROCEEDINGS AND THEN EXPRESSING HIS PREJUDICIAL PROPENSITIES THROUGH HIS CONDUCT AT THE HEARING AND THE RECOMMENDATIONS CONTAINED IN HIS REPORT."

ARGUMENT

"An independent and honorable judiciary is indispensable to justice in our society. . . .The provisions of this Code should be construed and applied to further that objective." Code of Judicial Conduct, Canon 1.

"A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where he has a personal bias or prejudice concerning a party. . . ." Code of Judicial Conduct, Canon 3C(1)(a).

"If the motion [to disqualify] is legally sufficient, the judge shall enter an order of disqualification and proceed no further in the action." Fla.R.Civ.P. 1.432(d).

"Upon motion of either party, a referee may be disqualified from service in the same manner and to the same extent that a trial judge may be disqualified under existing law from acting in a judicial capacity." Rule 11.06(5)(h), Integration Rule of the Florida Bar.

The Code of Judicial Conduct, the Rules of Civil Procedure and the Integration Rule regarding the disqualification of a judge are further supported by the case law. The Respondent will not attempt to set out here more than a couple of examples from dozens of cases over the years on this point. From Brown v. Dewell, 131 Fla. 566, 179 So. 695 (1938), which states that allegations of fact in affidavit for disqualification of trial judge for prejudice which are not frivolous or fanciful are sufficient to support motion to disqualify, to Mangina v. Cornelius, 462 So.2d 602 (Fla. 5th DCA 1985), which reaffirms that where the motion to disqualify a judge is legally sufficient, the judge is not to pass on truth of facts alleged but is to enter an order of disqualification.

In an unrelated proceeding now pending before this Court, the Respondent pointed to evidence of improper conduct by the Bar including

but not limited to ex parte communications with the Referee and the use of perjured testimony. Based upon the foregoing, the Respondent moved to disqualify the Referee from these proceedings. App.1. The Referee responded by denying the motion. App.2.

ITEM: The Referee on several occasions assumed the examination of witnesses with his own leading questions, R-227-232, R-251-259, even interrupting counsel for Respondent during direct examination of his own witnesses. R-242-246. The whole line of questions from the Referee suggests that either (a) he does not know whether the action by the Respondent in filing a Claim of Lien is improper conduct [in which case it would be unfair to suggest that the Respondent should have known that such conduct was improper, if in fact, it was], or (b) he knows that the conduct was not improper but asked numerous questions to justify the decision of wrongdoing against the Respondent already reached in his own mind.

ITEM: The Referee, without any supporting evidence of any kind, and in spite of the Respondent's own expert witnesses' testimony to the contrary, found the Respondent guilty of misconduct. As a finder of fact, the Referee's decision not to accept any of the testimony by Respondent's witnesses should be questioned by this Court. Although totally lacking in substance, the report by the Referee defies logic and reflects the Referee's extreme prejudices toward the Respondent by the "white-out" of the recommendation in the Bar's proposed finding, App.3, and the insertion of his own recommendation of a one year suspension. App.4.

ITEM: Although the Mechanic's Lien statute is prolix and complicated, R-238, and must be construed as a whole entity and not by its separate parts, Ceco Corp. v. Goldberg, 219 So.2d. 475 (1969), the

Referee nevertheless overruled Respondent's objection and restricted testimony by Respondent's own witness to one small section of the statute in response to the question of "whether or not an attorney may file a Mechanic's Lien in reference to a fee?" R-219. Such action by the Referee was not only highly prejudicial to the Respondent, but again reflected the attitude of the Referee as one fact-finder who was not in the least interested in finding the facts.

By his assumption of the interrogation of witnesses with his own brand of leading questions, his attitude toward the Respondent and his counsel and his recommendation of discipline, the Referee in this matter has reflected a extreme degree of prejudice not heretofore witnessed. Although totally lacking in evidence, he nevertheless found the Respondent guilty of violating three disciplinary rules, adopted the Bar's findings, "whited-out" the Bar's recommended discipline and entered his own unsupported, erroneous and unjustified recommendation to this Court of a one year suspension without citing a single rule, law, ordinance or statute which had been violated or even referencing a single case to support his finding.

The Referee's conduct in this matter has made a mockery of the term "equal justice under law." By his refusal to remove himself from these proceedings, he has accomplished just what Respondent feared when attempting to have the Referee recuse himself. This Court has stated on several occasions that it will demand responsible prosecution of attorneys, and further, that while the Bar consistently demands that attorneys turn "square corners" in the conduct of their affairs, that an accused attorney has a right to demand no less of the Bar. The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978). This same rule should apply to those who sit in judgment of other lawyers.

Respectively submitted this 22nd day of March, 1987.

/s/

B. ANDERSON MITCHAM
MITCHAM, WEED, BARBAS, ALLEN & MORGAN
1509 East Eighth Avenue
Tampa, Florida 33605
(813) 248-3601

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing with seven copies has been furnished by Federal Express to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Floridal 32301, with copies by U. S. Mail to David R. Ristoff, Esquire, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, and to John T. Berry, Esquire, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226 this 22nd day of March, 1987.

/s/

B. ANDERSON MITCHAM