IN THE SUPREME COURT OF FLORIDA
(Before a Referee)
CASE NOS: 73,629 and 74,398

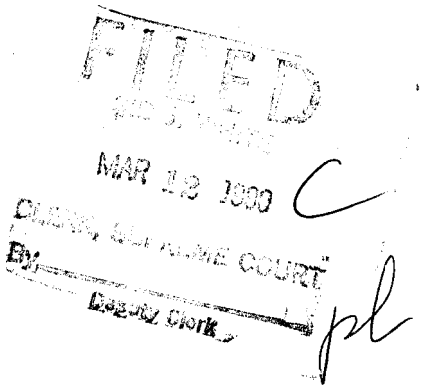
THE FLORIDA BAR,

Complainant,

vs

WALTER B. DUNAGAN,

Respondent



INITIAL BRIEF

Submitted by:

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Respondent
Fla. Bar #0130531

All references to Respondent's Appendix shall be designated with the prefix "**A**"; all references to the Findings shall be designated with the prefix "**F**"; and all references to the transcript of the proceedings before the Referee shall be designated with the prefix "**TR**"; all reference to the transcript of the Grievance Committee shall be designated with the prefix "TG", all references to the depositions had in this cause shall be designated with the prefix "**TD**"; all reference to the transcript of the Trial shall be designated with the prefix "T".

Respondent below, WALTER B. DUNAGAN, will be referred to as Petitioner herein.

The Florida Bar, will be referred to as "**Bar**".

Petitioner is unable to comply with the Rules Regulating Florida Bar, Rule 3-7.6(f) and Fla. R. App. P. 9.210(b)(3), completely, inasmuch as there is no index on appeal, nor delineation of the "record" transmitted by the Referee. The Supreme Court's docket sheet is contained in Petitioner's Appendix (A-20).

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STATEMENT OF THE CASE

An Ethics and Discipline Department Complaint form was filed by FRANK ANTALEK on February 12, 1988. A letter response only was requested. Because of continued complaint by ANTALEH, the matter was referred to Grievance. On October 4, 1988, demand was made on the Bar for required disclosure of the nature of the conduct being investigated and the rules being considered with respect thereto. (A-1). The Bar responded on October 17, 1988 adding a new charge (which later became Count III as to multiple representation and conflict of interest). (A-2). The Grievance hearing was held on November 18, 1988. Probable cause was found on November 21, 1988 (A-3). The finding included a charge as to interest which had not been previously mentioned.

A Formal Complaint was filed on January 31, 1989 (A-4). The Complaint was in three (3) counts. Count I for lack of communication (no/or inadequate bills for services rendered); Count II for incorrect addition of interest charges; and Count III for multiple representation and conflict of interest in attending a loan closing at a bank at which the client was borrowing money. Petitioner filed various motions to dismiss, strike, change venue and for disqualification, which were uniformly denied. Petitioner attempted discovery, and was allowed to discover virtually only those items that the Bar voluntarily provided. All proceedings were had in Duval County, except for trial.

One Motion to Dismiss filed on February 21, 1989, mentioned

that Count II was illegal in failing to comply with the rules as to notice (and the demand for notice, A-1). The Bar responded by initiating new grievance proceedings with respect thereto, without dismissing Count 11. In the new proceedings, the same grievance panel sat and the sole testimony produced by the Bar was copies of the transcript of the prior proceeding. Bar Counsel solemnly asked each panel member if they could consider the "new" allegations without consideration of the old testimony, proof and proceedings, and each assured Bar Counsel they would not consider the only evidence presented for their consideration. They found probable cause on that "evidence" having no prejudgment on the matter they previously adjudged, which was then pending.

Incidentally it was noted by Petitioner's request for admissions dated May 17, 1989 that the Florida Bar was dissolved on November 10, 1983. The Florida Bar was registered on April 6, 1989 as an "arm" (A-5).

Petitioner's Answer and Affirmative Defenses were filed on July 21, 1989. On May 25, 1989, Petitioner filed a Counterclaim and Petition to Set Aside Previous Convictions. The latter were denied by the Referee; and though not before the Supreme Court, by Order of July 5, 1989, the Supreme Court denied the same. Petitioner moved for a rehearing of the Supreme Court's Order.

On April 7, 1989 by response to request for admissions #31,

the Bar admitted that Count I of the Bar's Complaint was groundless. The Count was not dropped however and continued through trial and the closing argument of the Bar conceded Count I was unsubstantiated.

On May 18, 1989, Petitioner moved the Referee to enjoin or prohibit the institution of grievance proceedings against Petitioner as to charges which were already pending before the Referee.

On August 3, 1989 Petitioner moved to strike the Bar's reply to Affirmative Defenses.

On August 4, 1989, Petitioner moved for Summary Judgment. On September 28, 1989, Petitioner made a further Motion to Dismiss.

"Final Hearing" or trial was had on October 6, 1989. On November 21, 1989, Petitioner made a further Motion to Dismiss, and, on November 30, 1989, a memorandum of fact.

On November 7, 1989, the Referee reached her decision on all counts prior to preparation of transcript (A-6). Hearing as to the appropriate level of discipline was had in Duval County on December 7, 1989.

An Affidavit of costs was presented by the bar on December 15, 1989. There was no hearing as to costs. The Report of Referee was dated December 20, 1989.

II. STATEMENT OF FACT AS TO COUNT I

The Antaleks had been clients of Petitioner for about 14 years (F-1).

In order not be guilty of Count I, the Referee had to find

that Petitioner had sent the Antaleks the bill of September 23, 1986 on the date stated on the bill - otherwise, Petitioner would be guilty of a lack of communication. (A-7). But no other conclusion is possible. FRANK ANTALEK testifies positively that he received the bill of September 23, 1986 prior to the closing of October 20, 1986. (T 123 L 22-25 to T 124 L 18; A-8).

The cover letter to the bills is self validating in that the letter requests that the client secure a loan to take care of their multiple financial woes. The client had been previously advised to do so in conference and did so on September 20, 1986. (T 130 L 1-22; T 58 L 1-25).

The client cannot claim that the bill listing "formation of corporation $1,485.39" misled him in any fashion in that the ledgers were attached; that was a cumulative bill dating back to 1982; and the same amount had been previously billed him with correct labelling. Again, the Referee did find that there was correct and adequate communication to the client.

Hearing later that the clients had secured a loan from a source recommended, then it is only natural that the attorney would expect that his next telephone call would be from the bank or the client bringing money sufficient to take care of the concerns addressed in the letter, to which the client responded.

The response of FRANK ANTALEK to the billing of September 23,

1986 was made by his letter of November 4/6, 1986 (F-5, A-9). The letter says unmistakably "I have completed the review of your statement of September 23, 1986...". The letter does not say "As you well know we have been disputing this charge for some time". There is no allegation of prior dispute or misconduct. Indeed, my bill of September 23, 1986 is characterized as containing "unintentional errors."

It is the case that the one bill mislabeled formation of corporations is the sole item he attacks as incorrect. (FD p 40 L 14 to p 42 L 2; A 10). There is a great deal of profanity and diatribe as to various other matters, but nothing of substance. His bill back to me dated November 4, 1986 (A-11) lists only the "corporate" bill as incorrect - meaning that he has paid little or no attention to my bill since 1982.

The Bar's investigator and the clients bookkeeper all found Petitioner's records to be in order. The Referee is quite correct in Finding #8 that the ANTALEKS had a history of problems in keeping their bills current. A great number of cases were submitted to the referee where the ANTALEKS were claiming wrongful billing and I assisted them in paying what they justly owed.

The Bar at no time has suggested that the sum of $5,240.03 set forth in the letter of September 23, 1986 and prior bills was not just due and owing.

The "surprise and anger" of the ANTALEKS was such that they

took no action against anyone for approximately 2 years. FRANK ANTALEK'S letter of July 20, 1987 does suggest that the Bar encourages boldness in the presentation of false claims. (A-12).

As to Count I, the Referee recommends a finding of not guilty and no discipline but all costs are assessed against Petitioner.

It must be noted that the client stated positively that "we would not be here today" if he had understood the bills. (T 125 L 14-18). And the Bar agrees. (T 256 L 1-9).

Counts II and III were super added by the Bar as make-weights and after-thoughts to insure conviction on some matter, regardless of what is in controversy.

As To COUNT II

On October 4, 1988, Petitioner requested that he be advised of the nature of the conduct investigated and the rules involved. (A-1). The response of the Bar of October 17, 1988 mentioned nothing about interest. (A-2).

The Grievance Committee found an incorrect computation of interest on November 21, 1988. Petitioner objected to this in his Motion to Dismiss and Strike, and Strike as Sham or for more definite statement, dated February 21, 1989.

The response of the Bar was to file a new Grievance without dismissing the pending Count. Petitioner moved for injunction and prohibition against the new grievance and the same was denied.

The same grievance panel was presented with the transcript of prior testimony, no live testimony and no new testimony. Each member of the panel was asked if he could consider the matter without reference to the prior proceedings and all assured that they could. A new grievance was issued based wholly on the old testimony and the Bar continued to prosecute both cases til trial.

The Referee in the first full sentence of the last page of her report notes that "...(o)n the issue of interest, Mr. Dunagan at the end of an all day hearing admitted he incorrectly calculated interest and admitted he was guilty."

It is the case that the Bar and Petitioner admitted the relevance of the Fields case. The Florida Bar v Fields, **482** So **2d 1354** (Fla **86).** There and in the present case the bookkeeper added interest to a previous balance which results in an incorrect rate of interest, where interest is included in the previous balance. The error in math is facially apparent where interest is displayed as a separate charge and communicated to the client, as was the case here, as the Referee found. In the Fields case, there were aggravating factors. In the present case there are mitigating factors.

The Bar admitted that the amount involved was de minimis. (T **256 L 16-18).** The client characterizes the amount as being petty (T **146** L **17** to T **147** L **2;** T **126 L 15** to T **127** L **3). No** interest was normally charged (T **254** L **5-10).** The time expended for **the** client was far greater than that charged. (ibid). The ledgers introduced into evidence go back to **1982,** so that any claim would be waived, barred or estopped by time. The relationship

between the parties, who are both merchants, goes back to **1972.** The ANTALEKS were often delinquent **(F-20).**

As To COUNT III

The ANTALEKS had a history of problems in keeping many of their accounts and were often behind in paying Petitioner's bills **(F-8 & 20).** In view of the multiple expensive litigation, the ANTALEKS were experiencing, Petitioner recommended a loan to regularize their affairs and to take care of legal fees and costs past, present and future, attaching itemized bills and ledgers in the letter of September **23, 1986. (A-7).** Pursuant to the prior conference between Petitioner and his clients, the clients had already sought the financial aid needed and made written application for a loan on September **20, 1986.** (T **58 L 15-17,** T **130 L 11-14).**

The loan is totally with a third person: the ANTALEKS and MONEYTREE. (T **61 19-17.)** The ANTALEKS never employ an attorney in securing a loan from a bank or other third person. (T **78** L **20** - T **79** L 13 - T **154** L **12-24).** Petitioner was not asked by the ANTALEKS to attend the closing. (T **80** L **25** - T **81** L 13). Petitioner's Secretary was asked by the closing agent on Friday whether Petitioner would be present at the closing on Monday. **(A-**13).

The ANTALEKS admit that they intended to pay Petitioner the

money owed by the ANTALEKS to the Petitioner out of the closing proceeds. (T **183** L **10-17).** It is the case that Petitioner represented the ANTALEKS in suggesting to them the matters set forth in the letter of September **23, 1986,** and that the ANTALEKS responded thereto. (T **184** L 15 **- 22).** **As** to **DR5 - 101(A)** the client received full disclosure on September **23, 1986** with the letter and bills of that date and the client proceeded independently and without representation to secure a loan from third persons - signing an agreement with the lending institution that their fee was owed if funds were secured and the borrower backed out without cause. When the ANTALEKS borrowed money from the third person, the ANTALEKS understood, and the Bank, and closing agent understood that not a dime of the **$55,000.00** borrowed could be disbursedto anyone without express authorization fromthe ANTALEKS. (T **152** L **8 - 23** et seq; T **39** L **12** - T **4** L **13;** T **111 L 20** - T **112** L **12).** The ANTALEKS did directly or indirectly secure payoffs and deeds from Petitioner but he was not employed for the loan. The ANTALEKS relied upon themselves and the bank and the closing agent for the loan. No attorney was or ever would be hired by the ANTALEKS for a loan. The closing agent called Friday before the closing on Monday to **ask** whether Petitioner was going to attend the closing (T 107 L **12 - 25).** The ANTALEKS employed the Bank and the title company for the loan. The Petitioner was employed only to get a payoff on suits he was handling and to assist in getting

a deed and payoff which the Bank had tried to secure by itself (- Petitioner having nothing to do with the closing) but was having trouble securing and thought an attorney might have more success; and the Bank indicated that the client would call to give the attorney specific authorization for each act he was requested to perform. (As to the litigation, securing a settlement figure or payoff figure would be part of the ordinary handling of a case). (A-14). DR5 -104(A) requires that "(a) lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client had consented after full disclosure." These elements are neither pled nor proved; and the arguments above apply equally here. The client entered into a loan transaction with a bank, without an attorney, as the client never uses an attorney for loans. In this connection the client signed a loan agreement with the Bank providing for a $5,000.00 forfeiture if the client wrongfully failed to close after the loan was secured. The Bank and its closing agent were thus responsible for securing all payoffs and preparing all documents for closing, including the closing statement. The Bank did use the clients attorney to assist it in securing a couple of payoffs and a deed. When the Bank or its agent, the title company called the attorney and asked the

attorney for his fee or payoff the attorney correctly states his fee in accordance with the letter of September 23, 1986. The Bank and the closing agent had the total responsibility to secure authorization from the ANTALEKS as to any amount to be paid to the attorney for any reason. The Bank and closing agent had a special responsibilitywhere the amount was for $5,000.00 and was obviously not a fee for attending a loan closing or preparing a deed and securing a couple of payoffs. When the Bank or its agent calls the first mortgage holder, the hospital, or a doctor or opposing attorneys in pending litigation or the attorney representing the borrower in pending litigation and the bank or its closing agent asks "What is your fee? What is your payoff? What is the balance due you?" Then, each and all may state the amount due without calling the client to see if the bank has any business in trying to pay them off. An attorney does not have to be suspicious when someone tries to pay his bill; nor is an attorney required to investigate to determine whether a client is paying his bill fully, voluntarily and with control of all his faculties. The loan transaction between the Bank and the closing agent and the borrower was personal, confidential and fiduciary. The Bank had no business calling Petitioner to ask him if he wished to attend or wished to be paid, unless the client has authorized this contact. The borrower does not have to tell the Bank not to call the attorney

or pay the attorney, The Bank may not call the attorney or pay the attorney without the clients authorization. Without a transaction, it is totally hypothetical speculation as to whether the attorney and client have differing interest. The letter of September **23, 1986** with attached bills does show that the attorney has advanced thousand of dollars of costs for his client; has not been paid; and will not spend more of his money without reimbursement. It is to the clients interest to secure a loan to avoid foreclosure and prosecute to a successful conclusion, suits that he expects will yield him thousands of dollars; and, in the criminal suit, will save him money and prevent his incarceration. The client did think it was to his interest to secure a loan and pay his attorney some money; and the client expressly so testifies, saying that he intended to pay his attorney some **$1,500.00** which is all he says he thought he owed despite the fact that the letter of September **23, 1986** that says "get a loan" also says "**you** owe over **$5,000.00.**" Since the Court has held and the ANTALEKS admit the letter of September **23, 1986,** then if it is to the interest of the client to try to wheedle the attorney into accepting less than **$5,000.00** all he had to do was to tell the Bank that his attorney would not attend the closing. But the Bank can not invite attorneys and other persons, gratuitously, and on their own initiative to attend closing. And, if someone is at a closing who should not be there he would be asked to leave. The client is interested in doing exactly what the letter of September **23, 1986** caused him to do, and

exactly what he did. After the Bank and the closing agent told the client of the inclusion of the attorneys fee the client consented to payment of the same after full disclosure. "There is no doubt in my mind it was not a forced closing. I wouldn't be a party to that" (T 30 L 21 and 22). "The ANTALEKS have to agree to it. It's their money." (T 37 L 6 and 7; see T 35 L 2 - T 37 L 7). If there had been any question about the charge to any substantial extent the closing would not have taken place. (T 44 L 7 - T 46 L 10; T 115 L 2 - 17). The report of Charles Lee indicates that any dissatisfaction of the ANTALEKS would be highly voluble. The report of the Bars investigator does not show that Petitioner had anything to do with the loan transaction. (A-15). It is of course impossible for an attorney to handle a loan transaction (- which is rarely done by anyone and never done by the ANTALEKS) unless the attorney is told to whom he is to make disbursements; and Petitioner never received any such instructions. (Deposition of FRANK ANTALEK p27 L 12 - p28 L 18). DR5 -105A adds nothing to what is said previously. The loan closed October 20, 1986. The Bar investigator found nothing wrong with the closing. The Bar added that count after Petitioner demanded notice as to the nature of the conduct being investigated and the rules involved. Trial was had on October 6, 1989. In that great period of time, it would be extremely rare for memory not to have been affected. On the other

hand if your bank, or your closing agent, or your attorney, attempts to rob you of $5,000.00 at a closing, your objections would be immediate, loud, continuous, unforgettable and followed immediately by litigation against all those who had committed a wrong against you.

ARGUMENT

I. WHETHER THE REFEREE SHOULD HAVE DISQUALIFIED HERSELF

At the hearing of December 7, 1989, as to the appropriate level of discipline, Petitioner supplemented his previous motion to disqualify and the Referee refuted such charges orally as a matter of fact rather than addressing the motion as to its propriety as to legal form. This is error.

The findings of the Referee largely track the pleadings of the Bar. This, in itself, would not be error, except for the fact that they Bar never pled or proved the elements of an offense and the Referee does not pierce through the pleadings and proof to reveal the same.

The Referee does not address any Affirmative Defense of Petitioner - even to dignify them with denial.

The Referee finds that secretarial error in addition of interest is a very grave matter when the Bar and the client regard the matter as "petty" and "de minimis". The Referee takes special

note that the matter remained in the pleadings at trial - ignoring completely that Count I was the gravamen of the complaint of the Bar and the client and without which no proceedings would have occurred; and the Bar failed to acknowledge this til after trial despite their prior judicial admission in a request for admissions which requires all costs thereafter to be borne by the Bar - if not also those costs incurred before by the Bar bringing Count I which the Bar lost and engaging in illegal, unethical procedural tactics as to Count II (later refiled as a new case).

As to Count III the Bar investigator found nothing wrong and the Count was added as an after thought by the Bar despite the report of its examiner.

The Court makes Finding #9 that the Petitioner recommended BANKRUPTCY and the clients rejected that course of action and chose instead to take out a loan. Bankruptcy in this context is pejorative merely and is stated for the sole reason of casting doubt on the integrity of Petitioner, when it is perfectly legal and ethical to suggest bankruptcy in a proper case; and, in the present case the Petitioner also suggested getting a Bank loan and the latter advice was followed by the clients.

The "dispute" of the ANTALEKS as to their account found by the Referee to have existed for years is inherently incredible when the Referee well knows and finds that the ANTALEKS "experienced

difficulty" and had "disputes" with the whole world as to their billing and accounting. The ANTALEKS themselves in their letter of November 4/6, 1986, with or without the ANTALEKS bill to me attached, clearly says he ignored Petitioners billings and disputes only what has been billed since 1982.

To believe that the ANTALEKS hired Petitioner to handle the loan, when that is directly contrary to their practice, their testimony, and their acts in the instant case of getting the loan and signing the "irrevocable commission agreement" without counsel, and in securing Petitioner services for specific, individual acts only, is wholly incredible. The ANTALEKS are experienced in real estate closings. In all such closings a Real Estate Broker's fee is earned where the Seller wrongfully refuses to close; and attorneys and real estate Brokers attend closings and participate and attorneys charge fees for past, present or future services.

The Referee departed from the essential requirements of law in failing to consider or rule on any of Petitioner's Affirmative Defenses. There is no "particular act" alleged, as required by Rule; but if there were a "particular act" complained of, it occurred on October 1986, or sometime during the 14 previous years of representation, or both. The Bars Complaint was filed on January 31, 1989, a period in excess of two (2) years, so that no

claim of malpractice or legal professional misconduct can be based on a claim barred by law.

Laches equally applies because real estate closings and loans become indistinguishable to closing agents, lenders and attorneys who do nothing else full time.

II. **WHETHER IT IS UNETHICAL FOR AN ATTORNEY TO ATTEND A BANK LOAN CLOSING AT THE OFFICE OF THE CLOSING AGENT HIRED BY THE BANK WHEN INVITED BY THE BANK OR ITS AGENT TO ATTEND THE CLOSING WHERE THE BANK CALLED THE ATTORNEY FOR A PAYOFF ON FEES OWED TO HIM AND THE BANK INCLUDED THOSE FEES ON THE CLOSING STATEMENT AND IN DISBURSEMENT OF THE PROCEEDS OF THE LOAN MADE BY THE BANK TO A CLIENT OF THE ATTORNEY.**

CONVERSELY

WHETHER IF A BANK CALLS AN ATTORNEY TO ATTEND A CLOSING OF A LOAN TO THE ATTORNEYS CLIENT THE ATTORNEY MAY GO; WHETHER IF THE BANK CALLS AND ASKS THE ATTORNEY HOW MUCH THE CLIENT OWES HIM, THE ATTORNEY MAY SAY; UNLESS THE ATTORNEY FIRST *CALLS* HIS CLIENT AND ASKS HIS CLIENT TO SECURE THE SERVICES OF ANOTHER ATTORNEY TO AVOID ANY POSSIBILITY OF CONFLICT OF INTEREST.

OR

WHETHER, WHEN AN ATTORNEY ADVISES A CLIENT TO SECURE A LOAN TO PAY FEES AND COSTS, THE ATTORNEY MAY ATTEND THE CLIENTS CLOSING OF THAT LOAN WHEN INVITED WITHOUT TELLING THE CLIENT TO HIRE ANOTHER ATTORNEY.

It is suggested that these propositions are self-evident, and not over-simplified or distorted.

It is stretching matters to take the call from the closing

agent the day before closing (A-13) and the potation by the secretary as to the balance owed and convert that into an agreement by Petitioner that he would represent the ANTALEKS throughout the loan transaction for an amount never charged.

If it were a fact that Petitioner was engaged to represent the ANTALEKS throughout the whole transaction then he certainly neglected his duty because he knew nothing of the closing and did nothing toward the closing except for a few acts specifically requested.

Attorney LaRue had a mortgage on the premises for legal work done, or whatever. Under the rule proposed by the Bar and the Referee, attorney LaRue may not let his office issue an estoppel letter and he may not attend the bank closing.

In fact no attorney may do a bank closing or a real estate closing or charge any fee or collect any past fee, without prior disclosure of the total charge and the recommendation that the client seek other counsel as to the fee to be charged or collected - even though in this case the client was asked to secure a loan to pay all past fees and costs, and enough more to complete litigation; and the client did so independently of the attorney and without the attorney's knowledge.

If any attorney may go to a bank at the same time as his client is closing a loan, as real estate brokers regularly do, then surely, a client may use his attorney at the closing and not be required to use the Banks attorney or rely merely on the bank and its closing agent.

There is no conflict inherent in attending a closing. If there were a $5,000.00 conflict at a closing then the clients would not have signed under the penalty of perjury that their attorney was justly entitled to the $5,000.00 fee he claimed.

With virtually anyone involved, no closing would have taken place with a $5,000.00 fee to an attorney who was only owed $1,500.00 at best, and all or part of his fees were disputed.

As the Bar investigator found, the ANTALEKS are voluble and knowledgeable about closing. Mr. Payton of the Moneytree said the ANTALEKS engaged in one or two transactions with him after the closing and never complained about the closing in question.

The ANTALEKS could have had their $5,000.00 never paid out, or immediately returned by the attorney, or paid as damages by the Bank, or the closing agent if the $5,000.00 fee to the attorney was not authorized by the client, and he did not direct the Bank and closing agent to pay that amount to the attorney. To believe that the ANTALEKS never made any attempt with anyone to recover this $5,000.00 coerced or stolen from them, but the ANTALEKS were morally outraged, yet waited years to complain of the ethics of the attorney, does not comport with the common behavior of mankind. Certainly that is not the behavior of a man who when morally outraged, forthwith kicks in car doors if you make him wait in his car while he is on his way to pick up a videotape rental. State vs Antalek, Volusia County Court, Case No: 86-10237-D.

III. WHETHER THE REFEREE ERRED IN DENYING PETITIONER'S MOTION TO DISMISS THE COMPLAINT OF THE BAR FOR FAILURE TO STATE A CAUSE OF ACTION

The Bar failed to set forth the elements of a cause of action and the Referee denied Petitioner's Motions to Dismiss, Strike and for more definite statement. The error is harmful in that one cannot be clearly and convincingly convicted with respect to vague generalities. One is likewise deprived of his ability to defend against charges that are amorphous. The Rule does require that the complaint set forth the particular act or conduct for which the attorney is sought to be disciplined. Integration Rule 11.06(5)(a)(ii).

Discovery is of no avail with respect to such allegations that a client was "experiencing difficulty" in understanding bills or that Petitioner provided no "meaningful accounting".

In #31 of the Admissions of the Bar dated April 7, 1989 the Bar does admit the communication to the ANTALEKS of the letter of September 23, 1986 with all itemized bills and ledgers. However, hiding behind vagueness, the admission of the Bar did not cause them voluntarily to dismiss Count I and the Referee denied Motion for Summary Judgment with respect to the same, and the Bar continued questioning the September 23rd, letter all the way through trial (T 123 L 22 to T 124 L 18) reluctantly conceding in

closing argument that the Bar did not feel very strongly - about Count I - the only reason the complaint was filed! (T **255** L **24** to T **125** L **9).**

The report of the Bars investigator did not find anything significantly out of line with billing or communication **(A-15).**

The ANTALEKS were businessmen, merchants, with accounts, ledgers, books and records, deducting attorneys fees as business expenses (T **164** L **3-18).** Nevertheless the ANTALEKS never produced their books and records and ledger or any correspondence showing any dispute or discrepancy between Petitioner's bills and the ANTALEKS "Accounts Payable". (T **164** L **19** to T **169** L **5).**

Going over the entries line by line failed to elicit any memory of the client of charges going back to **1982,** whether it be the subject matter, performance of services, description on the bill, amount charged or otherwise (T **167** L 6 et seq.)

The Bar had no issue with the amount owed by the ANTALEKS to Petitioner and the exact amount of **$5,240.03** was admitted to be correct. (T **17** L **8-13).**

The Referee finds and the evidence is replete with the fact that the ANTALEKS are behind with their bills and "dispute" accounts with every tradesman. Petitioner is engaged again and again to help the ANTALEKS pay their just debts. And it is not the case that there is a worldwide conspiracy against the ANTALEKS to render accounts falsely to them.

Petitioner's accounts were audited by the Bar and the clients

bookkeeper BERNIE McBRIDE and found to be in order.

There is no evidence of a dispute as to Petitioners bill; not on the clients books and records; not at closing; not in correspondence; and not over the course of approximately 2 years. If $1,500.00 were owed and $5,000.00 taken, some tracks would have been left other than expressions of outrage on a witness stand which does not occur until ages after the alleged offense occurred.

IV. WHETHER THE COURT ERRED IN FAILING *TO* TO HOLD A HEARING AS *TO* FEES AND COSTS.

AND

WHETHER THE COURT ERRED IN ASSESSING ALL COSTS TO PETITIONER.

It is pretty axiomatic that one is entitled to a hearing before fees and costs are assessed.

COUNT I as to communication was the ground without which "we would not be here today," and the Bar lost on that point. However, the point was never abandoned after investigation, judicial admission, and merely "not felt very strongly about" in closing argument.

COUNTS II and III were added after the fact. Count II was added illegally and the illegality was insisted upon, even though the Bar and the client admitted that Count II involved an amount that was "de minimis" and "petty" and was a clerical error in computation.

The original complaint was to be handled by a letter from

attorney to client and copy to the Bar **(A-16).** Later it ballooned to a grievance hearing "because of continued complaint". (A-17); that is because of the volubility of the ANTALEKS. The Complaint is transmitted to the Supreme Court with the notation that "minor misconduct is not recommended" **(A-18)** (It is nice to have your complaints transmitted with proposed judgments.)

It is suggested that the Bar failed in the gravamen of its complaint.

V. WHETHER THE REFEREE ERRED AS TO VENUE.

Venue may seem to be a petty matter to bring up and one that rarely creates reversible error. Florida has always taken the position that venue is a matter on which reversible error can be grounded and there are many appellate cases as to venue.

On Integration Rule 11.06(1) the Referee appears clearly to have erred because all proceedings save "trial" were held in Duval County. Since Petitioner has established his practice, as a sole practitioner in Volusia County, Florida and has conducted his profession there for about 20 years, then if proceedings were instituted in Volusia County and there maintained to conclusion, a great number of friends, clients and fellow practitioners would have come to my aid and would have denounced the Bar for its unjust prosecution of me. Conversely if the Petitioner was a person of improper intents, purposes and practices, this too would become known.

As it was, the proceedings were conducted like the Star

Chamber and the Referee appeared in town and disappeared like a thief in the night - that is, in such a fashion that no one could come forward to support me or denounce me, unless I personally solicited them, which I would not do. It is the case that if you seek in Volusia County for an honest attorney, my name will be found.

Legally the rules cannot provide for venue in the home county; the rules of Civil procedure apply; and all motions may be deferred until final hearing.

Deferral of motions til trial does not comport with the rules of civil procedure and allows pleadings to go uncontested, discovery refused, no pretrial compliance, or notice of witnesses against you and all other rules of procedure violated until the date of trial, when everyone would be playing Russian roulette at point blank range, and no due process will have been employed, and the attorney subjected to the all-in-one-lynch trial or forced venue in distant locations regardless of cost in attending.

VI. WHETHER THE DISCIPLINE RECOMMENDED UPON PETITIONER WAS TOO SEVERE,

AND

WHETHER THE DISCIPLINE RECOMMENDED BY THE REFEREE DEPORTS FROM THE ESSENTIAL REQUIREMENTS OF LAW.

The Referee departed from the essential requirements of law in failing to set forth findings sufficient to support a finding of innocence of Petitioner as to Count I. As a minimum, that would include, as everyone admits, that the letter of September 23, 1986 was sent on September 23, 1986 and received by the client; that the client already knew or should have known that he owed $5,000.00 or so dollars already in fees and costs, and he had to borrow money to take care of prosecuting and defending multiple suits to completion as well as to regularize his business affairs; and that the client agreed with this assessment of his position and borrowed the money needed to achieve the purposes of the client set forth in the letter of September 23, 1986.

The client applied for the loan prior to September 23, 1986, but in accordance with the purposes set forth in that letter. The client directed the lending agency or the closing agency to pay his attorney the amount set forth in the letter of September 23, 1986 - or, at least the attorney is entitled to believe that banks and closing agents do not give away $5,000.00 of loan proceeds without authorization of their customer.

In those circumstances no Count III violation can exist. Count II only then remains as a de minimis matter which is normally too small to take legal cognizance of - especially considering the age of the account, that the client was a merchant, that the client

was undercharged on fee and so on. The Bar never alleged a particular act, nor any particular amount wrongfully collected at any particular time. It is the case that there were some secretarial miscalculations which were inadvertent.

Moreover, the Referee should have considered the Golden case in mitigation and should have entertained Petitioner's Motion to set aside his previous conviction on the basis of new evidence discovered. **(A-19).**

The Bar argued, correctly that the Golden case could not be taken as aggravation. The acts in the ANTALEK case were committed in **1986.** The Golden reprimand was in **1987.** The discipline was subsequent to the act complained of by ANTALEK and can not aggravate ANTALEK although the Referee did so find and recommend.

In the Golden case, Petitioner made virtually no contest and a public reprimand was ordered, even though the elements of the offense were not pled or proved. No request for review was made.

The newspaper came out with an account which said that Petitioner had been suspended for six **(6)** months and this functionally puts Petitioner out of business and punished him much more than ordered. The Volusia County Bar and the Florida Bar both refused, upon request, to do anything to correct the error. The local and State Bar have both reached the point in size and bureaucracy where nothing can be done, and control and

responsibility are lost.

Petitioner is lucky if he is able to take a 1 week vacation to visit his family in Texas every 5 years - even after 20 years practice and his mother now 85 years old. Petitioner's two brothers in the ministry cannot afford to visit him.

Suspension for two months for attending a closing is too harsh.

VII. WHETHER PETITIONER WAS DENIED THE RIGHTS GUARANTEED HIM UNDER THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF FLORIDA.

These matters are fully set forth in virtually all of the pleadings of Petitioner and are herein incorporated by reference. Each item is self-explanatory. However, should the Court desire any further more specific reference, explanation, or citation of authority, Petitioner is ready, willing and able to comply.

The assertion of constitutional rights before the Referee has already had a "chilling effect".

The matter of venue related to the rules of civil procedure will be again mentioned. The rules of civil procedure apply except where expressly set forth otherwise. Rule 3-7.5(e)(1). Discovery shall be available to the parties in accordance with the rules of civil procedure. Rule 3-7.5(e)(2). Venue shall be in the county

in which the alleged offense occurred or where the respondent resides or practices law. Rule 3-7.3(c). But hearings on all motions may be deferred and all rulings reserved until final hearing. Rule 3-7.5(g)(4). Trial may be had on ten (10) days notice; Rule 3-7.5(h); but this may be expedited. Rule 3-7.5(g)(7). Thus all rules of venue may be ignored, all discovery refused, all rules of procedure not followed, and the only check is that the Court at final hearing may decide to follow one or more of the applicable rules, and, of necessity, postpone the trial which everyone had to prepare for. The Supreme Court entertains no interlocutory appeals and its review is limited, so that the Supreme Court restricts itself from correcting a great deal of error committed by the Referee.

Such rules deny a fair trial and equality under the law. This is all the more the case where the Florida Bar is pitted against an individual practitioner and the Bar has all the wealth of the State at its command, including attorneys who spend 100% of their time in the area of ethics only, and the accused attorney and the judge or referee only had 2 hours of ethics at college. Moreover, before it reaches the Court or referee, the case is supposed to have had all sorts of people to review the same so that the conclusion is nearly inescapable that if the accused is present he is guilty.

If he waits until trial to admit that he has not accomplished

all things perfectly, this is an aggravating circumstance.

CONCLUSION

It is submitted that the Referee has erred and that Petitioner shou d be found not guilty as to Count III as well as Count I. Any punishment for poor math should be less severe than 2 months suspension.

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing has been furnished by U.S. Mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32302, Bar Counsel, The Florida Bar 880 No. Orange Ave., Suite 200, Orlando, Florida 32801-1085, and John T. Berry, Staff Counsel, The Florida Bar, 650 Appalachee Parkway, Tallahassee, Florida 32399-2300 this 9th day of March, 1990.

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