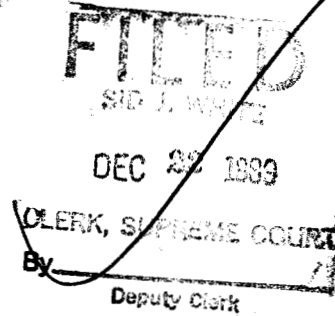


IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Case Nos. 73,629 and 74,398
[TFB Nos. 88-31,054(07A) and
89-31,289(07A)]

THE FLORIDA BAR,
Complainant,
vs.
WALTER B. DUNAGAN,
Respondent.



REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as a referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:

October 6, 1989 and December 7, 1989

The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits, all of which are forwarded to the Supreme Court with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar David G. McGunegle, Esq.

For The Respondent Walter B. Dunagan, Esq.

11. Findings of Fact as to Each Item of Misconduct of Which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As to Count I (88-31,054(07A))

1. Respondent, Walter B. Dunagan, represented Frank and Winifred Antalek in various legal matters over a period

of approximately fourteen (14) years. TR. p.122.

2. Beginning in 1983 the Antaleks claim to have experienced difficulty in interpreting Respondent's bills. The Florida Bar's Exhibits 1 and 2. There is conflicting evidence as to when the Antaleks first contacted Respondent for clarification.

3. A bill dated September 23, 1986 lists "formation of corporation...\$1,485.39." The Florida Bar's Exhibits 1 and 5. The bill was mislabeled and was, in reality, an aggregate of past due amounts.

4. Upon receipt of the mislabeled bill, the Antaleks believed they were being double-billed for the formation of two corporations which had already been paid for. The Antaleks were provided access to and copies of billing records and ledgers for each of their cases. The Antaleks testified that complete records were not received until after the loan closing on October 20, 1986. TR. pp.53-54, 124.

5. Frank Antalek responded to the September 23 billing by letter dated November 6, 1986. The Florida Bar's Exhibit 2. Mr. Antalek's November 6 letter outlines his dissatisfaction with Respondent's billing and services.

6. Respondent made no effort to explain any confusion in his billings to the Antaleks after receipt of Mr. Antalek's letter, because he claims there was no confusion. Testimony of Respondent. The Respondent's bills listed case name, amount of fees due, and costs incurred. The Florida Bar's Exhibit 3.

7. On November 10, 1986 Mr. Antalek asked Bernadine McBride of McBride Accounting & Tax Service to audit his account in Walter B. Dunagan's office. Testimony of Bernadine McBride. On November 11 the request was canceled, but the audit was nevertheless conducted and no irregularities were found. Testimony of Bernadine McBride.

8. The Antaleks had a history of problems in keeping many of their accounts current and Mr. Antalek testified he was often behind in paying Respondent's bills. Respondent's Exhibit 8; The Florida Bar's Exhibit 2; Testimony of Frank

Antalek.

As to Count III (88-31,054(70A))

9. By letter dated July 25, 1986 Respondent advised the Antaleks to institute bankruptcy proceedings in order to alleviate "the ordinary stress of day to day life" caused by mounting financial obligations. The Florida Bar's Exhibit 1. The Antaleks elected instead to seek a loan to pay off obligations due.

10. Among debts owed by the Antaleks was a mortgage on their home held by the FDIC, which was being foreclosed, and past due attorney's fees owed to Respondent. The amounts due Respondent were in dispute, however. See Count I. Testimony of Winifred and Frank Antalek.

11. Respondent recommended Frank Payton of Moneytree Financial Services to arrange a loan for the Antaleks. Mr. Payton, a mortgage broker, acted as a middleman in finding a lender. Testimony of Frank Payton.

12. Mr. Payton was explicit in explaining that his fee of \$5,225.00 would be payable once a lender was located without regard to whether or not the Antaleks went forward with the loan. TR. pp. 131, 61.

13. Dependable Title Services, Inc. acted as the settlement agent. The Florida Bar's Exhibit 1.

14. In anticipation of the closing, Respondent prepared the Warranty Deed symbolizing the payoff of the loan from Dennis Steelman to the Antaleks. The Florida Bar's Exhibit 7. In addition, Respondent gathered payoff figures from the FDIC and Dennis Steelman. The Florida Bar's Exhibit 6.

15. Attorney's fees of \$5,240.03 claimed by Respondent were also included on the settlement statement. The Florida Bar's Exhibit 4.

16. Mr. and Mrs. Antalek testified that Respondent did not discuss including the past due fees on the settlement statement with either of them. TR. pp.59, 133.

17. The Antaleks testified they were surprised and angered

to find the \$5,240.03 in attorney's fees listed on the settlement statement. The Antaleks continued with the closing, however, in order to avoid foreclosure by the FDIC and payment of Mr. Payton's fee without obtaining the loan monies. TR. pp.61, 63, 76, 116, 135, 136.

18. The Antaleks and Dependable Title's representative Shelley Benge believed Respondent was present at the closing to represent the Antaleks. Testimony of Winifred Antalek; Testimony of Frank Antalek; Testimony of Shelley Benge. TR. pp. 60, 79, 84, 102, 103, 134.

19. Respondent made no mention to the Antaleks of the possible conflict of interest presented by his representing them at the closing and also receiving a payoff amount from the loan proceeds. He did not advise them to seek independent counsel and gave no notice of his claim for attorney's fees prior to closing. TR pp. 64, 135.

As to Count I (89-31,289(07A))

20. The Antaleks were often delinquent in paying Respondent's fees for services rendered. Testimony of Frank Antalek.

21. In 1983 Respondent began charging interest at a rate of 1½% per month (18% APR) on the Antalek's outstanding balance. Respondent's Exhibit 1.

22. Respondent had no prior agreement with the Antaleks to charge interest on any outstanding balance, nor were they notified of Respondent's intention to begin charging interest. Testimony of Respondent. TR. p. 126.

23. Respondent charged interest on prior amounts billed, rather than principal alone. This resulted in interest on interest charges in excess of the statutory limit. Respondent's Exhibit 1.

24. Respondent testified that his method of charging interest was erroneous.

III. Recommendation as to Whether or Not the Respondent Should Be Found Guilty:-

As to each count of the complaint
I make the following recommendations as to guilt or innocence:

As to Count I (88-31,054(07A))

I recommend that the Respondent be found Not guilty and specifically that he be found Not guilty of the following violation of Disciplinary Rule 1-102(A)(6) of The Florida Bar's Code of Professional Responsibility, to wit:

Engaging in conduct reflecting adversely upon his fitness to practice law by failing to adequately communicate with his clients concerning his billing for legal fees.

(Count II of 88-31,054(07A) was refiled as 89-31,289 and this Count dismissed on October 6, 1989)

As to Count III (88-31, 054(07A))

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations of the Florida Bar's Code of Professional Responsibility: 5-101(A)(1), to wit:

'Accepting employment where the exercise of his professional judgment will be or reasonably may be affected by his own financial or personal interests, by his participation in the loan closing without notice to his clients of a conflict of interest nor consent of client; 5-104(A) for entering into a business transaction with his clients when they have differing interests therein and when the clients expect the lawyer to exercise his professional judgment therein for their protection; 5-105(A) for failing to decline employment when the exercise of his

independent professional judgment in behalf of his clients will be or is likely to be adversely affected by the acceptance of the proffered employment and 5-105(B) for continuing employment when the exercise of his independent professional judgment on behalf of his clients will be or is likely to be adversely affected by his representation of himself in relation to attorney's fees.

As to Case No. 89-31,289(07A)

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations of Disciplinary Rule 1-102(A)(6) of the Florida Bar's Code of Professional Responsibility, to wit:

engaging in conduct reflecting adversely on his fitness to practice law by billing interest at usury rates.

IV. Recommendation as to Disciplinary Measures to be Applied:

I recommend:

As to Count I (88-31,054(07A))

The Respondent having been found not guilty, no discipline is recommended.

As to Count III (88-31,054(07A))

I recommend that the Respondent be suspended from the practice of law for a period of 60 days with automatic reinstatement at the end of the period of suspension as provided in Rule 3-5.1(e), Rules of Discipline Standards 4-32 and 4-33.

As to Case Number 89-31,289(07A)

I recommend that the Respondent be suspended from the practice of law for a period of 60 days with automatic reinstatement at the end of the period of suspension as provided in Rule 3-5.1(e), Rules of Discipline. Standard 7.4. It is further recommended that this suspension be concurrent with Count III (88-31,054(07A))

V. Personal History and Past Disciplinary Record: After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.5(k)(1)(4), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: 51 or 52 (49 in February, 1987)

Date Admitted to Bar: 1970

Prior Disciplinary Convictions and Disciplinary Measures Imposed:

Public Reprimand and 6 months probation in July, 1987 for violation of Disciplinary Rule 5-104(A) of the former Florida Bar Code of Professional Responsibility by entering into a business transaction with a client without advising the client to obtain independent legal. Fla. Bar v. Dunagan, 509 So.2d 291 (Fla. 1987). The acts in these cases occurred before the reprimand. Therefore, the prior discipline is considered as an aggravating factor representing a pattern of behavior.

Other personal data:

In relation to the loan closing, Respondent continues to view his actions as appropriate. Tr. 12/7/89 p.15. He fails to recognize any conflict of interest

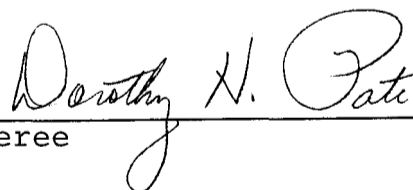
or his fiduciary role with his clients. On the issue of interest, Mr. Dunagan at the end of an all day hearing admitted that he incorrectly calculated interest and admitted he was guilty. Tr. 10/6/89 p. 262.

VI. Statement of Costs and Manner in Which Cost Should be Taxed: I find the following costs were reasonably incurred by The Florida Bar.

ADMINISTRATIVE COSTS	\$ 500.00
GRIEVANCE COMMITTEE LEVEL COSTS:	
Transcript costs	666.80
Bar counsel travel costs	51.60
REFEREE LEVEL COSTS:	
Transcript costs	1,153.60
Bar counsel travel costs	51.40
MISCELLANEOUS COSTS:	
Investigator costs	609.90
Miscellaneous Bar counsel travel	151.07
Deposition transcripts	<u>168.05</u>
TOTAL ITEMIZED COSTS	\$3,352.42

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent.

Dated this 20 day of December, 1989.



Referee

Copies:

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