IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

DAVID H. THOMAS,

Respondent.

75683

Case No.
TFB No. 89-10, 379 (20A)

REPORT OF REFEREE

THIS CAUSE is before the Court following a final hearing in the above styled cause. The report of the referee is made herewith in which certain findings and recommendations are submitted as provided in Rule 3-7.5 (k), Rules Regulating the Florida Bar.

I.

SUMMARY OF PROCEEDINGS. Pursuant to this Court's appointment of the undersigned referee, hearings were conducted according to the Rules of Discipline as follows: Pre-trial conferences were held on July 22, 1990, and August 31, 1990. Final Hearing was held on September 22, 1990. The following attorneys appeared as counsel for the parties: For the Florida Bar: Thomas E. DeBerg; For the Respondent: Pro Se.

II.

SUMMARY OF RECORD. A recitation of all the background information elicited by testimony at final hearing and disclosed by the exhibits in evidence would unduly prolong this report. Only

necessary matters are reported here.

A. Introduction

On April 28, 1989, the Twentieth Judicial Circuit Grievance Committee A found probable cause for further disciplinary proceedings with respect to the following alleged violations:

> **1.** Rule 4-1.16(a)(1), failure to withdraw when representation will result in a violation of the Rules of Professional Conduct;
> **2.** Rule 4-3.1, bringing a frivolous action;
> **3.** Rule 4-8.4(a), violating the Rules of Professional Conduct through the actions of another;
> **4.** Rule 4-8.4(d), conduct prejudicial to the administration of justice.

A final hearing was conducted before the referee on September 21, 1990. At hearing, the Bar withdrew the third allegation listed above, and asserted two additional violations:

> **5.** Rule 4-1.1, competence;
> **6.** Rule 4-3.2, failing to expedite proceedings.

The Florida Bar v Stillman, 401 So. 2d 1306 (Fla. 1981) was cited in support of the referee's consideration of the two additional allegations.

Central to this disciplinary proceeding is a prior business relationship between respondent and his wife and Henry and SueAnn DeHaan. The deterioration of that relationship resulted in a barrage of grievance complaints and civil suits. Mrs. DeHaan filed a grievance with the Bar, dated June 11, 1988, against respondent alleging misconduct in connection with the business. The DeHaans represented by attorney Robert C. Hill sued respondent and his

wife, Mary Ann Lehmann, alleging conversion, wrongful eviction, and civil theft. For their part, Lehmann filed a grievance with the Bar on June 14, 1988, against Hill; and on October 7, 1988, respondent filed a civil action on his and Lehmann's behalf against both the DeHaans and Hill. It is this final action which is the focus of this disciplinary proceeding.

B. Background.

Mr. DeHaan was starting a general contracting business and, with Mrs. DeHaan, established a business relationship with respondent and Lehmann. It appears that respondent and Lehmann agreed to share office space with the DeHaans as part of their agreement. It appears further that Lehmann lent money to the business as part of a financial arrangement.

Eventually, controversies arose. The DeHaans believed that Lehmann had improperly taken back a van used by the parties in their construction business. The van, while titled in Lehmann's name, allegedly contained tools belonging to the DeHaans when it was reclaimed by Lehmann. The DeHaans also objected to respondent's allegedly locking them out from the shared office space and seizing books and papers of the business. Of especial importance here, the DeHaans believed that the proceeds of a check belonging to the business and meant to be used to pay business taxes had been misappropriated for personal use.

Armed with these complaints, the DeHaans sought out the advice of Attorney Hill in June, 1988. On their behalf, Hill filed an

action against respondent and Lehmann based upon a complaint verified by the DeHaans. A portion of the verified complaint charged respondent with civil theft of the check. However, a later amendment charged that the proceeds of the check were deposited into Lehmann's bank account, thus removing respondent as a defendant as to this issue.

The substance of the DeHaan's dispute was presented to the Twentieth Judicial Circuit Grievance Committee A. That committee found no probable cause for disciplinary action against the respondent on October 21, 1988.

However, at about the same time period, on October 7, 1988, the respondent filed suit against Hill and the DeHaans. This was a five count suit. Count one charged the DeHaans and Hill with interfering with respondent's and Lehmann's business relationships. Count two charge the DeHaans and Hill with libel per se for filing a false Bar grievance against the respondent. Count three charged the DeHaans and Hill with maliciously prosecuting a civil theft accusation against respondent. The remaining counts are not material.

On October 28, 1988, a second hearing was conducted on October 28, 1988, by the Twentieth Judicial Circuit Grievance Committee A. Focusing on that portion of the suit brought by respondent naming Hill as co-defendant, wherein respondent alleged in count 2 that Hill had given active aid, participation, and counsel to Mrs. DeHaan on the occasion of her filing the grievance complaint against the respondent, the Grievance Committee found

probable cause for further disciplinary proceedings against respondent.

C. Final Hearing

At final hearing, the Bar focused solely on the second count of respondent's suit and argued that this count was frivolous. In support, the Bar began with the testimony of Attorney Robert C. Hill. Hill described an office visit by the DeHaans on or about June 13, 1988. They sought out his advice relative to their several complaints against both respondent and Lehmann, which ultimately resulted in Hill's filing of the law suit described above.

It was during this office visit, Hill explained, that the DeHaans had initiated a conversation expressing their desire to file a grievance against respondent. Hill testified the DeHaans did not ask for assistance in preparing the grievance, nor did he give any. He did not examine the written form of the complaint for its efficiency nor did he confer with them about the merits. He had occasion to see the written complaint, but only after the DeHaan's filed it with the Bar. Hill's sole involvment was to give the DeHaan's the address and phone number of the Bar.

Hill also testified that on June 23, 1988, respondent phoned after receiving the demand letter which Hill had sent on the DeHaan's behalf. In the course of that conversation, respondent said in an angry tone, "If you sue, I'll make you sorry you took this case." Hill also testified to a second conversation with respondent. On September 25, 1988, he had occasion to speak with

respondent at the Lee County Justice Center after a hearing on Hill's motion to dismiss out the DeHaans in respondent's five count suit. Respondent had indicated he wanted to discuss the possibility of settling the issues. One of the things respondent said was that if the DeHaans were to drop the civil suit, he believed he could get his wife to drop the grievance which she had filed against Hill. Respondent also indicated that if a settlement were reached, he would like to have Hill ask the DeHaans to drop their grievance against respondent. Hill also testified he had yet another occasion to speak with respondent. This took place on October 28, 1989, just prior to the Grievance Committee proceedings. During that conversation, respondent said that if Hill's testimony was not too damaging to him, he would dismiss the lawsuit pending against Hill.

Further, with respect to respondent's suit, Hill testified that while the DeHaans had been dismissed out with leave to amend, respondent did not so amend against the DeHaans, permitting the dismissal to stand. However, as to Hill, respondent did no discovery and simply let the case lie dormant until dismissed on Hill's motion for dismissal on grounds of lack of prosecution. The motion was handled by counsel provided to Hill by his malpractice carrier. Hill also described the conflict in his continued representation of the DeHaans caused by his being named a co-defendant with them in respondent's suit.

The respondent's testimony at final hearing included his reason for bringing Hill into his suit against the DeHaans. He believed that Hill had acted improperly in alleging that respondent

had taken the proceeds of a business check in the DeHaan's action relative to the break-up of the business relationship. Respondent produced a bank document entitled "Advice of Charge" which was directed to Mr. DeHaan. Respondent testified that this exhibit showed that the DeHaans had been put on notice as early as June 3, 1988, that the proceeds of the check had not been deposited into any personal account of respondent's and that therefore respondent had not misappropriated the funds. Because the DeHaan's had this notice, reasoned respondent, that gave him a good faith basis to conclude that Hill too had notice. In this fashion, respondent justified count 2 of his suit against Hill:

> " Mr. Hill, I submit to the Court, had a copy of the check that he sued me on. A copy of the check that Suzy said in her grievance I had stolen. A copy of the check that Mr. Hill said in his complaint that I had civilly thefted--for lack of a better phrase, Your Honor--his client had it June 3rd. I submit to the Court there's a good faith argument to be made that, in fact, if his client had it, he had it, and yet he still sued. He still participated in the filing of the grievance against me knowing that I had not taken anything."

Transcript of Final Hearing, Sept. 21, 1990, p.175.

Respondent testified that he had another basis in fact for naming Hill as a co-defendant in count 2. It was Henry DeHaan, he testified, who had told him that Hill had worked on the grievance complaint together with the DeHaans while in Hill's law office. It was based upon this statement that respondent concluded Hill had participated in the filing of the complaint to the Bar. Respondent was unable to recall the date of this conversation, other than it

occurred prior to his filing the suit.

In questioning by the Bar attorney, respondent was asked whether, in his prior statements before the April 28, 1989 Grievance Committee, he had told the committee that it was Mr. DeHaan who had told him of Hill's involvement. Respondent stated he could not recall.

A portion of respondent's statements to the Grievance Committee on April 28, 1989, follows:

> MR. THOMAS: Again, I believe that Mr. Hill promoted and was cognizant and aware of the fact that Mrs. DeHaan carried this matter into the public domain. I believe that limits--
>
> MR. LOGAN: That's not what you sued him for.
>
> MR. THOMAS: I sued him for having filed a grievance, yes.
>
> MR. GRACE: He didn't file the grievance, did he?
>
> MR. THOMAS: Counsel participated and conspired in filing the grievance.
>
> ***
>
> MR. GRACE: Your complaint says there was active aid and participation by Robert Hill.
>
> MR. THOMAS: Yes.
>
> MR. GRACE: What active aid was that? He said he gave them the telephone number and the address and the name.
>
> MR. THOMAS: And Mrs. Dehaan said that he counseled her.

MR. GRACE: Okay. What do you reckon that means?

MR. THOMAS: I reckon that means, and I suspect that at a future deposition, we'll rule in the fact that he told her how to go about it, who to contact.

MR. GRACE: You don't think that's a lawyer's obligation if a person wants to make a complaint?

MR. THOMAS: I don't think it's a lawyer's obligation to promote, when I'm absolutely certain at that time he had the facts before him.

MR. GRACE: I'm sorry, I don't think I understand yet.

MR. THOMAS: The complaint accuses me, for example, of theft. The lawsuit accuses me of having committed certain acts.

MR. GRACE: I'm sorry, let's get back to Robert Hill's participation in counseling them to file a complaint.

If your client comes to you and wants to file a complaint against me, don't you have an obligation to tell them how to do it?

MR. THOMAS: I don't have -- I don't believe my obligation extends to having the documents in front of me and telling them exactly how and what to say in that complaint when I have the documents in front of me. That flies in the face of that.

MR. GRACE: Okay. Do you think he said -- do you

really think that Robert Hill sat there with that lady and said, since you don't have any evidence to sue these people on or do anything else on, why don't you file a false complaint? Do you think he said that?

MR. THOMAS: I dont't know what occurred there.

Mr. Grace: Well, I understand, but you know, you just sat here and said you didn't think he was a liar.

MR. THOMAS: I don't believe Mr. Hill to be a liar. I believe Mr. Hill to be an honorable man. I believe, quite simply, that when he had in front of him the necessary information to make the judgment he had to make, he willfully refused to acknowledge them.

MR. GRACE: The issues that were raised in the complaint that the DeHaans filed against you are also the subject matter of pending litigation?

MR. THOMAS: Yes, sir, and it's been amended three times.

MR. GRACE: All right. And it remains pending and has not been resolved?

MR. THOMAS: Yes, sir.

MR. GRACE: All right. And I assume you have attacked the pleadings, et cetera.

MR. THOMAS: No, sir.

MR. GRACE: No? Why has it been amended? To add things?

MR. THOMAS: Well, forgive me. I did file a Motion

to Dismiss. I apologize. I filed a simple Motion to Dismiss saying that he was in possession of certain facts.

He accused me of signing checks when he was in certain possession of facts, and he amended twice to finally get that correct.

MR. GRACE: Has he got it alleged correctly now?

MR. THOMAS: No, sir.

MR. GRACE: Is it at issue?

MR. THOMAS: I'm just going to try the lawsuit.

MR. GRACE: Then it is an issue?

MR. THOMAS: Yes, sir.

Transcript of Grievance Proceeding, April 28, 1989, pp.28-32. (Emphasis supplied).

Also, respondent was asked about the status of the law at that time relative to the absolute privilege accorded to those lodging a complaint to the Bar. See McKenzie v Raymond, 519 So.2d 711 (Fla. 2 DCA 1988). Respondent indicated he had a good faith challenge to the grant of absolute privilege. He was asked to explain the particulars of his research and his proposed arguments, but offered none at the final hearing. Further, he was asked whether, in his prior statements before the April 28, 1989 Grievance Committee, he had argued to the committee that Hill had waived immunity. When shown the April 28, 1989 Grievance transcript demonstrating that argument, respondent testified that he could not recall. Finally, when asked whether he broached the subject of the continued

vitality of the doctrine of absolute immunity with the committee, respondent testified that he had no recollection. In fact, the April 28, 1989 Grievance Committee transcript bears no argument from respondent attacking the doctrine of absolute immunity.

At final hearing, respondent testified:

> " Yes, I sued Robert Hill. I sued Robert Hill on a good faith held belief that he had no immunity, number one. That has been borne out. I knew the state of the law that, in fact, he had immunity as it then existed. But I think a good lawyer is duty-bound to change rules and change law that is not good."

Transcript of Final Hearing, September 21, 1990 p. 177.

The DeHaans were not called as witnesses by either side as it appears that their whereabouts is unknown.

At final hearing, the Bar requested that the referee take note of pleadings filed by the respondent in this disciplinary proceeding as well as his handling of the matter.

II.

FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED: After considering all the pleadings and evidence before me I find:

As to Count 1

A violation of Rule 4-1.16(a)(1) was not established by clear and convincing evidence. This count appears to suggest either that respondent was ethically bound not to act as attorney in an action which he lodged on his own and Lehmann's behalf against the DeHaans and Hill, or that his suit against them resulted in Hill's having

to withdraw from representing the DeHaans in their action against respondent and Lehmann.

If the former, the respondent has an obvious right to represent himself in that action. Further, there is a lack of evidence demonstrating that Lehmann suffered any prejudice as a result of respondent's representation of her in their suit against the DeHaans and Hill. If the latter, the evidence fails to establish by clear and convincing evidence that the DeHaans were prejudiced by Hill's having to withdraw from further representation in their action.

As to Count II

A violation of Rule 4-3.1 was established by clear and convincing evidence. By that standard, the evidence shows that the respondent lacked either a factual or legal basis for his naming Attorney Robert C. Hill as a co-defendant in count 2 of respondent's October 7, 1988 law suit.

The motivation in bringing the action was clearly bound up in respondent's view that Hill had willfully refused to acknowledge exculpating evidence relative to an alleged misappropriation of funds. It is simply not creditable to have concluded, as respondent said he did, that the purported knowledge of the DeHaans relative to the check proceeds be imputed to Hill. The verified nature of the complaint could only serve to bind the DeHaans to the theft allegations against respondent. Hill's having amended the DeHaan's complaint could only demonstrate his professional responsibility

in conforming the allegata with what proof there was available to him at the time. There is nothing in this record to warrant respondent to reasonably believe that any exculpatory evidence had been in Hill's possession. Respondent's claim to the Grievance Committee on April 28, 1989, that he was "absolutely certain at that time he [Hill] had the facts before him", is rendered meaningless by his later admission to the same body that he did not know what happened when Hill met with the DeHaans on the occasion of their expressing a desire to file a grievance against respondent.

Of substantial significance were respondent's inconsistent explanations for his factual basis for bringing suit against Hill. Before the Grievance Committee, he asserted that Mrs. DeHaan had told him of Hill's "counsel" while at final hearing he testified that Mr. DeHaan was the source of his information. In either event, it is clear that as an attorney, respondent is charged with knowledge that Hill's obligation was to provide "counsel" or otherwise supply information to his clients when an ethical violation is asserted against a member of the Florida Bar.

Further, respondent's several statements to Hill had the cumulative effect of demonstrating respondent's motivation: he would retaliate against Hill for representing the DeHaans, and he would sue Hill in order to get leverage relative to the DeHaan's grievance, as well as their civil suit, against respondent.

Additionally, the casualness with which respondent treated his suit is shown by respondent's lack of interest in pursuing the

suit against Hill. His record inaction in furthering the prosecution of his claim against Hill is in stark contrast to his statement before the Grievance Committee that he was going to try the suit.

Finally, though respondent claimed a good faith basis for attacking the status of the law concerning absolute privilege, he did not offer the benefit of his research or any underlying legal theory for such an attack. Rather, at the Grievance Committee hearing, respondent claimed, not that he possessed such a good faith argument for diminishing the absolute privilege, but that there had been a waiver of such privilege. The totality of the circumstances demonstrates that the respondent violated Rule 4-3.1.

As to Count III

This count was withdrawn by the Bar.

As to Count IV

A violation of Rule 4-8.4(d) has been established by clear and convincing evidence. The conduct of the respondent, as demonstrated by his statements to Hill as well as his naming Hill as a co-defendant as above-described, reveals an attempt at abusing the legal system for personal reasons.

As to Count V

A violation of Rule 4-1.1 has not been established by clear and convincing evidence. It must be noted that it is only within

the context of these disciplinary proceedings that such a violation has been asserted by the Bar. The referee notes that the respondent, a real estate attorney for a number of years, acted pro se in these disciplinary proceedings. It is clear that the respondent's pleadings were inartfully drawn, and the arguments presented thereon skewed and piecemeal. The advocacy of the respondent could have been better. But these deficiencies, such as they were, have caused no injury to anyone. The advocacy skills of the respondent did not prevent this fact-finding process from reaching the merits.

As to Count VI

A violation of 4-3.2 has been established by clear and convincing evidence. Respondent's failure to dismiss his suit against Hill, where it is clear that he had no intention of going forward with the matter was a violation of Rule 4-3.2. Mr. Hill had been represented by counsel. It behooved respondent to either proceed with the case or dismiss it.

Respondent's pro se representation in these proceedings, while not orderly, did not prevent this fact-finding procedure from reaching the merits. Thus, I find no violation of Rule 4-3.2 stemming from respondent's advocacy in these proceedings.

III.

RECOMMENDATIONS 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

I recommend that the respondent be found not guilty.

As to Count II

I recommend that the respondent be found guilty of violating Rule 4-3.1 of the Rules Regulating the Florida Bar, to-wit: that respondent's naming Attorney Robert C. Hill as a co-defendant in Count 2 of a five count lawsuit entitled David H. Thomas and Mary Ann Lehmann vs. Henry M. DeHaan and Sue Ann DeHaan, [and] Robert Hill, Case No. 88-6365-CA-RWP, in the Circuit Court of Lee County, constituted the bringing of a frivolous action.

As to Count III

I recommend that the respondent be found not guilty.

As to Count IV

I recommend that the respondent be found guilty of violating Rule 4-8.4(d) of the Rules Regulating the Florida Bar, to-wit: that respondent's conduct and statements relative to his bringing the previously described five count lawsuit entitled David H. Thomas and Mary Ann Lehmann vs. Henry DeHaan and Sue Ann DeHaan, [and] Robert Hill, together with his attempts at settling the suit and pending grievance matters, demonstrate conduct prejudicial to the administration of justice.

As to Count V

I recommend that the respondent be found not guilty.

As to Count VI

I recommend that respondent be found guilty of violating Rule 4-3.2 of the Rules Regulating the Florida Bar, to-wit: that respondent's failure to dismiss his suit against Hill demonstrated a failure to expedite proceedings.

IV.

RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED: I recommend that the respondent be privately reprimanded by the Board of Governors as provided by Rule 3-5.1(a), Rules Regulating the Florida Bar, and that respondent be placed on probation for a period of one year with conditions that respondent take and pass the multi-state test for Professional Responsibility, as well as attend and complete 20 hours of Continuing Legal Education credits in the area of Civil Procedure.

V.

PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND MITIGATING FACTORS: After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.5 (k)(1)(4), I considered respondent's age [that he is 44 years of age], the date he was admitted to the Bar [December, 1975], prior disciplinary

convictions and disciplinary measures imposed therein [none], as well as the fact that the Bar's inquiry focused solely on a single portion of respondent's multi-count lawsuit.

VI.

STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED: I find the following costs were reasonably incurred by the Florida Bar:

Administrative Bar Costs.....	$500.00
Bar Counsel Expenses (Thomas E. DeBerg) (4/28/89)	
(142 miles @ $0.30).....	42.60
Meals.....	11.50
Tolls.....	1.00
Court Reporter Expenses (Katherine I. Nolan) (4/28/89)	
Transcript.....	142.75
Postage.....	2.40
Bar Counsel Expenses (Thomas E. DeBerg) (8/31/90)	
(135 miles @ $0.31).....	41.85
Tolls & Parking.....	2.75
Court Reporter Expenses (Suncoast) (8/31/90)	
Appearance Fee.....	45.00
Bar Counsel Expenses (Thomas E. DeBerg) (9/21/90)	
Transportation.....	80.60
Tolls & Parking.....	3.10
Meals.....	8.33
Court Reporter Expenses (Suncoast)	

(9/21/90)

Appearance Fee	45.00
Transcript	165.75
Postage	5.00
Total Amount Due	$1,097.63

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 30 day of October, 1990.

Referee

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail delivery on this 30 day of October, 1990 to Thomas E. DeBerg, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Fl. 33607, to David H. Thomas P.O.Box 367 Fort Myers, Fl. 33902-0367 and to Staff Counsel, The Florida Bar, Tallahassee, Fl. 32399-2300.

Judicial Assistant