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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

VS.

ROBERT J. NESMITH,
Respondent.
_____/

Case No. 92-31,207 (09D)

81,904

RESPONDENTS ANSWER TO BRIEF

ROBERT J. NESMITH
Respondent
2709 Paseo Street
Orlando, Fl 32805
(407) 246-0500
Bar No. 0801364

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The Report of Referee dated January 5, 1994, will be referred to as "RR."

The transcript of the final hearing shall be referred to as "T."

The bar's exhibits accepted into evidence at the final hearing shall be referred to as B-Ex. Likewise, the respondent's exhibits shall be referred to as R-Ex.

RESPONDENT RESPECTFULLY REQUEST THIS HONERABLE COURT FOR THE RIGHT TO MAKE ORAL ARGUMENTS IN THIS INSTANT ACTION.

STATEMENT OF THE CASE

The Ninth Judicial Circuit Grievance Committee "D" voted to find probable cause on December 16, 1992. The final hearing was held on December 7, 1993. The referee found the respondent not guilty on all charges.

The Board of Governors, at it's February, 1994 meeting voted to uphold the referee's finding of fact but to seek review of his conclusions that the respondent had complied with Rule 4-1.8.

STATEMENT OF THE FACTS

The Respondent and Mr. Passas were personal friends. The Respondent was instrumental in steering Mr. Passas in developing his business, which had been primarily a food service utilizing a refrigerated van. Mr. Passas needed help in trying to penetrating the Black Market and asked the Respondent to assist him.

Mr. Passas subsequently requested that The Respondent incorporated his business, suggesting that the respondent could receive shares of the corporation if wanted. Mr. Passas subsequently retained the respondent to represent the corporation via of a written contract. There was a short period of time in which Mr. Passas Retainer had expired, however another written contract was entered into.

On November 15, 1991 The Respondent received a personal loan from Mr. Passas in the amount of $4,500.00. The respondent advised Mr. Passas as to when he thought he could pay the loan back, wrote out him a promissory note, and asked if he would like to have another attorney review it. Mr. Passas said no, let me just ask my wife and see what she thinks.

The respondent had several conversations with Mr. Passas about the note explaining that he could not repay the note as promised, but would do so as soon as possible. Mr. Passas then became angry at the respondent because the respondent would not file charges against one of his black employees (who had filed a discrimination suit against him). Mr Passas subsequently filed a bar grievance and in addition included information concerning this personal loan, while simultaneously filing a civil action in court.

A civil processor lied about an attempt to serve the respondent where the respondent misrepresented himself, however the facts were to the contrary. The Bar attempted to show that the Respondent had done this to defraud or misrepresent Mr. Passas, which was unfounded at the hearing.

Mr. Passas subsequently received a judgement for the note which was paid to the Deputy Sheriff. On November 25, 1992 Mr. Passas requested the court to award him approximately 278.00 for service of process because of alleged evading service. The court specifically found that there was no attempt to evade service.

The referee found that the respondent did not engage in an impermissible conflict of interest ... that he Orally advised Mr. Passas of his right to consult another attorney and he declined to do so ... That this was a personal business gentlemen and unrelated to the respondent's representation of Mr. Passas Corporation.

The referee found that this was a civil matter best addressed by the courts, which agreed with what the bar had originally told the respondent and that the Bar was not a collection agency.

SUMMARY OF THE ARGUMENT

The Referees finding of fact are presumed to be correct. In addition the Bar is required to prove their Complaint by clear and convincing evidence, which they truly failed to do. The Bar now attempts to do what they could not do at the hearing or in their complaint and that is make broad assumptions and fail to follow or adhere to the laws of Florida.

The bar knows that in the State of Florida, a corporation is a separate entity capable of doing anything a human can do with some minor exceptions. The Respondent has the unyielding right to select the client's for hence he will work. Pursuant to the contractual retainers signed by both parties, the respondent represented The Corporation and not Mr. Passas.

The respondent explained his state of mind during the transaction and the other circumstances that occurred during this period of time. The respondent did take precautions to ensure that Mr. Passas interest were protected by providing him with the promissory note and suggesting that he seek other counsel to check it. Attorneys too are people who have difficulties and who have a personal life that they did not give up just to become one.

In conclusion, Florida law stipulate the rights of a corporation, and it is unquestionable that Mr. Passas was not a client of the respondent, and if he was not a client, the respondent could not have violated any conflict of interest rules.

ARGUMENT

POINT I

THE REFEREE'S CONCLUSION OF LAW THAT THE RESPONDENT'S SOLICITATION OF A PERSONAL LOAN FROM A CORPORATE CLIENT'S PRESIDENT DID NOT INVOLVE A CONFLICT OF INTEREST WAS CORRECT.

The bar attempts to ask too questions within one argument. They are required to prove their complaint by clear and convincing evidence. The referee's finding of fact is presumed to be correct and should be upheld.

The referee concluded that because Mr. passas had retained the respondent to represent his corporation, and not himself individually, he was not a client. The bar **now for the first time seeks to argue the alter ego argument.** This argument was not included in the complaint nor argued at the hearing, therefore was not preserved for appeal. The Respondent, in the interest of fairness has a right to know and be informed concerning any and all charges against him, in order to properly prepare his defense. The Respondent had an absolute right to choose his client. Mr. Passas has absolutely no right to expect any personal representation from a business retainer that was agreed to for a separate and distinct entity.

The bar states that Mr. Passas occasionally intermingles his business and personal matters and therefore suggest that anyone that engages in business with one engages in business with the other (T. p. 30: RR. p. 3).

It is clear from the evidence that Mr. Passas relied on the respondent for legal help and advice as it related to the business matters of the corporation.

The bar mentions The Florida Bar v. Hankal, 533 So. 2d 293 (Fla. 1988). In Hankal, the lender initiated a loan for the sole purpose of evading paying income taxes on the interest income. While the referee found professional misconduct on the grounds that "attorney's be held to a higher standard of conduct in conducting transactions with a lay person, even if layman is not a client, evading paying income taxes was found. Even though Hankel had also been reprimanded twice before, the referee recommended that Hankel receive a Public reprimand.

The instant case is readily distinguishable from the facts in Hankal in that the respondent was not found guilty of any wrongdoing in association with the loan in question. The bar alleged fraud and deceit but was unsuccessful in proving this point at the hearing. In addition a competent court of law found that the respondent did not attempt to evade service (T. pp. 91).

It is uncontroverted that Mr. Passas was not on personal retainer from the respondent. There is no way that Mr. Passas could demand that the respondent represent him on a retainer that was signed sealed and delivered to represent a corporate entity. The loan was a personal loan between friends outside of the business relationship with no attachments to the respondent's corporate representation.

RULE 4-1.8 STATES THE FOLLOWING:

> A lawyer shall not enter into a **business transaction** with a **client** or **knowingly** acquire an ownership, possessory, security, or other pecuniary interest **adverse** to a client....

In order, (1) this transaction occurred between two personal friends with no business attachments whatsoever. (2) Mr. Passas was not a client of the respondent. (3) The respondent did not acquire anything in interest **adverse** to the client. The respondent received a personal loan from Nr. Passas, which was repaid as soon as it was humanely possible for him to do so.

The subparagraphs (1) (2) (3) referred to by the apply only if paragraph (a) is applicable.

There was absolutely nothing in this transaction that was unfair or unreasonable. Mr. Passas was to receive all of his money within a certain period of time and if not his right to sue was preserved. In the end Mr. Passas received all of his money with interest.

THEREFORE based upon the intent of Rule 4-1.8 it does not apply to the foregoing situation.

The bar indicates that the referee did not make a finding of fact as to whether the respondent attempted to evade service. the bar does indicate that the referee stated in his report that he found the respondent's account to be believable because of his own personal experience ...(T. pp. 94-95; RR. p. 3). The bar seems to intimate that the referee was to make his decisions in a vacuum without the aid of his life experiences.

The respondent and his witness, Mr. Robert Myricks both testified about the encounter with the process server and Mr. Myricks testimony was consistent with that of the respondent. The testimony was not exactly alike because it was not rehearsed, for had it been the bar would have stated that we conspired.

The bar next attacks the respondent concerning his birth name. There is an inference that somehow the respondent did something wrong by correcting a stranger, that was being obnoxious, concerning his name. The respondent certainly has a right to be called by his appropriate name. The bar's suggestion that their was sufficient evidence that the referee could have relied on for which to find that the respondent had attempted to evade service is in error. The respondent and Mr. Myricks testified that the process server's version was incorrect. The burden in this case is on the bar to prove the complaint by clear and convincing evidence to which they failed.

The bar fails to inform this court that it told the defendant not to make any payments on the note or try to contact him because it would make it seem that he was trying to pay Mr. Passas off. The respondent was ill during a great portion of the time and involved in considerable personal problems. Mr. Passas was repaid as quickly and earnestly as possible and as soon as the assets were available to do so (T. pp. 94-95).

The respondent submits that the conclusion of law are correct and that the bar has failed to overcome their burden which presumes that the referee's findings are correct. The respondent did not abuse his attorney position because he did not have any business dealings with a client. Mr. Passas under any imagination of law was not the respondent's client. The respondent never engaged in the type of conduct refereed to in Hankal, to the contrary, he provided a written note covering the loan and suggested that Mr. Passas have another attorney review it. The bar failed to satisfy

their burden which was by **clear and convincing evidence.**

While attorney's may be held to a high standard of conduct in their business relationship with non-clients it does not suggest that they cannot have these dealings. If so, attorneys's could never enter into contractual agreements with anyone such as friends, bankers, mortgagors, finance companies, relatives, clergy etc. without having another attorney present.

In addition, this argument was not in the complaint (T. pp. 11), therefore it is not preserved for appeal, that the rule in an of itself is confusing as agreed by both the Bar and the Referee. (t. pp. 12). Subsequently if the bar and the referee agree that the rule is ambiguous, how can the bar even suggest that the respondent failed to abide by it.

The bars complaint alleged that the respondent procured a loan from a client without giving him advice to seek further advice from another counsel. (T. pp. 8)

The bar then attempts to state that the rules of ethics require ... consent from the person receiving the money, in writing.... (T. pp. 8). However the Bar fail to allege this in their complaint. (T. pp. 8). The bar admits that it did not include this issue in it's complaint against the respondent (T. pp. 9).

The referee explained, that in order that the respondent's due process rights were protected the issue needed to be in the complaint. This issues is therefore not preserved for appeal.

ANY SUSPENSION IS AN INAPPROPRIATE LEVEL OF DISCIPLINE FOR AN ATTORNEY FOUND NOT GUILTY OF ANY DISCIPLINARY VIOLATIONS.

The respondent submits that the bar seeks to punish him for insisting that he is innocent of charges of which he has been found not guilty of by a qualified disinterested referee. The bar is suggesting that he be punished for participating in the hearing because he is guilty. It appears that the respondent is expected not to contest the charges for if he does he will be punished whether he is right or wrong. In addition, I find it difficult to argue this question as an appeal. It was not a question or issue in the complaint, it was not argued at the hearing because the respondent was found not guilty. To argue this question, assumes guilt.

The bar fails immensely to show a correlation between Black and the respondent. There was no attempt to ascertain personal gain but simply an attempt to prevent the respondent and his minor son from becoming homeless. In Black , the attorney obtained an unsecured loan from an unsophisticated client and promised to pay a usurious rate of interest without informing the client of the **illegality of the transaction**. In the instant case, the loan was not obtained from a client, there was no illegality associated with the loan, therefore no conflict of interest.

The case of **The Florida Bar v. Hooper, 507 So. 2d 1078 (Fla. 1987)** is also inapposite. In Hooper, the attorney's conduct included him telling the agent that he wouldn't pay the bill, that he would, if sued, hold the suit in litigation for years and have the lien removed. Hooper also threaten to file additional lawsuits

unless the lawsuit against him was dropped. There is absolutely no such conduct indicated in the instant case.

The Florida Bar v. Anderson, 506 So. 2d 403 (Fla. 1987) and The Florida Bar v. Pitts, 219 So. 2d 427 (Fla. 1969) are not analogous to the issues in the instant case. Each involved some criminally element, and or misrepresentation with a client. These cases are not on point and can or should not be used for this purpose.

The respondent suggest, pursuant to the facts, that the issue of suspension is contraindicated at this, was not preserved for appeal because the respondent was found not guilty. The bar appears to be trying to defeat the whole purpose of the hearing which is to allow a disinterested party to decide the issues. The referee's decision should not be overturned without proof that his findings are clearly incorrect.

It is peculiar that the bar would now suggest that the public needs protection from the respondent. The respondent entered into an agreement with Mr. Passas and provided him with a promissory note. Mr. Passas was not a client and the respondent did nothing to evade service or refuse to pay Mr. Passas what was due him as soon as humanly possible. The curious issue about all of this is that before the bar met the respondent in person they told him that this might carry a **reprimand**. The respondent informed this representative that he was considering getting married and that he could not afford to if he was facing a suspension.

The respondent freely discussed the merits of this case with the bar, requested that it be expedited because of the health

problems that it was causing, and the impact it was having on preventing him from seeking other positions. After meeting the respondent the respondent noticed a change in their attitude toward him. Allegations of fraud and misrepresentation appeared.

The strangest thing about all of this is that the bar had earlier mailed the respondent a letter (SEE ATTACHMENT "A") regarding this matter informing Mr. Passas's Attorney that this was not a bar matter, and that the bar was not a collection agency, agreeing wholly with the referee in this case.

CONCLUSION

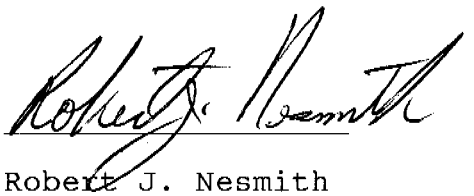
WHEREFORE, the Respondent prays this Honerable Court will review the referee's findings, conclusions of law and recommendations and enter an order adopting his report in full and require the bar to pay the respondent the cost to him of the proceedings now totaling $2500.00.

Respectfully submitted,

ROBERT J. NESMITH
Respondent
2709 Paseo Street
Orlando, Florida 32805
(407) 246-0500
Bar No. 0801364

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing answers to the Request For Admissions have been furnished by U.S. Mail to The Supreme Court Of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, to John B. Root, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801, and to The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 12th day of April, 1994.



Robert J. Nesmith
Respondent

ATTACHMENT "A"

THE FLORIDA BAR

Orlando Office
880 North Orange Avenue
Suite 200
Orlando, FL 32801-1085
Telephone (407) 425-5424

August 5, 1992

Mr. Hubert Fletcher
649 Jamestown Blvd.
Apt. 2177
Altamonte Springs, FL 32814

RE: Your Inquiry, Case No. 93-30,119 (09D)

Dear Mr. Fletcher:

This is to advise you that on the basis of a diligent and impartial analysis of all of the information available as of this date, The Florida Bar has found no probable basis for further inquiry. There is no indication or allegation of fraud in this inquiry. The court system should be adequate to collect a judgment. The Florida Bar is not a court and not a collection agency. If fraud was used in obtaining the note or in failing to satisfy the judgment, the case can be re-opened upon showing evidence of such fraud. This case is now closed.

The Florida Bar's inquiry concerns only the question of ethics and nothing else. If you have any questions, please consult with your own attorney.

Please be advised of our interest in the matter which you presented to The Florida Bar.

Sincerely,

John B. Root, Jr.
Assistant Staff Counsel

JBRjr/mcb

cc: Mr. Robert J. Nesmith, w/enclosures
5750 Major Blvd.
Suite 205
Orlando, FL 32819