097

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT JEROME NESMITH,

Respondent.

Case No. 81,904
[TFB Case No. 92-31,207 (09D)]

4-12

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INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 068153

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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.

STATEMENT OF THE CASE

The Ninth Judicial Circuit Grievance Committee "D" voted to find probable cause on December 16, 1992. The bar filed its one count complaint on June 8, 1993. The final hearing was held on December 7, 1993. The referee issued his report finding the respondent not guilty on all charges on January 5, 1994.

The Board of Governors of The Florida Bar considered the report at its February, 1994, meeting. The board voted to uphold the referee's findings of fact but to seek review of his conclusions that the respondent's conduct did not involve an improper business transaction wherein there were conflicting interests, the transaction was not entered into with a true client, and the respondent complied with Rule 4-1.8 even though he did not obtain the other party's consent to the transaction in writing. In sum, the board of governors thought that the referee's conclusions were not consistent with some of his findings of fact. The bar served its petition for review on February 22, 1994.

STATEMENT OF THE FACTS

The following facts are taken from the referee report unless otherwise noted.

Michael Passas owned a company known as the Garlic Crab Corporation. Beginning in 1990, the respondent represented the corporation. Initially this was done by a prepaid retainer with no written contract. In August, 1991, the parties executed a written contract which obligated the respondent to represent the corporation in civil matters. Mr. Passas paid the respondent $2,000 as a prepaid retainer.

On November 15, 1991, the respondent asked Mr. Passas for a $4,500 personal loan so as to avoid a foreclosure on his home. Mr. Passas agreed to loan the money and drew a check for $4,500 on his corporate account. The respondent admitted he did not advise Mr. Passas in writing that he should seek the advice of independent counsel prior to making the loan nor did Mr. Passas agree in writing to the transaction prior to making the loan. The respondent handwrote a promissory note at the time of the transaction. The note obligated the respondent to repay the entire $4,500, with no interest, within one month. Although the respondent had offered to pay interest, Mr. Passas declined. He did make it clear to the respondent, however, that he needed the money to be repaid within one month so that he would be able to

close on a real estate transaction.

The respondent made no payments on the note within the stated time. The respondent admitted Mr. Passas tried, without success, to obtain payment from him and that Mr. Passas eventually found it necessary to file a collection action. The suit was brought in Mr. Passas' name as an individual rather than the corporation's name. The civil process server who was hired to serve the summons on the respondent stated in his affidavit presented to the referee that he believed the respondent had attempted to avoid service by concealing his identity (B-Ex. 9). The respondent denied the process server's account of what transpired. The referee found that the alleged attempt to evade service was neither disproved by the respondent nor proved by the bar.

On May 8, 1992, Mr. Passas obtained a judgment against the respondent. A copy was mailed to the respondent at his record bar address. Thereafter, Mr. Passas began efforts to collect the judgment. Because the process server was not able to serve a subpoena duces tecum in aid of execution on the respondent, a levy was made on the respondent's car. The deputy sheriff who executed the levy eventually found the respondent who was in possession of his car at the time. When he advised the respondent that he was going to take the car pursuant to the levy, the respondent invited him to accompany him to his house

where he tendered payment of the entire judgment, in cash, to the deputy.

On November 25, 1992, the court awarded Mr. Passas a second judgment in the amount of $84.25, plus interest, for costs he incurred in attempting to serve the subpoena duces tecum in aid of execution. As of the date of the final hearing in the bar's case, the respondent had not satisfied this judgment.

The referee found that at the time the loan was made, the Garlic Crab Corporation had only one shareholder other than Mr. Passas. This person held a small number of shares and during the lifetime of respondent's promissory note Mr. Passas bought out this individual's entire interest. Mr. Passas used his capacity as sole shareholder and owner of the corporation and his individual capacity interchangeably.

SUMMARY OF THE ARGUMENT

Although a referee's findings of fact are presumed to be correct, his conclusions of law are susceptible to closer scrutiny by this court. The bar submits the referee's conclusions that Mr. Passas was not a true client and therefore there was no conflict of interest in the respondent's soliciting a loan from him and that R. Regulating Fla. Bar 4-1.8 was not violated even though Mr. Passas never consented to the transaction in writing are erroneous. Further, the referee made no finding with respect to the bar's allegation that the respondent attempted to avoid service of process despite receiving evidence from both parties. Instead, the referee related his own past experiences with civil process servers in general (T. pp. 94-95). The bar finds it troubling the referee would interject his own feelings and experiences with divorce litigants and civil process servers. Although all referees must, to a certain extent, base conclusions regarding credibility on their own observations, the bar questions the appropriateness of basing conclusions on such broad generalities as divorce litigants being very emotional and civil process servers being unreliable (T. pp. 94-95).

The bar submits Mr. Passas was a client because he looked to the respondent for legal advice (T. pp. 49-50). His corporation was a small one-man organization (T. pp. 21-22). The respondent was a friend, customer and corporate attorney (T. pp. 52-53).

Mr. Passas trusted him to repay the loan and even refused to charge him interest (T. p. 59). The respondent took advantage of a client whose business he knew had grown from a roadside vending cart to a restaurant (T. pp.52-53) because he desperately needed money and realized Mr. Passas, with his successful business, could spare a portion of what the respondent still needed to salvage his home from foreclosure (T. p.23). When the respondent failed to earn sufficient legal fees to repay the loan, he initially stalled Mr. Passas (T. pp. 28, 29 and 61), then he became incommunicado (T. p. 39). Because Mr. Passas found locating the respondent to be so difficult, had he needed legal services for his corporation pursuant to the $2,000 prepaid retainer contract, he would have found himself without a corporate attorney.

Mr. Passas never consented to the transaction in writing, as required by R. Regulating Fla. Bar 4-1.8. The wording of the entire rule makes it clear that the burden rests with the attorney to ensure all the required criteria are met before entering into a business transaction with a client. The respondent testified at the final hearing he did not even bother to consult the rules before soliciting the loan (T. pp. 77-78). It simply never occurred to him. Further, the case law clearly shows that a lawyer is held to high standard of conduct even in business dealings with nonclients. By virtue of their education and training, attorneys possess certain skills and knowledge

which the general public does not. The privilege to practice law, therefore, carries with it certain burdens and responsibilities which, if abused, may warrant revocation of that privilege. Petition of Wolf, 257 So. 2d 547, 548 (Fla. 1972).

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 INCORRECT.

The bar takes no issue with the referee's factual findings but does challenge his legal conclusions based thereon. Specifically, the bar challenges the conclusion that Mr. Passas was not a client and therefore the business transaction was between the two gentleman as individuals and not as attorney and client. The bar also questions the referee's conclusion that orally advising Mr. Passas to seek independent counsel was sufficient to satisfy the requirements of R. Regulating Fla. Bar 4-1.8.

The referee's findings of fact are presumed to be correct and will be upheld unless proved to be unsubstantiated by the evidence. The Florida Bar v. Micks, 628 So. 2d 1104 (Fla. 1993). The referee's legal conclusions, however, are subject to a broader scope of review because of this court's ultimate responsibility for entering an appropriate final judgment. The Florida Bar in re Inglis, 471 So. 2d 38 (Fla. 1985). The referee, in effect, concluded that because Mr. Passas had retained the respondent to represent his corporation and not himself individually, Mr. Passas was not a client. The bar submits the corporation was Mr. Passas' alter ego and therefore

Mr. Passas occupied a position similar to that of a client in that he had a long standing professional relationship with the respondent and relied on him for legal advice. The respondent initially was a customer of Mr. Passas when he sold crabs from a roadside vending cart and was instrumental in assisting Mr. Passas to establish a restaurant (T. pp. 52-53). The respondent also assisted Mr. Passas in obtaining investors (T. p. 53). At the time the loan was made by Mr. Passas from his corporate account, Mr. Passas owned a majority of the outstanding stock and there was only one other shareholder who held a minority of the issued shares (T. p. 21; RR. p.3). Mr. Passas was the chairman and president of the corporation (T. p. 21) and there were no other corporate officers (T. p. 22). Mr. Passas occasionally intermingled his business and personal matters and he used his capacities as sole shareholder and individual interchangeably (T. p. 30; RR. p. 3). Although Mr. Passas drew the respondent's loan from corporate funds, (T. p. 23, B-Ex. 2) the respondent made his promissory note payable to Mr. Passas (B-Ex. 1) and the suit was brought by Mr. Passas as an individual (T. p. 29; RR. p. 3).

It is clear from the evidence that Mr. Passas relied on the respondent for legal assistance and advice. As a result, the respondent owed him a duty of care not to take advantage of the relationship for his own financial gain. "Lawyers must be extremely careful in their personal dealings with clients. Lawyers act in a special fiduciary capacity with their clients

and must avoid using that relationship for personal gain." The Florida Bar v. Black, 602 So. 2d 1298 (Fla. 1992).

Even if Mr. Passas were not considered to have been a client, attorneys must exercise care in business transactions with non-clients as well. For example, a lawyer was publicly reprimanded in The Florida Bar v. Hankal, 533 So. 2d 293 (Fla. 1988), when he entered into a loan transaction with a former client. There was no attorney-client relationship with regard to the transaction. The lender initiated the deal for the purpose of evading paying income taxes on the interest income. The referee stated that "attorneys should be held to a higher standard of conduct in conducting financial transactions with a lay person, even if that layman is not a client."

It is uncontroverted that the respondent never obtained Mr. Passas' consent in writing to the loan prior to entering into the transaction. The respondent admitted that prior to asking Mr. Passas for the money, he did not first stop to determine whether or not it would be a rule violation (T. pp. 77-78). He desperately needed money and knew Mr. Passas was a potential source (T. p. 77). The bar submits that R. Regulating Fla. Bar 4-1.8, contrary to the referee's statement at the final hearing (T. p. 12), is not ambiguous or unclear. The rule states that a lawyer may not enter into a business transaction with a client or acquire a security interest adverse to a client unless the terms

are transmitted to the client in writing, the client is given the opportunity to consult with independent counsel, and the client consents to the transaction in writing. All three elements must be fully satisfied. There are no exceptions. It is clear from the evidence and the testimony that the respondent failed to fully comply with the spirit and letter of the rule.

Additionally, although the referee in effect made no finding as to whether or not the respondent attempted to evade service of process when Mr. Passas sued to collect on the delinquent note (RR. p. 3), it is clear from the evidence and testimony that Mr. Passas found it difficult both to serve the respondent with documents and collect the judgments. The respondent knew he was delinquent in fulfilling his obligation (T. pp. 79-81). He made no partial payments from the date the note was due until the deputy sheriff attempted to execute the levy on his automobile (T. pp. 29, 40). Yet when the deputy attempted to execute the levy, the respondent was able to give him the full judgment amount in cash (T. pp. 84-85).

The referee stated in his report that he found the respondent's account to be believable because his own personal experience had been that "too many process servers...go out and do an inept job and come back and say they couldn't find them and I've even had to go out and serve witness subpoenas myself when I was practicing because the process server wouldn't do the job."

(T. pp. 94-95; RR. p. 3). Yet the respondent's witness, Robert Myricks, testified that the man who came to the respondent's office asked if anyone there was named Bob (T. p. 71). The respondent told him there was a Robert Nesmith and after a brief conversation which Mr. Myricks could not hear, the respondent asked the gentleman to return in ten minutes (T. p. 71). Mr. Myricks and the respondent left shortly thereafter to eat lunch and upon their return saw a paper posted on the office door (T. p. 72). The respondent told Mr. Myricks what it was (T. p. 72). The respondent testified the process server asked if there was a Bob Nesmith present (T. p. 82). Because the respondent dislikes this nickname, he replied there was not (T. p. 82). He told the gentleman that he was Robert Nesmith and when the man asked to speak to him, he advised he was too busy, asked the man to return in ten minutes and then showed him out (T. p. 82). This is at some variance with Mr. Myricks' testimony. The affidavit of the process server, Mr. Dippenworth, (B-Ex. 9), stated that the respondent told him Mr. Nesmith was out and to please return in ten minutes. He also experienced difficulty in serving the respondent on other occasions. The bar submits there was sufficient evidence upon which the referee could base a finding without relying on his personal experiences with other civil process servers.

The respondent and Mr. Passas had a long-standing personal and professional relationship. The bar submits the respondent

took advantage of Mr. Passas' faith and trust in him to obtain a loan. He never made the risks clear to Mr. Passas. He failed to make even a partial payment on the note, which he had prepared, and forced Mr. Passas into suing him to recover the money. There was no indication he told Mr. Passas, the owner of the corporation which was his client, that he was going to be out of town for extended periods or how he could be contacted (T. pp. 39, 73-74, 83). The last time they spoke was a telephone call in or around January or February of 1992 (T. pp. 80-81). It appears, therefore, that had Mr. Passas needed to contact the respondent to perform already paid for legal services for the corporation pursuant to the $2,000 prepaid retainer contract, he would have been unable to do so.

The referee also found that the respondent's divorce and the illness of his girlfriend's child mitigated the situation (T. pp. 94-95). At the conclusion of the final hearing, the referee stated the following:

> Quite candidly, I find the case extremely weak. Now, the evidence is ambiguous to say the least as to whether Mr. Passas, or whatever his name is, was a client or not. At least he was a corporate client in principle...I really can't find that he was not advised to seek counsel because quite frankly the common sense thing is probably the truth is he checked with his wife, not with a lawyer, and if she okayed it, it was all right and if she didn't...I find he borrowed money from his client or from the president of his client...Quite frankly, it would be understandable under the circumstances of a divorce--I'm in family law at the moment. I've never seen more emotional people in my life...And I think his explanation looked plausible under the circumstances. He's in the throes of a divorce. His wife's left him. His girlfriend's

kid is sick (T. pp. 93-95).

The bar submits the referee's conclusions of law, based in part on his personal experiences and opinions, were erroneous and not supported by the evidence. While it might be argued the respondent's emotional state explained his actions, it does not excuse his abuse of his attorney position.

Even if Mr. Passas were not considered to have been a client, it is well settled in Florida that lawyers are held to a high standard of conduct in their business relations with non-clients. Attorneys owe a duty of care not only to the courts, but also to the public and the profession. As this court stated in The Florida Bar v. Bennett, 276 So. 2d 481, 482 (Fla. 1973):

> Some may consider it "unfortunate" that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple business acumen and not be held responsible under the high standards of our profession. It is not often, if ever, that this is the case. In a sense, "an attorney is an attorney is an attorney", much as the military officer remains "an officer and a gentleman" at all times. We do not mean to say that lawyers are to be deprived of business opportunities; in fact we have expressly said to the contrary on occasion; but we do point out that the requirement of remaining above suspicion, as Caesar's wife, is a fact of life for attorneys. They must be on guard and act accordingly, to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing.

POINT II

A SIXTY DAY SUSPENSION IS AN APPROPRIATE LEVEL OF DISCIPLINE FOR ENGAGING IN AN IMPROPER BUSINESS TRANSACTION WITH A CLIENT WHEREIN THEY HAD DIFFERING INTERESTS, GIVEN CERTAIN AGGRAVATING FACTORS.

The bar submits the case law and Florida Standards for Imposing Lawyer Sanctions support a sixty day suspension. This recommendation takes into account the mitigating factors found by the referee, namely the existence of personal or emotional problems. [Standard 9.32(c)]. Standard 9.32(a) also applies because the respondent has no prior disciplinary history. Aggravating factors include Standard 9.22(b), the existence of a dishonest or selfish motive, 9.22(g), refusal to acknowledge the wrongful nature of his conduct and 9.22(j), an indifference to making restitution.

In Black, supra, an attorney was suspended for sixty days and placed on a two year period of probation for soliciting a loan from a client. The attorney obtained an unsecured loan from his client and promised to pay a usurious rate of interest without informing the client of the illegality of the transaction. The attorney failed to advise the client of his right to seek the advice of independent counsel prior to entering into the transaction. The client eventually was repaid and suffered no loss, although he suffered exposure to potential damage. The lawyer was experiencing difficult personal circumstances and when he was unable to obtain money from other

sources, he seized upon the opportunity to obtain an emergency loan from his unsophisticated client. The referee found, in aggravation, that the attorney had a selfish motive, his client was vulnerable, and the attorney had substantial experience in the practice of law and should have known better than to take advantage of a client. In mitigation, the referee found the attorney had no prior disciplinary history, made a timely good faith effort to make restitution, was remorseful, made a full and free disclosure to the bar and cooperated in the proceedings, and had no intent to deprive his client of property or to deceive him.

An attorney was suspended for ninety days in The Florida Bar v. Hooper, 507 So. 2d 1078 (Fla. 1987), for engaging in misconduct related to his failure to pay a personal bill. The attorney contracted with an air conditioning company for the installation of equipment. The attorney was not satisfied with the quality of the work and refused to pay the bill. The company retained counsel who contacted the attorney by letter and demanded payment. After receipt of this letter, the attorney telephoned the company directly and spoke to an agent regarding the matter. He told the agent that he would not pay the bill and if the company filed a lawsuit against him or placed a lien on the property, he would have the lien removed and he would hold the suit in litigation for years to come. The matter did proceed to a civil action. The attorney failed to appear at his

scheduled deposition despite receipt of notice. He also wrote a letter to the company's attorney threatening to file additional lawsuits unless they dismissed a suit filed in county court and withdrew their pending complaint with The Florida Bar. In addition, he received a rebate based upon his false representation to the local utility company that he was both the dealer and salesman of the equipment. In mitigation, the attorney had no prior disciplinary violations. His misconduct arose from his overzealous attempts to represent himself in a business transaction and the subsequent litigation. This court reiterated, however, its comment in Bennett, supra, that even in personal transactions, attorneys must "avoid tarnishing the professional image or damaging the public which may rely upon their professional standing."

A six month suspension was ordered in The Florida Bar v. Anderson, 506 So. 2d 403 (Fla. 1987), for various misconduct engaged in by an attorney including convincing a client to surrender his entire cash holdings by means of an unsecured promissory note payable on demand. The attorney initially represented the client in an incompetency proceeding. Afterwards, the attorney induced the client to surrender his entire cash holdings to the attorney. In return, the attorney gave the client an unsecured promissory note which was payable on demand. The attorney did not repay all of the money when requested which forced the client to bring suit. The attorney

then tried to conceal his misconduct by preparing and backdating a second note to account for the money. The attorney also misrepresented his relationship with the client to the judge by requesting to be appointed as the client's guardian without disclosing that he was already the client's trustee. Several years later, he failed to file a full accounting of the trust in accordance with a court order. Prior to being appointed as guardian, the attorney also convinced the client to transfer property to him without having the existing guardian or trustee also sign the property transfer documents. There was no evidence that the attorney's actions constituted a conversion of the client's funds. The client knowingly and willingly entered into the loan agreement.

In The Florida Bar v. Pitts, 219 So. 2d 427 (Fla. 1969), an attorney was suspended for six months for borrowing a substantial sum of money from a client, giving him a note bearing criminally usurious interest and then pleading usury as a defense to a suit on the note. There was an indication that the attorney negotiated restitution and settlement with the client. The judgment entered by this court was based on the assumption that the restitution had been accomplished. If it had not, then either restitution or arrangements for restitution satisfactory to the client would be a condition for reinstatement.

The Florida Standards for Imposing Lawyer Sanctions also

support a suspension for engaging in an improper business transaction with a client. Under Standard 4.3, failure to avoid conflicts of interest, Standard 4.32 calls for suspension when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. The respondent failed to obtain Mr. Passas' consent to the transaction in writing. He failed to fully explain to him the risks of making such an unsecured loan.

Perhaps the problems encountered by lawyers who enter into business transactions with clients was best summed up by this court in The Florida Bar v. Kramer, 593 So. 2d 1040, 1041 (Fla. 1992).

> Business dealing between lawyers and clients are fraught with conflict-of-interest problems, as this case clearly illustrates. Human nature makes such conflicts virtually inevitable notwithstanding a lawyer's good intentions. When a lawyer deals with a client in a business transaction, the lawyer must be scrupulous in disclosing the exact nature of the transaction and in obtaining the client's consent in writing. Failure to comply with these safeguards normally warrants a greater punishment than a reprimand.

The bar further submits a sixty day suspension would satisfy the purposes of lawyer discipline as set forth in The Florida Bar v. Larkin, 447 So. 2d 1340 (Fla. 1984). It would serve to protect the public, punish the respondent's wrongful conduct, encourage rehabilitation by causing the respondent to consider

the reasons why such transactions must be closely scrutinized for the protection of the client, act as a deterrent to other members of the bar who might be tempted to seize upon similar opportunities when facing personal or professional financial difficulties, and create and protect a favorable image of the profession. As an attorney, the respondent surely must have known the ramifications of giving his client such an unsecured promissory note backed only by his promise to repay the money as soon as he received legal fees in connection with another case (T. pp. 78-79). The respondent failed to repay the money and keep in touch with his client thus forcing Mr. Passas to bring a civil action. The respondent failed to pay the judgment even though it was sent to him at his record bar address at that time (B-Ex. 5), thus forcing his client to bring a collection action and incur more attorney's fees and costs. Because the respondent failed to tell his client of his whereabouts, the respondent proved to be virtually impossible to serve. To the public it must appear that the respondent took advantage of his client and by virtue of his superior knowledge of the legal system was able to avoid paying his debt for a substantial period of time. In fact, as of the date of the final hearing, the respondent still had not paid the judgment awarding costs (B-Ex. 10) which was entered in favor of Mr. Passas on November 25, 1992, in the amount of $84.25 (T. p. 45). This is not a large sum of money and the bar submits the respondent's refusal to pay even a portion of it, despite having been made aware of its existence

through these proceedings, indicates bad faith on the respondent's part throughout the entire transaction. The bar submits that restitution of this amount to Mr. Passas by the respondent is warranted because the client's loss is based directly upon the respondent's misconduct and he has no other viable recourse available to him. The respondent has profited at his client's expense.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings, conclusions of law and recommendations and enter an order suspending the respondent for a period of sixty days, requiring restitution to Michael C. Passas in the amount of $84.25 plus interest accruing at the rate of 12% per year from November 25, 1992, and requiring payment of the costs of these proceedings now totalling $1,515.76.

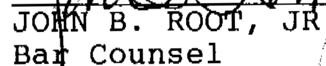
Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

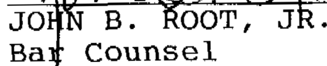
JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 068153

By: 

JOHN B. ROOT, JR.
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing brief and appendix have been furnished by regular U. S. mail to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U. S. mail to Robert Jerome Nesmith, respondent, at 129 East Colonial Drive, Orlando, Florida 32801-1201; and a copy of the foregoing has been furnished by regular U. S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 18th day of March, 1994.



JOHN B. ROOT, JR.
Bar Counsel

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Complainant,

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

v.

ROBERT JEROME NESMITH,

Respondent.
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APPENDIX TO COMPLAINANT'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 068153

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ORLANDO

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(Before a Referee)

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REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held on December 7, 1993. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - John B. Root, Jr.

For The Respondent - In pro se

II. Rule Violations Found: None

III. 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 on below, I find:

1. The respondent represented the Garlic Crab Corporation, owned by Michael Passas. During 1990 and early 1991 the respondent was on a prepaid retainer basis by virtue of an unwritten contract. However, in or about August, 1991, a written contract was executed in which the respondent was obligated to represent the Garlic Crab Corporation in civil matters. A fee of $2,000 was paid by Mr. Passas as a retainer in this amount.

2. The respondent was experiencing financial difficulties.

3. The respondent admits that on or about November 15, 1991, he approached Mr. Passas about obtaining a personal loan from him in the amount of $4,500.

4. He advised Mr. Passas that he needed the funds to avoid foreclosure on his home.

5. Mr. Passas agreed to loan the funds and drew a check from his corporate account, check number 5399, dated November 15, 1991, in the amount of $4,500.

6. The respondent admitted that he failed to advise Mr. Passas in writing to seek the advice of independent counsel prior to making the loan.

7. Mr. Passas testified that the respondent failed to advise him either orally or in writing that he should seek independent counsel prior to entering into the loan transaction.

8. The respondent, however, testified that he orally advised Mr. Passas that he should seek counsel.

9. Mr. Passas did not agree in writing to the transaction prior to making the loan.

10. A hand written promissory note was prepared at the time of the transaction by the respondent in which he agreed to repay Mr. Passas his $4,500, with no interest, within one month.

11. Mr. Passas testified that although the respondent had offered to pay interest on the loan he, Mr. Passas, waived any interest. Mr. Passas advised the respondent that he needed the money to be repaid so he could close on a real estate transaction which was being prepared but that he could loan the money to the respondent on a short term basis.

12. The respondent made no payments to Mr. Passas on the note within the stated time. The respondent admits that Mr. Passas attempted, without any success, to obtain payment from him and that Mr. Passas eventually filed a collection action in the County Court for Orange County.

13. The case was styled Passas v. Nesmith, case no. CO 92-1532.

14. A civil process server, John Dippenworth, attempted to serve the respondent in that case on or about February 25, 1992. The facts concerning Mr. Dippenworth's attempted service are in dispute. Mr. Dippenworth's affidavit, which was admitted as bar exhibit no. 9, contained his sworn account of his attempts to serve the respondent.

15. Mr. Nesmith in his testimony, essentially denied Mr. Dippenworth's account as contained in his affidavit.

16. I find that Mr. Nesmith's account concerning the attempts to serve him is believable. Although I find the allegation the respondent attempted to evade service of process was neither proved nor disproved, it is not uncommon for civil process servers to make inadequate attempts to serve documents on persons.

17. Although the check used by Mr. Passas to make the loan to the respondent was drawn on the account of the Garlic Crab Corporation, the promissory note was made in favor of Mr. Passas as an individual and the suit and judgment also were in his individual capacity.

18. At the time of the loan there was a second shareholder of a very small number of shares in the corporation. During the lifetime of the loan, Mr. Passas bought out the other shareholder and became the sole shareholder in the Garlic Crab Corporation.

19. Mr. Passas testified that his capacity as the sole owner of the issued shares and sole owner of the corporation in his individual capacity were used interchangeably.

20. The judgment in the lawsuit was not received until May 8, 1992. The final judgment, which was admitted into evidence as bar exhibit no. 5, reflected that a copy of it was sent by the court to the respondent at his record bar address at that time.

21. After the entry of the judgment, Mr. Passas began attempting to collect the judgment. The statements of Mr. Dippenworth in his affidavit concerning the attempts to serve Mr. Nesmith are at variance with the testimony of Mr. Nesmith. I accept, for this purpose, the testimony of Mr. Nesmith. The service of a subpoena deuces tecum in aid of execution was not accomplished upon Mr. Nesmith, however, a levy against Mr. Nesmith's automobile to satisfy the judgment was attempted. The deputy sheriff eventually found Mr. Nesmith who was in the possession of his car at the time.

22. When apprised of the fact the levy had been made on his automobile, Mr. Nesmith opted to pay the judgment at that time and invited the deputy to accompany him to his home where he made payment of the entire judgment to the deputy sheriff.

23. On November 25, 1992, the County Court, Ninth Judicial Circuit, entered a second judgment awarding costs to Mr. Passas in the amount of $84.25 with the said amount to bear interest at the rate of 12% a year. This judgment represented costs incurred in attempting to serve the subpoena deuces tecum in aid of execution.

24. As of the date of the final hearing in this matter, the respondent had not paid the cost judgment referred to above.

25. I find that the respondent did not engage in an impermissible conflict of interest by soliciting a short term loan from Mr. Passas. He orally advised Mr. Passas that he had the right to consult with another attorney and Mr. Passas declined to do so. This was a personal business matter between the two gentlemen and was unrelated to respondent's representation of Mr. Passas' corporation.

26. I find that this is a civil matter best resolved by the courts and not through a disciplinary proceeding. The problems experienced by Mr. Passas are not unusual in a debt collection action and the bar should not be used as a collection agency.

IV. Recommendations as to Whether or Not the Respondent Should Be Found Guilty: I recommend the respondent be found not guilty of the allegations contained in the bar's complaint.

V. Recommendation as to Disciplinary Measures to Be Applied:

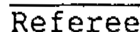
Having found the respondent not guilty, I recommend no disciplinary measures be imposed.

VI. Personal History and Past Disciplinary Record: I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 45
Date admitted to bar: June 16, 1989
Prior disciplinary convictions and disciplinary measures imposed therein: None

VII. Statement of costs and manner in which costs should be taxed: Having found the respondent to be not guilty, I recommend each party bear its own costs in this matter.

Dated this 5 day of January, 1994.



Referee

Copies to:

Mr. John B. Root, Jr., Bar Counsel, The Florida Bar, 880

North Orange Avenue, Suite 200, Orlando, Florida 32801

Mr. Robert Jerome Nesmith, Respondent, 129 East Colonial Drive, Orlando, Florida 32801-1201

Mr. John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300