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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)]

REPLY BRIEF

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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 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.

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 has reviewed the respondent's answer brief and, in passing, notes the respondent signed the certificate of service of his answer brief on April 12, 1994, stating that he mailed to the bar a copy of said brief on that date. Presumably the words "Requests For Admission" are a clerical error. The postmark on the envelope clearly shows the mailing date was actually three days later on April 15, 1994. Possibly the respondent neglected to mail the bar's copy on the date he signed the certificate of service and for three days thereafter. A copy of the envelope is appended.

Although the respondent bases much of his defense on the argument that Mr. Passas was not a client, it is not necessary to show an attorney/client relationship in order to find a lawyer guilty of violating the Rules Regulating The Florida Bar. The Florida Bar v. Davis, 373 So. 2d 683 (Fla. 1979). Furthermore, the testimony at the final hearing indicated that, at the very least, Mr. Passas was a former client because the respondent had incorporated his business (T. p. 37). The Florida Bar, however, is not receding from its position that Mr. Passas was a client of the respondent under the circumstances of this case. Even the respondent said in his statement of the facts in his answer brief

that Mr. Passas retained him to represent his corporation. He does not state that the corporation retained him. Although a corporation is a legal entity, its decisions are made by people and, in Mr. Passas' case, he was the corporation. There were no other officers or directors and only one other shareholder, who was bought out during the lifetime of the promissory note in question (T. pp. 21-22). At the time the loan was made, Mr. Passas was a majority shareholder of nearly all of the authorized stock (T. p. 51). Further, the respondent admits on page 5 of his answer brief that the evidence presented at the final hearing clearly showed that Mr. Passas relied on the respondent for legal assistance as it related to the corporation's business matters. The loan to the respondent was made by a corporation check (B-Ex. 2). The promissory note was made out to "Michael Passas" in the respondent's own handwriting (B-Ex. 1).

Attorneys owe a duty not only to clients but to others who also rely on the attorney. What matters is the individual's belief as to whether or not the lawyer is acting on that person's behalf or is protecting that person's interests. The degree of trust and reliance is what matters and not whether or not an individual is technically a client. It is not the attorney's intentions that govern, but rather, the layperson's state of mind, assumptions and beliefs.

In The Florida Bar v. Jennings, 482 So. 2d 1365 (Fla. 1986),

an attorney was publicly reprimanded for abusing his position to secure loans from his in-laws. There was no attorney/client relationship. He was found guilty of overreaching in his dealings with them. Of particular interest is Justice Ehrlich's dissent where he urged a 91 day suspension. He opined it was no defense that the persons involved were not clients and cited The Florida Bar v. Adams, 453 So. 2d 818 (Fla. 1984). Neither did he consider the personal relationship to be a mitigating factor. The attorney tricked his relatives into loaning him money. They gave willingly and without the advice of independent counsel because they trusted him and relied on his promise to do whatever paperwork was needed to secure their loans.

In The Florida Bar v. Simonds, 376 So. 2d 853 (Fla. 1979), a resignation case, an attorney secured from two clients investment loans for a retail business venture. No written security was given at the time of the loan, although sometime later the attorney did execute promissory notes. The venture failed. The clients were able to recoup over one-half of their investment amounts. The court stated that the attorney's conduct violated the "almost strict fiduciary standard imposed upon attorneys who enter into such business transactions with their clients" by failing to advise them about their differing interests and their legal rights.

Even where an attorney's conduct is unrelated to the

practice of law, this court has the power to render discipline because lawyers are held to a higher standard of conduct in business dealings than nonlawyers. The Florida Bar v. Hosner, 520 So. 2d 567 (Fla. 1988). For example, in Davis, supra, an attorney was publicly reprimanded for misusing investment capital in his possession. The attorney and a business partner, with whom there was absolutely no attorney/client relationship, entered into a speculative real estate venture. The partner was represented by independent counsel throughout the transaction and the two dealt at an arm's length as business associates. Nevertheless, the attorney was found guilty of misrepresentation and conduct contrary to honesty, justice and good morals that reflected adversely on his fitness to practice law.

Simply put, in the instant case, the respondent was experiencing financial difficulties and seized upon the opportunity to obtain a fast loan from a person who was a long-time acquaintance and for whom he had performed legal services. Mr. Passas had no reason to believe the respondent would take advantage of his generosity. Mr. Passas did not request the respondent execute a promissory note and when the respondent drafted one by his own volition, Mr. Passas declined to charge him interest on the loan (T. p. 59). The respondent's note, however, was not secured by any collateral (B-Ex. 1). The bar submits the respondent failed to protect Mr. Passas' interests by neither collateralizing the note nor explaining to Mr. Passas the

possible consequences of accepting such a note if default occurred. Furthermore, the bar submits the respondent did not repay the loan as soon as possible. In fact, he never attempted to make even a small partial payment during the life of the note or after the default occurred. Surely, a minimal sum paid weekly would not have been an impossible achievement. Regular small payments, at least, would have indicated a good faith effort on his part to fulfill his obligation. The fact remains that the respondent made absolutely no effort whatsoever to repay Mr. Passas any money until the day the sheriff arrived to seize the respondent's automobile. Suddenly, the respondent found in his possession enough cash to satisfy the judgment in full (T. pp. 84-85). The respondent stated in his answer brief on page 8 that "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)." This statement seems at odds with the referee's finding of fact that "the deputy sheriff <u>eventually</u> found Mr. Nesmith who was in the possession of his car at the time... When apprised of the fact the levy had been made on his automobile, Mr. Nesmith opted to pay the judgment <u>at that time</u> and invited the deputy to accompany him to his home where he made <u>payment of the entire judgment</u> to the deputy sheriff." (Emphasis supplied).

It is interesting to note that the respondent kept his cash at his home. Hubert K. Fletcher, Sr., an attorney who assisted Mr. Passas in his collection efforts, stated in his affidavit

admitted into evidence as bar B-Ex. 7 that he believed the respondent used evasive tactics to avoid collection and it was possible the respondent could have hid his checking account to avoid garnishment although admittedly this could not be proved. Further, the respondent has not paid even a small portion of the costs judgment awarded to Mr. Passas in connection with his collection efforts (T. p. 45). Although the respondent pointed out in his brief that he paid the original judgment in full, he neglected to address his continuing failure to pay the costs judgment.

The respondent's statement of facts in his answer brief includes several items which were not contained in either the referee's findings or the record. The referee never found the civil process server, John Dippenworth, lied. The referee only found that although the respondent's account was believable, the bar's allegations had been neither proved nor disproved (RR p. 3). The respondent then states as a fact, even though not found by the referee or entered into evidence, that Mr. Passas solicited the respondent's assistance in "penetrating the Black Market," which the bar assumes refers to an ethnic target market for a product and not the underground network of persons engaged in the illegal sale of goods. The respondent also states as a fact that Mr. Passas wanted him to file charges against an employee. Again, this is not among the referee's findings of fact.

The respondent's argument contains several inaccuracies as well. The transcript does not show that the Bar Counsel stated that R. Regulating Fla. Bar 4-1.8 was ambiguous (T. pp. 10-13). The bar's complaint alleged the respondent entered into an improper business transaction with a client in violation of R. Regulating Fla. Bar 4-1.8. The complaint summarized the rule and did not state it verbatim. Further, R. Regulating Fla. Bar 3-7.6(g) provides that pleadings may be informal. The bar submits its complaint was sufficiently clear to put the respondent on notice as to the alleged misconduct being charged and the requirements of the R. Regulating Fla. Bar 4-1.8 are clear. The respondent's answers to the complaint and requests for admission show he understood the nature of the charges. The rule requires a client to give written consent to a business transaction after the lawyer conveys the terms to the client in writing and after the client has been given the opportunity to seek independent counsel. It is uncontroverted that Mr. Passas never gave his written consent. In fact, Mr. Passas testified the respondent never advised him, orally or in writing, to seek independent counsel (RR p. 2; T. pp. 57-58). The respondent testified he orally advised Mr. Passas that he had the right to consult with another attorney (RR p. 2; T. pp. 76-77). It is uncontroverted, however, and the referee so found, that there was no written communication from Mr. Passas acknowledging he had been advised to seek independent counsel and he had declined to do so prior to making the loan (RR p. 2). The bar submits, therefore, the

referee's conclusion that the bar did not prove a violation of R. Regulating Fla. Bar 4-1.8 is erroneous. Findings of fact 6 and 7 of the referee's report, standing alone, would justify a finding of guilt of that rule. The respondent did not satisfy the clear requirement of the rule.

Respondent's citation to page 91 of the transcript of the final hearing does not support his position that a "competent court of law found he did not try to evade service of process." What the testimony on that page concerned was a separate bar grievance case against the respondent brought earlier by Mr. Passas' attorney alleging the respondent was trying to evade service of process in the civil case. Bar counsel, not a "court," dismissed the inquiry. It was not considered by a referee. Furthermore, that case was not entered into evidence and is irrelevant here. The letter contained in the respondent's appendix to his answer brief was not submitted by him to the referee. The bar objects to the respondent's inclusion of new evidence in his appendix. Florida Rule of Civil Procedure 9.220 permits parties to include only portions of the record and other authorities in the appendix. It does not provide for the inclusion of items not submitted into evidence at the trial level.

Although the respondent states on page 8 of his brief that he was ill during much of the time in question, he presented no

testimony or evidence to this effect other than to state that he suffers from high blood pressure, gout, heart problems and "a couple of other things" (T. pp. 92-93). He never stated these problems interfered with his ability to practice law or that they somehow mitigated his conduct. He testified it was the illness of his fiancee's son which required trips to Jacksonville that made the respondent difficult to contact (T. pp. 81 and 83). Although the respondent believes this should excuse his conduct, the bar submits his failure to maintain contact with Mr. Passas, with whose corporation he had a retainer contract to provide legal services, should be a factor in aggravation. Even if the respondent's testimony is correct, apparently he only spoke to Mr. Passas twice after defaulting on the note (T. pp. 79-81). Mr. Passas testified the respondent never contacted him to tell him he was unable to pay the note (T. p. 28) and he had a great deal of difficulty contacting the respondent despite repeatedly calling the respondent's office and leaving messages with the secretary (T. p. 28). Mr. Passas was able to contact him only after driving by the office and, upon observing the respondent's car in the parking lot, immediately calling the respondent's office from his car phone (T. pp. 28, 29). Even though the note was in default, the respondent assured Mr. Passas he would pay it in full within one week (T. p. 29). Mr. Passas told him that so long as he knew the respondent intended to pay him, he would be willing to wait and was upset only because the respondent had not returned his telephone calls (T. pp. 28-29).

The bar submits that personal difficulties do not excuse taking advantage of a client or using one's superior knowledge and skills gained as a result of being an attorney to take advantage of even a nonclient layperson. See The Florida Bar v. Shazner, 572 So. 2d 1382 (Fla. 1991), where a lawyer was disbarred for misappropriating trust funds despite arguing his depression over his financial and marital problems led to the misconduct. Upon his admission to the bar, the respondent took an oath which imposed upon him a higher duty of care than what he would have enjoyed had he not chosen to pursue this profession. "...[T]he practice of law is a privilege which places special burdens upon those choosing to pursue this honorable profession. Law, being a 'jealous mistress', makes extraordinary demands upon members of the bar." State v. Fishkind, 107 So. 2d 131 (Fla. 1958).

ARGUMENT POINT II

A SIXTY DAY SUSPENSION WOULD BE 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 stands on its case law cited in its initial brief and its argument that a sixty day suspension is warranted given the facts. It is clear that attorneys have been disciplined for engaging in improper business transactions with both clients and nonclients where the terms of the transactions violated the Rules Regulating The Florida. Bar. Further, a suspension is warranted given the facts of this case. A public reprimand would not be appropriate because it is reserved for isolated instances of neglect, technical trust accounting violations without intent, or lapses in judgment. The Florida Bar v. Welty, 382 So. 2d 1220 (Fla. 1980). This was no mere lapse in judgment. The respondent solicited the loan, prepared the unsecured promissory note, made no attempt to pay even a portion of the note during its lifetime, defaulted on the note, suffered a default judgment and became virtually impossible to locate. He paid only when the loss of his car was imminent at which time he paid in cash, in full. He still owes Mr. Passas for the costs awarded in a second judgment in connection with the collection efforts. The respondent's behavior is indicative of bad faith.

The practice of law is a privilege and the public often measures the standing of the profession in the community by the

deviations of the minority of lawyers who violate the rules of conduct rather than by the majority who regard their licenses to practice as a sacred trust and conduct themselves with the utmost fidelity and devotion. It is for this reason that lawyers must adhere to a higher standard of conduct than nonlawyers. State v. Evans, 94 So. 2d 730 (Fla. 1957). The respondent has failed to uphold these standards. He solicited a loan from a client which he then refused to repay until his automobile was levied. His failure to honor the outstanding costs judgment is indicative of the respondent's callous disregard for the harm done to his client. Such conduct warrants nothing less than a sixty day suspension to impress upon the respondent, and other members of the bar, the necessity to scrutinize closely any business transactions with clients and the importance of strictly adhering to the rules so as to protect the public.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings, conclusions of law and recommendations and enter an order finding the respondent guilty of the rules charged, suspending him 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,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing reply brief has 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 reply brief has been furnished by Certified Mail No. P 098 302 619, return receipt requested, to Robert Jerome Nesmith, respondent, at 129 East Colonial Drive, Orlando, Florida 32801-1201, his record bar address; and 2709 Paseo Street, Orlando, Florida 32805; and a copy has been furnished by regular U. S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 26th day of April, 1994.

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v.

ROBERT JEROME NESMITH,

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_____/

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APPENDIX TO REPLY BRIEF

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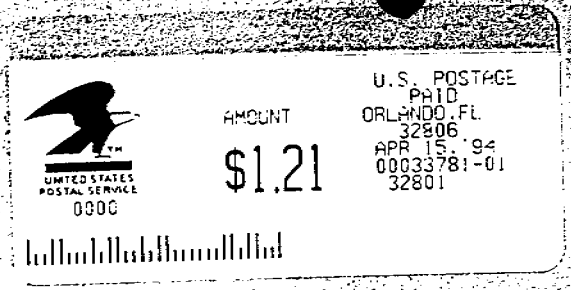

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