

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

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

[TFB Case No. 81,904]

v.

ROBERT JEROME NESMITH,

Respondent.

FILED

SID J. WHITE

JAN 7 1994

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

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 duces 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 duces 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:

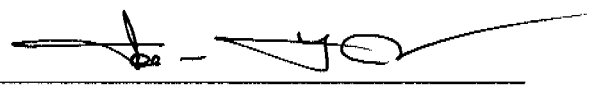
Having found the respondent not guilty, I recommend no disciplinary measures be imposed.

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 5th 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