IN THE SUPREME COURT OF FLORIDA

097

THE FLORIDA BAR,

Complainant,

v.

GARY H. NEELY,

Respondent.
_____/

Case Nos. 84,646 & 85,121
[TFB Case Nos. 94-31,627(07C)
& 95-31,015(07C)]

2/29

THE FLORIDA BAR'S ANSWER 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 held on July 7, 1995, shall be referred to as "T. I" followed by the cited page number. The transcript of the final hearing held on September 25, 1995, shall be referred to as "T. II" followed by the cited page number.

The Report of Referee dated October 11, 1995, will be referred to as "ROR," followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____).

The bar's exhibits will be referred to as B-Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as R-Ex. _____, followed by the exhibit number.

STATEMENT OF THE CASE

In case number 84,646, the bar filed its Petition for Order to Show cause on November 11, 1994. This court issued its Order to Show Cause on November 9, 1994. After twice moving for an extension of time to reply, the respondent served his response on November 19, 1994. Thereafter, the bar moved on January 20, 1995, for the appointment of a referee and one was appointed on February 3, 1995. The final hearing initially was set for April 12, 1995, but was continued to July 6, 1995, at the respondent's request. On July 11, 1995, the parties jointly moved this court for an extension of time for the referee to file his report which this court granted, allowing the referee until and including October 2, 1995, to file the report.

In case number 85,121, the bar filed a Petition for Order to Show Cause on February 7, 1995, which it amended immediately thereafter. This court issued its Order to Show Cause on February 15, 1995, and reissued it on March 22, 1995. The respondent served his answer on April 24, 1995. The bar thereafter served its motion for finding the respondent to be in

indirect criminal contempt of this court on July 6, 1995. The referee was appointed on July 11, 1995. The bar moved on July 14, 1995, to consolidate the two cases which was granted on August 3, 1995. Thereafter, the two matters proceeded to continued final hearing on September 25, 1995, and at that time the respondent's counsel moved for a continuance because the respondent's criminal charges that he practiced law without a license were still pending and he did not wish to waive his Fifth Amendment rights. So that the respondent could testify, the parties stipulated to sealing this record and directing it not be used in any criminal proceeding against the respondent (T. II p.p. 131-132). The referee entered his report on October 11, 1995, recommending in both cases that the respondent be found guilty of engaging in the unauthorized practice of law and referee recommended the respondent be permanently disbarred, pay all of the bar's costs associated with the two cases and make restitution to Ms. Cottle in the amount of $500.00. Should the respondent violate the court's order, the referee recommended he be incarcerated, pay a fine, or both.

The board of governors considered the referee's report at

its December, 1995, meeting and voted not to seek review of the referee's recommendations. The respondent served his petition for review on December 22, 1995, and served his initial brief in support thereof on January 30, 1996.

STATEMENT OF THE FACTS

On October 17, 1991, this court entered an order disbarring the respondent from the practice of law effective immediately, The Florida Bar v. Neely, 587 So. 2d 465 (Fla. 1991), (ROR-A p. 1).

In or around February, 1993, Veronica Cottle sought the services of an attorney to handle a possible legal malpractice suit (ROR-A p. 2). After being referred to the respondent by a neighbor, she obtained his telephone number from the local telephone directory assistance operator and called him to set an appointment (ROR-A p. 2). Initially, the respondent referred her to his former law partner, Gary Bloom (ROR-A p. 2). Ms. Cottle met with Mr. Bloom and thereafter called the respondent again (ROR-A p. 2). The respondent agreed to represent her for a fee of $1,000.00 (ROR-A p. 2). Ms. Cottle paid the requested fee and the respondent gave her a receipt so indicating (ROR-A p. 2). He also opened a file for her case that indicated it related to a possible legal malpractice action (ROR-A p. 2). The respondent testified he did not recall having told her he was disbarred and

not allowed to practice law in Florida (ROR-A p. 2, T. II p. 137). Dan Pray and William Cumming testified that the respondent told Ms. Cottle he was not a licensed practicing attorney (T. I p.p. 101, 116).

On or about December 15, 1994, the respondent, on behalf of Guest Services, Inc., filed a complaint in the Ninth Judicial Circuit Court (ROR-A p. 2). The respondent signed the complaint as the corporation's president (ROR-A p.2). The respondent filed a complaint not signed by a lawyer on behalf of a corporation (ROR-A p. 2). The corporation was not represented by a licensed attorney until February 6, 1995, when Christopher Ray entered his notice of appearance (ROR-A p.p. 2-3).

A corporation's filing of a complaint that is not signed by a licensed lawyer in this state constitutes the unlicensed practice of law, Szteinbaum v. Kaes Inversiones y Valores, 476 So. 2d 247 (Fla. 3d DCA 1985) (ROR-A p. 3). Further, the respondent caused process to be served and remained as the attorney as record until Mr. Ray filed his notice of appearance (ROR-A p. 3).

ARGUMENT

POINT I

THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY THE EVIDENCE.

In bar proceedings, a referee's findings of fact are presumed to be correct and this court will not reweigh the evidence and substitute its judgment for that of the referee as long as the findings are not clearly erroneous or lacking in evidentiary support, The Florida Bar v. Bustamante, 662 So. 2d 687, 689 (Fla. 1995). The party seeking to challenge the referee's findings of fact carries a heavy burden of showing those findings are clearly erroneous or without support in the evidence, The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). The bar submits the respondent has failed to prove the referee's finding, that the respondent engaged in the unlicensed practice of law, was not supported by clear and convincing evidence.

A referee's legal conclusions are subject to broader review by this court than are findings of fact, The Florida Bar in re Inglis, 471 So. 2d 38 (Fla. 1985). The referee's legal conclusion that the respondent's activities constituted the practice of law is also sound and well-supported by case law and

the evidence.

The practice of law involves giving advice and performing services that affect an individual's important legal rights and in order to reasonably protect an individual's rights and property, the advisor must have a greater legal skill and knowledge than the average citizen, State v. Sperry, 140 So. 2d 587, 591 (Fla. 1962). The gathering of the information needed to prepare a living trust does not constitute the practice of law, whereas determining whether a trust is appropriate for an individual's needs, and the "assembly, drafting, execution, and funding of a living trust document constitute the practice of law," The Florida Bar re Advisory Opinion, 613 So. 2d 426, 428 (Fla. 1992).

The respondent has attempted to argue he provided the same services a title insurance company legally could have provided Ms. Cottle. The respondent's argument is flawed. The agent who reviews the public records, the agency's records, and any available abstracts of title, is doing so on behalf of the title insurance company, not the prospective buyer, seller or lender.

The agent is researching the title so the agency may issue a title insurance policy and there is no charge for any of the work done other than the premium due when the policy is issued. The question of whether or not a title insurance company is practicing law by preparing title abstracts and issuing policies was first addressed in Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954). This court determined the act of researching the title by an agent of a title insurance company does not constitute the practice of law because in order for it to do so, there must be a client and, in the case of a title insurance company, the company is, in effect, its own client. Such was not the case with the respondent. He reviewed the title abstract in order to determine what needed to be done to clear it so Ms. Cottle could obtain a mortgage (T. II p.p. 134-135). Further, according to the respondent, Ms. Cottle paid him $1,000.00 for this service (T. II p. 137). It was not something the mortgage broker had the knowledge and training to do himself (T. II p.p. 144-145). The respondent conveyed his advice, based upon his legal expertise, to another attorney and directed him to take certain actions without advising the other lawyer he was not licensed to practice law (T. II p. 135, T. I p.p. 15-16, 18, 28).

The respondent himself testified he straightened out the abstract paperwork and the title problem by having Mr. DeMetros record the necessary document and told Ms. Cottle he had researched the possibility of correcting the abstract (T. II p.p. 137, 144). This certainly involves a knowledge of law beyond that of the average person and title insurance agents do not discuss this type of information with insurance purchasers. There is absolutely no evidence the respondent was acting as an agent for a title insurance company when he undertook to render these services to Ms. Cottle. In fact, he advised Mr. DeMetros he was retired or semi-retired which led him to believe the respondent was a licensed lawyer (T. I p.p. 15, 18, 28). Mr. DeMetros' testimony on this point is uncontroverted. The respondent then reinforced Mr. DeMetros' mistaken assumption by advising Mr. DeMetros that he would handle the title work himself rather than referring it to a title insurance company, which he certainly could have done (T. I p. 16). The respondent never told Ms. Cottle he had been disbarred (T. II p. 137) and she testified he advised her he was a lawyer (T. I p.p. 36).

This court held in The Florida Bar v. Dale, 496 So. 2d 813

(Fla. 1986), that an out of state attorney who was not licensed to practice law in Florida engaged in the unlicensed practice of law when he represented to a prospective real estate buyer that he could render legal assistance to him in connection with obtaining title insurance for the property. The accused lawyer operated a title company. The client was referred to him by the realtor and no one told the client the accused was not licensed to practice law in Florida. The attorney agreed his company would write the title insurance policy, and, acting as the closing agent, would allocate what documents should be prepared by each party and determine the closing costs. The attorney also provided the client with business and legal advice concerning the transaction which the client relied on to his detriment. The lawyer also charged an excessive fee for the work done. In two other instances, the attorney intentionally wrote policies for casualty insurance, something title insurance companies are prohibited from doing, and ignored title defects so as to sell a policy.

Much of the respondent's arguments in his brief are based on challenging the credibility of Ms. Cottle. The referee was in

the best position to judge credibility because he was able to observe the witness' demeanor while testifying and acts as this court's resolver of conflicts in the testimony, Dale, supra. The referee here chose to believe Ms. Cottle and not the respondent. According to the respondent, Ms. Cottle was an unreasonable person who kept demanding he represent her despite his having told her he was no longer licensed to practice law. Why would anyone, especially a person who feels she has been inadequately represented in the past by another law firm, want to hire a person who has already told her he is no longer licensed to practice law? If she did not believe he was going to represent her in a legal malpractice claim, why would she travel so far just to have a nonlawyer resolve a rather simple title problem for such a high fee of $1,000.00? She could easily have found someone in Jacksonville to handle that aspect of the matter. The bar submits it is clear that Ms. Cottle went to Daytona to hire the respondent to represent her in a legal malpractice claim because she did not believe a local lawyer would handle the case against another local attorney (T. I p. 37). She paid him $1,000.00 to take the case because she could not afford Mr. Bloom's fee (T. I p. 40). There is absolutely no evidence the

respondent ever, at any time, worked under the supervision of Mr. Bloom as a paralegal. They maintained separate offices and there is no evidence that Mr. Bloom directed the respondent's work, reviewed it or supervised it in any way. If in fact the respondent was acting as Mr. Bloom's paralegal in this matter, then Mr. Bloom assisted him in engaging in the unlicensed practice of law and thus violated the Rules Regulating The Florida Bar. The bar submits the respondent's argument is without merit because Ms. Cottle never hired Mr. Bloom or paid him any money. Therefore, how can his employee, the respondent, render services to someone who was not even one of Mr. Bloom's clients?

With respect to the findings in case number 85,212, concerning the corporation, the respondent's testimony clearly showed that at the time he signed the complaint as president of the corporation, he intended for the corporation to exist and believed it did (T. II p. 170). The respondent caused process to be issued and was listed on the service of process form as the attorney for the plaintiff (see exhibit A to the bar's Amended Petition for Order to Show Cause). The case law is clear that a

corporation's filing of a complaint not signed by a licensed attorney constitutes the unauthorized practice of law in this state, Szteinbaum supra. Despite the fact the corporation did not yet exist, the respondent clearly wanted the opposing party to believe it did and the business was in fact incorporated only five days later (T. II p. 160). In the interim, the business behaved as if it were a corporation by filing the suit. Additionally, it had behaved as a corporate entity prior to filing the suit because it had entered into three contracts on April 29, 1994, where the respondent signed on behalf of "Guest Services, Inc." (see B-Ex. 4, the Amended Complaint, attachments A, B and C). The bar therefore would argue that the business was at least a de facto corporation for these purposes and the manner in which the respondent executed the two contracts indicates he was misleading the other parties concerning the business' corporate status. The respondent did not intend to file the suit on his own behalf. Had he wished, he could have done so. He did not. He filed it in the name of the corporation he testified he believed existed at the time. The respondent may have been the sole shareholder at that point (T. II p. 160), but a corporation is a separate legal entity and as such it must be represented by

counsel in filing a lawsuit. Further, the respondent's actions certainly caused a financial loss to the defendants because counsel had to be retained and paid to file the motions to dismiss. Despite the respondent's testimony he always intended to hire a lawyer to pursue the suit, he did not see fit to retain one until around February, 1995, (T. II p. 157), some four months after he filed the lawsuit. In the interim, the respondent maintained the suit on behalf of the corporation. If he intended to hire a lawyer (T. II p. 162), why did he not do so at the outset? Why wait?

The cases cited by the respondent at the final hearing (T. II p. 168) to support his position that because he was a promotor of the yet to be formed corporation at the time he signed the complaint as the corporate president are distinguishable from the facts of this case. Both Katz v. Kenholtz, 147 So. 2d 342 (Fla. 3d DCA 1962), and Ratner v. Central National Bank of Miami, 414 So. 2d 210 (Fla. 3d DCA 1982), pet. for rev. den. 424 So. 2d 762 (Fla. 1982), deal with an individual's personal liability on contracts entered into on behalf of a yet to be formed corporation. That is not the case here. The issue is not

whether the respondent was personally liable on the contracts he entered into for Guest Services, Inc., but whether he could, either as the promoter or corporate officer, sign a complaint. The bar submits the case law is clear this may not be done without the signor engaging in the unlicensed practice of law if the signor is not a licensed attorney.

POINT II

THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION AS TO DISCIPLINE ARE CORRECT GIVEN THE FACTS OF THIS CASE.

Protection of the public from unqualified legal services providers is this court's primary goal in preventing the unlicensed practice of law, The Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1189, 1192 (Fla. 1978). Harsher sanctions are warranted when it is a disbarred attorney, someone who this court has found to be unfit to practice law in this state, who is the one providing the unsuspecting public with legal services. The bar submits that permanent disbarment and restitution are warranted here, especially in light of the respondent's extensive disciplinary history.

In The Florida Bar v. Brown, 635 So.2d 13 (Fla. 1994), a lawyer was found to be in contempt of this court for continuing to practice after he had resigned in lieu of discipline. In its order, this court stated that any lawyer who violates an order prohibiting the practice of law should be disbarred, absent strong extenuating circumstances. The accused attorney was disbarred for six years. Of course in the present case, the

respondent already has been disbarred and this does not appear to have deterred him from continuing to engage in the practice of law.

In The Florida Bar v. Riccardi, 304 So. 2d 444 (Fla. 1974), a lawyer was permanently enjoined from engaging in the practice of law. He had been disbarred previously but appeared and actively participated on the behalf of the plaintiff in a deposition and appeared and participated in a pretrial conference on behalf of a party. This court agreed with the bar's position that the accused's conduct expressly and impliedly indicated he was a licensed attorney. He was found to be in contempt and fined $500.00 and ordered to pay the bar's costs.

An attorney was held in contempt for continuing to practice after his disbarment in The Florida Bar v. Zyne, 276 So. 2d 9 (Fla. 1973). The accused did not participate in the bar proceedings and a default judgment was entered against him. This court ordered he be jailed for 60 days unless he should purge himself of the contempt within 10 days of the order. He could do so by proving he had closed his law office and had completely

ceased all activity involving the practice of law.

In The Florida Bar v. Carlson, 183 So. 2d 541 (Fla. 1966), an attorney was permanently disbarred after repeatedly being found in contempt of court for practicing law while suspended. The lawyer had a significant prior disciplinary history. The present matter consisted of two consolidated cases where the attorney had practiced law while suspended. In the first instance, he accepted a retainer and agreed to file a bankruptcy petition but failed to do so despite advising the client it had been filed. The referee recommended the attorney be disbarred. In the second instance, the attorney was paid to probate an estate but failed to take any action despite assuring the client the matter was progressing. The referee recommended the attorney be suspended. This court found the permanent disbarment sanction was more appropriate due to the attorney's prior history which indicated he was "beyond redemption."

The respondent's prior disciplinary history, which consists of seven instances where discipline was imposed against him, clearly shows he cannot or will not conduct himself in accordance

with the rules and, despite his disbarment, he has continued to violate the ethical requirements of this profession. Not only has he engaged in the unlicensed practice of law, he has made misrepresentations to Ms. Cottle and the court. He told Ms. Cottle he was a lawyer and accepted a substantial sum of money from her to clear up a relatively minor title problem, although he led her to believe the money was to be used in filing a legal malpractice action (B-Ex. 2, T. I p.p. 36-38, 40, 42, 79, 82, 135, 137, 144). He misled Radisson Inn, LBV, Double Tree Club Hotel and Howard Johnsons, LBV, into believing the contracts they entered into in April, 1994, were with Guest Services, Inc., a Florida corporation, when in fact the corporation was not created until October, 1994 (see B-Ex. 4 attachments A, B and C to the Amended Complaint filed February 22, 1995). The respondent made a misrepresentation to the court when he filed the civil action on behalf of a corporation he either knew or should have known did not exist. Further, the respondent's prior disciplinary history, as set forth more fully below, shows he has repeatedly engaged in fraud, deceit, dishonesty and misrepresentation in the past.

The respondent was suspended for ninety days in The Florida Bar v. Neely, 372 So. 2d 89 (Fla. 1979), for self-dealing to his clients' detriment and for his own personal gain, and for lying under oath before either the grievance committee, the referee, or both, in order to hide the fact that he took advantage of his clients. The respondent was representing two clients in prosecuting a mortgage foreclosure. The mortgagors met with the respondent and the mortgagee at the respondent's office. At one point during the conference, the respondent offered to purchase the property from his clients, the mortgagees, who refused. Several weeks later, the respondent informed his clients the mortgagor had given him the money to pay off the mortgage and he remitted to them a check drawn on his trust account. Although the clients wanted to proceed with the foreclosure, the respondent led them to believe they had no option other than to accept the payoff. They then executed a warranty deed, prepared by the respondent, conveying the property to the mortgagor. The mortgagor later conveyed the property to a corporation the respondent owned. The respondent's explanation for the consideration given for the transfer was not consistent and his testimony before the grievance committee and the referee was

contradictory.

In The Florida Bar v. Neely, 417 So. 2d 957 (Fla. 1982), the respondent was publicly reprimanded and placed on a one year period of probation after he failed to prosecute a criminal appeal or make arrangements for another attorney to handle the case. The appeal was pending during his suspension period ordered above. Instead, he repeatedly moved for extensions of time to file the appellate brief.

The respondent was suspended for 60 days and placed on a two year period of suspension for failing to properly supervise his nonlawyer employee's handling of his trust account records in The Florida Bar v. Neely, 488 So. 2d 535 (Fla. 1986).

In The Florida Bar v. Neely, 502 So. 2d 1237 (Fla. 1987), he was suspended for three months and again placed on a two year period of probation for further trust account problems. He failed to forward funds to a third party despite his client's direction that he do so and lied to the client when confronted, demanded this same client sign an exculpatory letter, prepared by

the respondent, advising the bar that he wanted to withdraw his grievance and conditioned the refund of the money that should have been forwarded upon the client's signing of the letter. He failed to comply with trust account record keeping procedures and failed to adequately supervise his bookkeeper's handling of the account.

The respondent was again suspended, this time for 90 days, in The Florida Bar v. Neely, 540 So. 2d 109 (Fla. 1989), for making misrepresentations, neglecting a legal matter, overdrawing his trust account and failing to promptly deliver property to which the client was entitled. The respondent had been retained to handle a personal injury action but allowed it to be dismissed due to his failure to prosecute it. He then lied to the client about the case's status. In fact, he told her she had won when in fact the court had assessed costs against her in dismissing the case. In another instance, he represented a married couple in various legal matters and represented their daughter in a malpractice action. The couple asked the respondent to do them a favor when he went out of town and collect for them some proceeds from a business they owned in the town the respondent was

traveling to. He did so but refused to turn over the money to them unless they signed certain papers, including a consent to his withdrawal from their daughter's case.

In The Florida Bar v. Neely, 587 So. 2d 465 (Fla. 1991), the respondent was disbarred for again taking advantage of a client, failing to honor a letter of protection, and misrepresenting to a client the amount of money he was owed as reimbursement for costs. In the first incident, he was representing a criminal defendant and wanted to secure his fees. The client had no assets, however, his elderly mother owed her home free and clear. The respondent caused her, without the benefit of independent counsel, to deed her home to a corporation he owned. He never explained the nature of the documents she signed and she had a limited education. The respondent's corporation then mortgaged the property and reconveyed it to the client's mother and the client without advising of the mortgage. When the mortgagee foreclosed, the court determined the respondent had fraudulently obtained the deed conveying the property to the respondent's corporation and thus it was void. In a second incident, while representing a client in a personal injury action, he entered

into a letter of protection with the client's treating physician. He then failed to advise the doctor when the settlement was paid nor did he forward to him any of the funds he was due. Each time the doctor's office spoke to the respondent's office, the doctor was misled into believing the matter had not been settled. In a third incident, the respondent was retained to represent a client in seeking to settle a claim by her former employer that she had embezzled funds. The respondent settled the matter and paid over funds to the former employer. He prepared a closing statement showing he had incurred significant travel costs that actually never existed.

The present charges indicate that even a disbarment has failed to impress upon the respondent that certain behavior is not tolerable. He has continued engaging in the same pattern of behavior that led to his disbarment, namely taking advantage of anyone he could for personal profit, and he shows absolutely no indication he will ever deviate from this course of conduct. If permanent disbarment, admittedly an extreme and rarely used sanction, is reserved only for those who show no hope of redemption, then certainly the respondent fits the criteria.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation of permanent disbarment and restitution of $500.00 to Ms. Cottle and approve same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to counsel for the respondent, Mr. Thomas E. Cushman, P.O. Box 1536, St. Augustine, FL 32085-1536; 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 14th day of February, 1996.

Respectfully submitted,

Jan Wichrowski

Jan Wichrowski
Bar Counsel