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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By

Chief Deputy Clerk

CASE NO. 84,646 & 85,121
[TFB Case No. 94-31, 627 (07C) & 95-31, 015 (7C)]

THE FLORIDA BAR,

Complainant,

vs.

GARY H. NEELY,

Respondent.

RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR
REVIEW OF REPORT OF REFEREE, HONORABLE JAMES A. RUTH

BRIEF OF RESPONDENT

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BRIEF OF THE RESPONDENT IN SUPPORT
OF THE PETITION FOR REVIEW

STATEMENT OF JURISDICTION

This Brief in Support of the Petition for Review is filed pursuant to Rule 3-7.7(c)(3) of the Rules Regulating the Florida Bar.

STATEMENT OF THE CASE AND FACTS

As to Supreme Court Case No. 84,646 [TFB Case No. 94-31,627 (07C)]

This matter commenced on the Complaint of Mrs. Veronica Cottle to the Florida Bar concerning the Respondent, **GARY H. NEELY**. The Florida Bar Investigator, Allen R. Booth, obtained an Affidavit from Mrs. Cottle on the 28th of September, 1994. Based on Mrs. Cottle's Affidavit, the Florida Bar (hereinafter "The Bar") filed a Petition for Order to Show Cause as to Why the Respondent Should Not Be Held In Contempt of this Honorable Court and further disciplined. The Petition was dated the 2nd of November, 1994.

On November 9, 1994 the requested Order to Show to Cause was issued, and Mr. Neely was ordered to respond before November 29, 1994. However, no copy of Mrs. Cottle's Affidavit was attached to the Motion received by the Respondent, and he filed a Motion for Extension of Time on the 28th of November, 1994.

Subsequently, on the 30th of January, 1995, the Acting Chief Justice designated the Chief Judge of the Fourth Judicial Circuit, the Honorable Donald R. Moran to appoint a Referee to hear the

matter within 180 days. The Honorable James A. Ruth, Duval County Judge, was appointed to hear the matter by Judge Moran.

On the 31st of January, 1995, Criminal Case No. 95-31493MM was filed in the County Court of Volusia County charging Gary H. Neely with the offense of "Practicing Law Without A License" in violation of F.S. 454.23.

Both the Order To Show Cause and the Criminal Case dealt with the allegations of Veronica Cottle. According to Mrs. Cottle's Affidavit, which was eventually attached to the Bar's Petition, Mrs. Cottle contacted Mr. Neely in February of 1993. On the phone, Neely suggested that she go see Attorney Gary Bloom in Palm Coast. Mrs. Cottle did in fact contact Mr. Bloom, but Bloom wanted a \$5,000.00 retainer. Mrs. Cottle was seeking representation concerning a potential malpractice suit against Attorney Donald Matthews in Jacksonville. The alleged malpractice dealt with a piece of real estate in Jacksonville that Mrs. Cottle owned, (TR91).¹ The exact problem with the real estate never became clear, and was the object of some dispute in this proceeding. Attorney Christopher R. DeMetros testified that the Law Firm of Donald Matthews had represented Mrs. Cottle in 1986 in reference to some foreclosures and equitable liens and an eviction (TR13). DeMetros personally represented her on a pro bono basis in a case against the City of Jacksonville in regard to tax liens on a piece of real estate. She had previously been represented by another

¹The designation "TR" refers to the transcript of this matter, followed by the page of the transcript.

attorney in town, also on a pro bono basis, about the tax lien. However, the other attorney withdrew and Mrs. Cottle came to see the Matthews' firm. Matthews directed DeMetros to represent Mrs. Cottle pro bono, which he did (TR13). DeMetros, for the Matthews firm, filed a claim against the City of Jacksonville dealing with penalties, interest, and taxes on the real estate on behalf of Mrs. Cottle. They were not successful in the suit, and afterwards Mrs. Cottle was seeking representation to sue Matthews for legal malpractice when she contacted Neely, and was thereafter referred to Bloom (TR15).

Another witness, William Cumming, testified that he was introduced to Mrs. Cottle at Gary Neely's office on Ridgewood Avenue in Daytona Beach (TR96). The purpose of the introduction was because Mrs. Cottle needed a loan, and Mr. Cumming is a mortgage broker. Mrs. Cottle had the real estate to use as collateral, but there was a title problem because of the unpaid taxes on the real estate (TR101). Cumming testified that Neely told Mrs. Cottle that she needed to take care of the taxes. Cumming got the impression that Mrs. Cottle wanted to borrow money directly from Neely, but instead, Neely referred her to Cumming (TR103). According to Cumming, "something had been messed up with somebody who had handled something previously". Neely told Mrs. Cottle "You need to take care of that." However, Neely "didn't represent it as if he was going to take care of it. She was rambling a little bit. And in that kind of circumstances, I generally say my standard answer, Well we'll let the title company

work that out since they get the final say." (TR103)

Mrs. Cottle subsequently provided an Abstract of Title, but it was incomplete. She had to go order another one from Florida Title in Jacksonville for which she paid \$75.00. (TR45) After obtaining the Abstract, and examining the title, Neely was able to determine that the only problem with the title to the real estate was that a certified copy of the Certificate of Title had not been recorded in the Public Records of Duval County. This information was relayed to Attorney Chris DeMetros (TR16), and DeMetros obtained the certified copy and recorded it. Thereafter Mr. Cumming invested a good deal of work in preparing the loan, but it never closed because Mrs. Cottle changed her mind (TR107).

During this time period it was obvious that Mrs. Cottle was in a very unsettled state of mind. According to her "I remember sitting there crying, telling him how desperate I was and what happened. My husband had gotten cancer. My daughter got murdered." (TR47) Witness Gary Bloom said "Mrs. Cottle had an attitude of great anger and great venom about her --- like the world was putting upon her." (TR92) Bloom quoted Mrs. Cottle as saying "That she was angry at Mr. Neely because he had turned her away because he said he wasn't a lawyer anymore." (TR93) William Cumming said "She was rambling a little bit." (TR103)

Another witness, Don Pray, was asked:

Q: "What was her state of mind, apparently?"

A: "Hers? It was back and forth. She couldn't seem to be pleased. Someone tells me, No, I mean, No. She didn't seem to

understand that. She wanted Gary. I deal with people like that a lot. **And I don't think she had all her wits about her, or faculties about her.**" (emphasis supplied)

Pray continued "She seemed to be distracted, not sure what she even wanted." Pray indicated that Mrs. Cottle asked him to help her also. He was asked "Why did you turn her down?" And he responded "She is a nut, alright." (TR124)

Despite the fact the title was cleared by Mr. DeMetros, Mrs. Cottle filed a Bar Grievance against Donald Matthews that was dismissed, (TR34) and then a Pro Se lawsuit against him, for Fraud, Deceit, and Misrepresentation. The lawsuit was dismissed (TR31). Mrs. Cottle then filed a Pro Se Appeal (TR31).

According to Mrs. Cottle, the malpractice suit against Donald Matthews was filed July 26, 1992 (TR38). However, Mrs. Cottle said that she later called Mr. Neely concerned because the "Statute of Limitations is going to running out". (TR50)

Mrs. Cottle's ability to accurately remember and comprehend matters around her is called into question by the fact that when she eventually called the Florida Bar and reported Mr. Neely, "they informed that he had been disbarred for 10 years." (TR51) In fact, Neely was disbarred on October 17, 1991.

Further evidence of Mrs. Cottle's confusion is shown in her response to cross-examination questions (TR54):

Q: "But did you file a lawsuit against Mr. Matthews?"

A: "Yes."

Q: "And that has now been dismissed?"

A: "No. It hasn't even come up yet. I'm doing it now and filing all my things."

Q: "Isn't the matter on Appeal?"

A: "It's on a Appeal to the Court of Appeals, yes.?"

Despite the fact that Mrs. Cottle was confused about some items, she did acknowledge that, even though she had only paid Mr. Neely \$1,000.00 and had received \$500.00 of that back, she in fact demanded that Neely pay her \$4,280.00 or that she would go to the Florida Bar and report him (TR65).

The trial of this matter was delayed on the joint request of the Bar and the Respondent because of difficulties caused by the pending criminal case in Volusia County. The Respondent was reluctant to testify in this cause, with the potential of his testimony being used against him in the pending criminal case. The matter proceeded to a final hearing over the Respondent's objections.

STATEMENT OF THE CASE AND FACTS

As to Supreme Court Case No. 85,121 [TFB Case No. 95-31,015 (07C)]

This cause commenced on a document entitled "Order to Show Cause" that recited that it was in fact a "Petition for Order to Show Cause" on the 6th of February, 1995. On the same date another document entitled "Amended Petition for Order to Show Cause" was filed by Bar Counsel.

Respondent was commanded to respond on or before May 11, 1995.

Apparently, attached as Exhibit A was a "Service of Process transmittal form dated December 15, 1994 showing Gary H. Neely as Attorney for Guest Services, Inc." The "Service of Process transmittal form was prepared by CT System. The transmittal form carries the disclaimer:

"Information contained on this transmittal form is recorded for CT Corporations Systems record keeping purposes only and to make quick reference for the recipient. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date or any information that can be obtained from the documents themselves. The recipient is responsible for interpreting the documents and for taking the appropriate actions."

The form attached as Exhibit A clearly shows that the Complaint was served on CT Corporation System in Plantation, Florida by a process server on December 15, 1994 at 10:00 AM. At trial there was a stipulation that the Articles of Incorporation of Guest Services, Inc., a Florida Corporation were filed October 10, 1994. The Complaint herein was filed on or about October 5, 1994, five days prior to the filing of the Corporate papers. Service, however, was not effected until December 15, 1994. No pleadings

were filed by the Respondent between the time of the Incorporation, and the time that Attorney Christopher Ray filed his Notice of Appearance on February 6, 1995. Thereafter, the lawsuit proceeded in the ordinary fashion with Mr. Ray as counsel for the Corporation.

Neely did not represent that he was acting as attorney for the Corporation at the time of the filing of the lawsuit, but signed the pleadings as the Corporate President. Neely was the sole stockholder and director of the Corporation.

This matter, and the Complaint from Mrs. Cottle were joined for the purposes of trial, and a hearing was held on the matter September 25, 1995.

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Respondent, **GARY H. NEELY**, objects to the Findings of Fact and the Conclusions of Law in the Report of the Referee. The objections will be numbered to correspond with the paragraph numbers of the Report of the Referee. Respondent objects as follows:

II.2. Neely objects to the Referee's Conclusion that "pursuant to their discussion, Respondent agreed to represent Mrs. Cottle for a fee of \$1,000.00.

Respondent suggests that the receipt obtained by Mrs. Cottle speaks for itself. The receipt is Bar's Exhibit Number 2, and Respondent suggests that the document is a receipt for "services for research of Quiet Title Suit for Duval County property and possible action against Mr. Don Matthews . . .".

Respondent further disputes the Referee's conclusion that **"at no point in time did respondent advise Mrs. Cottle that he was disbarred from the Florida Bar."** The testimony was clear from Attorney Gary Bloom, (TR 92, L 25) "what Mrs. Cottle said to me was that she was angry at Mr. Neely because he had turned her away because he said he wasn't a lawyer anymore." And again, (TR 92, L 12) "Your Honor, she said she was angry at Mr. Neely because he couldn't help her or wouldn't help her because he was not a lawyer anymore."

Another witness, William Cumming, testified (TR101) that Mr. Neely told Mrs. Cottle in Mr. Cumming's presence that Neely was "not a licensed practicing attorney". Cumming further testified that it was his impression that Mrs. Cottle was in

Neely's office to borrow money from him. Cumming is a mortgage broker, and Neely put Mrs. Cottle in contact with Cumming to obtain a mortgage.

3. Respondent further disputes the Referee's statement "I find that Respondent had no possible purpose in assisting Mrs. Cottle other than the unauthorized practice of law. Respondent was not permitted to do legal research on behalf of a client unless he did so under the supervision of an attorney, The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978). There was no indication that Respondent acted as a paralegal and that there is no indication that he was supervised by an attorney." In fact, Neely referred Mrs. Cottle to his former law partner, Gary Bloom, practicing in Palm Coast. Respondent suggests that if, in fact, Neely had been actually attempting to practice law, there was no necessity and no explanation for referring Mrs. Cottle to Mr. Bloom. Neely was, in fact, working in two capacities, both as a title examiner for William Cumming and his mortgage lending business, and a paralegal for attorney Gary Bloom in preparing a possible malpractice suit against Attorney Don Matthews in Jacksonville.

As to Supreme Court Case No. 85, 121, TFB95-31, 015 (07C)

5. Respondent objects to the Referee's finding that: "Respondent's filing of the Complaint on behalf of a Corporation not signed by an attorney and his subsequent representation in the matter until or about February 6, 1995, when Attorney Christopher Ray submitted a Notice of Appearance on behalf of the Corporation in the matter." In fact, no Corporation had been formed at the time of the filing of the Complaint, and Respondent's status was that of a "promoter" of a company to be formed, of which he would be the sole stockholder, director and operator.

6. Respondent disputes the Referee's Findings in Paragraph 6 and his Conclusions of Law.

III. Respondent disputes the Recommendations of the Referee in regard to the Finding of Guilt.

IV. Respondent disputes the Referee's Recommendations in regard to Permanent Disbarment, Costs and Restitution.

ISSUE I

Do the Respondent's actions constitute "the practice of law"?

This Court has previously held that a definition of the practice of law that is "lasting and all encompassing cannot be formulated since such practice must necessarily change with the ever changing business and social order." The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla 1978). This Court further held that "the protection of the public is the primary goal in determining whether a particular act constitutes the practice of law. Brumbaugh @ 1191. If "protection of the public" is the primary goal in the determination of whether or not Gary Neely was practicing law, then the conclusion should be that he was not practicing law. Here, Neely looked at a problem with the title to some property owned by Mrs. Cottle, for which she was attempting to get a mortgage. He recognized the problem, and realized that it's solution was very simple. He communicated with Attorney Chris Demetros and pointed out to Demetros that the only documents needed to clear the title would be a certified copy of the Certificate of Title filed in the Public Records (TR16). Attorney Don Matthews firm had previously represented Mrs. Cottle back in 1986, and subsequently, Chris Demetros, Esquire, of the Matthews Firm had represented her on a pro bono basis against the City of Jacksonville in regard to tax liens on her real estate. (TR13) Mrs. Cottle apparently believed that Attorney Don Matthews had wronged her in some way and had eventually filed a Grievance against Mr. Matthews, and subsequently

filed a Pro Se law suit against Mr. Matthews (TR31). The lawsuit was dismissed and again she filed an appeal Pro Se in that case (TR31).

The primary goal of protecting the public has been achieved by the Respondent, **GARY NEELY**. There is very little difference between the actions that Neely took, and those that are permitted of title insurance companies in describing the conditions which must be fulfilled before the title company will issue a title insurance policy in connection with the proposed real estate transaction. The Florida Bar v. McPhee, 195 So.2d 552.

Looking again to the "protection of the public" only a few members of the public were affected, and none of them adversely. First of all, Mrs. Cottle received the benefit of having the title to her property cleared. A cloud on the title was removed, and a potential basis of malpractice was corrected. In fact, in this case, the public benefitted from Mr. Neely's actions.

In conclusion, Respondent suggests that the Referee's Conclusions and Findings of Fact are without support in the evidence.

Further, the Conclusions of Law reached by the Referee are incorrect. Respondent suggests that the actions described do not constitute the practice of law, but more closely resemble the actions of a paralegal or a title examiner for a lender. The public was not endangered in any way by Respondent's actions, and in fact the public benefitted by his actions. Under such circumstances, Respondent suggests that he is not engaged in the

unauthorized practice of law.

ISSUE II

Does the filing of a lawsuit in the name of a Corporation yet to be formed constitute the practice of law where the Respondent would be the sole shareholder and director.

In this case, it is clear from the pleadings that the Respondent did not represent himself as an attorney in the lawsuit on behalf of Guest Services. It is likewise clear, that at the time of the filing of the lawsuit, the Corporation did not exist. This Court has recognized the fundamental constitutional right of all persons to represent themselves in Court proceedings. The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla 1978); Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed 2d 562 (1975). In this case, the Respondent Neely was doing nothing more than representing himself and his own legal interest. In Ratner v. Central National Bank of Miami, 414 So.2d 210, (3DCA 1982) the promoter of an unformed corporation was found to be liable on the contracts signed by the promoter because the Corporation did not exist at the time of the signing of the document.

In Akel v. Dooley, 185 So.2d 491, (2DCA 1966) the Court recited an already existing rule to the effect that "it has been held that an agent is personally liable where he professes to enter into a contract on behalf of an unincorporated association, club or committee, or on behalf of a Corporation, before its incorporation." The purported lawsuit on behalf of the Corporation dealt with a breach of contract. If the breach had been by Neely, and

the other party to the contract had sought redress, there is no doubt that they would have been justified in naming Gary Neely as being personally liable. Logically, and legally, it must follow that if Neely were responsible, he would also have the right to enforce the contract personally.

Neely did not represent himself as attorney for the Corporation but rather, its President.

After the Corporation was formed, there was no subsequent representation in the matter until Attorney Christopher Ray filed his Notice of Appearance on behalf of the Corporation. No actions whatsoever were taken in the lawsuit on behalf of the Corporation.

According to The Florida Bar v. Brumbaugh, 355 So.2d 1186, @ 1189, the purpose of prohibiting the practice of law by those not admitted to the bar is "to protect the public from being advised and represented in legal matters by unqualified persons". The Bar has presented no evidence in this case to indicate that any advice was given to anyone, or that anyone was represented by Respondent Neely other than himself. Brumbaugh declares that "in determining whether a particular act constitutes the practice of law, our primary goal is the protection of the public." @ 1191. The Bar, and the Referee have failed to point out any reason why the public would need protection in this case. Neely was representing himself, pure and simple. The public has suffered no harm from the filing of this lawsuit, nor did the defendants. In fact, but for the interference of the Florida Bar, this case is indistinguishable from thousands of other cases filed in Florida every year.

The Referee's Order recites the case of Szteinbaum v. Kaes Inversiones y Valores, 476 So.2d 247 (Fla 3DCA 1985) for the proposition that "a Corporation's filing of a Complaint not signed by an attorney constitutes the unauthorized practice of law." However, it constitutes the unauthorized practice of law **by the Corporation**. The factual situation in Szteinbaum is not similar to this situation.

In summary, Respondent suggests that the Referee's Conclusions of Law in regard to this case are incorrect, and that Respondent's actions do not constitute the unauthorized practice of law on behalf of another person or entity. Respondent suggest that he was authorized to file a lawsuit on his own behalf.

III. Recommendations as to whether or not the Respondent should be found Guilty.

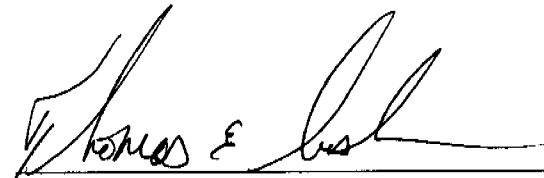
Respondent suggests for the reasons cited above, that he should not be found Guilty of the unauthorized practice of law.

IV. Recommendation as to Sanctions.

Respondent suggest that the suggested sanctions are inappropriate in as much as he has not engaged in the unauthorized practice of law.

Should the Court find that Respondent has engaged in the unauthorized practice of law, Respondent suggest that the suggested sanctions are unduly harsh and are disproportionate to any harm that may have been caused.

Respondent suggest that the recommended sanction of restitution is unauthorized The Florida Bar v. Warren, 661 So.2d 304 (FLA 1995).

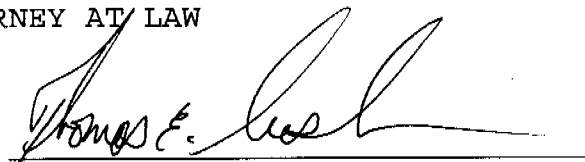

THOMAS E. CUSHMAN, ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished to JAN WICHROWSKI, BAR COUNSEL, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida, 32801, via U.S. Mail; and to JOHN T. BARRY, STAFF COUNSEL, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 30th day of January, 1996.

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