IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL CARR NORVELL,

Respondent.
_____/

Case No. 86,027
[TFB Case Nos. 94-31,482(5B)
and 95-30,134(5B)

MICHAEL CARR NORVELL'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 November 29, 1995 and November 30, 1995, shall be referred to as "TR" followed by the cited volume and page number.

The Report of Referee dated March 13, 1996, will be referred to as "RR" followed by the referenced page number.

STATEMENT OF THE CASE AND OF THE FACTS

This case is a matter of original jurisdiction before the Supreme Court of Florida pursuant to Article V, Section 15 of the Constitution of the State of Florida.

Final hearing in these proceedings was held on November 29, 1995, and November 30, 1995. The referee's report was duly filed in this Court.

The facts in this case are relatively uncontested. The Florida Bar initiated these disciplinary proceedings upon the initial complaint of Thomas Grizzard who was later joined by Douglas Dillard. The primary thrust of the complaints focused on Respondent's dealings and relationship with The Arbors of Lake Harris, Inc.

In July, 1991, Respondent and his wife, Martina Norvell, entered into a contract with The Arbors for the construction of their home. RR 1. The home was to be the first constructed in a housing development known as The Arbors of Lake Harris. TFB Comp. 1. Forrest Berg and Douglas Dillard were the principals of the Arbors and Jamie Senatore was hired as the architect. RR 1. At the time Respondent entered into the contract with The Arbors, he was not a member of The Florida Bar. RR2. He was reinstated as a member of the Bar on May 26, 1992. RR 2.

In late 1991, a dispute arose between Respondent and Messrs. Berg and Dillard after Mr. Senatore informed Respondent of improper payments to subcontractors that The Arbors had hired to work on Respondent's home. RR 2.

On or about December 3, 1991, Respondent met with lawyer Bob Williams to discuss an action against The Arbors and Messrs. Berg and Dillard. RR 2. Respondent retained Mr. Williams for $2,500.00 to represent him in the dispute; Messrs. Berg and Dillard retained lawyer Edward Clement. RR 2. Respondent sought to cancel the construction contract with The Arbors and to hire Mr. Senatore as the general contractor to finish his home. RR 2. On or about January 6, 1992, Respondent settled his dispute with The Arbors and successfully rescinded the construction contract. RR 2, Ex. 1. Respondent then hired Mr. Senatore to complete the construction of his home. RR 2.

At some point in early 1992 a dispute arose between Respondent and Mr. Senatore concerning the timely completion of Respondent's home. RR 2.

On or about March 30, 1992, Mr. Williams brought suit on behalf of Mr. Senatore against The Arbors and Messrs. Berg and Dillard concerning their refusal to sell shares in The Arbors back to Mr. Senatore under a share repurchase agreement previously executed by the parties. RR 2. The defendants in that suit retained lawyer Royce Pipkins to represent them. RR 2. The $1,000.00 payment to Robert Q. Williams, Esquire by the respondent's wife, Tina Norvell, was made on May 11, 1992 as payments on the Senatore/Norvell house contract were winding up. The payment was made, **per Senatore's instructions**, from an account the respondent opened strictly for the purpose of the House Construction Contract.

Tina Norvell testified that the same had been done for other bills owed by Senatore. RR 2, TR 339, 340. The $1,000.00 payment was paid prior to the Respondent being reinstated to The Florida Bar on May 26, 1992. The Respondent and his wife received a $1,000.00 credit toward the balance owed Senatore on the construction contract for the payment to Mr. Williams.

In the summer of 1992, Mr. Berg approached Respondent and asked the Respondent if he would assist The Arbors in some way to increase lot sales. RR 2. Respondent agreed to assist Mr. Berg in talking to Mr. Senatore about the lawsuit Mr. Senatore had filed against Messrs. Berg and Dillard and The Arbors. RR 3. Subsequently, Respondent discussed with Mr. Senatore the adverse affect that Mr. Senatore's lawsuit was having on lot sales in the subdivision. RR 3.

In or about July, 1992, a principal payment of $100,000.00 was due to Citizens National Bank (CNB), the primary lender for The Arbors. RR 3. The Arbors was not able to make this payment nor were Messrs. Berg and Dillard, who were individually liable for payment. RR 3. Consequently, the loan defaulted. RR 3. Messrs. Berg and Dillard had anticipated making the payment out of lot sale proceeds, but the pending lot closings did not occur due to the pending Senatore lawsuit. RR 3, TR 178. Mr. Berg contacted one of the CNB directors, Thomas Grizzard, a licensed realtor in Leesburg, Florida, to formulate a marketing plan that would boost lot sales and result in payment of the debt to CNB. RR 3.

The Arbors gave Mr. Grizzard a one year exclusive listing agreement for The Arbors on September 1, 1992. RR 3. Mr. Grizzard's marketing plan included a reduction in unit prices. RR 3. During the year that Mr. Grizzard had an exclusive listing agreement, Respondent was involved in procuring contracts for the sale of lots in The Arbors. RR 3.

In September, 1992, CNB filed a foreclosure action against The Arbors and its principals, Messrs. Berg and Dillard, individually. RR 3. As a result of the foreclosure, The Arbors' lawyer, Royce Pipkins, filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court, Middle District of Florida on or about December 1, 1992. RR 3. The Honorable C. Timothy Corcoran, III presided over the bankruptcy case. RR 3. Little action took place in the bankruptcy from the initial filing through June 1993, at which time Respondent and Mr. Pipkins filed a joint motion for substitution of counsel substituting Respondent as The Arbors' counsel of record. Ex. 21. In his June 15, 1993 order, Judge Corcoran granted the motion. Ex. 15.

On August 17, 1993, Judge Corcoran determined that Respondent had not filed an application for employment nor had The Arbors filed the required affidavit for employment of Respondent as counsel. Upon an order by Judge Corcoran, Respondent and The Arbors filed these documents that same day. Ex. 16, 17. In those documents, Mr. Berg and Respondent represented that Respondent had no ownership interest in The Arbors. Ex. 16, 17.

Those assertions were correct as a final agreement regarding Respondent's ownership interest was not reached until October 1993. Ex. 27, 28.

On or about September 15, 1993, Respondent appeared before Judge Corcoran on the "problem calendar." RR 4,5. At that time, Judge Corcoran entered an order denying Respondent's application for employment. Ex. 18. Respondent testified that upon learning of Judge Corcoran's order, he ceased pursuing the appointment and retained an experienced bankruptcy attorney for the Arbors, Richard Hennings. Tr. 388. In mid-September, 1993, Respondent forwarded $5,000.00 from his personal funds to lawyer Richard Hennings as an initial retainer for his assumption of the Chapter 11 proceedings. Mr. Hennings met with The Arbors officers regarding his representation of The Arbors. On or about October 1, 1993, Respondent and Messrs. Berg and Dillard executed an assignment and assumption agreement, giving Respondent a 100% ownership interest in The Arbors provided all debts were paid first. RR 5, Ex.13. The effective date of the agreement was September 27, 1993. Ex. 13.

On October 4, 1993, Respondent and Mr. Hennings filed a joint motion for substitution of counsel in The Arbors' Chapter 11 bankruptcy proceedings. Ex. 19. That motion revealed to the Court Respondent's prospective ownership interest in The Arbors. Ex. 19.

Disciplinary proceedings were initiated against Respondent and a hearing before a referee was held on November 29, 1995 and

November 30, 1995. The referee recommended that Respondent be found guilty of violating several rules of the Rules of Professional Conduct in connection with his conduct in The Arbors' bankruptcy action. RR 5, 6. The referee recommended that the Respondent be suspended for a period of 90 days. RR 6. In making his recommendation, the referee considered both aggravating factors, including multiple offenses involved in the same transaction and Respondent's prior conviction of marijuana charges, RR 6, and mitigating factors, including full and free disclosure to the disciplinary board, remorse, absence of harm to Respondent's clients and remoteness of prior offenses. RR 7.

SUMMARY OF RESPONSE TO BAR'S ARGUMENT

The Bar requests this court to find that, contrary to the Referee's findings, Respondent also violated Rules 4-1.4(b) and 4.1-7(b) by failing to provide his clients with necessary information and by representing conflicting interests. Additionally, the Bar requests a more severe punishment than the Referee's 90 day suspension. In support of the enhanced punishment, the Bar cites the Respondent's prior disciplinary history related to an incident on April 15, 1982. As a result of that incident, a conviction for conspiracy to possess and distribute marijuana, Respondent resigned from the Bar and was subsequently reinstated in May of 1992, some ten years after the offense giving rise to the resignation.

The recommendation of the Referee is characterized by the Bar as "erroneous and unjustified" notwithstanding two days of testimony and the submission of additional briefs by counsel on issues undetermined at the conclusion of two days of hearings before the Referee. The Bar states that the Respondent paid "legal fees" to Mr. Senatore's(Respondent's house contractor) lawyer, but the "legal fees" paid were, in fact, one thousand dollars of the total construction contract for Respondent's house that Mr. Senatore requested be paid directly to Mr. Williams rather than to him. This supposed "legal fee" was paid by

Respondent's wife from a separate **construction fund account** that **all** construction costs of the house were funded from. Mr. Berg, one of Respondent's clients and an officer of the Arbors, was fully aware of the hiring of Mr. Senatore to finish the Respondent's house and knew he was being paid for finishing the house by the Respondent. Whether Respondent paid the money to Senatore and Senatore then went to Williams office and tendered Williams the same money, or Respondent(acting on Senatore's order) sent the money directly to Williams for Senatore's account as Respondent did with many creditors of Senatore during the construction, is a distinction without a difference. The same funds would have ended up in Williams account as construction of Respondent's house was Senatore's source of funds during the period of time in question. This supposed "legal fee" was paid to Williams prior to Respondent's reinstatement to the Bar.

The Assignment and Assumption Agreement was executed by Respondent subsequent to the decision of Respondent to withdraw from the Bankruptcy representation. Further, the Agreement provided that **prior to any actual transfer of ownership**, the mortgage at Citizens National Bank being foreclosed would have to be satisfied and both Dillard and Berg released from any personal liability.

To accept the Bar's tortured reasoning that Respondent should have informed his clients that **after he retained Hennings to represent the Arbors in the Bankruptcy and withdrew from the case,** that he could not represent the Arbors any further in the Bankruptcy would be to state the obvious as the clients had met with Hennings and agreed to his representation of them in the Bankruptcy case. The client knew Respondent had paid Hennings a $5,000 retainer to represent them as the clients met with Hennings prior to Hennings filing his first document. At the time of execution of the Assignment and Assumption Agreement, the clients knew Respondent was not representing them in the Bankruptcy any longer as Hennings was on board.

As the initial Bankruptcy petition was filed by attorney Pipkins on the 1st of December, 1992 and the Respondent's application to represent the Arbors(Debtor) was denied on August 17, 1993 and Hennings Bankruptcy application was filed on September 4, 1993, the Bar's argument that Respondent "failed to inform" his clients about a further delay by hiring Hennings rings hollow. The clients **knew** Respondent was hiring Hennings and any "delay" was known to the clients and amounted to only two weeks after a nine month delay after the initial filing by attorney Pipkins.

Respondent should not be subjected to a suspension in excess of that recommended by the Referee.

POINT I

THE REFEREE'S CONCLUSION THAT THE RESPONDENT WAS NOT GUILTY OF VIOLATING RULES 4-1.4(b) AND 4-1.7(b) WAS NOT ERRONEOUS.

As stated in the Bar's Point I Argument, a referee's findings of fact are presumed to be correct and will not be revisited by this court unless it can be shown they are clearly erroneous or without support in the record. There is no proof in the record that the Referee's facts are erroneous or without support.

The Respondent did not violate rule 4-1.4(b) during the summer of 1992 because the May 11, 1992, $1,000.00 payment to Robert Q. Williams, Esquire by the respondent's wife, Tina Norvell, was made because payments on the Senatore/Norvell house contract were winding up. The payment was made, **per Senatore's instructions**, from an account the respondent opened strictly for the purpose of the House Construction Contract. Tina Norvell testified that the same had been done for other bills owed by Senatore. RR 2, TR 339. 340. Further, the $1,000.00 payment was paid prior to the Respondent being reinstated to The Florida Bar on May 26, 1992. The Respondent and his wife received a $1,000.00 credit toward the balance owed Senatore on the construction contract for the payment to Mr. Williams. Respondent did not inform Mr. Berg of the $1,000.00 payment to Mr. Williams because he **was not** funding the Senatore lawsuit.

The Respondent was never obligated to fund the Senatore lawsuit but he was obligated to pay Mr. Senatore for constructing his home. See Mr. Keeter's remarks in that regard. TR 516.

The Respondent did not fail to disclose to Mr. Berg and Mr. Dillard the conflict of interest between his duties under the Assignment and Assumption Agreement and his bankruptcy representation of The Arbors because at the time the bankruptcy petition was filed, Respondent had not commenced negotiations to purchase the Arbors. It was three more days before Respondent first broached the subject of purchasing the Arbors in his letter dated August 20, 1993 (Bar ex. 12). A review of that letter indicates the purchase of the Arbors was almost an afterthought. It was primarily a discussion about the progress of the case and compensation for services. In fact, the transaction was not finalized until after October 1, 1993. The Bankruptcy Court advised the Respondent that his petition to represent The Arbors was denied without prejudice on September 15, 1993. Both Mr. Berg and Mr. Dillard were happy with the transaction that they entered into and both had the advice of experienced counsel before signing any paperwork. In fact, Attorney Gene Mark drafted the agreement and had independent communications with his clients outside of Respondent's presence. Respondent had fair dealings with his clients in this business transaction.

Mr. Berg and Mr. Dillard were aware that the Respondent was receiving title insurance policy fees for issuing title insurance on the lots. The premium charged was the standard "card" rate for Lake County. Additionally, this issue was cleared with Attorney Richard Hennings prior to issuance of the policies.

The Respondent inquired about changing the subdivision restrictions on the minimum square footage to require larger homes in the subdivision **conditioned on CNB's approval**. Citizens did not approve the request and the Respondent did not pursue the matter further. To merely ask a questions is not unethical or a violation of the rules.

Page 17 of The Bar's brief states the Respondent later sued Mr. Senatore in a dispute concerning the construction of the Respondent's home. The Respondent is not aware of any lawsuit filed by him against Mr. Senatore concerning the construction of his home.

POINT II

THE REFEREE'S RECOMMENDED DISCIPLINE OF NINETY DAY SUSPENSION WAS JUSTIFIED GIVEN THE FACTS OF THE CASE AND THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY

The referee found the Respondent guilty of making misrepresentations to the Bankruptcy court. The referee recommended a 90 day suspension and passage of the ethics portion of the Bar Exam. Additionally, the Respondent was to pay the Bar's costs in the case which were $4,209.30.

The misrepresentation of the Petitioner to the Bankruptcy court was as to a prospective ownership of the property of the client after the obligations of the project were paid. In support of its position, the Bar cites to The Florida Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993) to the effect that misrepresentations constitute serious misconduct. In Jasperson, the Court approved the Referee's recommendation. In that case, Jasperson had filed forged documents with the court, and had not met with both clients in the one instance, and in another had failed to file a bankruptcy petition to prevent a foreclosure and purchased the property himself to avoid a malpractice problem. He then continued with the bankruptcy case. The Bankruptcy Court held that Jasperson's interests "not only interfered with his representation of Debtors, they completely dominated all actions taken in the bankruptcy case". The Supreme Court concluded that he continued with unnecessary litigation to protect his own interests. No such conduct is present in the instant case.

Even with that conclusion, Jasperson was found not guilty of violations of Rule 4-1.8(i). Unlike the Respondent, Jasperson was sanctioned by the Bankruptcy court on at least two prior occasions for misconduct. Judge Corcoran did not sanction Respondent for any of his pleadings in this case.

The Bar then cites The Florida Bar v. Abrams, 402 So. 2d 1150 (Fla. 1981), the facts warranting a one year suspension. The facts of Abrams included solicitation of employment in a criminal case, a subsequent attempt to withdraw without good cause, conflict of interest, failing to appear for court, and misrepresentation to the court that he represented a witness when he did not. The facts in Abrams, other than the adoption by the Court of the Referee's recommendations seem inapposite to this case.

The Bar cites Della-Donna, 583 So. 2d 307 (Fla. 1991) for the proposition that the conflict rule is strict. In Della-Donna, the attorney was engaged in conduct tantamount to extortion in an estate in excess of $55,000,000. In that same case, the court also stated:

> A referee's findings of fact are presumed correct and will be upheld unless clearly erroneous. The Florida Bar v. Stalnaker, 485 So.2d 815 [11 FLW 91, 1986 Fla.SCt 752] (Fla.1986). The standard on review is whether those findings are supported by competent substantial evidence, and this Court will not substitute its judgment for the referee's. The Florida Bar

> v. Hooper, 509 So.2d 289 [12 FLW 331, 1987 Fla.SCt 2367] (Fla.1987). After studying this record, we find competent substantial evidence to support the referee's findings that Della-Donna should be disciplined.

The Bar seems to be arguing for a suspension, and that is what the Referee recommended in this case, though not as much as the Bar would desire. The aggravating factors the Bar cites were discussed and considered by the Referee and set forth in pages six and seven of the Report of Referee in this case. The Bar is requesting this court to substitute its judgment for that of the Referee who heard two full days of testimony, was fully briefed on issues still undecided after the two days of hearing and who held a sanctions hearing after deciding the outstanding issues. What the Bar asks this Court to consider is what the Referee considered over a period of months in this matter.

In The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1983), Bern had been found guilty of multiple violations of the rules and the Referee's recommendation had been increased by the Court , citing "cumulative misconduct of a similar nature". The conduct in question in this case is neither cumulative nor similar.

The Respondent submits the Referee's recommendation should be adopted by this Court.

CONCLUSION

The Florida Standards for Imposing Lawyer Sanctions do not support the impositions of a suspension in excess of the Referee's recommendation in this case.

Due weight was given by the Referee to Respondent's prior disciplinary history, [Standard 9.22(a)]. He was suspended for a period of three years due to a Federal conviction for conspiracy to possess and distribute marijuana which occurred in 1982. He was allowed to resign in lieu of discipline in The Florida Bar v. Norvell, 456 So.2d 454 (Fla. 1984) This conduct is both remote in time (14 years) and totally unrelated to the current charges and does not reflect a pattern of misconduct.

A motive of the Respondent to protect the value of his own home would be parallel to the motives of the client in protecting the value of the subdivision as a whole.

The Respondent submits a 90 day suspension in accordance with the Referee's recommendation would protect the public. The Respondent argues that this discipline would have a deterrent effect on others who may be inclined to engage in similar behavior.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Respondent's Answer Brief and Appendix have been sent by United Parcel Service 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 Bar Counsel, James W. Keeter, Esquire, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801-1085; and a copy of the foregoing has been furnished by regular U.S. Mail to John A. Boggs, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 16th day of September, 1996.

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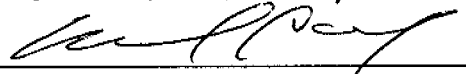

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