IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 86,027
[TFB Case Nos. 95-30,134(5B) &
94-31,482(05B)]

v.

MICHAEL CARR NORVELL,

Respondent.
_____/

THE FLORIDA BAR'S 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 held on November 29, 1995, and November 30, 1995, shall be referred to as "T. V." followed by the cited volume and page number. The disposition hearing held on February 8, 1996, shall be referred to as "T. II" followed the cited page number.

The Report of Referee dated March 13, 1996, will be referred to as "ROR," followed by the referenced page number(s) of the Appendix, attached to the bar's initial brief. (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.

ARGUMENT

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 CLEARLY ERRONEOUS.

The issue is not that the respondent paid $1,000.00 directly to Jamie Senatore's lawyer, Robert Williams, as fees earned by Mr. Williams in connection with Mr. Senatore's lawsuit against Forrest Berg (T. V. I p. 34; T. V. III p.p. 455-456), with whom the respondent later developed a lawyer-client relationship (T. V. I p.p. 181-182). Rather, the issue is the respondent's failure to disclose this payment to Mr. Berg when they formed an attorney-client relationship.

Mr. Berg, as a potential client, needed to know about the respondent's payment to Mr. Williams so that he could make an informed decision about whether to hire the respondent as The Arbors' counsel. Rule 4-1.7(b) requires that "the client consents <u>after</u> consultation" to the lawyer's obligations to a third person (such as Mr. Senatore). The rule required the respondent to reveal his $1,000.00 payment to Mr. Williams, who represented Mr. Berg's opposing party in the Senatore lawsuit.

There was no ethical justification for the respondent's failure to disclose this payment. The respondent's payment directly to Mr. Williams rather than to Mr. Senatore created the appearance that the respondent funded the Senatore lawsuit. The respondent knew the Senatore suit had been filed and knew the money would be applied toward Mr. William's legal fees for the Senatore suit (T. V. III p. 452). The respondent was nonetheless ethically obligated to reveal this payment.

In Point One of his Answer Brief the respondent argued that he and his wife received a $1,000.00 credit toward the balance owed Mr. Senatore on the construction of their house by paying the money directly to Mr. Williams. However, he did not cite record support. It does not appear there was any testimony directly on this point. Mr. Williams testified to a discussion regarding the respondent's payment to Mr. Williams(T. V. I p.p. 26-27, 31-32, 69). Presumably the respondent would have received a credit for these funds, but there was no testimony that he received a credit for the $1,000.00 payment. Likewise, the respondent did not provide record support for his position that he was not "obligated to fund the Senatore lawsuit." It was Mr.

Williams' understanding that the respondent would pay for Mr. Senatore's legal fees at least to the extent that the respondent owed money to Mr. Senatore for the house construction (T. V. I p.p. 26-27, 31-32, 69).

The respondent's representation of The Arbors in bankruptcy court while he negotiated for an ownership interest in The Arbors was a clear conflict of interest. The respondent knew, or should have known, that a lawyer may not acquire an ownership interest in a debtor corporation he represents in a bankruptcy case. In arguing that a final agreement was not reached until after he had filed the petition for The Arbors seeking his employment as its bankruptcy counsel, the respondent ignores the fact that he and Messrs. Berg and Dillard were engaged in lengthy negotiations for the respondent to buy out their interests in The Arbors. The negotiations were relevant to the bankruptcy court and should have been disclosed, if not in the application for employment, then in an amended application filed with the court shortly thereafter.

Contrary to the respondent's statement in his Answer Brief, he did not decide to withdraw from the case; the bankruptcy judge denied the application for his employment (B-Ex. 18). Although the respondent argued in the summary of the argument in his Answer Brief that Messrs. Berg and Dillard knew the respondent had hired Mr. Hennings and paid him a $5,000.00 retainer (and therefore knew the respondent was no longer representing them at the time they executed the Assignment and Assumption Agreement on October 1, 1993) (ROR-A p. 5), he failed to cite to the record to support this and the bar could find no support in the record. The only testimony the bar could find was that Messrs. Berg and Dillard became aware of Mr. Hennings' involvement in the case some time before the substitution of counsel was filed in October, 1993 (T. V. III p. 391). The respondent's position overlooks the fact that he engaged in the negotiations that resulted in the Assignment and Assumption Agreement long before he hired Mr. Hennings to replace him as bankruptcy counsel for The Arbors.

When the respondent first discussed his interest in buying Messrs. Berg's and Dillard's interests in The Arbors, he should

have advised them that this could result in his disqualification from representing the corporation in the bankruptcy. He failed in his duty to adequately communicate with his clients. That Messrs. Berg and Dillard may have realized the respondent could not continue representing them after the bankruptcy court denied the application for his employment is not the issue and it appears from the respondent's summary of the argument in his Answer Brief that he misapprehends the bar's argument concerning his failure to adequately communicate with Messrs. Berg and Dillard. The respondent should have told the clients at the time they discussed the respondent's proposed buy out of their interests that he might not be able to represent The Arbors in the bankruptcy. At least Messrs. Berg and Dillard would have been on notice that they needed to consider hiring another attorney to handle the bankruptcy. Mr. Dillard testified at the final hearing that he still did not know why the court disqualified the respondent from representing the corporation in the bankruptcy and just assumed it was because the respondent lived in the subdivision, the corporation's only major asset (T. V. I p.p. 125-126). Mr. Berg testified at the final hearing that he believed the respondent's application to represent the debtor

corporation had been denied because there were unresolved problems with the employment of the first attorney, Royce Pipkins (T. V. I p.p. 188-190). Neither Mr. Berg nor Mr. Dillard appeared to appreciate the respondent's conflict of interest as being the primary factor in his inability to represent The Arbors in the bankruptcy proceeding. The consultation with Mr. Hennings happened in September, 1993, only after the court had denied the application for the respondent's employment as bankruptcy counsel on September 24, 1993, (T. V. III p.p. 381-383, 471; B-Ex. 18; B-Ex. 19) and there is no indication that Mr. Hennings was involved in the bankruptcy case before that time.

The respondent also erroneously states in his Answer Brief summary of the argument that the bankruptcy court denied his application to represent The Arbors on August 17, 1993, and that Mr. Hennings' application was filed on September 4, 1993. The respondent filed his application on August 17, 1993, (B-Ex. 16) after the court determined that the respondent had not followed the appropriate procedures in June, 1993, when he entered his appearance as counsel for The Arbors (ROR-A p.p. 3-4). Mr. Hennings served his motion to be appointed to represent The

Arbors on October 4, 1993 (B-Ex. 19). Therefore, there indeed was a "further delay" in the bankruptcy proceedings because the respondent did not withdraw his application for employment on August 17, 1993, but filed it on that date, and Mr. Hennings did not appear until October, 1993. This resulted in a delay of more than two months, because the court did not approve Mr. Hennings' representation of The Arbors until October 13, 1993, (B-Ex. 20), which is considerably more than the two weeks delay the respondent asserted in his Answer Brief. Certainly the delay was not in the best interest of The Arbors.

The respondent mistakenly argues that the Assignment and Assumption Agreement provided that before any actual transfer of ownership, the CNB mortgage would have to be satisfied. The respondent's conflict of interest was inherent in the negotiation of the agreement and not strictly in the performance of it. Negotiations commenced on August 20, 1993, long before the respondent hired Mr. Hennings to take over the bankruptcy in September, 1993 (T. V. III p.p. 377, 385; B-Ex. 12; T. V. III p. 383). The respondent's statement that B-Ex. 12, where he expressed an interest in buying out Mr. Dillard's interest in The

Arbors, was "almost an afterthought" constitutes new testimony. The respondent did not testify to this at the final hearing.

Despite the respondent's argument that his dealings with Messrs. Berg and Dillard in the Assignment and Assumption Agreement were fair, this is not the issue. The issue concerns the conflicts of interest earlier in the respondent's dealings with Messrs. Berg and Dillard. He failed to advise Mr. Berg about his fee payment to Mr. Williams on behalf of Mr. Senatore, he sought to represent The Arbors against Mr. Senatore while the respondent had an ownership interest as a homeowner, and he sought to represent The Arbors in the bankruptcy while he was negotiating to purchase the corporation.

The respondent did more than merely inquire about changing the subdivision restrictions on the minimum square footage as he asserts in his Answer Brief. He and Mr. Berg and Mr. Dillard had an informal agreement that the corporation would not build any houses with less than 1,800 square feet (T. V. II p.p. 250-251; B-Ex. 23). The respondent first put the issue of minimum square footage in writing in a draft of the January 6, 1992, agreement

he entered into with The Arbors to settle the dispute over the construction of his home, although this provision was not included in the final agreement (B-Ex 2) because CNB would not agree to increasing the minimum square footage requirements (T. V. III p. 378). The respondent again proposed the minimum square footage be raised, with CNB's approval, in his letter to Doug and Mary Dillard where he stated that if they were not agreeable to this, and the other terms he put forth, he threatened to seek to withdrawal from representing the Dillards and The Arbors (B-Ex. 12). The agreement that the minimum square footage would be raised to 1,500 square feet, conditioned on CNB's approval, was included in the August 26, 1993, and September 1, 1993, drafts of the Assignment and Assumption agreement (B-Ex. 11). The final Assignment and Assumption Agreement (B-Ex. 13) provided that the assignors, the Bergs and the Dillards, would sign a separate agreement raising the minimum square footage of the houses built in the subdivision to 1,500 feet, conditioned on CNB's approval. The respondent made this issue a condition of his continuing to represent The Arbors and on his purchase of the Bergs' and Dillards' interests, which they were desperate to sell so as to relieve their personal liability for the corporation's debts.

Perhaps the respondent summed things up best himself in his letter of November 3, 1993, to Tom Grizzard (B-Ex. 24), "I have more time and money in this deal than anyone except the Dillards and the Bergs... I also have the most to lose of anyone as my house is there in the subdivision." The respondent's repeated "inquiries" revealed the underlying conflict of interest.

The bar notes that the respondent is correct on page 12 of his Answer Brief in that he did not sue Mr. Senatore. The fourth sentence of the second paragraph on page 17 of the bar's Initial Brief should have read "The respondent and Mr. Senatore later became involved in a dispute concerning the construction of the respondent's home." In fact, Mr. Senatore sued the respondent (T. V. III p.p. 359, 451).

POINT II

THE REFEREE'S RECOMMENDED DISCIPLINE OF A NINETY DAY SUSPENSION WAS ERRONEOUS AND UNJUSTIFIED GIVEN THE FACTS OF THE CASE AND THE RESPONDENT'S PRIOR DISCIPLINARY HISTORY.

The court should be able to rely on statements made to it by an attorney, who is an officer of the court. "Veracity should be the hallmark of an attorney and officer of the Court. It is the foundation of the trust and confidence which must vest in a lawyer." Petition of Steele, 283 So. 2d 350, 351 (Fla. 1973). The respondent knew, or should have known, that he would have been disqualified from representing The Arbors had the court known of his proposed ownership interest in it. Because he envisioned owning the debtor corporation, he had an interest in controlling the bankruptcy proceedings and could best do this as counsel for the debtor.

The bar believes that a suspension requiring proof of rehabilitation is warranted, given the respondent's prior disciplinary history and the aggravating factors outlined by the bar in its Initial Brief. Proof of rehabilitation is the important difference between the 90 day suspension recommended by

the referee, which does not require proof of rehabilitation prior to reinstatement, and the one year suspension the bar seeks. Any suspension of ninety-one days or more requires an attorney to prove rehabilitation to a referee in a separate proceeding, R. Regulating Fla. Bar 3-5.1(e), 3-7.10.

The practice of law is a privilege, not a right, and is revokable for good cause. Petition of Wolf, 257 So. 2d 547, 548 (Fla. 1972). The bar submits that making a misrepresentation to the bankruptcy court warrants revoking the respondent's license to practice law for at least one year with the privilege to be reinstated only after the respondent can prove he has been rehabilitated.

Concerning the respondent's Answer Brief statement that in The Florida Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993), the attorney was found not guilty of violating R. Regulating Fla. Bar 4-1.8(i) (which prohibits a lawyer from acquiring a proprietary interest in the subject matter of litigation), there is no indication in the opinion that the bar actually charged Mr. Jasperson with that rule violation or that he was found not

guilty of violating it. The bar cited Jasperson because one of the main issues involved the lawyer's misrepresentation to the bankruptcy court and his improper business transaction with clients who had conflicting interests.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, conclusions of law and recommendation of a 90 day suspension and instead impose a suspension of one year and payment of costs now totaling $4,209.30.

Respectfully submitted,

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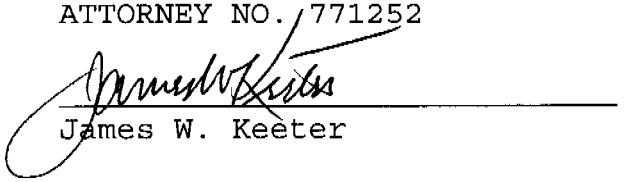
By: 
James W. Keeter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Reply Brief and Appendix have been sent by Federal Express Overnight Delivery to 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 respondent, Michael Carr Norvell, 1410 Emerson Street, Post Office Box 491615, Leesburg, FL 34749-1616; 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 2nd day of October, 1996.

Respectfully submitted,

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