IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

Case No.: SC07-2398
[TFB Case No.: 2007-31,452(05B)]

v.

JOHN VERNON HEAD,
Respondent.

_____/

RESPONSE TO REPORT OF REFEREE AND
SUPPORTING MOTION OF THE FLORIDA BAR

Respondent, JOHN VERNON HEAD, hereby files this, his RESPONSE to the Report of Referee Ruling issued by The Honorable J. David Langford and the subsequent pleading of the Bar in support of the findings as to cause but seeking the imposition of greater penalties and demands that this Honorable Court find notwithstanding the Referee's Ruling that the Respondent did not intentionally commit any violation of the Rules, did not in any manner attempt to act in a dishonest fashion and any Rule violation[s] were minor in character and the penalty issued by the Referee and the larger penalty sought by the Bar are nit supported by the facts, and in support thereof, states as follows:

ALLEGATIONS OF WRONGDOING

1. Essentially the Bar alleges that Respondent wrongfully represented two clients (Linda and Clay Hackney) in three matters without disclosing same to the Bankruptcy Court where they were currently involved in a Chapter 13 bankruptcy proceeding and further failed to inform the Court of these clients paying to his firm fees for such services. The Bar alleged that Respondent intentionally withheld knowledge of his actions from the Bankruptcy Court in violation of the Rules of Ethics. [The Complaint contained eighty-five (85) paragraphs, many of which did not cite specific facts, and eight (8) alleged violations of the Rules Regulating The Florida Bar and its members. The two day hearing saw the testimony six live witnesses and four witnesses by affidavit. As originally objected to by Respondent there was no structure to the Complaint. It does not relate any individual factual paragraph to any of the eight (8) alleged violations.

2. The three matters complained of were (I) a suit in Federal Court defending a corporation owned by the Hackneys [Crown Tree Tech, the corporation, was formed after the bankruptcy proceedings were filed and was an active Florida corporation as testified to without objection from the Bar by Ms. Weatherford the Chapter 13 Trustee and the expert witness called by the Bar and Mary Mantey, formerly the office manager and

paralegal for Respondent.] Crown Tree was sued for violation of the Fair Labor Standards Act by an employee and the sole evidence presented was that Respondent provided proper and excellent legal services.]; (II) defending Clay Hackney and the property rights of the Corporation in a criminal Matter [wherein Mr. Hackney was originally charged with criminal intent to do harm with a truck owned by the Corporation. The State Attorney originally sought jail time and confiscation of the Corporation's property. The case was eventually resolved with a fine and probation.] and (III) a motion for back alimony [Mr. Hackney was brought before the Circuit Court for failure to pay back alimony and faced potential incarceration. The matter was resolved with a schedule of future payments]. The Bar also alleged Respondent took funds without informing the Bankruptcy Court and did so intentionally.

3. The Bar also alleged that Respondent intentionally filed a false Pleading for a bankruptcy that did not exist.

RESPONDENT'S RESPONSE TO ALLEGATIONS

4. Respondent's responses to the allegations are:

FIRST, the Suggestion of Bankruptcy was filed in good faith and was not filed to anyone other than the Chapter 13 Trustee and the court for purposes of notice. When the Court informed the Respondent that it found

the filing improper, the Respondent immediately sought to apologize and rescind the pleading but the Bankruptcy Court refused to allow him to do so. No other persons were noticed and no other persons were ever involved in this issue. The Bar presented no evidence such was done in bad faith and the sole evidence offered was by the Respondent that it was done for notice purposes first and for a filing which became moot when the Court did not require action by the firm.

SECOND, none of the three cases were within the jurisdiction of the Bankruptcy Court. Simply representing a Florida corporation that was not a party to the bankruptcy case and representing Mr. Hackney in a criminal case and a child support case [failure to pay existing child support] did not require any notice or action in the Bankruptcy Court. No notice was required because none of the cases were within the jurisdiction of the Bankruptcy Court and no monies were received from the debtors. Respondent only had a duty to inform the Court and seek its approval when monies were paid to him by the debtors to cover fees owed by the corporation. Both Respondent and his office manager testified without contradiction that they had made such notice informing the Bankruptcy Court of the payment of fees at the time it was made by the Hackneys.

FACTS PRESENTED TO THE REFEREE

I. BAR PRESENTATION

NOTE: The Bar offered only one witness [her assistant also testified but her testimony is not germane], the Chapter 13 Bankruptcy Trustee. Ms. Weatherford, the Chapter 13 Trustee, testified as to each of the cases noted above as follows:

5. The Corporation was never mentioned in the bankruptcy filing, was never an asset listed nor listed as a creditor and as a third party, was not part of the bankruptcy. The Bar failed to offer any testimony that a Florida corporation not listed in a bankruptcy filing was in any way subject to the jurisdiction of the Bankruptcy Court. The Trustee testified that there were no incidents of jurisdiction to tie the corporation to the bankruptcy case and that the corporation was never a party to the bankruptcy case (Transcript, Volume I, Page 153). The Trustee also testified that the jurisdiction of the Bankruptcy Court is statutory and limited to the statute (T, I, Ps 149,150).

6. The Trustee testified that the Bankruptcy Court has narrow jurisdiction, limited to those matters specifically enumerated in the Federal Code or in case law. She testified that criminal matters were not within the jurisdiction of the Bankruptcy Court (T, I, P 151)

7. The Trustee also testified that established orders for child support and the issues surrounding the failure of payment were not within

the jurisdiction of the Bankruptcy Court and were left to the State Court, especially when issues of non-payment and potential incarceration were present (T,I,P 151-153).

8. The Bar also offered the pleadings from the Bankruptcy Proceedings and relied upon the opinion of the Bankruptcy Judge that Respondent has acted wrongfully and intentionally. However that opinion, as offered, was fatally flawed because of the actions of the Bankruptcy Judge refused to allow (i) Respondent to reply to the allegations made. Specifically, that Judge refused to allow Respondent to speak in his own behalf, (ii) live and/or affidavit testimony form Mary Mantey, the Respondent's office manager and case coordinator for the Hackney Case and (iii) denied Respondent the right to call a witness by quashing a subpoena on the grounds the witness lived to far away even though the witness was then present in the Courtroom. That witness was extremely important to the matter because she had told the Bar investigator that Respondent asked her to lie. Respondent denied this and the witness later moved and was not available to be cross-examined by the Respondent during the Referee's hearings. The abject failure of the bankruptcy Court to hear Respondent or allow for a fair response limits any evidentiary value in his opinion concerning Respondent.

II. RESPONENT'S PRESENTATION

9. With regard to the allegation that Respondent failed to provide notice of his services to the Court, he denied the allegation because the Bankruptcy Rules did not require he report that he was engaged to represent the Corporation nor did they require he report that he had been engaged to represent Mr. Hackney in a child support case or a criminal case and the Corporation in a civil suit and a criminal case involving Mr. Hackney.

a. The Rules and Case Law as cited by the Bar clearly reflects that no notice was required to be given to the Bankruptcy Court or the Trustee for the legal work done on the three files unless and until fees were received from the Hackneys. Generally the Rules require that an attorney representing a debtor inform the Court if he is doing other legal work for the debtor which will result in fees where the legal matters or relationship arise out of the attorney's relationship with the debtor within the bankruptcy. This is generally meant that if a matter is within the jurisdiction of the Bankruptcy Court because it will affect either a claim or a privilege to deny a claim, then the action must be reported.

b. In each of these three cases the legal representation did not qualify under those standards. The largest matter, and the one which gave rise to approximately 80% of the fees in question, was a matter where

Respondent represented the Corporation. The Corporation was a qualified corporation under the laws of Florida, was not a debtor or creditor in the Hackney Bankruptcy Case and was not involved in any other bankruptcy case, either then or now. The Corporation was sued in federal court for a violation of overtime rules. An affidavit detailing this from Charles Scalise, the opposing counsel in the Treverton Suit, was provided to the Bankruptcy Court and attached to our pleadings.

c. The Rules that were in place at the time of these events [the Rules were changed in January, 2006] did not require that an attorney notice the Court when he is undertaking matters for a party who is not a debtor and is not represented in the bankruptcy nor where the subject matter did not directly affect the bankruptcy case. To suggest there was such a duty stretches the Rule beyond any reasonable reading. For example, as the case law clearly references, if Respondent represented a person as a debtor and also represented their spouse who was not a debtor in an unrelated matter, there would be no obligation to so inform the Court about such representation. Further, as in this case, if Respondent represented a debtor in a criminal case there is no duty to report because the Bankruptcy Court has no jurisdiction over such matters. The automatic stay and other benefits of the bankruptcy filing for the debtor do not apply in criminal matters.

d. The other two matters were a criminal case and a child support case. Neither of the subject matters of these cases falls within the jurisdiction of the Bankruptcy Courts. A Bankruptcy Court cannot take jurisdiction over and modify child support nor does it have any jurisdiction over criminal/traffic matters. The result and underlying issues in these two cases only affected the bankruptcy filing of the debtors in that one of them faced serious consequences, including incarceration, which consequences could have impacted the ability of the debtors to meet their plan payments.

10. THUS IT IS CLEAR that Respondent had no duty to inform the Bankruptcy Court of his actions in these other cases.

RECEIPT OF FEES.

11. Respondent agreed with the Bar that once he received money from the Hackneys, even if for matters not related to the bankruptcy mater, he had a duty to report the receipt of those moneys to the Bankruptcy Court.

12. The Bar offered no testimony or exhibits, other than the Bankruptcy Judge's opinion, that Respondent intentionally failed to notify the Court of the receipt of funds. Respondent testified that he agreed there was such a duty and that he instructed his staff to file a notice of such receipt. Ms. Mantey testified that she had been given such instructions and that she had filed such notice(T, II, 43-45) evidencing she was clearly

surprised when she was informed that the filing she made did not include the prepared portion about the receipt of the fees. Her testimony made clear that she was instructed to so file, that she did so file and had no idea why the filing made was incomplete. However she did testify that the firm was having computer problems caused by severe damage during the 2004 hurricanes and she knew that some filings had to be redone several times before they got through. She had been unaware that her original filing was missing portions, including the notice of receipt of fees. Ms. Mantey's testimony was independent as she had not worked for Respondent for almost two years and was supported by the affidavit of Charles Witsman, the Respondent's technical support person, who in his affidavit testified to the computer problems the firm was having. The Bar offered no evidence in contradiction of the testimony of these two witnesses.

THE TITLE COMPANY DOCUMENTS

13. Respondent also testified to the fact that the documents from the title company were false and that it was clear neither the Trustee nor the Bankruptcy Court had paid attention to his pleadings and the moneys discussed therein. There was significant confusion because the Title Company sent a Closing Statement that did not reflect the fees to us and wrongly calculated the payments made form the loan proceeds. The

Trustee's office and the creditor's attorney had all used the loan documents when reviewing the debts and credits, which led to much confusion at the hearing. Our pleading, filed immediately after the loan closed and proceeds were disbursed identifies the fees allocated to us and requests their approval, along with the other payments and for a determination of the monies owed Turner. This is important because no-one, the trustee, Mr. Turner nor his lawyer would respond to our request for a pay-off amount, leaving us to provide our best estimate to the title company, which we did. Mr. Hackney testified before the Bankruptcy Court that he was at the title company for two days while the closing was completed, that Respondent was not present and did prepare any of the title documents, essentially denying the title agent's statement that Respondent has attempted to get her to lie about the events of the closing. Respondent cannot prove this but suspects she said what she did because her failure to issue a proper HUD Statement id a violation of Federal Law.

14. In fact Respondent acknowledged in Court that the closing statement form the Title Company sent to the Trustee and to him did not reflect the $ 10,000.00 paid to Respondent. Respondent suggested that was why both the Court and the Trustee seemed unaware of the payment to as the only place it appeared was in the pleading we filed [at this time

Respondent was unaware that a portion of our filing had not been properly made in the Court's electronic filing system]. The Court seemed to hold us responsible for the incorrect closing statement even though we did not prepare it. Respondent and his firm had nothing to do with the closing documents (T, II, Ps 26-39,40, 43-45 and generally Ps 1-24 and 47-60 as to how this matter was treated within the office, billed and contact with the title agency).

15. Because the issue of whether we had any involvement in the preparation of closing documents or instructed the Title Company in their preparation arose at the hearing, Respondent instructed Ms. Mantey to ask the Title Company for an affidavit citing that our office had not represented anyone at the closing, had not attended the closing and had not had anything to do with the preparation of the closing documents. It was related to Respondent by Ms. Mantey that Ms. Danizio (if indeed that was the closing officer as Respondent never spoke to or met anyone there who was introduced to me as the closing officer) told her that the owner of the Title Company would not allow her to sigh any affidavit. Respondent asked Ms. Mantey to tell them and Respondent later spoke briefly to one of them but do not recall if it was Ms. Danizio or the owner, to explain without an affidavit he would be left with no choice but to subpoena them for testimony

at the next hearing, which he was happy to avoid with an affidavit because their offices were in West Palm Beach or some nearby location.

16. The improper filing was not intentional and was handled by the Bankruptcy Court as if it were. Respondent admitted he did file a blank form of a Suggestion of Bankruptcy. However, he denied and the Bar offered no contradictory evidence he filed this in general with the intent of placing the public on notice or with intent to deceive but rather only gave a copy pre-filing to the Trustee and told her that if Bankruptcy Court ordered the Firm to repay the $ 10,000.00, it did not have the money and Respondent was filing the Suggestion to make the Court aware of that fact. Respondent filed this Suggestion only and specifically in the Hackney case because the Trustee had told me she would file to have the fees returned from the firm and not myself personally.

17. Respondent did not file it as an open Suggestion but merely filed it as such in the Hackney Case and did not want the Judge to rule the fees due from the firm and then find a bankruptcy filing. Respondent was concerned the Bankruptcy Court would believe he was attempting to circumvent re-paying any fees he required returned.

18. Respondent testified that while he agreed that he should have used a different form of notice about the financial condition of the firm, the Suggestion of Bankruptcy was given only to the Court and Trustee and only through the Hackney Case, not generally. On reflection he believed he should have filed this information in a different fashion but believe the error is only minor and technical since it only gave notice to the Bankruptcy Court and the Trustee and was not filed as a means to avoid collection.

COSTS

19. The Bar seeks costs and as part of its argument states that Respondent caused lost court time and the investigation. The facts do support this allegation. Respondent, both when the Bar first contacted him and in his first appearance before the Referee never shirked responsibility for his actions. Respondent stated he was responsible for the failure of the pleading disclosing receipt of fees to be properly filed even if such failure was electronic and not intended. Respondent denied he intentionally mislead the bankruptcy Court. He id not file pleadings and cause hearings in excess as it is clear the failure of the creditor Turner to offer a pay off led to the filings and hearing pre the disclosure issue. After that there was one hearing initiated by the court and two by Respondent, seeking a reconsideration and

an appeal. Certainly the Bar does not believe Respondent had no right to defend himself or to seek a reconsideration.

20. Since the Bar did not offer any evidence of intentional wrongdoing by Respondent (the pleadings do not offer any such evidence and the hearing before the Referee requires evidence to prove all allegations. The Bar presented only one witness, the Chapter 13 Trustee and she did not testify as to intent. The Bar cannot rely upon the findings of the Bankruptcy Court are opinion, not evidence and are fatally flawed because of that Courts refusal to allow the Respondent to testify, to allow his primary employee to fully testify and for preventing a vital witness present in the courtroom from testifying.

21. The Bar also refused to accept evidence that would have supported Respondent's position that he did not intentionally fail to file or inform. Respondent offered the Bar counsel a copied hard drive from his computer network and access to the actual hard-drive which would have supported his testimony and that of Ms. Mantey as to the filing attempts and the inclusion in the pleadings filed of the $ 10,000.00 at issue but the Bar counsel refused to accept either evidence, stating that she had no resources to examine either.

22. Respondent further has maintained from the outset of this matter that he was ready to accept responsibility for his actions. Since it is clear the Bar cannot and did not prove wrongful intent, Respondent's admittance prior to any of the investigation that his pleading was not electronically filed despite his attempts to so do and his admittance that his filing of the Suggestion was improper means that the costs sought by the Bar are essentially unnecessary and were complied by it without reason and Respondent should not be held responsible for them.

STANDARD OF REVIEW

23. The test for supporting or denying approval of Referee's Ruling is much like that used for a motion to reconsider is like that of a motion to dismiss, that the ruling fails to relate a particular cause of action [fact] that can be specifically related to an outcome or Rule violation. Simply put this means does the determination cite proven, substantiated facts in support of the alleged Rule violation. Wausau Ins. Co. v. Haynes, 683 So. 2d 1123 (4th DCA 1996). The relationship of the facts to the alleged violation is the fundamental requirement of a finding in favor of the Bar and the alleged violation should be found unsubstantiated without facts that clearly support it. For example, in Drakeford v. Barnett bank of Tampa, 694 So. 2d 822 (2nd DCA 1997) the failure to clearly allege ultimate facts in proximity to the

alleged violation allowed the Court to find that the entire Complaint should be dismissed for the failure to allege the facts sufficiently to support some cause of action.

24. Failure to offer specific facts as to intent or purpose also reflects that the facts offered for the pled special matters such as fraud is also a basis to reconsider the ruling. To state a claim for dishonesty the Bar must prove through substantive evidence that Respondent made a false statement regarding a material fact, that he had knowledge the statement was false and that he intended someone to rely on such statement to their detriment. See Mettler, Inc. v. Ellen Tracy, Inc., 648 So. 2d 253 (2nd DCA 1994). The allegation must also be made that the Respondent was aware the statement was false at the time it was made and it was made intentionally. See Coggin Pontiac, Inc. v. Putnam Auto Sales, Inc., 324 So. 2d 141 (1st DCA 1975).

25. The Bar failed to offer any evidence whatsoever as to intent to support any of its special matters such as dishonesty. The Bar simply attempted to rely on what was filed and the opinion of the Bankruptcy Judge. Its sole witness did not offer any testimony to support the intentional dishonesty issues.

26. Some of the alleged violations are of the type designated as "Special Matters" in the Rules of Civ. Proc. (see Rules 1.120), but are pled in the same fashion as the other alleged violations. Yet the Referee saw fit to only cite to this one document in his decision, ignoring all of the other facts submitted. The Referee failed to offer any reasoning or insight for his determination as to why these allegations were in actuality facts even though no witness to support same was ever introduced. In fact the evidence clearly reflected that Respondent did indeed make an error in either practice because he is responsible for his staff failing to confirm his pleadings were fully and properly filed and he accepted that in his opening remarks. He may also have used poor judgment in his suggestion of bankruptcy filing but that was fully addressed by the Bankruptcy Court. It is clear any such errors were made in good faith and without any attempt to deceive or be dishonest. Without contradiction the testimony or affidavits clearly reflected that Respondent has no intent to deceive and indeed made every effort to aid his clients. The computer problems of the firm [Aff. of Witsman, Testimony of Mantey and Head] established that without response from the Bar. The bankruptcy experience of Respondent at the time of the events was less than six month [acquired Witsman practice in September, 2004 and began representing the corporation in February of 2005]. The corporation for which

work was done was not part of the bankruptcy case by stock or income [T. of Weatherford] and in fact was not created until after the bankruptcy case was opened [T. Mantey].

CONCLUSION

Based on the foregoing and the fact that the Respondent is entitled to have the Ruling of the Referee vacated and be found not affirmed of any of the charges except as to the failure to confirm that his electronic filings were successfully made and that he used the wrong form when attempting to provide notice about his financial condition to the Bankruptcy Court. Especially on the issues of special matters such as dishonesty as it clearly reflects that these were not properly evidenced by the Bar and no discipline should be accorded for any allegation dealing with dishonesty. Respondent believes a reprimand for failing to properly supervise his staff as t the electronic filing and for the use of the wrong form are sufficient, especially given his 35 years of a clean record and the supporting testimony of his clients and colleagues.

Respectfully submitted this 22nd day of December, 2008.

Respondent request the right to argue this orally to the Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U. S. Mail to Joan Marie Stalcup, Esq., The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804-6314; Kenneth Lawrence Marvin, Esq., The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32299-2300 and filed with the Clerk of the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1927 [original and seven copies and pre-stamped postage to all parties, as required by the General Information Sheet promulgated in this matter] and to the Honorable J. David Langford, referee, Polk County Courthouse, P. O. box 9000, Drawer J161, Bartow, Florida 33831-9000.

John Vernon Head, Esq.