IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,
v.

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

JOHN VERNON HEAD,

Respondent.
_____/

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS.

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On December 26, 2007, The Florida Bar filed its Complaint against Respondent and later its Request for Admissions in these proceedings. On May 13th and 14th, 2008, a final hearing was held in this matter. All of the aforementioned pleadings, responses thereto, exhibits received in evidence and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

The following attorneys appeared as counsel for the parties:

For the Florida Bar - JoAnn Marie Stalcup
Frances R. Brown-Lewis

For the Respondent - Pro Se

II. FINDINGS OF FACT.

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary of Case. The events that gave rise to this proceeding have their beginning in 2003 when the respondent purchased the law practice of Ezra Witsman. After purchasing the practice, the Respondent filed Motions for Substitution on behalf of a number of Mr. Witsman's former clients including Clayton J. Hackney and Linda J. Hackney, his wife. The Hackneys had filed a Chapter 13 bankruptcy. The bankruptcy filing was made to try to retain ownership of a piece of real property that was their primary asset. They had purchased the property from George Randall Turner. The dealings between these parties became very acrimonious and ultimately Mr. Turner obtained a Final Judgment of Foreclosure against the Hackneys in February, 2003. The principle amount of the judgment was $142,000 that carried interest. There were also attorney fees of $15,375.58 that the Hackneys owed Turner, but these fees did not carry interest.

The Hackneys engaged Witsman to represent them in the bankruptcy in March, 2003. The Hackneys paid Witsman $1,500 and agreed to pay him at an hourly rate of $175 pursuant to the fee agreement they signed with him. The respondent took over the bankruptcy case in August, 2003, and never received any additional fees for the bankruptcy from the Hackneys.

The Hackneys had additional legal problems during the course of the bankruptcy. Clayton and Linda Hackney owned the stock in a corporation named Crown Tree Tech, which had a tree trimming service. This business provided the principle source of income for the Hackneys. A former employee filed a federal lawsuit on a wage and hour claim for unpaid overtime against Crown Tree Tech and the Hackneys. The respondent accepted representation and by his testimony received $1,000 from the corporation as a cost retainer and not as a fee check. The corporation also paid an additional $1,000 cost retainer for respondent's representation of Clayton Hackney for the non-payment of child support. The respondent also represented Clayton Hackney on an unrelated felony charge where George Randall Turner charged him with using a motor vehicle to try to run over Mr. Turner. The respondent did not initially wish to represent Hackney on the felony charge, but when no one else would because of Hackney's inability to pay a fee retainer, the respondent agreed to do so. Ultimately,

the respondent was able to finalize each of the matters without Mr. Hackney being incarcerated on the child support and criminal matters and with the payment of a sum of money on the wage claim that the Hackneys agreed to. The respondent was never paid any additional sums of money from the Hackneys and eventually stated he was owed $14,013.69 for these “non-bankruptcy matters”.

The bankruptcy was continuing however and the Hackneys were under a repayment plan. It was understood by everyone that the repayment plan would not pay off the obligation to Turner. It was therefore incumbent on the Hackneys to obtain refinancing on the real property to obtain the funds to pay off the mortgage. In 2005, a lender was located who would refinance the property. Statewide Title Corporation was the closing agent for the loan. It is from this closing and its aftermath that the charges in this action arose.

The Hackneys had spoken to the respondent’s office about paying a sum of money from the proceeds of the loan for the enormous amount of work done for them by the respondent. Mary Mantey’s recollection was that the sum of $10,000 was specifically discussed (testimony at Volume #2, page 52 of transcript). The Hackneys’ recollection was that they would pay “extra” but had not agreed to the $10,000 (Tab 28a1 judicial notice exhibit).

The Hackneys called respondent's office on the day of the closing to question the $10,000 figure that was to be paid from the proceeds of the closing to respondent. Eventually the Hackneys signed the closing documents and respondent received a check for $10,000 and George Turner received a check for $143,184.82 (Tab 24c judicial notice exhibit). The closing took place on May 28, 2005, but the proceeds were not distributed until June 7, 2005. Respondent's payment was based on an invoice (Tab 21a judicial notice exhibit) that had no information about hours worked, hourly rate or what work was done. The original HUD Settlement Statement (Tab 23c judicial notice exhibit) does not even show the $10,000 payment. Instead it shows George Turner receiving $153,184.82 (emphasis added). An Amended HUD-1 statement was prepared, but apparently not provided to anyone that showed the $10,000 payment to respondent.

A determination of what was owed to George Turner in the refinance was made difficult by the fact that the Hackneys were late with their payments often in the Chapter 13 proceeding and the mortgage holder (Turner) refused to cooperate in establishing what was owed to him. The burden therefore fell on respondent's office (and Mary Mantey in particular) to determine the amount that was owed to Turner and to provide that figure to the closing agent. The closing agent went forward with the closing

without any confirmation from Turner as to the total amount owed. No evidence in the record explains why this was done or why two different HUD statements were prepared.

The primary reason the Hackneys were refinancing the property was to be rid of George Turner as a creditor. The $10,000 payment to respondent from the loan proceeds prevented this from occurring. Turner was still owed money.

The respondent filed with the bankruptcy court on September 2, 2005, on behalf of the Hackneys a "Second Amended Motion to Modify Confirmed Chapter 13 Plan (Tab 17 judicial notice exhibit). This motion stated Turner's claims had been paid in full. The motion had attached to it a "payoff worksheet". The worksheet was a single page and showed attorney's fees of $8,999.00 in the payoff, but it is obvious that these were shown as attorney's fees owed to Turner that were part of the total payoff. The respondent never advised the bankruptcy court of his receipt of the $10,000 until the hearing before the bankruptcy court on January 24, 2006, when an evaluation of the HUD Settlement Agreement and the Turner disbursement check brought the discrepancy to light. By stipulation of the parties at the January 24, 2006, hearing, it was determined that Turner was owed an additional $7,200.

The respondent while not advising the bankruptcy court of his receipt of the $10,000 until the January 24th hearing, did not attempt to mislead the court by showing that $153,184.82 had gone to Turner. His second amended motion to modify confirmed Chapter 13 plan showed that only $143,184.82 had been disbursed to or on behalf of Turner (Tab 17 judicial notice exhibit). The respondent felt he had no obligation to disclose the receipt of this money since in his opinion it was for non-bankruptcy related matters.

The bankruptcy judge in a hearing on March 7, 2006, was apparently unsure as to whether or not the respondent should have reported the fees when he stated at page 9 the following:

"THE COURT: Well, do they have to disclose payments for non-bankruptcy representation?

MS. WEATHERSPOON: Your Honor, I think a lot of it was bankruptcy representation.

MR. HEAD: Absolutely none of it was bankruptcy representation, Your Honor.

THE COURT: Excuse me. Do they have to disclose the non-bankruptcy representation?

MS. WEATHERSPOON: In the past you have required if it was the same attorney to make a disclosure."

The trustee thereafter sought disgorgement of the $10,000 by Motion filed January 24, 2006 (Tab 21 judicial notice exhibit). Interestingly, the trustee in paragraph 10 acknowledged the tremendous amount of work done

by the respondent and in paragraph 12 sought disgorgement of the entire $10,000 or in the alternative a disgorgement of only $5,000.

Thereafter a hearing was held on the motion (and several other motions filed in the interim) on March 7, 2006. An order was entered on June 15, 2006 (Tab 34 judicial notice exhibit). That order had a number of Findings of Fact. Some of those "findings" are as follows: (1) counsel's statements (referring to respondent) in these pleadings are disingenuous (page 8 of Tab 17 judicial notice exhibit); (2) his request for and receipt of the $10,000 disbursement was intentional and contrary to his statutory and ethical duties as counsel for the debtors. Counsel's receipt of the disbursement created a conflict of interest between him and the debtors that disqualified him from continuing to represent them (page 11 of Tab 17 judicial notice exhibit); and (3) counsel has violated fundamental Bankruptcy Code and Rule provisions governing the conduct of attorneys. His actions have created irreconcilable differences with his clients (page 12 of Tab 17 judicial notice exhibit).

Under Conclusions of Law the court found a number of things, among them: (1) counsel received $2,000 from the debtors directly and $10,000 from the closing of the refinancing; (2) counsel was required to disclose receipt of these funds and failed to make such disclosure in violation of the

disclosure requirements of §329 and Rule 2016 (page 14 of Tab 17 judicial notice exhibit); and (3) counsel had not been candid with the court (page 15 of Tab 17 judicial notice exhibit).

A Motion for Reconsideration was filed by respondent (Tab 35 judicial notice exhibit) and an evidentiary hearing was held July 25, 2006 (Tab 40 judicial notice exhibit). The bankruptcy court granted the motion to the extent that it reduced the amount ordered to be disgorged from $12,000 to $10,000.

The respondent thereafter filed a Notice of Appeal on October 11, 2006 (Tab 41 judicial notice exhibit). The appeal was dismissed on October 16, 2006 (Tab 42 judicial notice exhibit). The respondent moved to vacate the order of dismissal which was granted orally on December 12, 2006 (Tab 44 judicial notice exhibit). This order was subsequently set aside on January 19, 2007 (Tab 46 judicial notice exhibit). This had the effect of finalizing the unappealed order of June 15, 2006.

The respondent, on February 20, 2007, filed a Suggestion of Bankruptcy (Tab 47 judicial notice exhibit) for the firm of John Vernon Head, P.A. in the Hackney bankruptcy file. The respondent did not ever file a petition for bankruptcy for the firm.

The bankruptcy court entered an Order to Show Cause (Tab 51 judicial notice exhibit) against the respondent for the filing of the Suggestion of Bankruptcy when no petition for bankruptcy was filed (or ever filed).

A hearing was held on May 15, 2007, and an order entered on same (Tab 53 judicial notice exhibit). The court found as follows: "Head certified in filing the Suggestion his firm had filed a bankruptcy case and the automatic stay provisions of U.U.S.C. Section 362(a) had been invoked. Those certifications were not true; (page 2) and further found "Head falsely represented his firm had filed for bankruptcy protection and the automatic stay was in effect. He willfully abused the judicial process by filing the Suggestion. He violated Rule 4-3.3 of the Florida Rules of Professional Conduct and Rule 9.011(b)." (page 3)

The court thereafter sanctioned the respondent by prohibiting him from practicing before the bankruptcy court in any way for a period of ninety (90) days from the date of the entry of the order.

III. RECOMMENDATIONS AS TO WHETHER RESPONDENT SHOULD BE FOUND GUILTY.

As to Count I – For entering into an agreement or charging or collecting a clearly excessive fee in violation of Rule 4-1.5a – NOT GUILTY. The respondent clearly was owed much more than he ever collected from his clients.

As to Count II – For representing a client where the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests in violation of 4-1.7(b) (prior to the May 22, 2006, amendment) – GUILTY. The respondent knew his clients owed him a large sum of money that they were unable to pay outside of the receipts from the refinancing. By receiving the $10,000 from the refinancing, his clients were unable to completely pay off their primary creditor, George Turner. It was ultimately stipulated that Turner was owed $7,200 more than the $143,184.82 he received from the closing. The $10,000 would have more than covered this and his client's primary objective would have been met (paying off George Turner).

As to Count III – For bringing or defending a proceeding, or asserting or controverting an issue therein where there is no basis in law or fact for doing so that is not frivolous in violation of Rule 4-3.1 (after the May 22, 2006, amendment) – GUILTY. The respondent knowingly filed a Suggestion of Bankruptcy with the bankruptcy court when no petition for bankruptcy had been filed or ever was. The respondent was sanctioned for this by the bankruptcy court by being forbidden to engage in any type of practice before the court for ninety (90) days.

As to Count IV – For knowingly making a false statement of material fact or law to a tribunal in violation of Rule 4-3.3(a)(1) – GUILTY. The same findings applicable to Count III apply to this count.

As to Count V – For unlawfully obstructing another parties access to evidence or for unlawfully altering, destroying, or concealing a document or other material the lawyer knows, or reasonably should know, is relevant to a pending or reasonably foreseeable proceeding in violation of Rule 4-3.4(a) – NOT GUILTY. The referee had originally indicated in a letter to bar counsel and respondent for purposes of the sanctioning hearing that it found respondent guilty of this count. In reviewing the evidence and re-reading the testimony from the hearing however, I have determined that this count was not proven.

As to Count VI – For knowingly making a false statement of material fact or law to a third person in the course of representing a client in violation of Rule 4-4.1(a) – GUILTY. The respondent filed a Suggestion of Bankruptcy on February 20, 2007, when no petition had been or ever was filed. The Suggestion was filed while the Trustee in bankruptcy was attempting to enforce the court's disgorgement order that was made final by the dismissal of the respondent's notice of appeal on January 19, 2007.

As to Count VII – For engaging in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 4-8.4(c) - GUILTY as to that part of the rule that references misrepresentation. The respondent misrepresented to the court that a petition for bankruptcy had been or would be filed.

As to Count VIII – For engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice in violation of Rule 4-8.4(d) – GUILTY. The defendant was not forthcoming in his receipt of the $10,000 from the refinance. As a result unnecessary hearings were held to determine the sums due to George Turner. Additionally, the filing of the Suggestion of Bankruptcy when in fact no petition for bankruptcy was filed caused additional proceedings before the court that should never have been required.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS.

I considered the following Standards prior to recommending discipline:

4.33 Public reprimand is appropriate when a lawyer is negligent in determining whether the representation of the client may be materially affected by the lawyer's own interests, or whether the representation will

adversely affect another client, and causes injury or potential injury to a client.

5.13 Public reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

6.12 Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to a court or other material information is improperly being withheld and takes no remedial action.

6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party or causes interference or potential interference with a legal proceeding.

V. CASE LAW.

I considered the following case law prior to recommending discipline:

In *The Florida Bar v. Dunagan, 565 So2d 1327 (Fla.1990)* an attorney received a sixty (60) day suspension for receiving unpaid attorney fees from a refinancing of real property where the clients were not advised prior to the closing that attorney's fees would be deducted from the closing. This case is not totally factually similar to the instant case because *Dunagan*

had a couple of other ethical breaches not present in this case (charging interest on interest and participating in the closing).

In *Florida Bar v. Hagendarf, 921 So2d 611 (Fla. 2006)* an attorney was suspended for two (2) years for engaging in frivolous litigation. Interestingly the attorney was only suspended for sixty (60) days in the State of Nevada, which was the site of the misconduct. The attorney in this case filed a quiet title suit on real property he was a tenant in claiming to be the owner of the property. His legal theories were meritless and the Nevada court imposed sanctions against *Hagendarf* under Nevada's Rule of Civil Procedure 11 for engaging in frivolous litigation.

In *Florida Bar v. Miller, 863 So2d 231 (Fla. 2003)* an attorney was suspended for one year for concealing critical evidence, advancing spurious arguments and submitting misleading affidavits and testimony in a federal employment case.

In *Florida Bar v. Lathe, 774 So2d 675 (Fla. 2000)* an attorney was suspended ninety-one (91) days for making an intentional misrepresentation to a judge on two separate occasions. The attorney further failed to comply with an order to pay costs until the judge held him in contempt and ordered his incarceration.

In *Florida Bar v. Varner, 780 So2d 1 (Fla. 2001)* an attorney was suspended for ninety (90) days for filing a fictitious voluntary dismissal of a non-existent law suit.

VI. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS.

A. Personal History of Respondent:

Age: 61 years old

Date Admitted to the Bar: October 3, 1990

B. Aggravating Factors:

1. The respondent received an admonishment for minor misconduct on August 1, 2005. The basis of this admonishment was a court finding "That the respondent had no reasonable basis to pursue the litigation, and that the respondent had intentionally, while without malice, filed and presented claims that lacked any plausible, legal or factual support. The court found the lawsuit was "lacking in merit" and "frivolous"."

2. Substantial experience in the practice of law. The respondent by his testimony has been a practicing attorney for 35 years in Florida and various other state and federal courts.

C. Mitigating Factors:

1. Timely good faith effort to make restitution. The respondent immediately paid the $10,000 after judgment was entered against him.

2. Character or reputation. The referee heard the testimony of Larry Morris, Jerome Fowler and Shelton Fenton as to the good character and reputation of the respondent. Their testimony was very credible.

D. Factors Which are Neither Aggravating nor Mitigating:

1. Failure of the injured client to complain. Neither of respondent's clients (the Hackneys) testified in this proceeding. The only testimony the referee was able to consider of theirs was contained in the transcripts of hearings held in the bankruptcy court. It would have been helpful to hear from them and to gauge their demeanor in court.

VII. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED.

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. Suspension from practice for a period of sixty (60) days.

B. Payment of The Florida Bar's costs in these proceedings.

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXES.

I find the following costs were reasonably incurred by The Florida Bar:

A. Grievance Committee Level Costs:

Bar Counsel Travel Costs	$	88.39

B.	Referee Level Costs:	
	Court Reporter's Costs	$ 5,556.55
	Bar Counsel Travel Costs	$ 732.76
C.	Administrative Costs	$ 1,250.00
D.	Miscellaneous Costs:	
	Investigator Costs	$ 872.10
	Copy Costs	$ 723.00
	TOTAL	$ 9,222.80

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final, unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

DATED this _____ day of AUGUST, 2008.

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J. DAVID LANGFORD
Circuit Judge/Referee
P.O. Box 9000-Drawer J161
Bartow, FL 33831-9000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32301, and that copies were mailed by regular U.S. Mail to KENNETH

LAWRENCE MARVIN, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; JOANN MARIE STALCUP, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, FL 32804-6314; FRANCES R. BROWN-LEWIS, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, FL 32804-6314 and JOHN VERNON HEAD, Respondent, 13011 Bellerive Lane, Orlando, FL 32828, on this _____ day of AUGUST, 2008.

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Judicial Assistant