IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant, Supreme Court Case No. 10-1175

v. TFB File Nos. 2009-31,193(4C)
2010-30,043(4C) &
KOKO HEAD, 2010-30,467(4C)

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:

Procedural History

A. These proceedings originate with bar complaints filed against Respondent by Margaret A. Wharton, Esquire and Chris Johnson arising out of a hotly contested commercial tenant eviction. Ms. Wharton is the Respondent's opposing counsel and Mr. Johnson is a third party adverse to Respondent's client. No complaints were lodged against Respondent by his client, Mr. Lucas. On June 17, 2010, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings.

B. On July 8, 2010, Respondent filed his Answer, Affirmative Defenses, and a Motion to Dismiss. On August 25, 2010, the Bar filed its Response to the Motion to Dismiss. On September 17, 2010, the court held a telephonic case management conference and a hearing on the Motion to Dismiss. At that time, the court orally denied the Motion to Dismiss. On September 28, 2010, the court entered its written order denying the Motion to Dismiss.

C. Thereafter, the parties engaged in discovery. This matter was initially set for final hearing on December 10, 2010. However, because of a conflict in the court's schedule, the final hearing was reset for January 14, 2011.

D. On January 12, 2011, Respondent filed his Emergency Motion to Continue Final Hearing. In his Motion, Respondent alleged that he was unable to secure the appearance of a "critical" witness, Circuit Judge Michael Traynor at the trial and Respondent could not proceed without his "exculpatory" evidence. Respondent indicated that his alleged misconduct occurred in a civil matter before Judge Traynor and the judge's busy schedule prevented Respondent from securing a deposition before the final hearing. The Respondent had only attempted to arrange for Judge Traynor's appearance a few days earlier and the alleged "emergency" was entirely of the Respondent's own doing.

E. Later that same day, the court conducted a telephonic hearing on Respondent's Emergency Motion. Respondent indicated that Judge Traynor

would voluntarily appear and testify at the final hearing, if necessary. However, Judge Traynor would need to cancel a number of other matters already set on his busy calendar in order to be able to travel to Deland and testify at the trial. Over the Bar's objection, the court reluctantly granted Respondent's Motion. The Court suggested that Respondent take Judge Traynor's deposition at a mutually convenient date and time instead of calling Judge Traynor live at trial. On January 19, 2011, the court entered its Omnibus Order granting Respondent's Motion to Continue, Resetting the Final Hearing for February 18, 2011, and granting the Bar's *ore tenus* motion to compel discovery responses.

F. On February 14, 2011, The Florida Bar filed its Emergency Motion to Quash Respondent's Notice of Taking Deposition of Judge Traynor. Apparently, Respondent again waited until the last minute to secure Judge Traynor's testimony and attempted to set the deposition on short notice. Judge Traynor's deposition was rescheduled for Thursday, February 17, 2011 – the day before the final hearing. However, on that day, Judge Traynor became ill and was unable to attend the deposition.

G. On February 17, 2011 – the day before the final hearing – Respondent filed his "Second Emergency Motion to Continue Final Hearing or in the Alternative to Bifurcate Final Hearing or in the Alternative to Postpone Final Argument Pending Receipt of Judge Traynor's Deposition Transcript." The court

declined to hear Respondent's Motion that day and instead directed the parties to appear before the court the following day as previously scheduled.

H. On February 18, 2011, as previously ordered, the parties appeared for Final Hearing. The court granted the Bar's Emergency Motion to Quash Notice of Taking Deposition. However, the court reserved on the request for sanctions. The court also denied Respondent's Second Emergency Motion to Continue. Thus, on February 18, 2011, the final hearing commenced. As an initial matter, the Bar argued that Respondent had just then, in open court, handed Bar counsel Respondent's Supplemental Notice of Answering Interrogatories listing a new witness – one Deputy Cory Harp – expected to testify via an affidavit along with Respondent's Supplemental Response to Request to Produce providing copies of Respondent's correspondence with his expert witness and Judge Traynor.

I. Because the Bar had requested these matters in discovery months before and given their untimely production, the court granted the Bar's motion to strike Respondent's Supplemental Discovery Responses as untimely and also granted the Bar's request to prevent Respondent from introducing any of the underlying documents from the stricken materials.

J. The Bar called its witnesses and Respondent cross-examined those witnesses. Respondent was also allowed to call one of his witnesses – his daughter who was not feeling well – out of turn. Ultimately, the Bar rested late in

the day. Given the late hour, the court continued the final hearing until February 24, 2011, so that Respondent could present his case.

K. In light of the continued proceedings, the court allowed Respondent to take the deposition of Judge Traynor by February 23, 2011. The court also encouraged the Bar to try to contact Deputy Harp in an attempt to examine him regarding Respondent's untimely affidavit so that the court could receive it into evidence since the Bar's objection was solely as to timeliness and not to the affidavit *per se*.

L. On February 24, 2011, the parties returned to court and Respondent began by moving *ore tenus* for an involuntary dismissal of Count II of the Bar's complaint pursuant to Fla. R. Civ. P. 1.420(b). The court entertained the parties' arguments and denied Respondent's motion. The court permitted the Bar to briefly reopen its case to allow the Bar to withdraw its objection to Respondent's introduction of Deputy Harp's affidavit because the Bar had been able to secure a counter-affidavit which was then introduced into evidence.

M. Respondent then presented his case, the Bar cross-examined his witnesses, and Respondent rested. The court then entertained the parties' closing arguments regarding guilt and proposed discipline. All items properly filed including pleadings, recorded testimony, exhibits in evidence, and this Report of

Referee constitute the record in this case and are forwarded to the Supreme Court of Florida with this report.

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 and Findings of Fact.

COUNT I
The Florida Bar File Nos. 2010-30,043(4C) & 2010-30,467(4C)
COMPLAINTS OF MARGARET WHARTON
and CHRISTOPHER JOHNSON (respectively)

Count I arises out of a commercial tenant eviction in which Respondent represented the landlord. Ms. Margaret "Peggy" Wharton, a fellow member of the Florida Bar, was Respondent's opposing counsel in that eviction. She became so concerned with Respondent's failures to timely respond to her that she brought the issue to the Florida Bar and on June 26, 2009, filed her grievance against Respondent. *See*, TFB Exhibit A. Ms. Wharton testified that in 30 years of practicing law, she had never before filed a Bar complaint but felt compelled to do so in this instance given her frustration with Respondent.

In her grievance and again in her live testimony, Ms. Wharton related that Respondent had failed to respond to matters, would unilaterally set hearings and depositions, and failed to regularly communicate with or respond to her about the

case. Ms. Wharton's grievance and testimony focused on the conduct of Respondent in three areas of the lawsuit. First, she raises the Respondent's conduct at the leased premises on March 19, 2009. On that date, Ms. Wharton's client, Mr. Chris Johnson, traveled to the leased premises previously occupied by the defaulting tenant, Nations Fence ("Nations"). Mr. Johnson, on behalf of his company, Superior Fence & Rail of North Florida, were competitors of Nations but were negotiating to purchase Nation's assets, fixtures, inventory and current job contracts. Mr. Johnson was visiting the site to pick up "his furniture, fixtures, equipment and inventory". Mr. Johnson was armed with a letter signed by the insolvent tenant identifying him "as an authorized agent" of the tenant. (See Respondent's Exhibit 15). Mr. Johnson claimed that the Respondent illegally and unethically refused to allow him to remove furniture, fixtures, equipment and inventory from the leased premises, claiming a landlord's lien for his client.

At the same time, an employee of Nations, Nancy Allen, visited the leased premises in order to obtain the tenant's business records to answer a sales tax audit. Ms. Allen testified that she told the landlord, Mr. Lucas, and the Respondent that she needed the books and records for this audit but both the landlord and the Respondent refused to allow her to take the tenant's books and records.

The testimony is in conflict on precisely who was at the leased premises and when. However, it appears that the Respondent was at the leased premises on that

date for at least a sufficient period to have discussions with Nancy Allen about access to the tenant's books and records.

The facts are similarly unclear as to whether the landlord, the tenant or Mr. Johnson had a superior interest to the furniture, fixtures or inventory in the leased premises. The uncontested evidence shows the tenant was in default of the lease at this time. Under Florida law, the landlord had a statutory lien on the tenant's property that attached when the property is brought onto the premises. *In re: Miller Engineering, Inc.*, 398 BR 473 (Bank.S.D.Fla. 2008). A landlord's lien is superior to any subsequently created liens. *Beason – Simmons v. Avion Technologies, Inc*., 662 So.2d 1317 (Fla. 4th DCA 1995). The landlord's lien is possessory, that is, the landlord loses its lien when the property is removed from the premises. See, *Lovett v. Lee*, 193 So.2d 538 (Fla. 1940). Accordingly, the Respondent's client had a direct interest in seeing that his landlord's lien was preserved and the property was not removed from the leased premises. Suffice to say that Respondent prevented anyone from removing anything from the leased premises on that date. The court sees no improper or unethical conduct by Respondent in preserving the status quo until the matter could be reviewed by a court.

The most serious allegation against the Respondent is that he violated Rule 4-3.3(a) dealing with candor towards the tribunal and 4-8.4(c) dealing with

dishonesty, fraud, deceit or misconduct. The Bar contends that the Respondent misrepresented that he made certain business records of the tenant available to the tenant's employee, Nancy Allen, on March 19, 2009, when he in fact denied the tenant access to those records on that date. This misrepresentation allegedly appears in the Respondent's Affidavit of Compliance filed with the court in the eviction matter (TFB Exh. J). Respondent denied this allegation and testified in these proceedings and in his affidavit filed in the eviction matter that he expressly made the records available to the tenant on that date.

The Court heard the testimony of Nancy Allen, the tenant's comptroller. She arrived about nine in the morning to pick up files needed for a tax audit. The tenant requested that Ms. Allen pick up the files. Ms. Allen drove to the leased premises in her car with her husband along with another employee driving a truck, in order to pick up the files. She had gone to Staple's to buy banker's boxes so she "could at least get the '08 job files so I could try to configure or put together sales tax reports for later '07, early '08." When Ms. Allen arrived with the truck and its driver, she saw Mr. Johnson and the deputies. When she announced that she had come to gather files, the landlord denied her access. Ms. Allen testified that she was there through the lunch hour until about 2:30 or three in the afternoon – almost six hours waiting to pick up the records. She ultimately told the truck driver to leave, knowing that she could still take a significant number of files in the trunk of

her large car. In fact, her precise testimony when asked by the court was "Yes. I have a Lincoln and they – you can put five dead men in the trunk. It's a huge trunk." Ms. Allen testified that as a result of the long wait, she and her husband had retrieved lawn chairs from their trunk and they were seated under a shade tree just waiting when Respondent eventually arrived at the leased premises and refused to allow her to remove any files.

Ms. Allen testified that she was at the leased premises for over 6 hours and was denied access to business records she desperately needed. She further testified that the records would only be made available if and when the tenant signed a revocation letter emailed on the evening of March 19, 2009, long after she left the leased premises. That email, corroborating Ms. Allen's testimony and sent on March 19, 2009 at 5:21 p.m., further stated "upon receipt of the signed letter in the form I have prepared, the files you need for the audit will be made available to you . . . ".

Whether the Respondent improperly denied Nancy Allen access to the corporate books and records is not the issue in this case. The issue for this court is whether the Respondent misrepresented those facts in his Affidavit of Compliance filed with the court on March 27, 2009 (Respondent's Exhibit 5). In such Affidavit, Respondent asserts that he "told her she could take all the files". Respondent affirmatively maintains that Ms. Allen's contentions are false. This

court rejects the Respondent's testimony on this issue and finds such testimony directly conflicts with the plain language of the Respondent's email sent that evening. Accordingly, the Respondent's statement in the Affidavit of Compliance was inaccurate and untrue. Consequently, Respondent violated Rule 4-3.3 by filing an inaccurate and untruthful Affidavit with the court.

Second, Ms. Wharton contended that the Respondent misrepresented whether a complaint for distress for rent had actually been filed on March 19, 2009 and used that misrepresentation to his client's benefit. Indeed, the Respondent did prepare a letter purporting to show a case number for the landlord's distressed proceedings at a point in time before these proceedings were even filed. Further, Mr. Wharton contends that Respondent showed that letter to law enforcement at the leased premises on the date in question in order to frustrate Mr. Johnson's attempts to remove the property from the premises.

The Respondent denied delivering the letter to law enforcement and the testimony of the other witnesses at the leased premises that day support his denial. However, the letter contained a case number purporting to be the case number for the distress proceedings but, in fact, had nothing to do with the landlord tenant matter. In fact, the distress proceedings had not been filed and were not filed at the time the letter was issued. Although the Respondent contends that the incorrect case number was a simple clerical mistake, no case number could have been

provided since the case was not even filed until later. More likely, a fictitious case number was given by the Respondent for whatever tactical benefit it might lend to protect the landlord's lien.

By his own testimony, Respondent admits that he then dictated the March 19, 2009, letter. Respondent then went to the location, and to prevent access to the property, brought with him his March 19, 2009, letter (TFB Exhibit F) containing an erroneous case number. This court does not accept Respondent's testimony regarding how that information came to be on the letter – that his secretary/wife had mistakenly typed it in and he simply had not noticed. This is not a situation where an old document was modified for a new purpose and the wrong case caption was carried over accidently. This court finds that the only reason that information is on the letter is to make it appear as though a case had been filed which **may** have authorized Respondent's denial of access to the premises.

The court finds that Respondent violated Rule 4-4.1 by posting this letter on the leased premises. However, such violation was minor and of no consequence in the case. No evidence was presented that showed that the letter was relied upon by anyone or caused damage or harm.

Third, Ms. Wharton complained about Respondent's failure to timely communicate about and comply with court rulings dealing with the appropriate bond in the distress proceedings. Specifically, Ms. Wharton testified that at a

hearing in April 2009, Judge Traynor orally ruled that the plaintiff was to have an appraisal of tenant's property to determine whether the distress bond should be increased. The court subsequently entered a written order requiring the appraisal to be performed within 20 days. However, Respondent filed a motion for reconsideration claiming that the appraisal was going to cost his clients $17,000. Ms. Wharton found another appraisal company that would do the appraisal for much less, informed Respondent, and had the appraiser contact him directly to arrange the details. However, the appraisal was not done.

Ms. Wharton testified that on June 15, 2009, the court entered another order permitting Ms. Wharton's clients to obtain the appraisal and directing the landlord to "provide access to the property and shall not interfere in any way with . . . access to the property for the purposes of the appraisal." Both of the court orders noted above are contained in TFB Exhibit A. Despite this new order, Ms. Wharton testified that Respondent again refused to cooperate to get the appraisal done. Ms. Wharton complained that often she could not contact Respondent (*see*, TFB Exhibit C) or coordinate the scheduling of depositions, requiring the needless filing of motions for protective order with the court. *See*, TFB Exhibit B.

She also testified that she spoke to Respondent by phone on March 19, 2009, and when Ms. Wharton asked Respondent if he had obtained a distress writ yet, he replied that he was on his way to get one and during that phone call, gave her the

case number that appears on his March 19, 2009, letter (TFB Exhibit F). After she spoke to Respondent that day regarding his denial of access to the property, she confirmed both that Respondent had not yet filed a case and that Respondent's purported case number allegedly evidencing an existing civil action actually referred to a mortgage foreclosure case filed earlier and having nothing to do with the Lehmann matter. Accordingly, Ms. Wharton did not rely upon or suffer damage from the incorrect case number on the letter. It became apparent from the evidence that Ms. Wharton's real issue stemmed from her belief that Respondent had caused a wrongful lockout of her client and had helped the tenant's employee, Mr. Willard, incorporate a business with a deceptively similar name, with Respondent himself as the registered agent. Ms. Wharton maintained that Respondent's actions demonstrated his active participation "in an apparent conspiracy to assume possession of the property and leased premises with the intent to divert those assets to this new corporation and its principal, Bill Willard, even though it is clearly not entitled to do so under the law."

This theory may be the crux of her client's claims in the landlord-tenant action but it was not proven in these proceedings. Moreover, while Respondent was sometimes difficult to deal with, his conduct does not rise to the level of flagrant and repeated unprofessional conduct necessary to violate the bar rules.

Respondent's conduct was also criticized by Ms. Wharton's client, Christopher Johnson. On October 5, 2009, Mr. Johnson, also a member of the Bar, filed his grievance against Respondent. *See*, TFB Exhibit D. He claimed he was in the process of purchasing the assets of Nations Fence, including substantial inventory and equipment located on the leased property. He claimed he had been authorized by the tenant to take possession of those assets. Mr. Johnson acknowledged that the sale had not yet been consummated because he had not been able to enter the premises to "take an inventory of what was actually there."

Mr. Johnson testified that after he commenced his purchase of the company, he and the landlord, Mr. Lucas, had several phone conversations wherein they agreed that Mr. Johnson would pay the remaining month's rent in order to allow him sufficient time to move the business out of the leased premises. Mr. Johnson testified that Mr. Lucas called him one more time to insist that Mr. Johnson make the payment in certified funds and Mr. Johnson agreed to do so.

Pursuant to their conversation, Mr. Johnson obtained the certified funds and a few days later, on March 19, 2009, Mr. Johnson went to the property to pay the balance of that month's rent and to provide Mr. Lucas a copy of the tenant's letter giving Mr. Johnson (and his agents) authority to enter the premises. *See*, TFB Exhibit E.

Mr. Johnson testified that when he arrived with the certified check and the letter of authority, the landlord denied him access to the property. Mr. Johnson then proceeded to videotape the events transpiring and that recording was admitted as TFB Exhibit Y. Respondent then arrived and produced the letter which purported to show that an action had just been filed in civil court for distress (*see*, TFB Exhibit F).

Walter Lehmann, the owner of Nation's Fence, the tenant, testified that he had provided Mr. Johnson with a letter of authority (TFB Exhibit E) with the intent that Mr. Johnson be able to enter the business location. Mr. Lehmann also testified that on March 19, 2009, he had sent Ms. Allen and another employee with a truck to the business to pick up needed files for an audit.

Respondent's daughter, Kaitlynn Head, testified that she was employed as receptionist by the tenant. According to Ms. Head, she, along with all of the other employees, were terminated on March 16, 2009. Nevertheless, she was present on the premises on March 19, 2009. Ms. Allen (who had hired Ms. Head and was employed by the business) came to the leased premises to pick up records. Ms. Head did not remember Respondent being present when the deputies were there. According to Ms. Head, she distinctly remembers Respondent telling Ms. Allen that "she could take any of the old files that she needed for the tax audit, but she was not allowed to take the current files" because there was a dispute as to who

owned those files. According to Ms. Head, she then escorted Ms. Allen to the warehouse where the files were located and indicated to her what years were in what boxes. According to Ms. Head, Ms. Allen then declined to take any files with her stating that she would return with a truck on a later date. Ms. Head even claimed that she remembered the kind of car that Ms. Allen drove that day.

Respondent's expert, J. Stephen Alexander, testified as an expert in tenant evictions. In his opinion, the underlying facts evidenced that the tenant's property had been abandoned and as a result, a landlord was required to take immediate possession and safeguard the property. He further testified that the advice provided by Respondent to his landlord client on March 19, 2009 regarding their refusal to allow Mr. Johnson – on behalf of himself individually or as an agent of the defendant tenant – to remove business files and personal property from the leased premises based upon the existence of the statutory landlord's lien was proper – even though the breach of lease and foreclosure of landlord's lien action was not filed until approximately an hour after Respondent arrived at the leased premises. The subsequent perfecting of the landlord's lien occurred when the distress writ bond was posted and Judge Traynor issued the Distress Writ on March 20, 2009.

Respondent unequivocally testified at the final hearing that when he arrived at the leased premises at a little after 2:00 p.m., there were no deputies present and

that he never provided the letter to anyone other than his landlord client to post on the door. Additionally, the testimony of Ms. Allen, Ms. Head, Mr. Lucas, Mr. Willard and, most importantly, the affidavit of deputy Cory Harp – one of the deputies who was present at the leased premises – makes it clear that Respondent was not present when the deputies were present (see Respondent's exhibits 16a, 16c, 16d, and 17). Accordingly, it does not appear that the letter with the nonexistent case number played any role in preventing Mr. Johnson or Ms. Allen from removing property from the leased premises.

Additionally, the Bar criticizes the Respondent from going to the leased premises in the first place. However, Respondent went to the property because his client, Mr. Lucas, the landlord, had "frantic[ally]" called him and told him about the escalating situation. The court sees no problem with the Respondent coming to the aid of his client at his client's business premises.

For all the consternation surrounding the taking of Judge Traynor's testimony, he had little to add concerning the issues in this matter. Illustrative of that point is the following exchange from Judge Traynor's deposition (page 15, lines 10-19):

> "Q Your honor, to your knowledge have I ever made a false statement of fact or law to you in this case? This case being the Landlord/Tenant case.
>
> A I have no idea. I mean, the answer – I mean, you know, you and Ms. Wharton have argued in front of me on numerous occasions.

> Factual things were represented, of many of them I don't know that I ever had an evidentiary hearing regarding it one way or the other. So I'm not in a position to say whether they were or they weren't."

The Bar attempts to connect the Respondent's conduct to a broader and improper purpose. The Bar contends that the Respondent's unethical treatment of the tenant, Mr. Johnson and Ms. Wharton arises out of a conspiracy to convert the tenant's business opportunity to the landlord. Specifically, the Bar contends that the Respondent and the landlord would not turn over the business assets and inventory to Mr. Johnson or the books and records of the business, including current job files, to Ms. Allen because the landlord needed both to steal the tenant's business. While this view of the Respondent's conduct is shared by Ms. Wharton, the Bar has failed to prove by clear and convincing evidence that the Respondent intended or participated in any efforts to steal the tenant's business. To the contrary, the evidence offered by the parties clearly establishes that the Respondent was attempting to protect the landlord's interests. The conduct of the Respondent, viewed in light of all of the evidence shows no more than minor misconduct and misjudgments by the Respondent.

COUNT II
The Florida Bar File No. 2009-31,193(4C)
COMPLAINT OF MURAT TASTAN

This count arises from Respondent's representation of Murat Tastan for water intrusion into the client's condominium. On March 31, 2009, Mr. Tastan filed his grievance with the Bar alleging that Respondent had not represented him appropriately. Mr. Tastan testified that Respondent had undermined his case by such things as: failing to provide copies of documents including an offer of settlement, drafting poor responses, delaying the case unnecessarily by requesting many extensions, responding late on several occasions to important time sensitive documents, and failing to communicate with him.

Eventually, Respondent withdrew from Mr. Tastan's case and the case later settled under Mr. Tastan's new attorney, Mr. Hughes. In fact, the correspondence introduced at trial established that Respondent knew of Mr. Hughes' involvement on behalf of the client shortly after Respondent withdrew.

Mr. Tastan's complaint was initially closed by the Bar as a fee dispute. *See*, Respondent's Exhibit 25. However, after a failed request for fee arbitration (*see*, Respondent's Exhibit 26), Respondent sent Mr. Tastan a letter on August 9, 2009, attaching a Statement of Claim for fees allegedly owed and stating that Respondent would not file the complaint if Mr. Tastan signed a Mutual General Release. *See*, TFB Exhibit X. Mr. Tastan did not sign the Mutual Release, but did consult with his new counsel, Mr. Hughes, about the matter and forwarded the letter with a grievance to the Bar on the advice of his new counsel. Consequently, the Bar

reopened his grievance and contended that Respondent had violated Rule 4-1.8(h) by failing to advise Mr. Tastan of his right to independent counsel when attempting to limit the lawyer's liability through the mutual release.

Respondent argued first that Mr. Tastan had not alleged malpractice and that the Bar has neither pled malpractice nor proven it. In the alternative, Respondent then argued that when he sent his letter, Mr. Tastan was indeed represented by counsel in the water intrusion case and so Respondent did not violate 4-1.8(h) because his former client was not "unrepresented" for purposes of the rule.

The Rule in question provides:

> **(h) Limiting Liability for Malpractice.** A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

Under this rule, a lawyer may not limit his liability to his former client, unless he advises the client in writing that independent representation is appropriate. The mutual release sent by Respondent to Mr. Tastan would do precisely that. Therefore, based on the second sentence in Rule 4-1.8(h), the court finds that Respondent had a duty to advise Mr. Tastan in writing that independent representation by counsel was appropriate when considering the mutual release and settlement. The court also finds that Respondent did not advise Mr. Tastan of his

right to independent counsel for settlement/release purposes and by this failure, Respondent violated the Rule. Such violation was minor, however, as Mr. Tastan was represented by separate and independent counsel and consulted with that counsel about the mutual release. More importantly, Mr. Tastan was not damaged by the letter because he did not sign the mutual release or agree to the terms of the offer.

III. RECOMMENDATIONS AS TO GUILT.

Based on the foregoing, I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

As to Count I: 4-3.3(a)(Candor Towards the Tribunal), 4-4.1(Truthfulness in Statements to Others) and 4-8.4(c)(A Lawyer Shall Not Engage in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation).

As to Count II: 4-1.8(h)(Limiting Liability for Malpractice)

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

4.34	Admonishment is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no injury or potential injury to a client.
6.14	Admonishment is appropriate when a lawyer is negligent in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

6.24	Admonishment is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes little or no injury to a party, or causes little or no actual or potential interference with a legal proceeding.
7.4	Admonishment is appropriate when a lawyer is negligent in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

V. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Bar v. Clement, 662 So. 2d 690 (Fla. 1995)(Referee in bar discipline case can consider any evidence referee deems relevant to resolving factual question).

The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986)(In bar discipline cases, which are neither civil nor criminal but quasi-judicial, hearsay is admissible and there is no right to confront witnesses face to face).

The Florida Bar v. Mavrides, 442 So. 2d 220 (Fla. 1983)(Cumulative misconduct will be dealt with more harshly than isolated instance of misconduct).

The Florida Bar v. Ratiner, SC08-689 (Fla. 6/24/10)("First, we consider the respondent's challenge to the pattern-of-misconduct aggravating factor. A referee's findings in aggravation carry a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. . . .Contrary to the respondent's argument, it is not necessary for misconduct to have been a basis for discipline in order for it to be considered in aggravation. Here, the respondent's pattern of engaging in abusive conduct is relevant to the appropriate sanction to be imposed for the violations at issue in this case.").

The Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001)(Knowingly presenting false evidence is a violation of an attorney's professional duty).

The Florida Bar v. Rood, 620 So. 2d 1252 (Fla. 1993)(2-year suspension for attorney who on two separate occasions misrepresented facts to court first by omission and then by misrepresentation).

The Florida Bar v. Jordan, 705 So. 2d 1387 (Fla. 1998)(Attorney's violation of rules of professional conduct requiring competence, diligence, and communication with client and prohibiting attorney from making agreement with client limiting lawyer's liability to client for legal malpractice warranted suspension for one year in light of attorney's prior disciplinary convictions.

The Florida Bar v. Colclough, 561 So. 2d 1147 (Fla. 1990)(6-month suspension warranted for misrepresentations to court and opposing counsel).

The Florida Bar v. Lathe, 774 So. 2d 675 (Fla. 2000)(91-day suspension for attorney's intentional misrepresentation to judge on two separate occasions that he could not attend deposition).

The Florida Bar v. Fortunato, 788 So. 2d 201 (Fla. 2001)(". . . providing false testimony at disciplinary hearing warranted 91-day suspension.").

The Florida Bar v. NicNick, 963 So. 2d 219 (Fla. 2007)(Attorney's misrepresentations and obstruction of party's access to evidence warranted 91-day suspension).

The Florida Bar v. Jordan, 705 S. 2d 1387, 1390 (Fla. 1998) (malpractice was clear as was the fact that former client was unrepresented)

The Florida Bar v. Head, 27 So. 2d 2 (Fla. 2010) (misrepresentations to the trial court are clear and resulted in findings and orders sanctioning counsel by the trial court)

The Florida Bar v. Tobkin, 944 So. 2d 219 (Fla. 2006) (affidavits are admissible in bar disciplinary proceedings where the rules of evidence are relaxed)

In re Miller Engineering, Inc., 398 B.R. 473 (Bkrtcy S. D. Fla. 2008) (statutory landlord's lien is created and attaches as to property on the leased premises upon execution of the lease)

VI. 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. Admonishment of Respondent publicly recognizing the identified conduct as improper.

B. The Respondent shall be on probation for a period of one year and shall complete during such time at least five hours of continuing legal education and training in the topics of ethics and/or professionalism.

C. The court grants the Bar's motion for sanctions and orders Respondent to pay $500 to The Florida Bar's Client Security Fund; and,

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

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following:

A. Personal History of Respondent:

Age: 52

Date admitted to the Bar: May 31, 1985

B. Aggravating Factors:

9.22 Florida Standards for Imposing Lawyer Discipline:

(a) prior disciplinary offenses; provided that after 7 or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct shall not be considered as an aggravating factor;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) refusal to acknowledge wrongful nature of conduct;

(f) substantial experience in the practice of law.

C. Prior Discipline: Grievance Committee Admonishment for Minor Misconduct dated November 12, 2007, finding that Respondent had violated 4-1.1, 4-1.3, 4-1.4(b), 4-1.8(a), 5-1.1(b), 5-1.1(e), 5-1.2(b)(5), 5-1.2(b)(6), 5-1.2(c)(1)(A), and 5-1.2(c)(1)(B).

D. Mitigating Factors: None

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

Pursuant to the Florida Bar's Interim Affidavit of Costs, I find the following costs were reasonably incurred by The Florida Bar:

Administrative Costs, pursuant to to Rule 3-7.6(q)(1)(I), Rules of Discipline	$ 1,250.00
Court Reporter Fees and Transcripts	675.00
Bar Counsel Travel Expenses	1,203.59
Investigative Costs and Expenses	459.52
Preliminary Witness Expenses	67.15

TOTAL	$ 3,655.26

However, the court notes that this is only an interim costs statement and should the Bar file a final cost affidavit, the court recommends that Respondent be ordered to pay the final costs as reported in any final affidavit.

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 March, 2011.

_____

Honorable Terence R. Perkins, Referee
Circuit Court Judge
Volusia County Courthouse
101 N Alabama Ave
Deland, FL 32724-4316

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, Florida 32399-1927, and that copies were mailed by regular U.S. Mail to Respondent, Koko Head, whose record Bar address is Law Office of Koko Head PA, 100 State Road 13 Ste D, Saint Johns, FL 32259-3839; Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and Carlos Alberto Leon, Bar Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this _____ day of March, 2011.

_____
Honorable Terence R. Perkins, Referee

Koko Head, Esq.
Koko Head PA
100 State Road 13 Ste D
Saint Johns, FL 32259-3839

Thomas D. Hall, Clerk
Supreme Court of Florida
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Tallahassee, FL 32399-1927

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