

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

**FILED**  
JOHN A. TOMASINO  
FEB 24 2014

THE FLORIDA BAR,  
  
Complainant,

Supreme Court Case  
No. SC13-1382

CLERK, SUPREME COURT  
BY \_\_\_\_\_

v.

The Florida Bar File  
No. 2010-31,481 (09A)

JAMES NEWELL CHARLES,  
  
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 August 2, 2013, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. On January 13, 2014 and January 14, 2014, the final hearing was held in this matter. All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

## 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. Findings of Fact as to Each Item of Misconduct of Which the Respondent Is Charged: After considering all the pleadings and evidence, pertinent portions of which are commented on below and supported by competent substantial record evidence, this referee finds the following by the standard of clear and convincing evidence:

This matter was referred to The Florida Bar by The Honorable Richard B. Orfinger, of the Fifth District Court of Appeal subsequent to the Appellate Court's review of the Final Judgment entered by Judge Parsons in the Circuit Court proceedings. Judge Parsons entered the Final Judgment on November 26, 2008 and entered the Order on Attorneys Fees and Costs on July 29, 2011. See The Florida Bar's Exhibits 1, 2, and 7.

The disciplinary proceedings in the present case are not a trial de novo regarding the merits of the underlying federal and civil cases. The disciplinary proceedings solely concern respondent's conduct in both these matters. Both orders entered by Judge Parsons were the subject of appellate review. The Final Judgment was affirmed without opinion on May 18, 2010. The Order on Attorneys

Fees and Costs awarding fees and costs to the State of Florida was affirmed on March 19, 2013. See The Florida Bar's Exhibit 5.

Respondent, in his Answer, admitted paragraphs 1 through 8 and 11 through 17 of the formal complaint. In the paragraphs which were denied, respondent stated that a review of the applicable orders, as set forth in the complaint, was necessary and that the orders were the best evidence of what was stated in each order. The orders as referenced in the formal complaint and respondent's Answer are the afore-referenced orders entered by Judge Parsons.

In both orders the court identified actions by respondent which had a negative impact his client, the judicial system, and the State of Florida. This included causing the client to lose his right to recovery for a clearly meritorious claim as well as the imposition of fees and costs jointly against respondent and his client for more than \$400,000.00.

In the Final Judgment, the court found that the federal court was directly misled by respondent in his representations that the amounts in the settlement agreement had been reviewed and determined to be reasonable by attorney Michael Roper, acting as an independent expert. The court further found that respondent conceded that such a review never took place. The court specifically found respondent did not act in good faith and perpetuated "an overt fraud on the Federal Court." See The Florida Bar's Exhibit 1.

The court found that respondent did not make the client's claims in good faith and with full disclosure. Instead, respondent tried to magnify the claim, in an attempt to exaggerate the basis for recovery. Ultimately, the court concluded that respondent's efforts to assert a claim for recovery and fees involved gross overreaching, which caused the client to lose his right to recovery when he would be entitled to receive some compensation for his damages. See The Florida Bar's Exhibit 1.

The Order of Attorneys Fees and Costs found that the claim brought by respondent was without any legal basis in fact or law, which satisfied the elements required for recovery by the State of Florida pursuant to Florida Statutes, Section 57.105. The court held that fees and costs should be imposed against respondent and his client as a result of respondent's overt actions to perpetrate a fraud upon the court and the State of Florida. See The Florida Bar's Exhibit 2.

The findings by Judge Parsons in both orders regarding respondent's conduct are supported by competent substantial evidence by the standard of clear and convincing evidence as further set forth below.

The referee heard testimony from the following witnesses in this matter: James Peters, Assistant Attorney General, Florida Attorney General's Office, retired; Michael Roper, private attorney; E. Clay Parker, private attorney; James R. Tanner, private attorney; and James Charles, respondent.

In addition to the testimony, The Florida Bar submitted Exhibits 1-22 into evidence and respondent submitted Exhibits 1-25 into evidence without objection. Further, based on the ore tenus request of the parties, the referee took judicial notice of the following court files: Michael C. DuPont v. Sebastian Tanguosso, Luis Bustamante, Jane Rowe, and John Doe, Case No. 98-41-CIV-ORL-19A, in the United States District Court for the Middle District of Florida, Orlando Division and Michael C. DuPont v. Jeffrey Atwater, Case Number 2002-3288 CICI, in the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida.

James Peters testified regarding his extensive involvement with the underlying state court proceedings. Mr. Peters, recently retired from his position as an Assistant Attorney General and Special Counsel with the Florida Attorney's General's Office, having started with the office in 1977. Mr. Peters was the Special Counsel from the Florida Attorney General's Office assigned to the state court matter filed by respondent.

In his testimony, Mr. Peters provided the procedural background for both the federal and state court cases. Respondent represented Michael C. DuPont in a federal case claiming civil rights violations arising from a government sting operation which was resolved with a signed settlement agreement. The agreement reached by the parties was referred to as a "Coblentz Agreement," pursuant to Coblentz v. American Surety Co. of New York, 416 F.2d 1059 (5th Cir. 1969).

The settlement agreement, which specified the amount of damages, attorney's fees and costs, was accepted by the federal court without an evidentiary hearing as to the reasonableness of the agreement. See The Florida Bar's Exhibit 9 and Respondent's Exhibits 21-24.

Mr. Peters' involvement began when respondent filed the state action to enforce the judgment and seek recovery against the State of Florida, in accordance with the provisions of the settlement agreement. Mr. Peters, on behalf of the State of Florida challenged the enforcement of the judgment. The trial court granted summary judgment in favor of the State of Florida and denied the State's motion for attorney's fees under Section 57.105, Florida Statutes (2003). Both parties appealed the trial court's order. Gallager v. DuPont, 918 So. 2d 342 (Fla. 5<sup>th</sup> DCA 2005). According to Mr. Peters, in its opinion the appellate court remanded the case back to the trial court for the purpose of determining the issues specifically related to the agreement, which included the reasonableness of the recovery and fees and whether the agreement was made in good faith. Gallagher, at 348-350. The appellate opinion was received into evidence as The Florida Bar's Exhibit 20 and 22; Respondent's Composite Exhibit 12.

Mr. Peters provided testimony regarding the tremendous length of time it took to reach final determination with the case. The proceedings began in December 2002 and the appellate court affirmed the Order on Attorneys Fees and

Costs in March 2013. He testified that, based on his direct involvement with the case, there were delays during the proceedings which were attributable to respondent's actions. Further, respondent's actions subsequent to the final appellate determination also caused delays with the State of Florida's efforts to enforce the judgment entered on its behalf against respondent. He agreed with the reference by Judge Parsons in the Order on Attorneys Fees and Costs that the case was an "ancient" case. See The Florida Bar's Exhibit 2, page 2.

According to Mr. Peters, respondent's deposition in the underlying case was set and rescheduled on more than one occasion. Mr. Peters described the events involving each time respondent's deposition was scheduled. In the first instance, the date and location were coordinated with respondent. However, respondent failed to appear for his deposition. Respondent's deposition was subsequently rescheduled for the Orlando Office of The Florida Attorney General. According to Mr. Peters, respondent appeared late for the deposition and without the requested documents, including those documents specifically pertaining to respondent's attorney's fees. The deposition was again rescheduled for a third time. In this instance, the deposition was also a video deposition. Respondent appeared late for the deposition and refused to sit in the witness chair. While he ultimately was seated for the deposition, it once again had to be rescheduled. Mr. Peters testified that respondent's deposition was finally taken and completed in the presence of the

judge, in his chambers. Mr. Peters also testified regarding the difficulty he encountered in obtaining documents from respondent regarding the amount of his claim for attorney's fees.

Mr. Peters further described the case progression which included numerous motions and appellate proceedings. At one point the trial date was continued at the last minute based on respondent's filing of a writ with the Fifth District Court of Appeal. In preparation for the final hearing Mr. Peters testified that he took depositions of witnesses and reviewed numerous documents regarding the reasonableness of the recovery and fees and whether the agreement was made in good faith. This evidence included, but was not limited to the affidavit and deposition of attorney Michael Roper, the deposition of attorney Leonard Alterman, and correspondence from both attorney's to respondent.

Mr. Peters testified that the evidence he obtained established that the settlement agreement respondent filed with federal court, which was ultimately approved by the court contained a misrepresentation. Paragraph number one on page five of the agreement specifically stated "An independent expert, Michael Roper, Esquire, has reviewed the amounts and determined the amounts are reasonable." Mr. Peters testified that this paragraph was contrary to the affidavit and deposition testimony of Mr. Roper. See The Florida Bar's Exhibit 9 page 5, and The Florida Bar Exhibits 11-14.



In addition, Mr. Peters testified that during the proceedings an offer of settlement was made by the State of Florida to respondent. The offer was rejected and the case proceeded to trial. Further, based on the orders entered by Judge Parsons and affirmed by the appellate court, respondent's client was determined to have a valid claim but recovered nothing. The court entered a judgment in favor of the State of Florida jointly against respondent and respondent's client for more than \$400,000.00. See The Florida Bar's Exhibits 1 and 2.

Michael Roper, a member of The Florida Bar admitted to practice in 1985, testified regarding his brief communication with respondent regarding the settlement agreement at issue. Mr. Roper's testimony was also presented via his video deposition taken in 2006 and his affidavit in the underlying state court proceedings. Mr. Roper is a private attorney from Orlando whose primary area of practice is representing governmental agencies in civil rights litigation.

Mr. Roper and respondent represented opposing parties in an unrelated matter in or around 2001 during which time, on a break in the proceedings, respondent asked Mr. Roper if he would consider providing expert testimony regarding the amount of attorney's fees in another case. According to Mr. Roper's testimony and affidavit, respondent never provided him with any documentation to render an opinion. Further, it was Mr. Roper's testimony that the brief conversation with respondent was the one and only time in which Mr. Roper had

any contact with respondent regarding the issue of attorney's fees in the case at bar. See The Florida Bar's Exhibits 11-14.

In his testimony Mr. Roper testified regarding his background and experience regarding the review and calculation of attorney's fees in civil rights cases. Mr. Roper also testified that Mr. Peters was the one who provided him with respondent's documentation regarding the claim for attorney's fees. Mr. Peters also provided Mr. Roper with a copy of the settlement agreement filed with the federal court.

Upon review of the agreement Mr. Roper testified that he did not render the opinion contained in the settlement agreement. Further, Mr. Roper testified that he did not authorize respondent to make any statements or opinions on his behalf. Mr. Roper was unaware that respondent filed an agreement with the federal court which contained an expert opinion by Mr. Roper that he never rendered. It was Mr. Roper's testimony that respondent's claim for attorney's fees, based on the records respondent produced to the State of Florida were not reasonable and he never would have rendered such an opinion. Mr. Roper was a very credible witness. See The Florida Bar Exhibits 11-14.

Respondent testified in the bar's case via the transcript of the hearing held before Judge Parsons on November 21, 2008. In his response to the inquiry by Judge Parsons regarding respondent's representations to the federal court

pertaining to the settlement agreement, respondent stated that Mr. Roper reviewed the amounts in the agreement. Respondent further stated that he provided Mr. Roper the specific amounts at issue. He stated he did not have the paperwork to support the amounts. Mr. Roper's testimony was wholly contrary to respondent's regarding the review of amounts and the rendering of an expert opinion. In his response to the court's inquiry, respondent stated that Mr. Roper did not remember the conversation or in the alternative, Mr. Roper had a misunderstanding with respondent as to the issue of the attorney's fees. See The Florida Bar Exhibit 21, pages 404-412.

The affidavit of James R. Tanner, a member of The Florida Bar, dated January 16, 2008, was received into evidence on behalf of respondent in lieu of live testimony. Mr. Tanner's affidavit was submitted in the state court proceedings before Judge Parsons in support of respondent's position regarding the reasonableness the settlement agreement and respondent's attorney's fees. See Respondent's Exhibit 16.

E. Clay Parker, a member of The Florida admitted to practice in 1963, testified on behalf of respondent. Mr. Parker was received as an expert in the area of settlement agreements in federal civil rights cases as well as the duties and responsibilities pertaining to the insurance carriers directly related to the

enforcement of such agreements. Mr. Parker testified that respondent provided him with documents in support of his claim for attorney's fees.

In his testimony Mr. Parker detailed his experience regarding civil rights and the duties of plaintiff's counsel pertaining to the filing of the law suit and determination of coverage. Mr. Parker also testified regarding the procedure he follows in his legal practice regarding the determination of reasonable fees. Mr. Parker reviewed respondent's records in anticipation of testifying at the November 2008 hearing before Judge Parsons. While he did not testify at the hearing, Mr. Parker opined that it was the responsibility of plaintiff's counsel to optimize the recovery for the client and highlight the exposure for the defendant. It was Mr. Parker's opinion that Judge Parsons did not understand this aspect of such cases nor was he provided the necessary expert testimony at the hearing. Mr. Parker further testified that based on the foregoing he could reasonably disagree with the conclusions reached by Judge Parsons.

Respondent testified on his own behalf. In his testimony respondent explained that Mr. DuPont's federal case was the first civil rights claim that he handled. Respondent provided testimony regarding his own difficult experience involving criminal charges for which he was acquitted. Respondent's charges were handled by the same agency and prosecutor who handled Mr. DuPont's case.

In his testimony, respondent described himself as a zealous advocate for his

clients. It was respondent's position that the Office of the Attorney General succeeded in placing the focus of the case on respondent's conduct rather than the merits of Mr. DuPont's claim. Respondent described in his testimony particular incidents in which he felt that the Office of the Attorney General was engaging in bullying tactics with him. Respondent also testified regarding the circumstances with his deposition from his perspective. It was respondent's position that the State of Florida improperly placed him in a position of being a witness while at the same time representing Mr. DuPont. These circumstances as well as other actions by the State of Florida were the basis for the appellate review sought by respondent.

Respondent further testified that it was his reasonable belief that based on his conversation with Mr. Roper respondent had an expert to support his claim for recovery and attorney's fees. Respondent also testified that he expected to have a hearing in the federal case regarding damages and attorney fees set forth in the agreement. However, the court approved the agreement without requiring a hearing. It is noted by the Referee that notwithstanding the approval of the agreement by the federal court based on the Respondent's representations of Mr. Roper's damages and attorney fees opinion, Respondent made no mention made to the federal judge that a hearing was indeed needed on these issues.

According to respondent's testimony, Mr. Roper had no recollection of serving or agreeing to serve as an expert witness. Thus, respondent's statement contained in the settlement regarding Mr. Roper's expert opinion was not a misrepresentation or misleading. It was respondent's position that the settlement agreement was a private agreement between the parties. He anticipated that there would be a hearing before the federal judge. It is clear to the Referee that the Respondent was complicit in placing fraudulent material facts before the federal court, to enhance the value of the case.

Respondent's exhibits do not support his position that there would be a hearing before the federal judge. Respondent's exhibits 20 through 24 clearly establish that the federal court directed respondent to submit a memorandum of law regarding his claim for fees. Moreover, the federal court's order directed respondent to respond and provide justification for the legality of the arrangement reached by the parties in the settlement agreement. In response, respondent filed a Motion for Entry of Final Order and Memorandum of Law. See Respondent's Exhibits 20-23.

In mitigation, the respondent testified that he could have been clearer in his documents and communication. Further, he has no prior discipline history. Respondent testified that he maintains a good reputation in the local legal

community and has been professionally impacted by the orders entered by Judge Parsons.

In aggravation, the referee finds that respondent's conduct had a negative impact on his client whereby the client lost the right to pursue his meritorious claim. Further, the client became the subject of the imposition of attorney's fees and costs as a result of respondent's conduct. In addition, respondent's conduct in continued pursuit of his attorney's fees not only was to the detriment of his client but is also evidence of respondent's selfish motive in this matter. Respondent's conduct in the more than 10 years of litigation involved both a pattern of misconduct as well as multiple offenses committed over a period of time. Due to the duration of time involved in the underlying litigation it is felt that the Respondent had many occasions to salvage his client's case by correcting the misrepresentation made to the federal judge, but did not choose to do so, to his client's detriment. In his testimony, respondent did not accept full responsibility for the consequences of his actions and the impact on his client as well as the judicial system. It is abundantly clear that the Respondent's actions were not forthright as an officer of the court and one who would choose to disrupt timely legal processes and would utilize a material misrepresentation to a judge that would ultimately undermine the sustainable cause of action of his unknowing client.

### III. RECOMMENDATIONS AS TO GUILT.

As to the complaint, this referee makes the following recommendations as to guilt or innocence: This referee finds respondent guilty of the conduct set forth in the complaint.

Pursuant to the Findings of Facts, I recommend respondent be found guilty of violating the following Rules Regulating The Florida Bar: 4-3.1 A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established; 4-8.4(c) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; and 4-8.4(d) A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice.

### IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I have considered the following Standards prior to recommending discipline:

#### 6.0 Violations of Duties Owed to the Legal System

##### 6.1 False Statements, Fraud, and Misrepresentation



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

#### 7.0 Violations of Other Duties Owed as a Professional

7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

##### Aggravating Factors:

- 9.22 (b) dishonest or selfish motive;
- (c) pattern of misconduct;
- (d) multiple offenses.
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim.

##### Mitigating Factors:

- 9.32 (a) absence of prior disciplinary record;
- (f) inexperience in the practice of law;
- (g) character or reputation.

#### V. CASE LAW

I have considered the following case law prior to recommending discipline:

The Florida Bar v. Adler, 2013 WL 6013420(Fla. 2013) – The Supreme Court of Florida imposed a 91 day suspension for an attorney’s misconduct involving misrepresentation of his personal finances pertaining to the purchase of an apartment. The Court considered the attorney’s false statements and actions, including assertions he knew to be untrue, in order to complete the real estate purchase. In mitigation, the attorney had no prior discipline history, made full disclosure to the disciplinary board and had a cooperative attitude during the proceedings. The court found that the attorney had extensive experience in the practice of law and a selfish or dishonest motive as the two aggravating factors.

The Florida Bar v. Head, 27 So. 3rd 1 (Fla. 2010) – The Supreme Court imposed a one year suspension and disapproved the referee’s recommended 60 day suspension for the attorney’s failure to be forthcoming with the bankruptcy court regarding case information and pleadings. The bankruptcy court found the attorney’s statements to be disingenuous regarding the receipt of funds on behalf of his clients which interfered with the resolution of the pending case. The attorney also filed a Suggestion of Bankruptcy even though no petition for bankruptcy had been filed with the court. The bankruptcy court found that the attorney violated the fundamentals of the Bankruptcy Code and that his conduct was contrary to his ethical duties to his clients. In aggravation, the Court found that the attorney was previously disciplined in 2005 for similar misconduct.

The Florida Bar v. Miller, 863 So. 2d 231 (Fla. 2003) – The attorney was suspended for one year suspension for deliberately concealing a material fact from the court in an employment discrimination case. After the truth came to light, the court held a hearing during which the attorney falsely testified under oath that he did not recall having received the first notice from the client. As a result, the trial court imposed sanctions against the attorney for concealing critical evidence, advancing spurious arguments, and submitting misleading affidavits and testimony. The trial court found the attorney engaged in a bad faith course of deceit. In mitigation, the attorney had no prior disciplinary history and suffered the imposition of sanctions by the federal trial court for his misconduct.

In The Florida Bar v. Rotstein, 835 So.2d 241 (Fla. 2002), an attorney was suspended for one year for various acts of misconduct, including creating a fraudulent letter for the purpose of submitting it to the bar and the grievance committee in order to conceal his neglect in allowing the statute of limitations to run on a client's claim. The court noted that in recent years it has moved toward stronger sanctions for attorney misconduct and that "basic, fundamental dishonesty . . . is a serious flaw, which cannot be tolerated" because such dishonesty and a lack of candor "cannot be tolerated by a profession that relies on the truthfulness of its members." *Id.* at 246, quoting The Florida Bar v. Korones, 752 So.2d 586, 591 (Fla. 2000).

In The Florida Bar v. Herman, 8 So. 3d 1100, 1108 (Fla. 2009), quoting The Florida Bar v. Rotstein, 835 So. 2d 241, 246 (Fla. 2003), the court stated “this Court ‘has moved towards stronger sanctions for attorney misconduct’ in recent years.”

Although respondent does not have a prior disciplinary history, his limited mitigation does not overcome the Court’s presumption of suspension for his misrepresentations made to the federal court and state court during his representation of Mr. DuPont.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BEAPPLIED:

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

A. Suspension from the practice of law for 91 days requiring proof of rehabilitation prior to reinstatement.

B. Payment of The Florida Bar's costs in these proceedings which currently total \$3,790.85.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD:

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

Personal History of Respondent:

Age: 53

Date admitted to the Bar: October 20, 1986

Prior Discipline: None.


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

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

Investigative Costs	\$462.10
Administrative Fee	\$1,250.00
Court Reporters' Fees	\$1,276.25
Witness Costs	\$474.60
Copies	\$222.90
Bar Counsel Costs	\$105.00
<b>TOTAL</b>	<b>\$3,790.85</b>

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 20th day of February, 2014.

  
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WILLIAM BRUCE SMITH  
Referee

Original To:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

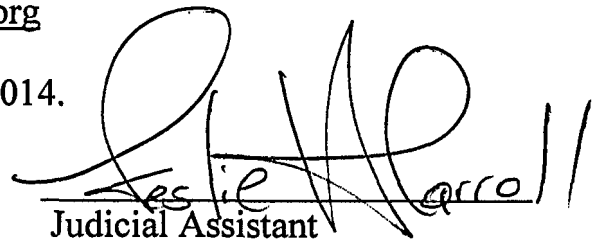
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this 20th day of February, 2014.

  
Judicial Assistant