IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v. Case No 62,951
63,652
JOHN L. JAMES, 65,143

Respondent
_____/

REPLY OF RESPONDENT

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REPLY BRIEF

Respondent, in order to maintain a relatively short reply to the brief of the bar, will address certain issues and statements made by the bar, and cite the location of the disputed facts and issues.

Two issues regarding the Motion for Enlargement of time filed by the Florida Bar will be addressed, and a Motion for enlargement of time accompanies this Brief.

ARGUMENT

The Bar states as fact that:

> "Mr. and Mrs Foulke appeared togeather at Respondent's office and cited the details of their agreement. Upon drafting the agreement, Respondent set up a hearing before Judge Hall without notifying counsel for Mrs. Foulke." Answer Brief of the Florida Bar, at Page 5.

The Bar in one paragraph makes two factual errors. The first error is that Mrs. Foulke came to Respondent's office. that simply did not occur and no evidence supports such a fact. The second error is that hearing was set "upon drafting the agreement." Hearing was set by Respondent after the agreement was signed by Mrs. Foulke. By attempting to distort the facts of the case before this court, the Bar tries to establish an analogy to Hanley v. Hanley, 426 So.2d 1030 (Fla. 2d DCA 1983). The analogy is simply not compelling. Hanley deals with a situation in which an opposing party appeared at the office of opposing counsel, presumably in accordance with an appointment, and executed an agreement which had been fraudulently induced. This case deals with a situation where counsel had had no dealings regarding settlement and where the agreement was straightforward and understood.

Hanley is also interesting in that procedurally it is before the appellate court as an apparant case of first impression on the facts in 1983. The events of the matter before this court occurred in 1981, and the Bar suggests that respondent should have followed the decision in Hanley. Respondent could hardly have the advantage of the construction of communicate which Hanley, by implication, utilizes, when Hanley was not a published case.

The Bar argues that the referee did not necessarily adopt the logic of the Memorandum of the Bar. That is true, so far as it goes, however, absent a stated rationale, Respondent must presume that the rationale of the Bar was adopted by the Referee. The Referee states no independant reason for any action. Report of Referee.

Where only one set of reasoning appears, and the findings are consistant with the reasoning, logic requires that the reasons in the memorandum were adopted, or that the referee has acted without reason, or has secreted his reasoning. The last two alternatives should be unacceptable to this court. Answer Brief of the Florida Bar, at Page 6.

The Bar states that:

" In the instant matter, it is nowhere disputed that Respondent was not aware that Mrs. Foulke was represented by counsel." Answer Brief of the Florida Bar.

That statement is simply untrue. The defense presented was that Respondent was told by his client that Mrs. Foulke had fired her attorney and did not want Respondent to contact that attorney regarding this matter. The issues are whether respondent was entitled to rely upon that stastement, and whether a client can, without notifying their attorney, consiously terminate an attorney and settle the matter without further consultation with the counsel of record.

The Bar takes the position that once counsel appears, the litigation is his until he is replaced or withdraws. That was not Respondents understanding of the Disciplinary

Rules based upon his examination of them. The Disciplinary Rules seem to be based upon an attorney being the servant of his client, whose duty is to represent the client as the client desires, so long as the client desires, and that the relationship is and can be terminated by the client at any time, with or without notice to the attorney. The Bar's position is contrary, that the client must have the services of counsel, whether desired or not. Such was not respondent's understanding of the Rules. Hanley, in fact, seems to state that the client seeking to terminate an attorney should be advised by that attorney, irrespective of the desires of the client. That rationale is contrary to the position which Respondent believed was an attorney's, which is that he advises as the client should desire to utilize his services. See Answer Brief of the Florida Bar, at page 8.

The Bar by brief at page 10 argues that Respondent failed to properly notice hearing. That determination rests entirely on whether Mrs. Foulke can validly waive notice of hearing. If the case belongs to the client, and she can terminate his services without notice, then she can waive notice of hearing. If the case belongs to the attorney and she can only act after consultation with him, or after his withdrawl, then the wavier is invalid. The assumption made is that once an attorney appears, he is the only person who can act validly. This creates the situation of control of the litigation by the attorney even though his client expresses a desire to discharge him and resolve the litigation. Such a result is contrary

to the principle that the cause of action belongs to the client and the attorney servies as a legal advisor and representative. The cart now pulls the horse.

The Bar, at page 11 of its Answer Brief denies that certain matters are abandoned. The bar would have this court take judicial notice of a common courtesy of notifying opposing counsel prior to settlement and "intentional failure to provide notice of the final hearing to Mrs. Foulke's attorney. . ." These are the first time that there have been specific allegations purportedly supporting violation of the cited sections. The Bar is simply to late to be alleging specific local customs and specific Rules of Civil Procedure, where those allegations were not set forth by the complaint. Furthermore, there is no proof of the Rules of Civil Procedure, and their violation requires that a specific construction of the rule be applied. failure to properly construe a rule of procedure hardy constitutes a wilful violation of the rule. Absent a specific showing of knowledge of a local custom, no violation is hown, and no such evidence exists.

The Bar argues that a defense based upon unintentional, negligent, or inadvertant misconduct does not constitute a defense, and should not be considered by this court. Such a statement is clearly contrary to the clear wording of the cited sections. DR 7-106(C)(5) requires knowledge, DR 7-106(C)(7) requres intent, DR 1-102(A)(2) requires circumventing, an intentional act, and the remaining sections require at least general intent, and specific intent, or the lack

of such intent is certainly relevant in determining an appropriate penalty where the purpose of these rules is to protect the public against the unscrupulous. Ignorance is remedied by education, malice is usully punished. The Bar seekes extreme punishment in this case and then argues that intent is irrelevant. If intent is irrelevant to the Bar, purhaps the recommended penalty should be examined closely to establish the true best interests of society and the accused attorney, and education by way of an ethics course examined as an alternative to suspension. Answer Brief of the Florida Bar, at Page 12.

The Bar at Page 15 of its brief states "Mr. Chester was not told of this action." The Bar states that by contract a collection agencey had entered into an agreement with Mr. Chester, and that he had authorized suit on his behalf, and then implies that Respondent should have received specific authorization to commence litigation. The issue really is one of agency. Could Mr. Chester, by contract, appoint an agent to act on his behalf regarding litigation of the matters referred for collection. The Bar takes the position that appointing an agent to control litigation, who had a continuing contract with an attorney to perform the work is unethical. It is, of course, improper to allow a non lawyer to control professional judgment but that is not what is involved, no proof exists that Respondent allowed any control of his professional judgment, the evidence is clear that Respondent did allow an appointed agent to act for the clients who had appointed the agent. If it is improper for an agent to act for

a principle, corporations are in trouble, because that is the usual way for corporations to act, and is common throughout the legal profession. The bar disapproved of the close working relationship of counsel and the collection agency and this case is before this court on such matters as restricting or redefining agency, establishing a new violation for quasi partnership for a close, mutually benificial working relationship, and redefining misrepresentation to include dealing under an agency contract and seeking damages. The bar then seeks to redefing professional control to be withholding or not seeking litigation and obtaining desired results for an appointed agent. Answer Brief of the Florida Bar, Pages 16-18.

The underlying issue is simple and dispositive. Can an agent duly appointed, act for a principle during litigation, and recive and give necessary notices, and information for the principle.

The Bar also seeks to turn the actions and agreements of the collection agency into the responsibility of Respondent. Respondent is not responsible for the billing, accounting, contracting, or erroneeous perception of the relationship of Respondent. The Bar would have this court distort DR 1-102 (A)(4) and ignore precident, and turn the Rules into a series of strict liability offenses violated by Ipsi dixit determination of the Bar. Answer Brief of the Florida Bar, at Page 16. The Bar says that failure to notify a client constitutes misrepresentation. Not in any dictionary using common English.

The Bar states as fact that the collection agency was "responsible for" filing satisfactions. That is factually incorrect. The testimony was clear that typing was done upon occasion by the receptionist and or Mr. Hampton, and that Respondent revied that typed material and either personally filed the documents, or used employees of Mr. Hampton for Messanger service to the court house. Respondent was clearly responsible for all documentation. Answer Brief of the Florida Bar. at Page 21.

The bar further states that Mr. Hampton had free access to litigation files. The testimony is clear that the files were jointly reviewed by Hampton and James, but were segregated when litigation was commenced and were Respondent's flies. Answer Brief of the Florida Bar, at Page 21.

The Bar alleges that Mr. Hampton accepted calls on Respondent's telephone. The testimony does not show any knowledge of that practice by respondent, other than for Hampton to take messages. Answer Brief of the Florida Bar, at Page 21.

The Bar states that James had merely assumed that Hampton's staff would file a certain satisfaction. That is not factually accurate. The document was delivered to an employee for delivery and the employee, who was diverting funds and forging checks, diverted this document and several others trying to conceal his crimes.

The Bar assumes that all calls to the collection agency were made to Respondent. That was not shown. There is no testimony of what telephone was called and even whether Mr. Derrick belived, or anyone else believed that they were dealing with an attorney, or dealing with a collection agency.

The Bar assumes without proving that such calls were to Respondent, and disregards the testimony that Mr. Hampton was only authorized to take messages on Respondent's phone. Taking messages is clearly not the practice of law, nor does it require a disclaimer. Answer Brief of the Florida Bar, at Page 24, 27.

The Bar urges this court ot break new ground by prohibiting what it refers to as a quasi partnership. The bar does not want an attorney to cooperate with a non lawyer for mutual profit, rather than shared profit, so a new rule is born. This court should decline. Answer Brief of the Florida Bar, at Page 26, et. seq.

The Bar also now alleges a feeder system. Answer Brief of the Florida Bar, at Page 26. This allegation should have been made or should not now be argued. The Bar simply tries to paint the Respondent with as much tar as posible and does so with "bad words". Shake the majic potion bottle and screem "feeder system" and further reasoned proof is not required. This statement by the Bar is a clear Red Herring, inserted soley to illicit prejudice.

The bar at Page 37 of its brief continues to argue

that the improper conduct of the Bar in accumulating cases should be disregarded, and that thae Bar's improper conduct in failing to bring these matters to hearing within any reasonable time and disregarding this legal matter do not constitute valid grounds for mitigation of penalty. The basis for an enhanced penalty for repeated violation of the Disciplinary Rules is the fair warning provided by a Disciplinary Proceeding that the offending attorney needs to proceed more carefully in the practice of law. That fair warning has not previously been afforded to Respondent, and he asks no more consideration than the facts justify. The Bar has been guilty of derilection of a legal matter which would result in discipline to another attorney, and the bar has utilized that derilection of its duties to accumulate a multi count complaint against Respondent, knowing that any one of the counts would result in no more than a reprimand. Now the Bar wants to be rewarded for this misconduct by an enhanced penalty for this prosecution, and the recovery of exhorbinate costs which could and should have been avoided by expeditious handling of this matter.

I HEREBY CERTIFY that a true and correct copy of the forgoing has been delivered to the Florida Bar, Attn: Mr Watson, Tallahassee, Florida 32301 this 25th day of July 1985.

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MOTION FOR ENLARGEMENT OF TIME

COMES NOW Respondent and moves this court to enlarge the time for fiming of this reply and says:

1. Respondent, by the accompanying brief addresses certain factual and legal issues ehich may assist this court in its decision in this court.

2. Respondent misunderstood the due date for this Brief and hereby submits said Brief for consideration.

Wherefore Respondent moves for enlargement of time for purposes of filing this Brief.

I HEREBY CERTIFY that a copy of the forgoing motion has been delivered by U.S. Mail to The Florida Bar, Attn: James Watson this 26th day of July, 1985.

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ARGUEMENT REGARDING MOTION OF THE FLORIDA BAR

The Florida Bar, by motion, requested additional time to file its answer brief.

2. Other than compounding the dely which has already occurred in this case, respondent had no objection to that motion.

3. The Bar chose to try to justify the motion by blaming Respondent for the delay when it is clar that the Bar misfiled the Brief and the lack of addressing the original brief to Mr. Watson's attention at The Florida Bar was irrelevant to that misfiling.

4. The Bar also commented that Respondent's Brief was late. The Bar, in making that allegation attempted to justify its own defalcation, instead of facing the fact that a mistake had been made. The allegation is erroneous. The original due date of Respondents Brief was Memorial Day, a legal holiday, and the brief was mailed the next day.

5. Respondent asks this court to consider as additional mitigation the further delay in these procedings caused by the Bar's Motion and as futher mitigation, the Bar's unfounded accusations of wrongdoing in the Respondent's filing of his brief.

I hereby certify that a copy of the forgoing has been delivered by U.S. mail to The Florida Bar, Attn: Mr. Watson

Tallahassee, Florida 32301, this 26th day of July, 1985.

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