IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MILTON E. GRUSMARK,

Respondent.

_____/

Case No. 72,506

On Petition to Review

Answer Brief of Complainant

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INTRODUCTION

The Florida Bar, Complainant, will be referred to as the "the Bar" or "The Florida Bar". Milton E. Grusmark, Respondent, will be referred to as "Grusmark" or "Respondent". The symbol "TR." will be used to designate the transcript of the final hearing which took place on August 19, 1988. All emphasis has been added.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar accepts Respondent's Statement of the Case and of the Facts as a generally accurate account of the proceedings with such additions and exceptions as are set forth below and in the argument portion of this brief.

1. In addition to a ten day suspension, the Referee found that Respondent should be permitted readmission only upon proof of payment of $3,000.00 to Donald Silverstein. (Report of Referee, Page 2)

2. Respondent received $10,000.00 from Silverstein, toward the total fee of $15,000.00 to represent Silverstein and the Co-Defendant. (TR. 19)

3. Respondent agreed to submit the disagreement over fees to voluntary binding arbitration before the Dade County Bar. (TR. 69)

4. An arbitration hearing was held. Respondent and Silverstein were present. (TR. 28-29)

5. The Chairman of the Fee Arbitration Committee testified that Respondent stated that fees should be returned. It was a question of how much. (TR. 48)

6. The Arbitration Committee awarded $3,000.00 of the $5,000.00 paid for representation of Silverstein to Silverstein. (TR. 47)

7. Respondent paid no monies to Silverstein. (TR. 48)

SUMMARY OF THE ARGUMENT

Respondent argues that the Referee only considered one factor as a guide in determining whether Respondent collected an excessive fee. It is the Bar's contention that there was evidence regarding five of the eight possible factors presented to the Referee.

Respondent also asserted that the Referee delegated his responsibilities by relying on the findings of an arbitration panel. The Referee was presented with the testimony of the Complainant and Respondent and did consider all evidence.

It is Grusmark's final contention that Disciplinary Rule 2-106 only includes the setting of an initial fee and not the fee that was collected. The clear language of the rule and caselaw does not support that argument.

POINTS ON APPEAL

POINT I

WHETHER THE REFEREE DID CONSIDER SPECIFIC CRITERIA IN DETERMINING THE REASONABLENESS OF THE FEE?

POINT II

WHETHER THE REFEREE DID NOT DELEGATE THE THE RESPONSIBILITY OF HEARING AND DECIDING THIS MATTER TO THE DATE COUNTY FEE ARBITRATION COMMITTEE?

POINT III

WHETHER DISCIPLINARY RULE 2-106 ENCOMPASSES THE REASONABLENESS OF THE ORIGINAL FEE AGREED TO BETWEEN AND ATTORNEY AND HIS ATTORNEY?

ARGUMENT

I

THE REFEREE DID CONSIDER SPECIFIC CRITERIA IN DETERMINING THE REASONABLENESS OF THE FEE COLLECTED (RESTATED)

It is well established that a referee's findings of facts and recommendations in attorney discipline proceedings come to this Honorable Court with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). There is ample evidence in the record to support the Referee's findings. Disciplinary Rule 2-106(A) of the Code of Professional Responsibility provides:

> (A) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

The Rule goes on to say in subsection (B):

> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

There are several factors following the Rule which are to be considered as guides to determine whether a fee is reasonable. There is no requirement that all factors must be met. In fact, there is no requirement that any of the factors must be considered. Nonetheless, many of the factors were presented to the Referee. Respondent alleges that only one of these factors was considered by the Referee. The testimony does not bear out that contention.

Respondent made a point of stressing the fact that his appearance before the Federal Court on behalf of Silverstein was "permanent" rather than "temporary". Respondent believed that once he appeared in the case he would not be let out. (TR. 53-54) The Bar printed out, however, in cross examination of the Respondent that the local rules provide that an attorney may seek leave from the court to withdraw from a case.[1] (TR. 66-67) Nonetheless, Grusmark's alleged concern that he might not be permitted to withdraw in effect alludes to Disciplinary Rule 2-106(B)(1); the labor involved, Disciplinary Rule 2-106(B)(6) the length of the professional relationship. Grusmark also advised the Referee that he believed the case was very difficult since Silverstein and his co-defendant claimed to be innocent dupes. It was further mentioned by the Respondent that he had represented another individual in a similar case and knew that a good deal of work might be involved. Disciplinary Rule 2-106(B)(1) (TR. 58-59)

The Respondent additionally informed the Referee that as a result of his conversations with the Prosecutor he was responsible for securing that Silverstein would be released on a personal surety bond. (TR. 55) Consequently, Disciplinary Rule

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[1]Rule 16 (D)(3) of the Local Rules of the Southern District of Florida provides:

> No attorney shall withdraw his appearance in any action or proceeding except by leave of court after notice served on his client and opposing counsel.

2-106(B)(4) involving "results obtained" was brought before the Referee.

Respondent attested to the fact that Silverstein was more hysterical than any other client he had seen in jail; that his only concern was being released as quickly as possible. (TR. 52-53) Therefore, Respondent has referred to Disciplinary Rule 2-106(B)(5), a factor wherein a client imposes time limitations.

Moreover, Respondent testified to his experience. Disciplinary Rule 2-106(B)(7). He stated that he had experience with the type of case he represented Mr. Silverstein on. He claimed he "knew what was involved". (TR. 50) Respondent also discussed the fact that he could now handle things more succintly and faster, than when he began practicing law thirty nine years ago. (TR. 64) Respondent also referred to his reputation in the community by virtue of various public offices he held beginning in 1958. (TR. 59-60) Disciplinary Rule 2-106(B)(7)

Therefore, there was evidence before the Referee regarding Disciplinary Rule 2-106(B)(1)(4)(5)(6) and (7). The Referee's lack of reference to all factors in his Report does not establish that those factors were not considered.

ARGUMENT

II

THE REFEREE DID NOT DELEGATE THE RESPONSIBILITY OF HEARING AND DECIDING THIS MATTER TO THE DADE COUNTY FEE ARBITRATION COMMITTEE (RESTATED)

It is well established that The Florida Bar must establish its allegations charging an attorney with misconduct with competent evidence. State ex rel. The Florida Bar v. Grant, 85 So.2d 232 (Fla. 1956). The Bar proved its allegation that Milton Grusmark collected an excessive fee and that such misconduct, considering all circumstances, warranted a ten day suspension. The Bar presented testimony from the client, Silverstein as to the circumstances regarding the fee. (TR. 17-43) The Bar then submitted relevant evidence of the Arbitration committee regarding their finding (TR. 31)[2] The Respondent also testified as to the fee. (TR. 50-65) Certainly, the Referee had sufficient evidence before him to give the arbitration award its appropriate weight and did not delegate his responsibility of conscientiously hearing all evidence and ruling on the merits of the case.

In In Re the Integration Rule of The Florida Bar, 103 So.2d 873 (Fla. 1956), this Court addressed a situation where an attorney was accused of being a member of the Communist Party. It was held that evidence taken by a court or governmental agency

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[2]Respondent initially objected to introduction of the Arbitration award on the ground that a dissent had not been signed. (TR. 30) Respondent then withdrew his objection. (TR. 31) Therefore, Respondent has waived any right to raise an objection to introduction of this evidence. Marsh v. Sarasota, 97 So.2d 312 (Fla. 2nd DCA 1967).

investigating that lawyer could be introduced in disciplinary proceedings. The opinion went on to say that the evidence should be accorded such weight as would be deemed proper. In Re Integration Rule, at 878.[3]

It has also been held that:

> The results of a civil suit are not necessarily conclusive of disciplinary action; there must be proof of a breach of the Code of Professional Responsibility for Attorneys before discipline will result.
>
> The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973)

Similarly, the Bar did not rely solely on the finding of the Fee Arbitration Board. Other evidence was presented to the Referee. The Referee ruled based on all evidence and did not delegate the important responsibility this Court imposed to the Arbitration Committee's findings.

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[3]The Dade County Bar Association is a voluntary private organization.

ARGUMENT

III

DISCIPLINARY RULE 2-106 DOES NOT ONLY ENCOMPASS THE REASONABLENESS OF THE ORIGINAL FEE AGREED TO BETWEEN AN ATTORNEY AND HIS ATTORNEY

Disciplinary Rule 2-106 clearly provides, among other things, that a lawyer shall not collect an excessive fee. There is absolutely nothing in that Rule which limits the Bar to the question of what was initially charged, rather than what was ultimately collected. Furthermore, any discussion regarding the Rules Regulating The Florida Bar, effective January 1, 1987 is simply irrelevant since the alleged misconduct occurred prior to that time.

In The Florida Bar v. Gentry, 475 So.2d 678 (Fla. 1985) Respondent quoted a client a total fee of $750.00. The client paid $200.00 toward that fee and received minimal representation. Respondent was prosecuted and this Honorable Court upheld the Referee's finding that Disciplinary Rule 2-106(A) had been violated. Gentry, at 680. Therefore, the proposition that a "collected" fee is excessive is not unique to the case sub judice.

Furthermore, Respondent is correct in his statement that the question of return of the fee is not material to the question of excessiveness. The Referee found that Grusmark was insincere in his intention to return the unearned fees.

> Moreover, Respondent's failure to honor his obligation to repay these monies after agreeing to be bound by fee arbitration

> constitutes an aggravating factor. Had Respondent been sincere in his intentions to return monies he would have returned some small amount despite his cry of financial difficulty. Therefore, Mr. Silverstein's testimony that Respondent had laughed and stated, "You're not going to get a dime back. Try and get it." is quite believable.
>
> (Report of Referee, Page 3)

The Referee found this factor to be aggravating and not dispositive of the substantive charge.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Report of Referee should be upheld.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Initial Brief on Petition for Review was sent Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to Sheryl J. Lowenthal, Attorney for Respondent, at 2550 Douglas Road, Suite 206, Coral Gables, Florida 33134 on this 24th day of February 1989.

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