IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ANTHONY L. BAJOCZKY,

Respondent.
_____/

Case No. 73,377

TFB File No. 87-21975-02

ANSWER BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Complainant below, files this Answer Brief in the case against Anthony L. Bajoczky, hereinafter referred to as Respondent. References to the hearing transcript will be designated (TR - page number), and references to exhibits introduced as evidence at the hearing will be designated (Bar Exhibit - number) or (Respondent Exhibit - number). References to the Report of the Referee will be designated (RR - page number), and references to the Initial Brief of Respondent will be designated (Respondent's Brief - page number).

STATEMENT OF THE CASE AND FACTS

On November 30, 1988, The Florida Bar filed a formal complaint against Respondent charging a violation of Disciplinary Rule 1-102(A)(4) which provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Honorable Dedee S. Costello was appointed referee in this matter to hear the complaint.

A final hearing was held in this matter on May 9, 1989. As a result of the hearing, the Referee entered a final report on June 19, 1989, finding Respondent guilty of violating Disciplinary Rule 1-102(A)(4) and recommending that Respondent receive a public reprimand.

Respondent filed a timely Petition for Review disputing the finding of guilty and the recommended penalty.

Respondent's misconduct arose from his representation of Janet Gary Cox in divorce proceedings and in related matters.

Respondent was retained by Janet Gary Cox (now Janet Williams) in April 1986 to represent her interests in a dissolution of marriage action with her husband, Kemuel Cox (TR-7, 128). Prior to retaining Respondent in April 1986, Janet Cox had met with Respondent in February 1986 in an attempt to secure legal representation. (TR-6).

At the time Respondent was retained by Janet Cox she was required to pay Respondent a retainer fee of $3,000.00 with the understanding that Respondent would charge against the retainer at a rate of $85.00 per hour. (TR-8; Bar Exhibit-3).

When Janet Cox retained Respondent she did not have sufficient funds with which to pay Respondent. In order to pay Respondent, Janet Cox requested her parents, Evelyn and Allen Gary, to loan her the funds. (TR-8). Mr. and Mrs. Gary did not have sufficient monies to meet Janet Cox's request and borrowed the $3,000.00 to pay Respondent's retainer from family friends, Mr. and Mrs. C. B. Williams. (TR-8). The borrowed funds were received by a cashier's check to Evelyn Gary for $3,000.00 that was endorsed and given directly to Respondent as the requested retainer. (Bar's Exhibit-1; TR-9).

On June 3, 1986, Respondent wrote Janet Cox a letter discussing the status of her divorce case and memorialized the fee agreement. (Bar's Exhibit-2). In Respondent's letter of June 3, 1986, he explained how many hours he had expended on her case and requested an additional $2,000.00 be deposited by Janet Cox toward fees and costs. A fee statement was included with the above letter. (Bar's Exhibit-3).

As a result of Respondent's request for fees Janet Cox again requested a loan from her parents. In order to obtain the needed funds Mr. and Mrs. Gary were required to borrow

$3,000.00 from Mrs. Gary's sister. (TR-11, 12). On June 18, 1986, a second $3,000.00 payment was given to Respondent. (Bar's Exhibit-6).

At the time of the dissolution Janet and Kemuel Cox were the owners of three funeral homes, a florist shop and a limousine service. (TR-6). After their marriage Janet and Kemuel Cox had received financial assistance from Janet's parents, Mr. and Mrs. Gary, in order to purchase and operate the businesses. (TR-18). At the time the businesses were incorporated Mr. and Mrs. Gary were listed as corporate officers on the corporation papers. (TR-14).

When the dissolution of marriage proceedings began the Cox's businesses were experiencing financial difficulties that had resulted in outstanding debts, Internal Revenue Service liens for custodial taxes and problems with the Department of Insurance. (TR-6, 7, 82, 96, 97, 130, 135, 140). As a result of the Internal Revenue Service tax liability, a lien was placed on Mr. and Mrs. Gary's home as a result of the status as corporate officers. (TR-13, 14).

The problem related to the Internal Revenue Service lien against the home of Janet Cox's parents was part of the problems associated with the Cox's dissolution and was on a debt owed not by the Garys. (TR-15).

Prior to Respondent being retained by Janet Cox, her mother had met with Respondent to inquire if he would represent the Garys in an attempt to recover the money given to the Coxes from Kemuel. Respondent would not represent the Garys. (TR-39, 40). At no time did Mrs. Gary discuss with Respondent the Internal Revenue Service lien or request he assist them with their problem. The Garys never guaranteed Respondent they would be responsible for Janet Cox's legal fees. (TR-40).

In August 1986, a Final Judgment of Divorce was entered dissolving the marriage of Janet and Kemuel Cox. The circuit court retained jurisdiction to decide at a later date the matters of child custody, support and settlement of property rights. (TR-15, 16).

As a result of a negotiated settlement a Supplemental Judgment was entered in the divorce in December 1986. (TR-16; Bar's Exhibit-4). As part of the properly settlement agreement and supplement judgment Janet's parents, Mr. and Mrs. Gary, were to receive from Kemuel Cox, $20,000.00 for their equity ownership in the funeral home in Tallahassee. (Bar's Exhibit-4, paragraph 15). This equitable interest was to be paid by Kemuel by delivering $4,000.00 to the Garys at the final hearing, execute a three-year note with interest payments of $106.66 per month with the $16,000.00 principal balance due in a lump sum payment at the end of three years. (TR-17). This money was being paid the Garys for their joint

contributions to the Coxes' businesses. (TR-18). The Garys received this special equity ownership interest without having been made parties to the court action.

At the final hearing on December 19, 1986, Respondent received a trust check from Kemuel Cox's attorney for the $4,000.00 initial payment to the Garys. This trust check was made payable to Allen and Evelyn Gary and Respondent. (Bar's Exhibit-5). While at the courthouse, the various settlement documents were executed by Janet and Kemuel Cox. (TR-19).

Janet and her parents state that they were instructed to return to Respondent's office with his associate, Ms. Fournier, so that everyone could endorse the check and the Garys would receive their $4,000.00. (TR-22, 43-44, 58-59).

Janet Cox and Mr. and Mrs. Gary returned to Respondent's office where they waited an hour or longer for Respondent to return. After waiting at least an hour, they were told by Ms. Fournier that Mr. and Mrs. Gary should endorse the $4,000.00 trust check and when Respondent had endorsed it Mr. Gary would be called to come pick up the check. (TR-23).

After not hearing from Respondent's office, Janet Cox made several attempts to determine why her parents had not received their $4,000.00. While not ever discussing the matter with Respondent, Janet Cox was told several times by Ms. Fournier

that Respondent had the check and it would be sent as soon as it was endorsed. (TR 23-24).

The $4,000.00 to the Garys was to be used to repay the initial loan the Garys had received from Mr. and Mrs. Williams. (TR-44). Mrs. Gary visited Mrs. Williams after leaving the office of Respondent on December 19, 1986 and told her they would have her money that afternoon. (TR-45). Mrs. Williams acknowledged the December 1986 visit and later being told the money promised was not received. (TR-52).

After repeated attempts to contact Respondent regarding the delivery of the $4,000.00 to the Garys, Janet Cox received a letter from Respondent dated January 28, 1987. (Bar's Exhibit-6). In this letter addressed to Janet and Mr. and Mrs. Gary, Respondent included a statement of fees and costs showing that the $4,000.00 received from Kemuel Cox for the Garys' equitable interest was applied to legal fees from Sale of Building - December 23, 1986.

Mr. and Mrs. Gary testified that there were no guarantees given by them for payment of their daughter's legal fees and there was no agreement, oral or written, that Respondent was to apply the funds for their equitable interest to Janet Cox's legal fees.

Despite the initial requests to speak to Respondent, Janet was unable to see Respondent personally after the settlement. Both the Garys and Janet had contact with Respondent's associates but no mention was made of the $4,000.00. The Garys have never received their funds from Respondent.

SUMMARY OF THE ARGUMENT

The report of the referee is to be viewed with a presumption of correctness. The report of the referee set forth facts found by the referee that Respondent engaged in conduct that was dishonest and deceitful in obtaining an equity interest for Mr. and Mrs. Gary and applying the funds received to outstanding attorney fees of Janet Cox without their joint consent or approval. The referee did not err in denying Respondent's request that the case be dismissed at the close of the Bar's case.

After receiving evidence from both the Bar and Respondent, the referee made a finding of fact that The Florida Bar had met is burden of proof after reviewing the testimony and observing the witnesses. Based upon the facts found by the referee and the stated reasons in her report for finding the Respondent guilty of misconduct as charged, the report of the referee should be affirmed and Respondent disciplined as recommended.

ARGUMENT

POINT I

SUFFICIENT EVIDENCE WAS PRESENTED BY THE FLORIDA BAR DURING ITS CASE TO SUPPORT THE REFEREE'S DENIAL OF RESPONDENT'S MOTION TO DISMISS.

As set forth in the formal complaint filed by The Florida Bar herein, Respondent is charged with having violated Disciplinary Rule 1-102(A)(4). This rule provides that a lawyer shall not engage in conduct (emphasis added) that involves dishonesty, fraud, deceit or misrepresentation.

At the formal hearing, The Florida Bar presented testimony from Janet Cox, her parents, Mr. and Mrs. Gary and Mrs. Williams relating to conduct of Respondent upon which the formal complaint was based.

At the close of testimony from The Florida Bar's witnesses, Respondent moved for summary judgment or dismissal asking that the charges against Respondent be dismissed in that the evidence presented by The Florida Bar was insufficient to prove Respondent guilty by clear and convincing evidence. (TR-63, 64).

Respondent argues in this point that the referee erred in not dismissing the charges at this point. In reviewing referee

reports this court has made it abundantly clear that the findings and conclusions of a referee are accorded substantial weight, and they will not be overturned unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981); The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). On review, the burden is upon the party seeking review to demonstrate that the report of the referee is erroneous, unlawful or unjustified. The Florida Bar re Inglis, 471 So.2d 38 (Fla. 1985).

Respondent's request for dismissal falls within the provisions of Rule 1.420, Fla. R. Civ. P., which sets forth procedures for involuntary dismissals. Under the guidelines of the rules providing for an involuntary dismissal after the presentation of evidence by the plaintiff (The Florida Bar herein), the moving party has the burden of showing that a prima facie case has not been made in support of the complaint. Buchanan Const. Inc. v. City of Tallahassee, 308 So.2d 613 (Fla. 1st DCA 1975).

At the final hearing, Respondent moved for dismissal stating that there had been no testimony that Respondent made any statement or committed any conduct that fell within the provisions of the provisions of DR 1-102(A)(4).

The testimony before the referee at the time Respondent moved for dismissal was uncontroverted and clearly showed that

Respondent had received a check jointly made out to him and Mr. and Mrs. Gary and failed to deliver the money to the Garys. At this time the testimony clearly showed this money was to go to the Garys as a result of a supplemental judgment granting them an equitable interest. The Garys and their daughter had testified that there had been no agreement or guarantee that this equitable interest payment was to be applied to any outstanding balance on fees owed to Respondent by his client, Janet Gary. The Garys' expectation of receiving this money was established by their attendance at the courthouse for the entry of a stipulated settlement, their waiting at Respondent's office in excess of an hour for his return, and Mrs. Gary's visiting Dorothy Williams with the explanation that Mr. Gary would be picking up their money from Respondent later that day which would allow them to repay the money borrowed for Respondent's initial retainer.

Respondent argues that no statement was shown directly attributable to him that promised the Garys they would receive the $4,000.00 after the entry of the supplemental judgment. The Florida Bar would argue that there is no necessity for a specifically worded promise by Respondent but that such a promise from Respondent or expectation of the Garys must be seen in the totality of Respondent's involvement in negotiating the settlement and his interaction with the Garys at the time the $4,000.00 was received and thereafter.

The evidence before the referee at this point not only established a prima facie case against Respondent but The Florida Bar would state that by his conduct prior to and after the receipt of the $4,000.00 check, there was clear and convincing evidence to allow the referee to deny Respondent's Motion for Involuntary Dismissal.

Since the allegations set forth in the complaint were proved by competent and substantial evidence the denial of Respondent's Motion for a Voluntary Dismissal was not an abuse of the referee's discretion and with Respondent's failure to overcome the presumption of correctness of the referee's conclusions, the denial of Respondent's motion should be affirmed.

POINT II

COMPETENT AND SUBSTANTIAL EVIDENCE WAS PRESENTED SHOWING RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION.

After the final hearing in this matter, the referee ruled that The Florida Bar had proved by clear and convincing evidence that Respondent was guilty of violating Disciplinary Rule 1-102(A)(4) and recommended Respondent be disciplined by receiving a public reprimand. (RR-7, 8). The referee stated that her findings and conclusions were based upon a review of the testimony and having observed the witnesses during the hearing. (RR-7).

The referee also set forth in her report the reasons upon which her finding of guilt was based. (RR-7, 8).

The first reason given by the referee in support of her finding of guilt was that there was no written agreement between Respondent and the Garys that they would be responsible for Janet Cox's attorney fees.

Respondent argues that even without such an agreement the evidence clearly demonstrates the Garys had made such an agreement through their past actions. Respondent asserts that he had the authority to apply the settlement proceeds to his fees based on the fact that the Garys had borrowed all prior funds used to pay his fees up to the final settlement of the

divorce proceedings. Respondent has also argued in his brief that because he is so responsible in discussing fees that there could be no misunderstanding. (Respondent's Brief-16).

A review of the evidence and testimony presented at the final hearing clearly demonstrates that there was competent and substantial evidence to support the first conclusion of the referee.

It is undisputed that Respondent's initial contact was with Janet Cox and that Respondent was retained by Janet Cox to represent her interest in a pending divorce. Respondent was retained on April 5, 1986 upon payment of a $3,000.00 retainer by Janet Cox. These funds were obtained by a loan to Janet Cox's parents from Mr. and Mrs. Williams. (TR-8). By letter of June 3, 1986, Respondent notified Janet Cox that the initial retainer had been spent and additional funds were needed. (TR-11; Bar's Exhibit-2). Respondent was paid an additional $3,000.00 by Janet Cox toward her fees by delivering to Respondent $2,400.00 in cash and endorsing a $600.00 personal check to Respondent. The cash was the result of a loan from Janet Cox's aunt to her mother, Evelyn Gary.

In reviewing the new matter report document (Bar Exhibit-4), it is evident that Respondent had discussed the fee arrangement with Janet Cox initially in February 1986, but failed to have her sign the area designated "fee agreement"

upon being retained. This new matter report makes no mention of the Garys being responsible for all or part of the legal fees.

In Respondent's June 1986 letter, he has requested additional funds. This letter was directed to Janet Gary individually and made no reference to her parents. In his letter, Respondent specifically states that Janet Cox will be notified when additional monies were necessary. No further notices or statements were sent to Janet *Cox* prior to the final hearing on the divorce settlement.

Respondent was clearly aware of Janet Cox's financial difficulties and her having to borrow money to pay her legal fees. Knowing this situation, Respondent failed to make any formal arrangements with Janet for final payment, or with her parents, Mr. and Mrs. Gary, before the final hearing, that would specifically require that Mr. and Mrs. Gary were to be held responsible. No one was required to sign a fee agreement or promissory note for outstanding fees.

The referee's second conclusion upon which she bases her finding of guilt was that Mr. Gary was never present during the times Respondent claims he discussed applying the $4,000.00 to Janet Cox's outstanding fees.

Mr. Gary testified that he never discussed any of his daughter's problems with Respondent and that he had not attended any meetings with Respondent as related to the divorce proceedings. (TR-55). Mr. Gary also stated that neither he nor his wife had guaranteed payment of Janet Cox's attorney fees. (TR-55).

An examination of the supplemental Judgement (Bar Exhibit-4) clearly shows that the funds representing the equitable interests of the Garys were to be joint funds with Mr. Gary having a direct interest. Without ever having met with Mr. Gary it does not support Respondent's claim that Mr. and Mrs. Gary had agreed to apply the joint funds to Janet Cox's legal fees. Since Mr. Gary had a direct interest in the $4,000.00, it would seem that his specific approval would have been required in applying these funds to Respondent's legal fees. Respondent fails to show that such an independent discussion and approval took place.

The referee's third conclusion finds that the Supplemental Judgement clearly shows the $4,000.00 was partial payment to the Garys for an equitable interest in part of the marital property. (Bar's Exhibit-4).

The Supplemental Judgement clearly finds an equity interest on behalf of the Garys who were not parties to the court case. It is also important to note that while the

settlement was in the form of a supplemental judgement, no hearing actually took place and the specifics had been worked out through negotiations well before the date of the judgement. The parties sought the entry of such a final deposition in order to protect the equitable interest from future bankruptcy actions.

The agreement provided that Mr. and Mrs. Gary receive a $4,000.00 immediate payment from Kemuel **Cox** and a promissory note/second mortgage for $16,000.00. The $4,000.00 payment was in possession of Kemuel **Cox's** attorney at the courthouse which is further evidence of a prior settlement agreement. As testified and shown by evidence at the hearing, the check was made out to Mr. and Mrs. Gary and Respondent. If the agreement beforehand was for this money to go to Respondent's legal fees it would appear that the simplest manner of disposition would have been for the disbursement to have gone directly to Respondent.

In the referee's fourth conclusion she found that the events following the entry of the Supplemental Judgement support the testimony of the Garys and Janet **Cox** that they were to receive their money at the settlement hearing.

Janet Cox and the Garys each testified that, at the courthouse, Kemuel **Cox's** attorney delivered a $4,000.00 check to Respondent that represented the Garys' equitable interest in

the marital property. After the security documents and deeds were executed the Garys and Janet Cox testified Respondent told them to return to his office with Ms. Fournier. (TR-21, 22; 42-44; 56-58; 61).

The fact that the Garys and Janet Cox returned to Respondent's office after the settlement and waited for Respondent to return is uncontradicted. If, as has been argued by Respondent, it was *so* abundantly clear to the Garys that this money was going to Janet Cox's legal fees, why did they not just endorse the check at the courthouse and leave? Another inquiry along these lines is why did the Garys even appear at the courthouse since the negotiated settlement eliminated a need for testimony and the court had no jurisdiction to hear their claim for a special equity.

The only explanation for the Garys' extended period of waiting for Respondent is their expectation of receiving the $4,000.00.

Respondent argues that the Garys knew about endorsing checks and by doing this it reinforces Respondent's argument that the money was to go to fees. This argument is contrary to the evidence. Only Mrs. Gary had ever endorsed any checks (the initial retainer) given to Respondent, and Mr. Gary testified that he had never promised this money to Respondent and if he

had known the money was going to legal fees he never would have endorsed the check. (TR-60).

The referee's final conclusion that the fact of the Garys being non-parties to the divorce action and receiving a special equity is well supported by the evidence.

Janet Cox received no marital property out of the divorce and only wanted the money from Kemuel to go to her parents for the help they had given her.

Respondent had initially reviewed the Garys' request of suing Kemuel for their special equity and had emphatically told Mrs. Gary that they had no cause of action against Kemuel. (TR-163, 164). In the supplemental judgement, the Garys were given a special equity without having been made parties to the action and without a formal hearing.

If Respondent's argument is to be accepted, then this elaborate scheme of protecting Janet Cox's recovery from possible future bankruptcy claims was designed merely to provide and protect a source of legal fees for Respondent.

At the hearing, the Respondent contended that the Garys and Janet Cox clearly understood the $4,000.00 was going to attorney fees. This contention is again argued in Respondent's brief.

Respondent alleges the testimony at the hearing was contradictory as to the allegations within the complaint; however, Respondent's actions contradict his own position.

Respondent holds himself out as someone who carefully addresses legal fees but made no provision to protect his fees when it was obvious his client was financially unable to pay. Respondent initially informs his client that she will receive periodic statements as fees and expenses are incurred and fails to do this. No final statement is presented to his client prior to the culmination of the work and a final statement is issued only after the hearing and the $4,000.00 has been applied to the fees. It is at this time that Respondent, for the first time, addresses the fee statement to his client and the Garys.

Respondent has also suggested that the only reason this complaint was filed, was because Mrs. Williams, from whom the initial retainer was borrowed, saw where the Garys had received a $20,000.00 judgment from Kemuel and was pressuring the Garys for repayment. Such a premise is contrary to the testimony of the Garys and Mrs. Williams.

Respondent has also attempted to argue that there were no specific promises made to the Garys or words from him to the effect that they would receive this money. Respondent's actions in settling the matter and arranging for an equity

interest payment clearly led the Garys to believe they would be receiving this money. When Respondent applied the endorsed check to Janet Cox's legal fees this action was dishonest, deceitful and misrepresentative of his promised action to the Garys.

The referee received all the testimony and observed the demeanor of the witnesses during the final hearing. In her discretion she weighed the credibility of the evidence and found that, for the reasons cited in her report, Respondent was guilty of the misconduct charged.

These findings and conclusions of a referee are accorded substantial weight and they will not be overturned unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968); The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978).

In the case of The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980), this Court held that the responsibility for finding facts and resolving conflicts in the evidence is placed with the referee. The review of a referee's findings is not in the nature of a trial ~~de novo~~, but is to determine if the findings of the referee are supported by clear and convincing evidence. The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987). The stated presumption of correctness of a judgment of

a trier of fact prohibits an appellate court from re-weighing the evidence and substituting its judgement for that trier of fact. Shaw v. Shaw, 334 So.2d 13 (Fla. 1976).

In the instant matter, the referee found that the Florida Bar had met its burden of proof and found Respondent guilty of misconduct. As the trier of the fact, the referee resolved the conflicts of testimony against the Respondent. It has been clearly shown that there was clear and convincing evidence presented at the hearing to support the conclusions of the referee. In order to reverse the findings of the referee on review, Respondent is asking this Court to reweigh the evidence which this Court has held to be inappropriate. The findings of the referee are supported by clear and convincing evidence and the report should be affirmed.

CONCLUSION

The Florida Bar, presented sufficient evidence for the referee to have denied Respondent's Motion for Involuntary Dismissal. The record reflects competent and substantial evidence to support the findings and conclusions of the referee's report.

Respondent fails to show that the report of the referee was erroneous or was lacking in evidentiary support. Having failed to meet the required burden of proof to overturn the presumption of correctness of the report of the referee, the report of the referee herein should be affirmed and the Respondent disciplined as recommended.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been forwarded by certified mail P981 744 781, return receipt requested, to JOHN A. WEISS, ESQUIRE, Counsel for Respondent, at his record Bar address of Post Office Box 1167, Tallahassee, Florida 32302-1167, on this 30th day of October 1989.

James N. Watson, Jr.

JAMES N. WATSON, JR.
Bar Counsel

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