IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ANTHONY L. BAJOCZKY,

Respondent.
_____/

Case No. 73,377

TFB File No. 87-21795-02

COMPLAINANT'S ANSWER BRIEF ON DISCIPLINE

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TABLE OF CITATIONS

Other Authorities Cited

PRELIMINARY STATEMENT

The purpose of this Answer Brief is to respond to the argument presented by Respondent as to what should be the appropriate discipline for Respondent's conduct if the report of the referee is affirmed in this matter.

The prior Answer Brief of Complainant fully sets forth the facts and procedural history of how this matter comes before the Court.

In keeping with Respondent's outline of his brief, Complainant's disciplinary argument will be addressed under Point III.

SUMMARY OF ARGUMENT

Complainant argues that the appropriate disciplinary sanction in this matter is at least a public reprimand.

Respondent's actions are tantamount to a conversion of funds without authority. The failure of Respondent to protect his fees prior to the conclusion of the divorce action does not allow for self-help measures.

While Respondent may have provided excellent representation in a difficult matter this is not enough to excuse or mitigate his misconduct to a level of a private reprimand.

ARGUMENT

POINT III

IF THE REPORT OF THE REFEREE IS AFFIRMED, THE APPROPRIATE DISCIPLINE IS AT LEAST A PUBLIC REPRIMAND

As argued previously, there was substantial and competent evidence to support the findings of the referee and the recommendation that Respondent be found guilty of misconduct should be affirmed.

In considering the level of discipline, it is inherently necessary to isolate the particular conduct Respondent is charged with and the time frame within which it was committed.

Respondent's argument for a private reprimand in these proceedings asserts such is the appropriate discipline based upon the complexity of the representation and the favorable results obtained for the client. Such thinking is absurd and does not justify misconduct that involves the taking of another's property. Taking this argument to the extreme, if a lawyer should win a complex and difficult case of first impression, would he then be excused from having taken more money than originally contracted for?

Respondent was hired by Janet Cox to represent her in a divorce action to the best of his abilities. Having done a

good job is no more than what he was hired to do and promised, This level of accomplishment is what each and every lawyer should be expected to strive for and when such is accomplished it should not be held out as mitigation for subsequent misconduct related to his representation.

Respondent has also pointed out that he also disbursed trust funds during his representation. By this argument he appears again to be arguing that by having previously followed the prescribed and expected conduct of a lawyer, the instance of the alleged misconduct should either be mitigated or excused,

Respondent has placed a great deal of weight on the fact that his firm should have expected to be paid for its work and the money received was for its representation. Respondent then pats himself on the back for "discounting" his final legal fees and chastises his client for not testifying at the final hearing that she would stand good for Respondent's attorney fees.

The weakness in Respondent's argument is evident in the manner in which he handled the collection of his fees from the beginning.

Respondent clearly was aware that his client, Janet Cox, was not in a financial position to personally pay all of her

attorney fees. Respondent was aware of the initial retainer having been procured by a loan through Ms. Cox's parents.

After the initial retainer was deleted by fees and costs, Respondent promptly notified his client of the need for the payment of additional fees. The result of this demand was a prompt payment of monies in excess of what was requested. In Respondent's letter of June 3, 1986 asking for more funds he stated, "Thereafter, I will notify you when additional money for legal fees or costs becomes necessary."

After the second payment of fees, Respondent failed to remit to his client any further fee demands until after the supplemental judgment was entered and he had applied the Garys' $4,000.00 to his outstanding fees.

After the letter of June 3, 1986 fees were never discussed in detail by Respondent with his client nor were there any further demands made for additional payments. Knowing in advance of the final hearing in the dissolution the financial status of Ms. Cox, Respondent made no efforts to present a final billing to Ms. Cox or to make any arrangements for the guarantee of payment of such fees.

The discounting of Respondent's fee came only after his converting the Garys' $4,000.00 and applying this money to fees he knew were not protected either by neglect or oversight. If

such a discount was within the nature of Respondent since his fees exceeded his original estimate of "$12,000.00", why was not such a discount appropriate at the time of the matter's conclusion? It is apparent that such a discount given almost a month after the final hearing and the Respondent having converted the Garys' $4,000.00 was an effort to placate the Garys' from complaining about the conversion. This attitude of the Respondent is further reinforced by the fact that the final settlement statement showing how the $4,000.00 was disposed was addressed for the first time to not only Janet Cox, his client, but also to Mr. and Mrs. Gary, her parents.

Respondent also argues that since there was no other alternative means set up for the payment of his fees, it was understood that the Garys' $4,000.00 was to go to his fees.

The responsibility for his fees falls squarely on Respondent to protect and in this matter Respondent failed to do so. Respondent had initially done so and even promised that such updated fee requirements were to be expected but for whatever reason Respondent failed to follow-up on this promise. Such failure cannot justify the self-help steps taken by him in converting the $4,000.00 of the Garys to his use against his clients' attorney's fees. If Respondent felt that the Garys were also truly his clients he could have placed a lien against these funds.

While it is undisputed that Respondent ably represented his client in a complex divorce action this is no more than can be expected of all lawyers irregardless of the nature of the representation undertaken. Such action is therefore no excuse or mitigation for misconduct in connection with a lawyer's representation.

This Court has set forth certain criteria for determining the proper disciplinary sanctions to be imposed against attorneys. These are generally as follows: First, the judgment must be fair to society; second, the judgment must be fair to the respondent, being sufficient to punish and at the same time encourage reformation and rehabilitation; and third, the judgment must be severe enough to deter others from like violations. The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

In cases of similar misconduct as alleged against Respondent, this Court has held that a public reprimand was the appropriate disciplinary sanction. A public reprimand was ordered in The Florida Bar v. Bern, 433 So.2d 1209 (Fla. 1983), where an attorney refused to turn over funds to his client for several months and commingled the funds. In The Florida Bar v. Sterling, 380 So.2d 1295 (Fla. 1980), an attorney failing to deliver trust funds being held on a defaulted contract after having agreed to do so warranted a public reprimand. And most appropriately, in The Florida Bar

v. Fields, 482 So.2d 1354 (Fla. 1986), this Court held that the dereliction in failing to reach a fee agreement with clients before representing them and failing to communicate with clients concerning their concerns and questions on fees warranted a public reprimand.

Respondent's reliance on the recent case of The Florida Bar v. Doe, Supreme Court of Florida, Case No. 72,365 (September 28, 1989) for the entry of a private reprimand is inappropriate. The intention of Respondent was to take the Garys' $4,000.00 which deprived them of their property. In the instant matter, Respondent failed to try to negotiate any type of understanding with the Garys after the taking of the money. In no manner of speaking can Respondent's action be classified as unintentional so as to allow a finding that his actions were minor misconduct.

The Standards for Imposing Disciplinary Sanctions provide under Section 5.13 that a public reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves misrepresentation and adversely reflects on the lawyer's fitness to practice law.

A public reprimand is clearly the appropriate sanction in this matter in that it effectively meets the criteria of Pahules and is supported by comparable past case law.

CONCLUSION

From the facts of the case which show an intentional misrepresentation and taking by the Respondent, it is clear that the appropriate discipline should be at least a public reprimand.

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 744 753, 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 13th day of December 1989.

JAMES N. WATSON, JR.