IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

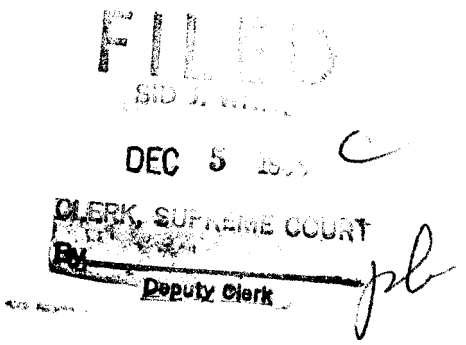
Complainant,

v.

ANTHONY L. BAJOCZKY,

Respondent.

Case No. 73,377



RESPONDENT'S BRIEF ON DISCIPLINE

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PRELIMINARY STATEMENT

The purpose of this Brief is to argue that the appropriate discipline, should misconduct be found, for Respondent's conduct is a private reprimand. Respondent has captioned his argument as to discipline Point III to maintain consistency with the prior briefs submitted in this case.

Respondent notes that in his prior briefs he has referred to the client variously as Janet Williams or as Janet **Cox**. Between the time that the complaint was filed and the final hearing in this cause, Janet **Cox** remarried and became Janet Williams. Respondent will refer to the Complainant as Ms. **Cox** throughout this Brief.

SUMMARY OF ARGUMENT

Respondent argues that he is guilty of no misconduct and that these charges should be dismissed. However, should the Court find that Respondent engaged in misconduct, the appropriate discipline is a private reprimand.

Respondent and his firm did a fine job of representing Janet Cox in an exceedingly complex dissolution of marriage. The Cox divorce involved not only the dissolution of the marriage and the problems attendant to the parties' children, including custody, visitation, and child support. It also included the division of five businesses in three cities, real estate (some of which was in Jacksonville) in addition to the marital home, a partition and bankruptcy action, problems with the IRS and Insurance Commissioner, and even potential criminal charges.

Respondent's firm expended 195 1/2 hours on the Cox dissolution over a period beginning April 14, 1986 and ending at final hearing on December 19, 1986. Thereafter, the firm expended numerous hours on uncompensated efforts on behalf of Ms. Cox and her parents, Mr. and Mrs. Gary.

Respondent's excellent work on Ms. Cox's behalf, coupled with the fact that he discounted his final bill to her by more than $4,600 because it exceeded his original estimate to her, constitutes substantial mitigation in this matter.

It is clear that Respondent and his associate, Patricia Fournier, thought they had a firm arrangement with Mr. and

Mrs. Gary and Janet Cox to apply money received at final hearing towards Janet Cox's bill. This understanding was consistent with the past practices of the Garys to pay Ms. Cox's bills. If Respondent acted improperly, it was at most not having a firm arrangement with Mr. and Mrs. Gary and Janet Cox as to the manner in which the $4,000 would be applied. It certainly was not overt misconduct.

In light of Respondent's good faith and excellent representation of the Complainants, the sanction imposed should be one that encourages rehabilitation without exacting retributive penalty, i.e., a private reprimand.

ARGUMENT

POINT III

IF RESPONDENT IS FOUND TO HAVE COMMITTED MISCONDUCT, THE APPROPRIATE DISCIPLINE FOR HIS OFFENSE, IN LIGHT OF HIS SUPERLATIVE REPRESENTATION OF JANET COX, IS A PRIVATE REPRIMAND.

Respondent asks this Court to find him not guilty of any misconduct and to dismiss these proceedings. However, should this Court find that Respondent violated the Code of Professional Responsibility, he asks that the Referee's recommendation that he receive a public reprimand be rejected and that a private reprimand be imposed instead.

The determination of the appropriate discipline for misconduct is entirely within this Court's discretion. A referee's recommendation as to discipline does not come before this Court cloaked with a presumption of correctness. The Florida Bar v. McCain, 361 So.2d 700, 708 (Fla. 1978).

When considering the issue of misconduct, one cannot help but have a tendency to focus on the negative factors in a lawyer's representation of a client. In determining the appropriate disciplinary sanction to be imposed, however, Respondent submits that the focus should be equally directed towards the positive factors in the representation. In the case at bar, Respondent's firm's excellent representation of Janet Cox and her parents far outweighs the dispute over the entitlement to the $4,000 fee.

Respondent's firm spent in excess of **195 1/2** hours on **Ms.** Cox's divorce. Bar Ex. 6. That is almost five full weeks of lawyer time expended on a case between April 14, **1986,** the initial date of the representation, TR 133, and the December **19, 1986** final judgment entered in the case. Bar Ex. **4.**

The 195 1/2 hours does not include the time spend on Ms. Cox's post-dissolution of marriage problems, R.Ex. 1 and **2,** and on the six to twelve discussions that the firm's associate, Al Penson, had with Janet Cox and her mother regarding Ms. Cox's contemplated bankruptcy. TR ***88.***

There is no doubt that the Cox dissolution of marriage warranted the time spent by the firm. The parties' divorce included a custody fight, visitation, and child support. TR **97.** Those issues alone can necessitate great quantities of lawyer time. But, the Cox dissolution of marriage also involved the division of three funeral homes in three different cities, a limousine service, a florist business, and the marital home and other real estate. TR **96, 97,** 131, **132.**

To compound the complexity of the Cox dissolution, Respondent's firm had to deal with the bankruptcy of the business, a partition suit filed by the husband, IRS actions concerning the failure to pay custodial taxes, and problems with the Insurance Commissioner regarding the parties' failure to forward premiums pre-paid for funeral services to the appropriate entity. TR **132-135.**

While Mr. and Mrs. Gary, Janet Cox's parents, claimed no attorney/client relationship with Respondent, it is beyond dispute that Respondent spoke to the IRS on their behalf regarding the $9,900 lien placed against their home for the failure of their daughter and son-in-law to pay custodial taxes. TR 147.

Respondent did a good job representing Janet Cox. He got her out from under a debt of hundreds of thousands of dollars (TR 140) and obtained $20,000 plus three years of interest payments at $106 per month for the benefit of her parents. It was from this corpus that Respondent's $4,000 fee was obtained. As explained in Respondent's Exhibit 6 and by Respondent's testimony, TR 140-142, Janet's $20,000 equity, which was also claimed by her parents as a result of their labors and loans to the business, was saved from possible IRS levy or forfeiture in bankruptcy by having the money paid directly to her parents. Had the $20,000 been awarded to Janet, it is possible the IRS could have levied upon it or, had she declared bankrupcty, the money could have been either taken as part of her estate or, had it been delivered to her parents, challenged as a preferential transfer. All of these problems were avoided by Respondent's ingenious representation.

The paperwork involved in Respondent's representation was voluminous. As he testified to the Referee, it involved

twenty-five sub-files and filled an entire banker's box. TR 154, 155.

It is obvious that Janet Cox was not dissatisfied with Respondent's services after the final judgment on December 19, 1986 and continuing for several months thereafter. As indicated by the testimony and Respondent's Exhibits 1 and 2, there were numerous telephone conversations between Ms. Cox and the firm's lawyers. TR 106, 151. It is equally undisputed that Respondent was communicating with Ms. Cox, too. Even Ms. Cox's mother had to admit that Respondent called Mrs. Gary seeking Ms. Cox. TR 148. In fact, during that telephone conversation, Respondent asked Mrs. Gary if she was receiving the interest payments that Kemuel was supposed to be paying. Curiously, Ms. Gary never complained about Respondent's failure to forward the $4,000 to the Garys. TR 46, 47.

Respondent asks this Court to keep in mind the superb nature of his representation when determining the discipline to be imposed. Do not let the single facet of fees well earned detract from the overall quality of the representation.

Respondent was not charged with violation of trust accounting rules or with charging a clearly excessive fee. Clearly, during Respondent's representation he received funds in trust for Janet Cox and properly disbursed them. Bar Ex. 6 (page 2 of the January 28, 1987 statement attached to Respondent's letter of that same date). In Respondent's final

accounting, he specifically notes receiving $2,289.85 from the sale of the parties' house in Jacksonville and $458.35 received from the Old Stone Credit Corporation, a sum of $2,748.20. He paid that sum to the Funeral Services, Inc. for payment of the parties' pre-paid funeral services.

Likewise, there can be no doubt that Respondent did not charge a clearly excessive fee. Respondent's new matter report (R.Ex. 3) as confirmed by his June 3, 1986 letter to Ms. Cox (Bar Ex. 2) set forth in advance his contemplated fees for representing Ms. Cox in her divorce. The case was to be handled at an hourly rate of $85 and Respondent estimated that the total fee would be "a maximum of $10,000 - $12,000, possibly more, depending upon the complexities of your cases, the extent and necessity of trial preparation and trial.''

Despite Respondent's qualifier that his fee might "possibly'' exceed $12,000, in his final accounting on January 28, 1987, Respondent discounted his bill by $4,617.50 because that sum exceeded the $12,000 upper limit on his fee. Bar Ex. 6.

Respondent did not have to discount the firm's fees by $4,600. He chose to do so. If there is any doubt about Respondent's good faith in this action, it is removed by his discount of the fees.

Respondent's discounting of his fees is certainly a major factor showing good faith. But, it is not the only one. His firm's continuation of the representation long after the

initial $6,000 was used up, and without a demand of more fees, shows a lawyer acting in accord with the highest precepts of our profession. He did not dump Janet Cox as a client when her initial $6,000 retainer was used up. He continued to represent her even when they got to a good stopping point--the obtaining of a judgment dissolving the marriage on August 18, 1986. TR 138.

Respondent and Ms. Fournier testified that it was understood all along that the $4,000 received from Kemuel at final hearing would be applied toward the firm's fees. TR 100, 101, 141. Obviously, the Complainants denied those statements. If, in fact, there was no such agreement, how was Janet Cox going to pay Respondent's fees? It is undisputed that $5,400 of the first $6,000 in fees paid to Respondent came from Mr. and Mrs. Gary. Where was the rest of the money to come from?

Janet Cox never uttered one word during final hearing about her intention to pay Respondent any more fees. While she denied the arrangement to transfer the $4,000 to Respondent's firm, she offered no alternative form of payment. Was she expecting the rest of the representation to be for free? Respondent submits that was not the case.

Ms. Cox's failure to testify to an alternative arrangement to pay fees to the firm becomes even more curious when one notes her conduct after the December 19, 1986 hearing. Despite the fact that she was allegedly outraged

over the transfer of the $4,000, she continued to utilize the firm's services. She called in messages regarding problems with Kemuel, R.Ex. 1 and 2, and she consulted with Al Penson upwards of a dozen times regarding her bankruptcy. TR 88. If, in fact, Ms. Cox did not intend the $4,000 to go to the firm, then she had no arrangement with the firm for payment of fees at all. If such was the case, it is obvious that Ms. Cox was taking advantage of her lawyers.

Just as clients have a right to expect conscientious representation by their lawyers, lawyers have the right to expect conscietious payment of their fees by their clients. It is a two-way street. There is no law that says otherwise.

How does the firm get paid if the $4,000 doesn't go to Respondent and Ms. Fournier? While the record is silent on the matter, except for the testimony of Respondent and Ms. Fournier, one cannot help but speculate that the answer is simple. The firm does not get paid.

The relationship between Respondent and his client is an important factor this Court should consider in determining discipline. Of course, the power to render the ultimate judgment in any disciplinary proceeding is the exclusive province of this Court. The Florida Bar v. Rubin, 362 So.2d 12, 16 (Fla. 1978). In Rubin, the Court stated that

> The exercise of that power should achieve a result which, in light of the circumstances of each case, will best protect the interests of the public, maintain the integrity of the Bar, and insure fairness to the accused lawyer.

The purpose of a discipline is not to exact retribution. Rather, its objective is "to correct the wayward tendency in the accused lawyer" while encouraging rehabilitation. **The Florida Bar v. Ruskin**, 126 So.2d 142, 144 (Fla. 1961).

In the Florida Standards for Imposing Lawyer Sanctions, various categories of misconduct are set forth and then broken down into sanctions based on the gravity of the lawyer's misconduct. Respondent submits that his misconduct falls under the category of lack of candor, Rule 4.6. Rule 4.64 of that paragraph states:

> Private reprimand is appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

Respondent submits that Rule 4.64 is the appropriate paragraph to cover his offense. Respondent and Ms. Fournier both believed that they had a firm arrangement with the Complainants to apply the $4,000 obtained on the day of final judgment towards their outstanding legal fees. If they were wrong, their omission was a failure to have a firm, unambiguous arrangement with their clients. Even the Referee in her ruling from the bench indicated such an omission. She stated that "it was incumbent upon [Respondent] to have a clear understanding with not just Mrs. Gary but Mr. Gary as to the use of the monies." TR 201.

The standards, under Rule 9.32, also set out mitigating factors to be considered in determining a discipline. Because Respondent was not granted a determination hearing at final

hearing, he presented no evidence as to his good character or to his excellent reputation for honesty and ability in the community. However, it was conceded by the Bar that Respondent had no prior disciplinary record (TR 189), a factor in mitigation pursuant to Rule 9.32(a). As an additional mitigating factor, Respondent submits that he had no dishonest or selfish motive in the case.

Clearly, the argument can be made that Respondent's obtaining the $4,000 involved a dishonest or selfish motive. However, Respondent and Ms. Fournier both testified that they believed the $4,000 was to go to them as payment towards an incredibly large bill. TR 100, 101, 141. Had Respondent not received the $4,000 from the Garys, he certainly could have gone after Janet Cox €or it. And, had he not been acting in good faith, he would not have discounted $4,600 from the firm's bill.

If collection of fees was Respondent's sole reason for representing Ms. Cox, he certainly would not have engineered a means of payment that resulted in Kemuel's deliverying funds directly to the Garys. Respondent would have set up the money in such a way that it went through Janet Cox's hands so that Respondent could have either collected it from her or put a lien upon it. However, Respondent protected her equity and benefited her parents by having Kemuel's payments delivered to the Garys. By so doing, Respondent precluded a suit against

Janet Cox or the imposition of any sort of lien on Kemuel's payments.

Respondent clearly, throughout this litigation, acted with Janet Cox's best interests in mind. The firm diligently represented her. It continued to represent her after the dissolution of marriage. They did not try to milk her for fees and continued to allow associate Penson to discuss bankruptcy with her long after the firm's final bill was submitted (and not paid in full). Respondent's omission was simple: he did not reduce every aspect of his fee arrangement with Ms. Cox to writing.

Respondent did, however, in the early stages of the representation, clearly set forth his fee arrangement with Ms. Gary. Bar Ex. 2. In that June 3, 1986 letter, written less than two months after the representation commenced, Respondent set forth his hourly rate of $85 and estimated that his maximum fee would be about $12,000. However, he left himself an escape clause and said that it might be more. Respondent's letter is consistent with the notes he made during his initial interview with Ms. Cox. R.Ex. 3.

Notwithstanding Respondent's escape clause set forth in the June 3rd letter, he chopped off his fees at the $12,000 level. Such acts are not consistent with a lawyer who is deperately trying to exact money from clients in any manner that he can.

If Respondent engaged in wrongdoing, it was of a **de minimis** nature. For such offenses, a private reprimand is appropriate. After all, the purpose of a private reprimand is to rehabilitate, not to punish. In Re: The Florida Bar;, 434 So.2d 883, 884 (Fla. 1983).

By their very nature, it is difficult to cite to private reprimands as support for a disciplinary sanction. Generally, they are unreported. The Florida Bar v. Doe, Supreme Court of Florida, Case No. 72,365 (September 28, 1989), mentioned earlier, cites one example where this Court ruled that a public discipline was not appropriate for minor misconduct. In **Doe**, a lawyer filed a lien against a former client based on an "onerous contract." **Id.**, p. 4. However, because the Court felt that Respondent's actions did not involve an intentional violation of any rules, it reduced the discipline from a public to a private reprimand.

Respondent submits that he intentionally violated no rules in the case at bar. His misconduct was minor.

In The Florida Bar v. G.B.T., 399 So.2d 357 (Fla. 1981), this Court rejected a six-month suspension recommended by a referee and imposed, instead, a private reprimand for neglect of a legal matter. In that case, the Court specifically referred to Respondent's prior clean record. Id., p. 358.

Respondent's case is somewhat analogous to that in **The** Florida Bar v. W.H.P., 384 So.2d 28 (Fla. 1980). There, a lawyer received a private reprimand for charging a Legal Aid

client a fee without securing a waiver from the Legal Aid Society. While there is no doubt that the fees collected were well-earned and reasonable, the lawyer's method of obtaining the fee was found to be improper. Accordingly, he received a private reprimand. Similarly, Respondent's firm's fees are reasonable and well-earned. If the Court feels his method of collecting the fee was improper, he should get, at most, a private reprimand.

In The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986), a lawyer received a public reprimand after being found guilty of three counts of misconduct. His misconduct surrounded his propensity to sue clients for fees without first trying to reach an amicable settlement with them. In one count, he charged a clearly excessive fee. The lawyer also charged a usurious interest rate in tabulating the amount owed to him. Mr. Fields argued that he should have only received a private reprimand for his misconduct. The Court rejected his argument with the following reason:

> It is clear from the record that Respondent has been derelict in failing to reach fee agreements with his clients before representing them, in failing to communicate with his clients concerning their legitimate concerns and questions on fees, and in failing to properly supervise non-lawyer employees. Id., p. 1359.

Three justices dissented from the Court's holding in Fields. They would have ordered a private reprimand for Respondent's

> poor business judgment and inadquate supervision over the business aspect of Respondent's practice. Id., p. 1359.

Respondent's misconduct surrounded a single incident. It was not a course of conduct as was Mr. Fields'. His fees were fair and his representation was superlative. His omission involved the failure to reach a clear understanding with his clients.

Respondent submits to this Court that he had no intention of violating the Code of Professional Responsibility. These disciplinary proceedings have been an education for Respondent. If the purpose of disciplinary proceedings is to protect the public primarily, and to rehabilitate the lawyer secondarily, a private reprimand will accomplish those purposes. The public needs no protection from the Respondent. He did an excellent job for his client, obtained a just result, and charged an exceedingly fair fee. Respondent did not abandon his client when funding dried up. He did not cease the representation upon the rendition of a final judgment. In essense, he tried to help his client. He expected no more than fair compensation.

If, in fact, this Court finds there was a misunderstanding between Respondent and his client, it can rest assured that no such offense will happen again.

Respondent tried to be above board and open in fee arrangements with his client, as reflected by his letters of June 3, 1986 (Bar Ex. 2, 3) and his final accounting on January 28, 1987, Bar Ex. 6. It will be an easy step for Respondent to make sure that interim fee arrangements are reduced to writing in the future. Whether this Court disciplines Respondent or not, such procedure, this Court can rest assured, will be followed.

A private reprimand will accomplish this Court's goals. A public reprimand is nothing more than the imposition of a penalty. Such is not the purpose of disciplinary proceedings. The Florida Bar v. Ruskin, 126 So.2d 142, 144 (Fla. 1961).

CONCLUSION

Should this Court find that Respondent engaged in misconduct, it should impose, at most, a private reprimand.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has bee mailed to James N. Watson, Jr., Bar Counsel, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 5th day of December, 1989.

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