IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ANTHONY L. BAJOCZKY,

Respondent.
_____/

Case No. 73,377

INITIAL BRIEF OF RESPONDENT

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SYMBOLS AND REFERENCES

The Respondent, Appellant in these proceedings, shall be referred to as Respondent or Mr. Bajoczky. The Florida Bar, Appellee, will be referred to by its full title or as "the Bar."

References to pages in the transcript of final hearing will be indicated by T-. The Bar's exhibits at final hearing will be designated by Bar Ex. followed by the appropriate number and Respondent's exhibits will be designated R.Ex. with the appropriate number.

STATEMENT OF THE CASE AND FACTS

Respondent was charged exclusively with violating Disciplinary Rule 1-102(A)(4) which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. He was not charged with violating any ethical precepts relating to fees or to the handling of trust property.

Respondent was charged with violating a provision of the Code of Professional Responsibility, which was last effective in this state on December 31, 1986. Therefore, all alleged misconduct occurred on or prior to that date.

The Bar's formal complaint was filed in this Court and in due course the Honorable Dedee S. Costello was appointed Referee to preside over these proceedings. Final hearing was held on May 9, 1989.

By report dated June 19, 1989, the Referee issued her final report finding Respondent guilty of violating Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility. She recommended that he receive a public reprimand and that he be assessed costs in the amount of $1,680. Respondent seeks review of the Referee's report.

On February 4, 1986, Janet Williams (then Janet Gary Cox) met with Respondent to discuss his representation of her in divorce proceedings from Mrs. Williams' then-husband, Kemuel Cox. T-128, R.Ex. 3. At that meeting, and as reflected on his new matter report, R.Ex. 3, Respondent advised Mrs. Williams that his fee for representing her would be $85 an

hour and that he estimated the maximum fee would be $10,000 to $12,000, possibly more. He further estimated costs to be $4,000 to $6,000 and requested a $3,000 retainer.

Subsequent to that meeting, Respondent met with Mrs. Williams' mother, Evelyn Gary, to discuss the case. T-131.

On April 14, 1986, Mrs. Williams and Mrs. Gary met with Respondent and retained him to represent Mrs. Williams in the divorce. A retainer of $3,000 was paid to Respondent.

The $3,000 for Respondent's initial fee was obtained by Mrs. Gary borrowing $3,000 from her friend, Mrs. C. B. Williams. T-36, 37. In fact, a cashier's check from Mr. and Mrs. C. B. Williams to Evelyn Gary was endorsed over to Respondent as payment for the initial retainer. Bar Ex. 1.

On June 3, 1986, Respondent wrote Mrs. Williams and discussed her case. He also requested an additional $2,000 to satisfy an outstanding balance of fees. Bar Ex. 2. Accompanying that letter was statement indicating past services rendered and showing a balance due. Bar Ex. 3.

The Cox dissolution of marriage was unusually complex. In addition to the typical disputes involving custody, visitation, and child support (the parties had two young children), the dissolution involved substantial business properties and huge indebtedness. The parties owned and operated three funeral homes, a limousine service, and a florist business. They also owned a residence and a vacant lot. They were facing bankruptcy, had problems with the IRS

regarding custodial taxes, and owed substantial sums to Funeral Services, Inc. (FSI) for pre-paid insurance funds collected but never paid to FSI. Coupled with these problems was the fact that the Department of Insurance was threatening to revoke the funeral license for failure to pay the pre-paid funds to FSI. There was also the possibility of criminal charges being brought for issuing bad checks, (Bar Ex. 2, p. 2) and, finally, Kemuel had filed a partition suit for the parties' jointly-owned Property. T-6, 7, 82, 96, 97, 130, 135, 140; Bar Ex. 4.

In addition to the problems surrounding the business, Mr. and Mrs. Gary, Mrs. Williams' parents, had had an IRS lien in the amount of $9,900 place against their house because the Cox funeral business had paid custodial taxes that were withheld from employees' pay checks. T-40. Respondent and his associate, Patricia B. Fournier, spoke to the IRS about this problem on numerous occasions. T-146.

During his representation of Mrs. Williams, Respondent on several occasions received large sums of money in trust but immediately disbursed those funds to FSI and the IRS to keep those agencies at bay. T-147.

On June 18, 1986, Mrs. Williams and Mrs. Gary paid Respondent $3,000 towards legal fees. That sum consisted of a $600 check signed over to Respondent that was made out to Mrs. Gary from a friend, James E. Fralin, and $2,400 cash paid to Respondent on Mrs. Williams' behalf by Mrs. Gary. R.Ex. 4.

Mrs. Gary had borrowed that sum from her sister to help pay Mrs. Williams' bills. 7-38.

Mrs. Gary had also borrowed money to help her daughter and Kemuel start up their funeral business and she took care of them while they were getting started. T-18.

On August 18, 1986, the marriage of the parties was dissolved. However, jurisdiction was retained to rule on all other matters. On December 19, 1986, after extensive negotiations, the parties appeared before the Court with a stipulated settlement. That settlement was encompassed in the supplemental judgment handed down by the Court on that date. Bar Ex. 4.

As part of the negotiated settlement, it was agreed that Kemuel Cox would execute a promissory note and second mortgage in favor of Mr. and Mrs. Gary in the amount of $16,000 as satisfaction for his former in-laws' equity in the building. In addition, $4,000 was to be paid to the Garys' benefit at hearing. The $16,000 was to balloon after three years. In the interim, $106.66 per month interest payments were to be made payable to Mr. and Mrs. Gary.

The $4,000 check, drawn on Mr. Cox's lawyer's trust account (Bar Ex. 5), was made payable to Allen and Evelyn Gary and to Respondent. The various documents that needed to be signed, including quit claim deeds, mortgages, and promissory notes, were signed in the hallway outside the Judge's chambers. There is some dispute whether Mr. and Mrs. Gary

endorsed the $4,000 check in the hallway or later that afternoon in Mrs. Fournier's office. Regardless, they endorsed it that day. Mr. Gary endorsed the check first and then his wife did. Bar Ex. 5.

After the hearing, Mr. and Mrs. Gary and Mrs. Williams accompanied Ms. Fournier to Ms. Fournier's office. There they waited for one-half to one hour for Respondent to return. However, due to the press of other business, Respondent was not able to come back to the office. Janet Williams and Mr. and Mrs. Gary testified that Ms. Fournier instructed them to endorse the check and to leave it and that after Mr. Bajoczky returned, he would endorse it and forward the $4,000 to them.

On January 28, 1987, Respondent wrote Mrs. Williams in care of her parents and summarized the dissolution proceedings. Bar Ex. 6.

In his January 28, 1987 letter, Respondent pointed out that his firm had spent 195 1/2 hours on the Cox dissolution for a total of $16,617.50 in fees plus $292.10 in costs for a balance of $16,909.60. However, because the Respondent had estimated the initial fee would not exceed $12,000, he discounted his bill by $4,617.50. He then credited the account with the $4,000 received on December 19, 1986.

There were numerous contacts between Janet Williams and Mr. and Mrs. Gary with Respondent and Ms. Fournier after the dissolution was finalized. R.Ex. 1 and 2. There is a dispute between the witnesses as to whether the $4,000 was ever

mentioned in any of these communications. There is not dispute, however, that Respondent spoke to Mrs. Gary on at least one occasion several months after the dissolution and that she did not mention anything about the $4,000. T-47. It is also undisputed that Mrs. Williams and her mother met with another of Respondent's associates, Al Penson, on several occasions and talked to him numerous other times in January, February, and March 1987 to discuss Mrs. Williams' filing for bankruptcy. Mr. Penson testified (he is no longer in Respondent's firm) that they never mentioned anything to him about the bill.

Mrs. Gary testified that several months after the final hearing in her case, Mrs. C. B. Williams called and pointed out that the local Credit Bureau report listed the Garys as having received a $20,000 judgment. T-47.

Mrs. Williams filed a grievance with The Florida Bar, together with her parents, in late April or early May 1987.

SUMMARY OF ARGUMENT

There was no testimony before the Referee during the Bar's presentation of evidence that Respondent misrepresented anything to Mrs. Williams or to her parents. The parties all agreed that they accompanied Ms. Fournier to the latter's office and waited for Mr. Bajoczky. Nobody testified that Respondent told Mrs. Williams or Mr. or Mrs. Gary that he would forward the $4,000 received from Kemuel to them.

Respondent was not accused of charging a clearly excessively fee. In fact, he laudibly discounted his fee to comport with his original estimate (although even there he had language to the effect that the $12,000 cap could be exceeded), and he was charged with no violations of the Bar's trust accounting provisions. He was charged solely with unspecified conduct involving dishonesty, fraud, deceit, or misrepresentation. There was no showing of any misrepresentation, intentional or otherwise, in the Bar's case and, therefore, it should have been dismissed.

The Bar has the burden of proving by clear and convincing evidence that misconduct occurred. In the case at Bar, the evidence did not show, by any stretch of the imagination, that Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. While the Referee found that Respondent violated Disciplinary Rule 1-102(A)(4), her findings point to no instance in which Respondent engaged in conduct involving a violation of that rule.

Giving Mrs. Williams and Mr. and Mrs. Gary the benefit of doubt, this case involved at most a misunderstanding as to where the $4,000 was going. Not giving them the benefit of doubt, after Mrs. C. B. Williams approached them and asked them about the $20,000 judgment that she read about in the Credit Bureau report, they then decided to file a grievance against Respondent to reclaim the money they had agreed to pay to him. In both scenarios, Respondent is guilty of no misconduct.

ARGUMENT

POINT I

THE BAR PRESENTED NO EVIDENCE DURING ITS CASE INDICATING THAT RESPONDENT ENGAGED IN ANY CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION AND, THEREFORE, THE BAR'S CASE SHOULD HAVE BEEN DISMISSED UPON MOTION OF THE RESPONDENT AFTER THE BAR'S LAST WITNESS TESTIFIED.

Respondent was accused of violating but one disciplinary rule, DR 1-102(A)(4) of the Code of Professional Responsibility. He was not accused of violating any of the Bar's rules relating to excessive fees or with violating any of the Bar's trust accounting provisions. The latter is extremely significant because, if in fact Respondent improperly received the $4,000 that is the crux of this dispute on behalf of the Garys, his failure to disburse it would have been a violation of the Bar's trust accounting regulations. However, the Grievance Committee did not find that Respondent violated those rules and, therefore, it has to be assumed that he did not receive those funds in trust.

The Code of Professional Responsibility was replaced by the current Rules Regulating The Florida Bar on January 1, 1987. The Florida Bar Re: Rules Regulating The Florida Bar. 494 So.2d 977 (Fla. 1986). Because Respondent was accused of no violations involving the rules regulating the Bar, he did not engage in any misconduct subsequent to December 31, 1986.

At the end of the Bar's case in chief, Respondent moved

for summary judgment (The more appropriate motion would have been for dismissal of the case. However, Bar Counsel did not object to the phraseology of the motion and the Judge ruled on the merits of the motion, not on the manner in which it was tendered). The basis for Respondent's motion was the Bar's failure to elicit any testimony indicating any dishonesty, fraud, deceit, or misrepresentation by Respondent.

The gravamen of the complaint against Respondent was, succinctly put, that Mrs. Williams and her parents thought the $4,000 received from Kemuel Cox was to go directly to Mrs. Williams' parents. Respondent and Ms. Fournier testified that it was agreed all along that the $4,000 would go towards Respondent's large legal bills. However, the complainants never testified that Respondent in any way misrepresented to them what would happen to the check.

Mrs. Williams' testimony was to the effect that after the hearing on December 19, 1986, they all went to Ms. Fournier's office, Ms. Fournier told them to endorse the check, and that when Respondent returned he would sign it and forward the check to Mr. and Mrs. Gary. T-21 - 24.

Mrs. Gary testified that Ms. Fournier asked them to return to Ms. Fournier's office, that they signed the check there, and that Respondent was not involved. T-43. In fact, Mrs. Gary testified that when she spoke to Respondent about Janet's case several months later (Respondent called seeking

Mrs. Williams), she never asked him about the $4,000. T-46, 47.

Mr. Gary testified that "they" told him that he would be getting the $4,000 check. He never identified "they." T-56-58.

The $4,000, Bar Ex. 5, was endorsed first by Allen Gary and then by his wife, Evelyn W. Gary. Respondent signed it last. The complainants agree that Respondent was not present when they endorsed the check. T-22, 44, 61.

There is nothing in the record indicating any deception by Respondent. No testimony whatsoever.

The Bar has the burden of proving by "clear and convincing evidence" that misconduct occurred. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970) at 596. That burden is stiffer than that required in civil proceedings but falls short of that required in criminal case. Id., 597.

Respondent submits that there was no testimony indicating deception, let alone sufficient testimony presented during the Bar's case to meet the clear and convincing burden. What statements did Respondent make that were dishonest? What statements did he make that were deceitful or fraudulent? What misrepresentations did he make? None of those questions are answered in the testimony or in the Referee's finding of fact.

The Referee, in her narrative summary of the case, found that "the Garys were of the belief" that the $4,000 was to go

to them and that there was no agreement that they would be responsible for "the total fees" charged to their daughter. Regardless of the Garys' belief, there was no testimony indicating that Respondent made any misrepresentations to them that fostered this belief.

Giving Mrs. Williams and the Garys the benefit of doubt, there was a misunderstanding between the individuals involved. Mrs. Gary had borrowed $3,000 to pay Janet's initial retainer. She obtained the money by receiving a cashier's check from Mr. and Mrs. C. B. Williams and she endorsed it over to Respondent. The second $3,000 payment made to Respondent consisted of $600 delivered in a check to Janet from Mr. Fralin, which Janet endorsed over to Respondent, and $2,400 in cash borrowed by Mrs. Gary. Respondent testified that, in similar manner to his first two payments for fees, the $4,000 check was to be endorsed over to him by the Garys for their daughter's benefit. This was consistent with the complainants' prior actions of endorsing checks over to Respondent and with Mrs. Gary's borrowing $5,400 to pay Respondent's fees.

Misunderstandings between lawyers and their clients about fees do not automatically become grounds for discipline. In fact, there were no such charges by the Grievance Committee in this case. If Respondent was, in fact, to have received the $4,000 for the Garys, they were trust proceeds, and his failure to disburse them would have been considered a

violation of the Bar's trust accounting rules. However, the Grievance Committee found no such violation. In fact, the funds were not trust funds. They were earned fees.

All of the statements made to the complainants after the December 19, 1986 hearing were made to them by Ms. Fournier. Respondent is not stating that Ms. Fournier made any misrepresentations -- in fact, none were made. However, if there was any misrepresentation, it was made at that time. And it was not made by Respondent.

Absent evidence pointing to deceptive statements made by Respondent after the Bar had presented its case, the proceedings should have been dismissed.

POINT II

THERE WAS NO SUBSTANTIAL, COMPETENT EVIDENCE PRESENTED SHOWING RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION.

Respondent has been accused of engaging in conduct involving dishonest, fraud, deceit, or misrepresentation in violation of Disciplinary Rule 1-102(A)(4). To show misconduct, the Bar must prove by clear and convincing evidence that misconduct has occurred. Rayman, supra, 596. Such a degree of proof is higher than that required in civil actions, yet falls short of the proof required to sustain a criminal conviction. Id,, 597. Respondent submits that the Bar completely and utterly failed in its attempt to meet such a burden.

Respondent is not unmindful of the fact that this Court has held that a Referee's findings of fact will not be disturbed unless clearly erroneous or lacking in evidentiary support. Jhe Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). Fortunately, Respondent does not have to challenge any of the salient facts found by the Referee. On page five of her report, the Referee found that "the Garys were of the belief" that the $4,000 was to go to them. There is no finding who gave them this belief or whether it was predicated in fact. The next paragraph states that the Garys had not entered into an agreement to pay "the total fees charged to Janet Gary (Williams)." Respondent does not

dispute that assertion on this appeal. The balance due that was claimed in his January 28, 1987 letter, Bar Ex. 6, was Janet Williams' to pay. Finally, on page six of her report, the Referee found that the Garys testified that they were told that when Respondent returned he would endorse the check over to the Garys. Ms. Fournier, not Respondent, told the Garys that.

Respondent takes issue with the Referee's conclusion that he violated Disciplinary Rule 1-102(A)(4). That conclusion viewed in a different light than her findings of fact. The Florida Bar in Re: Inglis, 471 So.2d 38 (Fla. 1985) at 41.

Simply put, it is Respondent's position that he had the authority to apply the $4,000 received by the Garys towards Mrs. Williams' fees or, at least, had the good faith belief that he had such authority. The complainants' past actions support his belief.

Mrs. Gary was, laudibly, a mother who believed in helping her daughter far beyond that which most of society requires of parents. She borrowed money to set up Janet and Kemuel in their funeral business and supported them during the early stages of their commercial endeavor. T-18, 48. She was an officer of the business and, in fact, in such capacity found herself facing a $9,900 lien from the IRS for the funeral home's failure to pay withholding and Social Security taxes. T-48.

When Janet Williams needed $3,000 to retain Respondent in

her dissolution of marriage proceedings, Mrs. Gary borrowed $3,000 from Mrs. C. B. Williams. She received a cashier's check from Mrs. C. B. Williams and endorsed it directly over to Respondent as payment of her daughter's initial retainer. Bar Ex. 1.

When Respondent on June 3, 1987, requested an additional $2,000 to defray legal fees and expenses, Bar Ex. 2 and 3, Mrs. Gary once again came through for her daughter. Three thousand dollars was paid to Respondent on June 14th. Of that sum, $2,400 was cash paid by Mrs. Gary. She had borrowed that money from her sister in Sanford. The remaining $600 was a check made payable to Janet Cox (Williams) which she endorsed over to Respondent. R.Ex. 4.

Respondent's only two payments prior to final hearing, each in the amount of $3,000, consisted of $5,400 borrowed by Mrs. Gary and a $600 check paid to Ms. Williams that was signed over to Respondent.

Respondent is very responsible in discussing fees with his clients. The new matter report, Bar Ex. 3, reflected Respondent's initial discussion with Mrs. Williams when they met on February 4, 1986. In that report, it is stated that he would represent Mrs. Williams for $85 an hour and that the cap on her legal fees would be $12,000, possibly more. Respondent confirmed these figures is his first fee letter and statement to Mrs. Williams dated June 3, 1986. Bar Ex. 2 and 3. In that letter, Respondent described the firm's efforts and

requested an additional $2,000 towards fees. Three thousand dollars was paid on June 14, 1986.

The Cox dissolution proceedings were exceedingly complex. Ultimately, Respondent and his associate, Patricia Fournier, spent 195 1/2 hours on the case. It involved five businesses (three funeral homes in three cities and a limousine service and florist business), problems with the IRS, problems with the Department of Insurance regarding the funeral homes' failure to pay to FSI pre-paid insurance premiums, monumental debts, Kemuel's bankruptcy, and Kemuel's partition suits. It also had the normal custody, child support, and visitation problems. There were properties besides the businesses and the marital home that had to be divided and there was even a possible criminal charge regarding a bounced $1,000 check.

At the Bar final hearing, Respondent brought in his files on the Cox dissolution of marriage. It contained twenty-five sub-files and filled a banker's box.

As if his problems with the Cox dissolution of marriage were not enough, Respondent also tried to resolve the IRS lien that had been filed against Mrs. Gary's home by the IRS.

Throughout the proceedings, the threat of Mrs. Williams filing for personal bankruptcy permeated the proceedings. Al Penson, Respondent's former associate who now works for a different firm, was consulted on the bankruptcy early in the proceedings and, after the final judgment was obtained, met

with Janet and her mother to discuss the possibility of her so filing.

In addition to assisting her daughter financially, Mrs. Gary was very much a participant in Janet's dissolution of marriage. She met alone with Respondent to discuss the dissolution proceedings, and to explore the possibility of Respondent representing her, in March, prior to Mrs. Williams retaining Respondent. She attended virtually every one of Janet's meetings with Respondent. T-140. Even after the dissolution of marriage was final and after Respondent allegedly improperly took the $4,000, Mrs. Gary was accompanying Janet to meet with Respondent's associate, Mr. Penson, to discuss Janet's bankruptcy.

For Mr. and Mrs. Gary and Janet Williams to attest that the Garys had no intention for the $4,000 received from Kemuel Cox to go towards Respondent's fees completely belies their entire past relationship with Respondent. It was the Garys that borrowed the money to set up the Cox funeral home; it was the Garys that borrowed $5,400 of the initial $6000 in fees paid to Respondent; it was the Garys that benefited from Respondent's efforts to keep the IRS from executing on a lien on the Garys' house; and, it was the Garys that got a $20,000 mortgage from Kemuel Cox. Mrs. Gary attended virtually every meeting with Respondent and Ms. Fournier to discuss the case.

Janet Williams was facing bankruptcy. It was estimated that the equity in the funeral home was approximately $40,000.

Respondent feared that if Kemuel signed that $20,000 directly over to Janet, that it could be seized in the, then, eminent bankruptcy proceedings. Likewise, any monies that Janet received that she paid to her parents, could also be attached as preferential payments under the bankruptcy laws.

Because the Garys had invested money and substantial amounts of time in operating the business, it was agreed that Kemuel would pay to them Janet's equity and, by so doing, would quite properly defeat any claims on the funds that might result from Janet's impending bankruptcy. Accordingly, Kemuel executed a promissory note and second mortgage on the business in favor of the Garys for $16,000, which was to balloon in three years. In the interim, he was to pay them $106.66 per month. The initial payment of $4,000 was, accordingly to the complainants, to go to Mr. and Mrs. Gary, enabling them to pay Mrs. C. B. Williams. According to Respondent and Ms. Fournier, the $4,000 was to go to Respondent to defray a huge deficit in legal fees.

It is interesting to note that according to the complainants, Respondent, who had been so meticulous and careful in discussing fees and securing advance payment in February and June, had made no mention of future fees as the case was winding down. Not one word was mentioned about arrangements to pay Respondent's fee. Was he going to forget it? Of course not. Was Janet going to pay him any fees after the divorce was final? It's doubtful.

To give the Garys the benefit of doubt, they thought they were going to get the **$4,000.** They never told the Referee who told them that they were going to receive the funds. To continue giving the complainants the benefit of doubt, Respondent at least thought he was to get the **$4,000** for fees.

Assuming the complainants testified truthfully, this case was, at worst, a misunderstanding between the parties relating to fees. Such misunderstandings are not grounds for disciplinary proceedings. In The Florida Bar V. Miller, Case No. **54,443** (March 15, 1979), a public but unpublished opinion, this Court threw out charges of charging a clearly excessive fee by a lawyer. The predicate for the finding was that the Referee only found that Ms. Miller's retainer was "excessive" and not "clearly excessive." Thus, the case was dismissed despite the fact that there was no clear fee arrangement between Ms. Miller and her client (she said the initial **$1,500** fee was non-refundable and he said it was not -- the Referee found for the complainant).

Reading between the lines, Miller involves a misunderstanding between a lawyer and a client. Such misunderstandings should not automatically be grounds for discipline.

If the Bar's position in this case in correct, i.e., that Respondent should have promptly delivered the **$4,000** to the Garys, aren't those funds trust funds? If the Bar's position is correct, the Grievance Committee would have found probable

cause for failing to disburse trust funds. But, the Grievance Committee did not find probable cause for any violation of the trust accounting rules. Absent such a finding, the Bar cannot argue that the funds were held in trust. If the funds were not held in trust, they must have been received as fees.

The complainants' actions on the day of the final hearing and during the four months following contradict their contention that they thought they were to immediately receive the $4,000. The most crucial contradiction is: Why did Allen and Evelyn Gary endorse the check made payable to them and and leave it with Respondent if they thought they were going to receive the money? They clearly knew about endorsing checks over to people, they endorsed C. B. Williams' check to Respondent. Yet, they endorsed the check and left.

But, more significant than their endorsing the check, is the complainants' continued contact with the law firm, requesting and receiving additional legal services, for several months after they were allegedly duped into giving up the $4,000 check.

Common sense dictates that if the complainants were upset over Respondent's failure to deliver to them $4,000, they would have been raising Cain about the money. Instead, as indicated by Mr. Penson's testimony and by R.Ex. 1 and 2, they are continuing to request and receive legal services from the firm with no mention of their complaint. For example, a telephone message left for Respondent dated December 23, 1986

from Janet Gary (Williams) stated as follows:

> Just wanted to let you know about conversation with her ex -- as you'll probably be hearing from his attorney soon. She's in Graceville and has the kids with her -- he supposed to have visitation with them tomorrow. He called and advised that SHE (sic) had to deliver two kids (sic) to him. She has to work tomorrow -- SO she told him that if he wanted his visitation -- HE (sic) had to come there and pick them up. He got mad said "She was supposed to get them to him" etc. -- Anyway -- he said he'd see her in Court. So -- if you so hear from someone; that's what it's all about. She cannot take off from her new job to deliver the kids; she has no problem with him having them-- she just cannot provide the transportation.
>
> If you need to call her in the morning -- she can be reached at (904) 263-6834.

There is no mention in that memo of any dissatisfaction about any check. Why not?

R.Ex. 2 consisted of seven telephone messages to lawyers in the firm from either Janet Cox Williams or her parents. Most of them were to Al Penson and pertained to his discussions with them for filing bankruptcy. The testimony before the Court was that these were all the telephone left. The only one of those message slips that had anything to do with a check was a January 22nd message slip for "Patty" (Ms. Fournier), not for Respondent, and contains the notation that the children were with Janet in case Kemuel called and it asked about the check. Ms. Fournier testified that his inquiry was about the 3106.66 interest check which would have been due three days before, i.e., January 19, 1989. The first check was due one month after the supplemental judgment was signed on December 19, 1986. A February 11th memo slip from

Janet's father to either Respondent or Ms. Fournier had the cryptic message "Kemuel is not sending child support."

Terri McIntyre, Respondent's receptionist pulled all the telephone message slips relating to the Cox divorce. They were submitted into evidence as Respondent's exhibits one and two. None mention a $4,000 check or evince any complaint.

finally, even Mrs. Gary testified that she spoke to Respondent several months after the dissolution of marriage and she made no mention of the $4,000 check. Respondent had called her looking for Janet. T-46, 47.

Respondent testified that the first time that he learned of the complainants' dissatisfaction over the handling of the $4,000 check was when he received the Bar's Complaint. T-156.

Mr. Penson, not the subject of the grievance and no longer affiliated with the firm, set up a file on January 7, 1987, on Janet Williams' bankruptcy. On that date he wrote to Mrs. Williams and requested an appointment to discuss the bankruptcy. There were numerous letters in the file relating to those proceedings. Mr. Penson also met with Mrs. Gary regarding the IRS. T-88. He estimated that during the period January 1 through April 6, 1987 he spoke to Mrs. Williams six to twelve times and to Mrs. Gary six to ten times. During those conversations, none of the complainants ever expressed any disenchantment with the manner in which the law firm had handled the fees in the divorce matter. T-88, 89.

Janet Williams and her parents were in frequent touch with the law firm after the final judgment was issued in the divorce. There is no written evidence whatsoever, and no testimony from the three lawyers involved, including one who is an impartial witness, that they ever expressed any disenchantment about the $4,000 fee. It beggars the imagination to believe that they would have been seeking and receiving extensive legal services from the firm if they felt like $4,000 had been taken from them.

The written documentation indicates communications about bankruptcy, visitation, child support, and other issues.

Ms. McIntyre, the receptionist, heard no complaints despite the fact that Mrs. Williams came by to pick up mail at the office. T-76.

Respondent suspects that the Garys became disenchanted with his handling of the $4,000 only after Mrs. C. B. Williams approached the Garys and inquired about the $20,000 judgment that they had been awarded in Kemuel's case. Mrs. Williams had learned about the judgment in the monthly Credit Bureau report that she received. Mrs. Gary testified that several months after the settlement Mrs. Williams approached about the judgment. The conversation took place in April, May, or June 1987. T-47, 48.

Respondent did everything right in his handling of the case except, unfortunately for him, he did not treat his clients as an adverse party in an arm's-length business

transaction. Specifically, he did not require that everything with his clients be reduced to written contract as he would with an adverse party. He did, however, specifically set forth his fee arrangement at his initial meeting with Mrs. Williams, confirmed by letter dated June 3, 1986 and, after the case was entirely over with, on January 28, 1987, gave a complete accounting of all services rendered. To that extent, he avoided the immediate problem in the Miller case.

Despite the fact that his firm had expended almost two hundred hours on the incredibly complex Cox dissolution of marriage, and despite the fact that he had benefited the Garys materially through his services, he discounted his bill by $4,617.00. He did not have to do that.

Respondent did a good job for his clients. He and his associate, Patricia Fournier, continued to work with them even after the marriage was completely dissolved. His other associate, Al Penson, discussed bankruptcy with them, wrote numerous letters, and expended time on their behalf. All services after December 19, 1986, were without charge.

The Bar would have this Court believe that Respondent saw a chance to grab $4,000 in fees without his client's permission. But Respondent had on several previous occasions received a "lot of money" for the benefit of Janet Williams and, rather than seizing the money for his fees, used it to keep the Department of Insurance and FSI, or the IRS, at bay. T-147.

If, in fact, Respondent duped the complainants, where is the evidence of it? Janet Cox Williams is college-educated--yet she never wrote a letter to the law firm complaining about the $4,000. She allegedly left a note, but it is nowhere to be found. She says she waited four months for the check, but she never wrote a letter inquiring about it? Her mother admittedly talked to Respondent, yet she never asked about it. The reason they weren't loudly complaining about the $4,000 in early 1987 was that they knew all along that it was properly being applied to Janet's fees. Her parents had subsidized Janet Williams throughout her business life and throughout her divorce. It was logical that the $4,000 that they received from Kemuel would also go towards his fees.

Not every misunderstanding between a lawyer and the client should be grounds for discipline. Just as was true in Miller, despite a Referee's belief to the contrary, this Court has to, at times, step in and say "Bar you have gone too far." Such is true here.

Although a referee's findings are treated with great deference, they must still survive close scrutiny before being approved. For example, in Rayman, at page 598, this Court said:

> While we cannot say that there was no evidence to support the referee's findings, we are constrained to the view that ... the evidence does establish the charges with that degree of certainty as should be present in order to justify a finding of guilt on charges as serious as those made against these respondents. (e.s.)

The Rayman Court then dismissed the Bar's case and went on to say on the same page that the Florida Supreme Court has:

> a continuing duty to require charges such as these to be supported by clear and convincing evidence where the charges have been denied by reputable members of the Bar.

When viewed with hindsight, it becomes obvious that Respondent should have entered into a written fee agreement with the complainants. However, this Court should follow the lead of the Court in The Florida Bar v. Farber, 214 So.2d 478 (Fla. 1968), where the Bar's case was dismissed with the observation that:

> Although in retrospect it may appear it would have been a wiser and safer course on the part of Respondent to have verified [the propriety of his contact] this failure of caution on the part of Respondent does not result in his being guilty of solicitation. We believe the Particular circumstances merit our giving the Respondent the benefit of any doubts as to whether he was guilty .... (e.s.)

Respondent did a marvelous job representing Mrs. Williams. He performed numerous hours of work and then discounted his fee by one-third. His firm then continued to assist Mrs. Williams and her parents in post-dissolution matters and in discussing bankruptcy.

Respondent should be given the benefit of doubt. This case should be dismissed.

CONCLUSION

The Bar failed to present sufficient evidence during its case in chief to prove Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. Therefore, the case should have been dismissed upon motion at the end of the Bar's presentation.

The Referee's conclusion that Respondent violated DR 1-102(A)(4) is wrong. The evidence presented before her did not meet the clear and convincing burden required of the Bar to discipline a lawyer.

These proceedings should be dismissed and the record in this case sealed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was mailed to JAMES N. WATSON, JR., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida *32399-2300,* on this 7th day of September, *1989.*

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