IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ANTHONY L. BAJOCZXY,

Respondent.
_____/

Case No. 73,377

RESPONDENT'S REPLY BRIEF

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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.

At the end of the Bar's case, even giving tne complaining witnesses the benefit of doubt, there was no evidence presented to the Referee showing Respondent, prior to January 1, 1987, engaged in any conduct involving dishonesty, fraud, deceit, or misrepresentation. (As pointed out in the initial brief, Respondent was only charged with violating provisions of the Code of Professional Responsibility. The Code was replaced by the Rules Regulating The Florida Bar effective January 1, 1987).

There was no statement presented to the Referee by Respondent that was not true.

The check that Respondent's firm applied towards fees was made payable to Mr. and Mrs. Gary and to Respondent. (Bar Ex. 5). He did not receive those funds in trust. (The grievance committee did not find probable cause for misuse of trust funds, although that option was available to them). The Garys endorsed the check and left it for the third payee, Respondent, to negotiate. (TR 43, 61).

If the Garys had been expecting the funds from that $4,000 check for themselves, they would not have endorsed it and left it.

All the witnesses agreed that Ms. Fournier, Respondent's associate (who was not charged with any impropriety), asked the Garys to endorse the check. (TR 22, 43, 58). Nobody said Respondent told then to endorse the check.

While Janet Cox testified that Respondent asked her to go to the office (TR 22), her mother and father contradicted her and said that Ms. Fournier asked them to return to the office. (TR 43, 61).

Everybody agrees that Respondent was not present when the check was endorsed (TR 22, 43, 61).

Ms. Fournier worked with Respondent throughout the case. Ms. Fournier took Janet Cox and her parents back to her office. Ms. Fournier instructed the Garys to sign the $4,000 check. Ultimately, it must be presumed that Ms. Fournier deiivered the check to Respondent.

Ms. Fournier, properly so, has not been charged with any misconduct. Yet, Respondent has been.

The thrust of Respondent's motion to dismiss was that there were no acts clearly attributable to Respondent that involved dishonesty, fraud, deceit, or misrepresentation prior to January 1, 1987. Absent such a specific showing, supported by clear and convincing evidence, there can be no finding that misconduct occurred.

POINT II

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

Basically, the Bar argues that the Garys expected to get a substantiai something for nothing. It is undisputed that the Garys benefited from Respondent's efforts. Yet, the Garys, the Bar, and the Referee would have this Court believe that these individuais did not expect to pay for the benefit received. (Bar Ex. 5).

It is beyond dispute that Respondent, through ingenious lawyering, obtained for the Garys $20,000 compensation plus interest. The $20,000 was to be paid by $4,000 down at finai hearing and a $16,000 balloon three years later. In the interim, the Garys were to receive $106.66-per-month interest payments.

Respondent and his associate also worked with the IRS in an attempt to eliminate, or forestaii execution on, a $9,900 lien placed against the Garys' house because their daughter's business had not paid custodial taxes. (TR 48, 97, 146).

It is implausible that the Garys thought they were getting these substantial benefits for free.

It is logical to assume that all parties thought that the $4,000 the Garys received at final hearing was to go towards Respondent's firm's fees. It is beyond dispute that $5,600 of

Janet Cox's $6,000 in fee payments came directly from her parents. (TR 28, 29). This is consistent with the Garys' past efforts to help their daughter out financially. (TR 48).

If the Garys had paid virtually ail of Janet's fees in the past, why would they suddenly stop their assistance? They didn't.

Two undisputable factors point directly towards the fact that the Garys were helping out Janet. First, they endorsed. the check made payable to them and to Respondent, outside of Respondent's presence. If they intended to keep the money, there was no reason for them to endorse the checks.

Secondly, nobody complained. about Respondent's keeping the $4,000 until April or May. (TR 156).

Ms. Fournier spoke of numerous post-dissolution contacts with Ms. Cox regarding visitation and late support payments. Yet, Ms. Cox never complained about the $4,000 check. (TR 106, 107).

Al Penson, Respondent's former associate, testified that he spoke to either Janet or her parents about their bankruptcy six to twelve times during the time period January 1, 1987 through April 1, 1987. Not once did they complain about the law firm's handling of the $4,000 in fees. (TR 88, 89).

Respondent's Exhibits 1 and 2 show numerous telephone messages left with the firm. Yet, none of them complained about the firm's handling of the $4,000 in fees.

It is undisputed that Respondent spoke to Mrs. Gary several months after the divorce and she did not complain about the fees. Mrs. Gary testified that Respondent had called her house seeking Janet (which is in direct contradiction to Janet's testimony that Respondent would not communicate with her) and that she did not mention the $4,000 check (TR 46, 47). Respondent even raised the subject of Kemuel's payments by asking if she were receiving her $106.66 interest payments. Yet, she did not compiain about the $4,000 (TR 47).

It defies logic for anybody to believe that Janet Cox and her parents were upset about the manner in which the $4,000 was applied when they did not complain about it.

Why did they ultimateiy complain to the Bar? Because Mrs. C. B. Williams, who had lent the Garys the initial $3,000 for Janet's iegai fees, saw that the Garys had obtained a $20,000 judgment when she was reviewing the publication that listed judgments. (TR 47,48). Upon asking about the judgment, the Garys were put in an awkward situation and filed a grievance.

Respondent submkits that Janet Cox lied at final hearing on numerous occasions. She stated she could never contact Respondent and after a while, she couldn't talk to Ms. Fournier. (TR 24).

Yet, Ms. Cox's own mother testified that two months after the divorce, Respondent called Ms. Gary seeking Ms. Cox. (TR **46, 47).**

Ms. Cox said she waited four months to file a grievance because whe was waiting for an explanation about the $4,000. (TR **26).** Yet, none of the telephone messages she left demanded an explanation. (R.Ex. **1, 2).** Mr. Penson said she never complained. (TR 88,89).

Ms. Cox admits she never wrote Respondent's firm a letter demanding the $4,000. (TR **33).** She claims she ieft a note with Terri, the rece2ptionist. (TR **34).** Yet, Terri testified that she only saw Respondent's Exhibits One and Two. (TR **72-76).**

Terri further testified that she spoke to Janet Cox and the Garys on the telephone or in the office after the divorce. Yet, they never complained about the **$4,000.** (TR **76).**

The Referee listed several reasons for her findings. They are invalid.

First, the Referee points to a lack of a written agreement between Respondent and the Garys as support for her findings that the $4,000 should have gone to then. There is no requirement that an attorney/client fee arrangement be in writing in dissolution of marriage matters. As pointed. out in Respondent's first brief, actions speak louder than words. Throughout the reiationship, the Garys nave been responsible for Janet Cox's legal fees.

Furthermore, as pointed out above, the Garys received direct benefit from Respondent's services.

In his letter dated June 3, 1986 (Bar Ex. 2), Respondent set forth his fee arrangement with Janet, pointed out that her initial deposit had Seen used up, and requested an additional **$2,000.** The Bar now argues that Respondent's failure to request additional money after June **3,** 1986, or to get a written contract with Janet and/or her parents prior to final hearing, supports the Referee's position that Respondent was not entitled to the **$4,000.** (Respondent's Brief, p. 16). In fact, the opposite is true.

The reason for Respondent's not forcing Janet into any sort of formal contract was that it was understood by all parties that any sums obtained at finai hearing would defray the firm's fees. (TR 100, **103,** 145).

It is interesting to note that Janet Cox never testified how she intended to pay her lawyers for the baiance of his firm's two hundred hours worth of services to her. Did she think she never had to pay them? Of course not. Sne, as did everybody else, knew that her parents' **$4,000** was going to Respondent.

Janet Cox's reliance on the firm for assistance did not stop upon the final hearing (the day on which the $4,000 went to Respondent). **As** indicated by Respondent's Exhibits 1 and 2, there were numerous telephone messages to the firm. Furthermore, she consulted with **Al** Penson six to twelve times

about bankruptcy (TR 87, 88), even though no formal arrangement was ever entered into.

Ms. Cox also admitted talking to ms. Fournier about post-dissolution problems surrounding visitation and child support. (TR 32, 106).

The Referee's second basis for finding against Respondent was Mr. Gary's failure to attend meetings or specifically agree to the $4,000 going to Respondent.

With all due respect to Mr. Gary, his memory is shaky. As Mr. Gary himself testified at final nearing:

> I had a stroke about nine weeks ago now. And my remembers is not as sharp as they were. (TR 59).

Mrs. Gary's participation in Janet's divorce is beyond dispute. She attended virtually every meeting. She delivered to Respondent the $5,600 of Gary funds that went towards Janet's fees.

And, Mr. Gary indirectly consented to Respondent receiving the $4,000 when he endorsed the check outside of Respondent's presence and left it in Respondent's office.

Finally, Mr. Gary's testimony about the $4,000 payment is vague. All he can remember is that "they" told him he would get $4,000. (TR 57). Despite repeated questioning, he never identified who "they" were. [Mr. Gary's testimony about the lady at Respondent's office pertained to Ms. Fournier, not some secretary. (TR 58).]

The Referee's third conclusion, that the supplemental judgment gave the Garys an equitable interest, is a false

premise. The Garys had the right to apply the funds that they received from Kemuel Cox anyway they pleased. Is the Referee stating that Respondent would have had to have had an equitable interest for him to receive fee payments out of the corpus? Of course not.

The Referee's fourth conclusion is the Garys' waiting for Respondent in Ms. Fournier's office after the hearing. As pointed out earlier, only Janet Cox says that Respondent asked them to go back to the office. (TR 22). Her mother testified that Ms. Fournier asked them to go Sack to the office. (TR 43). Mr. Gary concurred. (TR 61).

It was Ms. Fournier, not Respondent, that asked the Garys to sign the check and to leave it in the firm's offices. (TR 22, 43, 58).

The $4,000 check shouid not be viewed in isolation. It must be kept in mind that Respondent's recovery for the Garys was $20,000. The $4,000 was the initial payment and $16,000 was to be paid three years later. In the interim the Garys were receiving monthly interest checks in the amount of $106.66. (Bar Ex. 4). The Bar argues on page 20 of its brief that Respondent's version of events would indicate that his protection of the Garys was nothing more than an "elaborate scheme'' to protect his own fees. Nothing could be farther from the truth. The $4,000 payment was the only thing that was to go towards Respondent. the Garys received $16,000

and thirty-six months of $106.66 interest payments (for a total of $3,840).

Respondent and Ms. Fournier devoted almost two hundred hours to Janet Cox's divorce. Respondent discounted his bill by $4,617.50 (Bar Ex. 6) for the firm's extensive work. As indicated in Bar Ex. 6, Respondent had received on at least two separate occasions trust funds on behalf of Janet Cox ($2,289.85 and $458.35) and applied it to Funeral Services, Inc. to keep the Cox-Gary Funeral Home from being shut down.

If Respondent was engaged in intentional misconduct, why would he have been so scrupulous in all other aspects of his representation? Respondent abided by his initial estimate of fees, despite that fact that there was language in there that would have allowed him to exceed his $12,003 cap. (Bar Ex. 2). Respondent properly dealt with money received on Janet's behalf during the representation by forwarding it to Funeral Services, Inc. to keep the funeral home afloat. He did not apply that money unilaterally towards his fees.

Respondent's firm continued representing Janet, despite no fee payments after June, 1986. With the exception of the events surrounding the $4,000 check, Respondent's conduct is exemplary. Everything before the $4,000 check was in accord. with the high standards of our profession. Everything after the final hearing was apparently in accord with the highest standards of our profession. Janet Cox and her parents

continued to visit Respondent's firm up through April seeking assistance and legal advice.

Does anyone really beiieve that the Garys and Janet Cox would have been continuing to seek assistance from Respondent's law firm for five months after the final hearing if they thought $4,000 had been taken from them improperly? Of course not.

As pointed out earlier, the grievance committee did not find probable cause for misuse of trust funds. The grievance committee did not find probable cause for charging an excessive fee. If Respondent mishandled the $4,000, the committee would have found violations of rules pertaining to that misconduct. They did not do so. They did not do so because Respondent did not receive the $4,000 in trust and he did not charge a clearly excessive fee. This case is more akin to a fee dispute than it is to a mishandling of funds. The Florida Bar has no jurisdiction over fee disputes unless the amount demanded is clearly excessive, extortionate, or fraudulent. Rule 5-1.1, Rules Regulating Trust Accounts.

This case was, at worst, a misunderstanding between two lawyers (although oniy one was charged) and their clients over the payment of fees. Such matters should not give rise to disciplinary proceedings absent other aggravating factors.

The Garys received valuable services for the $4,000. Janet Cox certainly received valuable services for the $4,000.

To argue dishonesty, fraud, deceit, or misrepresentation, one must argue that Respondent acted in bad faith. There is no such showing. These charges against Respondent should be dismissed for the Bar's failure to prove misconduct by ciear and convincing evidence. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970).

CONCLUSION

At the end of the Bar's case, it faiied to show specific conduct attributable to Respondent indicating he engaged in misconduct. Respondent's motion to dismiss at the end of the Bar's should have been granted.

There was insufficient evidence in the record to support the Referee's finding that Respondent engaged in misconduct. Accordingly, the charges against Respondent should be dismissed.

Respectfully submitted,

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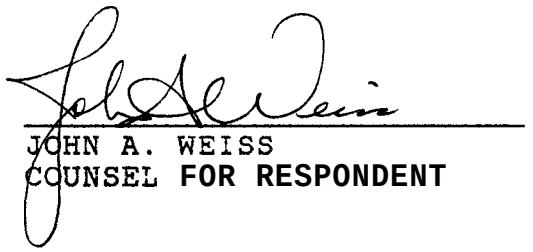
CERTIFICATE OF SERVICE

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, this 14th day of November, 1989.



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