

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

FILED
SID J. WHITE

JUN 23 1989

CLERK SUPREME COURT
Deputy Clerk *ph*

THE FLORIDA BAR,
Complainant,

v.

ANTHONY L. BAJOCZKY,
Respondent.

Case No. 73,377

TFB File No.87-21975-02

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.5, Rules of Discipline, the following proceedings occurred:

On November 30, 1988, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. All of the aforementioned pleadings, attachments thereto, and exhibits received in evidence, and this report constitute the record in this case and are forwarded to the Supreme Court of Florida.

11. FINDINGS OF FACT

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary Of Case.

Respondent was retained to represent Janet Gary Cox on or about April 10, 1986 in a dissolution of marriage action. Respondent was given a retainer fee of \$3,000.00 by Ms. Cox at this time. Ms. Cox did not have sufficient funds of her own and the retainer fee was borrowed by her parents from a family friend, Dolly Mae Williams.

The funds received from Dolly Williams were in the form of a cashiers check made payable to Ms. Cox's mother, Mrs. Allen Gary. Mrs. Gary endorsed this cashiers check and it was given to Respondent as his initial retainer fee.

On or about June 3, 1986, Respondent wrote a letter to Janet Cox regarding the status of the dissolution case he was handling for Ms. Cox. Within this letter, Respondent memorialized the discussed fee arrangements of the April meeting when he was retained. Respondent proceeded to explain that he had already expended a sufficient number of hours at the stated hourly rate of \$85.00 per

hour that had depleted the original retainer fee leaving an outstanding balance. In the letter of June 3, 1986, Respondent requested Ms. Cox make an additional payment toward fees of \$2,000.00.

As with the initial retainer fee request Ms. Cox was without sufficient funds to pay the next requested payment of attorney fees. As previously, Ms. Cox requested assistance from her parents. Her mother, Mrs. Gary, borrowed \$3,000.00 from her sister and gave this to Ms. Cox. Ms. Cox paid Respondent \$2,400.00 in cash and endorsed a \$600 check from a friend who had repaid a loan. Respondent's bank records reflect such payment as having been made on or about June 18, 1986.

The dissolution action was a complicated matter in that Mr. and Mrs. Cox owned several businesses, including several funeral homes, that were experiencing business problems concerning nonpayment of withholding taxes with the IRS, problems with the Department of Insurance regarding prepaid funeral arrangements and nonpayment of business debts. Ms. Cox's parents had helped the Cox's establish their business through loans and assistance in the business.

Mr. and Mrs. Gary had been placed upon the funeral home incorporation documents as officers. As a result of the IRS problems there was a lien placed upon the Gary's home. This was also an issue that was being handled indirectly through Ms. Cox's representation by Respondent.

Mrs. Gary, Janet Cox's mother, had previously approached Respondent prior to his being retained by Janet Cox to represent her in attempting to sue Mr. Cox for an equitable interest in the Tallahassee Funeral home. Respondent declined this representation upon the belief that he could not prove a sufficient special equity on behalf of the Garys.

In August, 1986, the marriage of Janet Cox to Kemuel Cox was dissolved with jurisdiction reserved to settle the issues of property division and child custody at a latter date.

Due to the financial conditions of the businesses, the only property that had any residual value was the Tallahassee funeral home. A settlement agreement was reached whereby Kemuel Cox would purchase Janet's interest in this property for \$20,000.00 by paying a down payment of \$4,000.00 and executing a second mortgage of \$16,000.00.

Janet Cox wished this money from her ex husband to go to her parents for their assistance in helping the Cox's to start their funeral home business.

In considering the structure of this settlement, Respondent concluded that in light of a possibility of Janet Cox having to file bankruptcy, it would be better if the presiding judge effect such settlement by entering a supplemental judgment so as to take the

payment of any money to the Garys out of being characterized as preferential treatment to creditors.

The agreement was to be that the Garys would receive \$4,000.00 at the time of the supplemental judgment with Kemuel Cox executing a second mortgage in favor of the Garys. The mortgage provided for interest payments on the \$16,000.00 balance for three years with the entire amount due at the end of such period. In the supplemental judgment, the parents, Mr. and Mrs. Allen Gary, were recognized as having an equity ownership interest in the Tallahassee funeral home in spite of not being parties to the action.

Despite testimony to the contrary by Respondent and his witness Ms. Fournier, the Garys were of the belief that this \$4,000.00 was to be given to them and was not to be applied toward any outstanding attorney fees owed by Janet Cox.

The Garys had not entered into an oral or written agreement to be responsible for the total fees charged to Janet Gary by Respondent.

After the property settlement and entry of the supplemental judgment, Respondent was given a trust account check from the ex-husband's lawyer for \$4,000.00 made out to Mr. and Mrs. Gary and Respondent.

The Garys returned to Respondent's office with his associate, Ms. Fournier, where they waited for Respondent to return from the courthouse. After waiting for Respondent for a period of time of up to two hours, the Garys endorsed the trust account check and left Respondent's office. Mrs. Gary left Respondent's office and went to see Mrs. Dolly Williams to tell her they were going to be able to repay the loan for the initial retainer fee.

The Garys testified that they were told that when Respondent returned he would endorse the check and the Garys would be called to come to Respondent's office to pick up their money.

Respondent and his associate dispute any agreement that the \$4,000.00 down payment by Kemuel Cox would go to the Garys and that it had always been the intention of the parties to apply these proceeds to Janet Cox's attorney fees.

After the supplemental judgment was entered, Respondent sent a letter to Janet Cox on January 28, 1987. In this letter, the Garys learned for the first time their \$4,000.0 was being applied to Janet Cox's attorney fees. In this letter, Respondent outlined the fees and costs incurred in his representation. This was the first notice Respondent had given regarding attorney fees since his letter of June 3, 1986 where he requested more money. Respondent's letter of January 28, 1987 was also addressed to the Mr. and Mrs. Gary for the first time.

After the supplemental judgment was entered all the parties had additional contact regarding enforcement of the judgment; however, there is a dispute over whether or not there was an issue made of the return of the \$4,000.00 to Mr. and Mrs. Gary.

At the time of the final hearing in this matter, the Garys had not received the \$4,000.00 from Respondent.

III. RECOMMENDATIONS AS TO GUILT.

I hereby find that The Florida Bar has met its burden of proof and find the Respondent guilty of having violated Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility of The Florida Bar by having engaged in conduct involving misrepresentation involving the handling of the \$4,000.00 down payment received from Kemuel Cox.

In reviewing the testimony and having observed the witnesses during the hearing, my finding of guilt is based upon the following reasons:

(1) There was no written agreement between Respondent and the Garys that they would be responsible for Janet Cox's attorney fees.

(2) Mr. Gary was never present during any of the times Respondent testified that discussions took place regarding applying the \$4,000.00 to Janet Cox's attorney fees.

(3) The supplemental judgment clearly show the \$4,000.00 was to belong to the Garys.

(4) The testimony of the Garys and Janet Cox is supported by their having returned to Respondent's law office and waiting several hours for Respondent's return. This supports their belief that Respondent was to return and endorse the trust account check.

(5) The Garys were nonparties to the dissolution action and the agreement of their receiving \$4,000.00 for special equity contradicts the existence of any clear agreement that such money was to go to Respondent.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

- A. A public reprimand.
- B. Payment of costs in these proceedings.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.5(k)(1), I considered the following personal history of Respondent, to wit:

Age: 43 years old

Date admitted to the Bar: October 18, 1973

Prior Discipline: None

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

A. Grievance Committee Level

1. Court Reporter's Fees	1,006 .00
2. Bar Counsel Travel	<u>00.00</u>

Subtotal 1,006.00

B. Referee Level

1. Administrative Costs	\$500.00
2. Court Reporter's Fees	174.00
3. Bar Counsel Travel	<u>00.00</u>

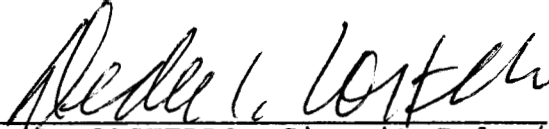
Subtotal \$674.00

TOTAL \$1,680 .00

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be payable beginning

30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

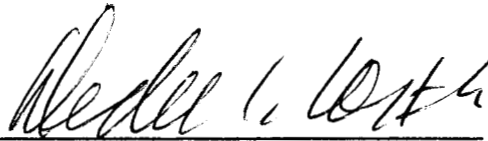
Dated this 19th day of June, 1989.



DEDEE S. COSTELLO, Circuit Judge/Referee
Washington County Courthouse
Post Office Box 647
Chipley, Florida 32428

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to SID J. WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and that copies were mailed by regular U.S. Mail to JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; OUR ATTORNEY, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and JOHN A. WEISS, Counsel for Respondent, at his record Bar address of Post Office Box 1167, Tallahassee, Florida 32302, on this 19th day of June, 1989.



DEDEE S. COSTELLO, Referee