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12-7

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs. Supreme Court Case No. 76,154

THOMAS P. MURPHY,

Respondent
_____/

ON PETITION FOR REVIEW

ANSWER BRIEF OF COMPLAINANT

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B] OF ITS

TABLE OF AUTHORITIES

Cases

Rules of Professional Conduct

DEFINITIONS OF TERMS AND ABBREVIATIONS

In this Answer Brief of Complainant, the Respondent, Thomas P. Murphy, shall be referred to as "Respondent" or "Mr. Murphy."

The Florida Bar shall be referred to as "The Florida Bar" or "The Bar."

All other witnesses shall be identified initially by full name and subsequently referenced by surname.

The following abbreviations shall be used: "TFBX" shall refer to an exhibit introduced by The Florida Bar at the final hearing (e.g. "TFBX 5" shall refer to The Bar's Exhibit No. 5). "TR" shall refer to the transcript of the final hearing on September 5, 1991. "RR" shall refer to the Report of Referee dated May 6, 1992. "IBR" shall refer to the Initial Brief of Respondent.

STATEMENT OF THE CASE AND FACTS

TO the extent it is not inconsistent with the following, The Florida Bar adopts Respondent's Statement of the Case and Facts and adds the following:

On or about March 2, 1987, Respondent was retained to represent Kathleen Wagner (the client) in connection with her claims for injuries arising from a vehicular-pedestrian accident. Prior to retaining Respondent, Ms. Wagner had been represented by two attorneys in California.

The terms of the contingency fee contract signed by Ms. Wagner provided that Respondent was to receive a fee of one-third of any recovery up to one million dollars through the time of filing of an answer or the demand for appointment of arbitrators. Subsequent to such a demand, Respondent was to receive a forty percent (40%) fee.

Respondent was ultimately able to recover $300,000 policy limits for his client, but not without first demanding arbitration.

On or about December 3, 1987, Respondent prepared and the client signed a closing statement and settlement agreement. The closing statement indicated that Respondent was to receive one-third of that recovery as his fee. Having agreed to accept a one-third fee by virtue of the closing statement, Respondent did not exercise any rights he may have had to forty percent (40%) of the settlement as per the retainer agreement. The Bar maintains and has consistently maintained that funds taken by Respondent in excess of the one-third fee set forth in the closing statement were taken coercively and extortionately, thereby constituting

misconduct which is subject to sanctions.

Prior to trial, the Bar stipulated that with regard to the $300,000 recovery from The Hartford, Respondent had made a demand for arbitration. As a result of that demand for arbitration, the Respondent would have been entitled to forty percent (40%) of the recovery as his fee. That was the extent of the Bar's stipulation.

As it happens, Respondent did not claim a forty percent (40%) fee when he prepared the closing statement. Rather, he agreed to a fee of thirty-three and one-third percent (33 1/3%) of the settlement. At all times, it has been the Bar's position that Respondent extorted the additional $20,000 he received from the client. The stipulation entered into by the Bar in no way served to compromise or circumvent the Bar's position.

SUMMARY OF THE ARGUMENT

Respondent's guilt is supported by clear and convincing evidence and the Referee's findings are not clearly erroneous. The stipulation made by The Florida Bar that Respondent would be entitled to a forty percent (40%) fee under the terms of the contingency fee agreement is irrelevant to the issue of whether Respondent extorted fees from his client in violation of the Rules of Professional Conduct. The closing statement prepared by Respondent and signed by the client indicates that Respondent was entitled to a thirty-three and one-third (33 1/3) percent fee of his client's settlement and it is that closing statement which is controlling in this matter. The evidence presented at the final hearing is sufficient to prove Respondent's guilt by clear and convincing evidence.

The Referee's findings were based on both personal observation of the witnesses and careful review of the evidence. Accordingly, the Referee's findings of Respondent's guilt are entitled to a presumption of correctness.

I.

THE REFEREE'S FINDING THAT RESPONDENT COERCED HIS CLIENT, KATHLEEN WAGNER, TO PAY HIM ADDITIONAL PAYMENTS OUTSIDE THOSE AGREED TO IN THE CLOSING STATEMENT IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND IS NOT CLEARLY ERRONEOUS.

Shortly before the trial of this matter, The Florida Bar stipulated that Respondent would have been entitled to fees equalling forty percent (40%) of the client's settlement according to the terms of the contingency fee agreement between Respondent and his client, Kathleen Wagner. (A copy of TFBX 1, the Contingency Fee Agreement, is attached hereto as Appendix "A"). By entering into this stipulation, the Bar was merely recognizing that arbitration was demanded and thus, according to the Contingency Fee Agreement, the Respondent would have had the right to claim a forty percent (40%) fee. Respondent, however, did not claim a forty percent (40%) fee. Rather, as indicated clearly by the Closing Statement, Respondent claimed only thirty-three and one-third percent (33 1/3%) of the settlement as his fee. (A copy of TFBX 5, the Closing Statement, is attached hereto as Appendix "B"). The Bar has consistently maintained throughout these proceedings and continues to maintain to date that Respondent's taking fees over and above the amount provided for in the closing statement was a violation of Rules 4-1.5 and 4-8.4 of the Rules of Professional Conduct. As a consequence of having engaged in misconduct, the Respondent is deserving of discipline.

The Respondent's position that the Referee's findings are erroneous is predicated on an incorrect interpretation of The Florida Bar's stipulation. Respondent argues that The Florida Bar stipulated to Respondent's having earned a forty percent (40%) fee of the three hundred thousand dollar ($300,000.00) settlement with The Hartford. Consequently, Respondent argues, the Bar could not prove that Respondent coerced his client to pay him fees he earned. Respondent's argument must fail for the simple reason that it is premised on an incorrect and invalid interpretation of the stipulation. The Bar's stipulation was that under the terms of the contingency fee agreement, Respondent would have been entitled to forty percent (40%) of the settlement as his fee. That is where the stipulation ended. The Bar has always maintained that the closing statement altered Respondent's fee. The narrow scope of the stipulation was acknowledged and understood by Respondent *(see* IBR 3) and operates as a fatal blow to Respondent's argument.

As the Referee correctly recognized, the terms of the contingency fee agreement were completely irrelevant to the issue of whether Respondent extorted unearned fees from his client in violation of Rules 4-1.5 and 4-8.4, of the Rules of Professional Conduct. (RR 1-2). The closing statement relating to the Three Hundred Thousand Dollar ($300,000.00) settlement that was prepared by Respondent and signed by Wagner unambiguously established Respondent's fee as thirty-three and one-third percent (33 1/3%) of the settlement. (Appendix "B"). The Referee concluded that the terms of the closing statement superseded the terms of the

contingency fee agreement between the parties and that Respondent's further actions to obtain Twenty Thousand Dollars ($20,000.00) from his client amounted to extortion. (RR 1-2).

Support for the Referee's conclusion that the closing statement was the controlling document with respect to Respondent's fee entitlement can be found in Rule 4-1.5(F)(5), Rules of Professional Conduct, which provides in past:

> In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. (Emphasis provided.)

Additionally, sufficient facts are present in the record to allow the Referee to conclude that Respondent extorted fees from his client exceeding those set forth in the closing statement. Wagner testified that after she signed the closing statement reflecting Respondent's thirty-three and one-third percent (33 1/3%) fee,

> "Mr. Murphy pulled me into the adjacent office and told me I had to give him $20,000.00 cash that day out of my settlement check. He told me he had to have it that day, and he was going to go to the bank with me to make sure that he got it.'' (TR 142).

Respondent explained to Wagner that the twenty thousand dollars ($20,000.00) was to compensate Respondent for the referral fee that Respondent was obligated to pay to Ned Good, Wagner's former attorney. (TR 143).

Wagner testified that she agreed to Respondent's demands only because Respondent threatened to withhold her settlement proceeds.

(TR 144-145). Immediately thereafter, Respondent accompanied Wagner to her bank where Wagner deposited the settlement check drawn on Respondent's trust account into her own account. When Wagner tried to withdraw cash from her account in compliance with Respondent's demands, Wagner was informed by bank personnel that the proposed cash withdrawal would necessitate the preparation of certain forms reflecting the transaction. Fearing the possibility of adverse tax consequences for herself, Wagner refused to sign the required documents, and the bank consequently aborted the cash withdrawal. (TR **145-146,** 270-271).

Wagner testified that she was contacted the following morning by a vice president of her bank who informed **Wagner** that a cash transaction would not be acceptable--only checks could be written on Wagner's account. (TR **146-148).** In order to meet Respondent's demands and comply with her bank's instructions, Wagner met Pam Palermo, Respondent's legal secretary, at the bank. Palermo instructed Wagner to write three checks totalling Twenty Thousand Dollars--in the amounts of Seven Thousand ($7,000.00), Seven Thousand ($7,000.00), and Six Thousand ($6,000.00) Dollars--payable to Respondent. Wagner complied, but wrote the words "LOAN PAYMENT'' on the face of the checks. (TR 148). Wagner explained:

> "Because when the bank officer called me that morning, I was **so** afraid they would cancel my account, I said Mr. Murphy had loaned me money because I had been **so** long without getting any settlement money, and that was a loan repayment and he had asked for it in cash, and I was trying to do what he wanted. I knew she would look at that check as it went through to see what it said. So I wrote loan payment on it.'' (TR **149).**

The Referee concluded that Wagner's version of the facts were more reliable. In particular, the Referee noted that "the payment by the three different checks and the designation on the checks to be a loan [sic] give greater credence" to Wagner's testimony than to that of Respondent. (RR 2).

Respondent argues that the Referee's findings defy common sense and logic since Respondent had no motive to prepare a closing statement indicating fees of thirty-three and one-third percent (33 1/3%) when, in fact, Respondent was entitled to fees equal to forty percent (40%) of the Three Hundred Thousand Dollar ($300,000) settlement under the terms of the contingency fee agreement. (IBR 25). Considering the evidence, the Referee could justifiably conclude otherwise. For example, the Referee could have deduced from the evidence that Respondent's demand for Twenty Thousand Dollars ($20,000.00) in cash was a scheme to avoid payment of income taxes on the sum.[1] Additionally, or in the alternative, the Referee may have concluded that the closing statement's reflection of a thirty-three and one-third percent (33 1/3%) fee was part of a plan to avoid payment of approximately Six Thousand Dollars ($6,000.00) in referral fees to Ned Good, Wagner's former attorney.

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[1]Respondent has argued that a tax evasion motive is preposterous simply because Respondent eventually paid taxes on the additional $20,000.00 received from Wagner. However, Respondent's argument neatly avoids the evidence presented at the final hearing that Respondent originally demanded that Wagner pay the $20,000.00 in cash funds. When Respondent's plan to extort untraceable cash funds from Wagner was foiled by Wagner's bank, Respondent was forced to accept traceable checks instead, thereby rendering tax evasion too perilous, if not impossible.

Respondent further argues that the Referee felt constrained by the facts of the case and found Respondent guilty only to punish Respondent for attempting to cheat Good out of a part of his fee. The Florida Bar concedes that Respondent was not specifically charged with such misconduct and any discipline imposed for such behavior might violate due process guarantees. However, even if the Referee believed that Respondent attempted to cheat Good, such a finding does not preclude a concurrent finding that Respondent extorted fees from his client in excess of those set forth in the closing statement. On the contrary, Respondent's motive to either cheat Good out of fees or evade taxes on the Twenty Thousand Dollars ($20,000.00) is entirely consistent with Respondent's extortionate demands upon Wagner. In fact, either or both of these findings would lend support to Wagner's version of the facts since they would supply the motive for Respondent's actions that Respondent argues are so desperately lacking.

The Referee's findings were based on clear and convincing evidence as required by The Florida Bar v. Wefss, 586 So. 2d 1051, 1053 (Fla. 1991). Respondent's reliance on State v. Oxford, 127 So. 2d 107 (Fla. 1960) to show otherwise is misplaced. In that case, Oxford's disbarment was based solely upon the testimony of Oxford's former secretary who had previously given exonerating testimony at two separate hearings. After Oxford terminated her employment, the secretary repudiated her earlier exonerating testimony and was offered as The Bar's key witness at Oxford's trial. This Honorable Court held that Oxford's disbarment could

not stand solely on the former secretary's discredited testimony. In so holding, this Honorable Court stressed the Referee's own findings that the witness "still lies about some things" and "exaggerates and colors her story because of her animosity" toward Oxford. State v. Oxford, 127 So. 2d 107, 111 (Fla. 1960).

In Mr. Murphy's case, the Referee made no explicit findings that Wagner's testimony was not credible. On the contrary, the Referee explicitly found that Wagner's story was more credible than Respondent's testimony. The Referee had the unique opportunity of personally evaluating the testimony of all the witnesses. His judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect. The Florida Bar v. Thomas, 582 So. 2d 1177, 1178 (Fla. 1991). Since Respondent has not demonstrated by clear and convincing evidence that the Referee's findings are erroneous, the Referee's finding of guilt should not be disturbed.

II.

THE USUAL PRESUMPTION OF CORRECTNESS THAT ATTENDS THE REFEREE'S FINDINGS SHOULD NOT BE DISTURBED BY THE INTERVENING PERIOD BETWEEN THE RESPONDENT'S TRIAL AND THE FILING OF THE REFEREE'S REPORT

Respondent argues that the presumption of correctness attending a Referee's findings should be stripped away whenever the Referee's report is not filed within thirty (30) days of the trial or within ten (10) days of receipt of the transcripts. In support of this argument, Respondent cites Phipps v. Sheffman, 211 So. 2d 598 (Fla. 3d DCA 1968) and Sconyer v. Schepter, 119 So. 2d 408 (Fla. 2d DCA 1960). Neither of these cases support Respondent's argument.

In both Phipps v. Sheffman and Sconyer v. Schepter, the findings of the trial judge were based exclusively on typewritten deposition testimony--absolutely no live testimony was heard by either judge. In the present case, the Referee actually heard and saw the live testimony of all witnesses presented at trial. Although there was a nearly eight (8) month period between the trial and the rendering of the Referee's report, the Referee had the unique benefit of personally observing the witnesses' demeanor and evaluating their credibility.

In The Florida Bar v. Guard, 453 So. 2d 392 (Fla. 1984), this Honorable Court refused to dismiss a complaint filed by The Bar against Guard where the referee had failed to hear the charges without excessive delay. In so holding, this Honorable Court stressed that dismissal would "totally frustrate the primary

purpose of discipline, namely, protection of the public from the misconduct of attorneys." The Florida Bar v. Guard, 453 So. 2d 392, 394 (Fla. 1984). Similarly, by stripping away the usual presumption of correctness to which the Referee's findings are entitled, the protection of the public would be jeopardized. This is particularly true where the public's protection hinges upon the credibility of the witnesses appearing at trial--credibility that the Referee is in the best position to evaluate. The Florida Bar v. Saxon, 379 So. 2d 1281, 1283 (Fla. 1980).

CONCLUSION

The Referee's findings of guilt are supported by clear and convincing evidence and should not be disturbed. Respondent coerced his client, Kathleen Wagner, to pay fees outside of and in addition to those reflected in the closing statement prepared by Respondent and required by Rule 4-1.5(F)(5), Rules of Professional Conduct. The Referee's findings of guilt were based upon personal observation of the witnesses and his findings should not be disturbed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven true and correct copies of the foregoing Answer Brief of Complainant were sent via Airborne Express to Sid J. White, Clerk of the Supreme Court of Florida, Supreme Court Building, 500 Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to Andrew S. Berman, Esq., Young, Franklin & Berman, P.A., Attorneys for Respondent, 17071 West Dixie Highway, North Miami Beach, Florida 33160 and to John T. Berry, Staff Counsel for The Florida Bar, Tallahassee, Florida 32399-2300 on this 24th day of November, 1992.

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