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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	Supreme Court Case No. 76,862
Complainant-Appellee,	)	
v.	)	The Florida Bar File No. 90-50,105 (17H)
BRUCE L. HOLLANDER,	)	
Respondent-Appellant.	)	

ANSWER BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Bruce L. Hollander, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the Report of Referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

STATEMENT OF THE CASE AND THE FACTS

The Respondent, Bruce L. Hollander's, statement of the facts is argumentative and incomplete. The Florida Bar therefore adopts the Referee's finding of fact as its own and sets forth the same below.

The Referee, after hearing testimony and argument, found as follows:

A. In October of 1987, Frank Ferrano of Eagle Air Conditioning contacted Automated Credit Services (A.C.S.) with regard to collecting an outstanding debt.

B. A.C.S. is owned 100% by Bruce Hollander and his wife, and is located in the same office building as Hollander and Associates (The Firm). R. 50, 57.

C. A retainer agreement was executed October 19, 1987 (FB Exh. 1). Ferrano signed on behalf of Eagle Air Conditioning and Respondent signed on behalf of A.C.S.

D. Ferrano agreed to a contingent fee of one-third of any monies collected on his behalf.

E. Sometime after October 19, 1987, the Ferrano collection matter was referred to Hollander and Associates to file suit; someone at the Hollander firm executed a "new case report" which denotes that the Firm would be paid a contingent fee. (FB Exh. 2)

F. A handwritten note appears in the Respondent's file which indicates a 40-60 split of any settlement. (FB Exh. 3)

G. A note to the Hollander file dated June 29, 1988, by

Respondent states "modified fee 50 per hour against 1/3 recovery." (TT 60, FB Exh. 4)

H. Ferrano admits having a discussion with Respondent regarding a change in the fee arrangement, but did not agree to it. (TT 24)

I. Respondent admits that there is no written retainer agreement between the Respondent and/or his Firm and Ferrano. (TT 54)

J. The Respondent is the sole partner in the entity known as Hollander and Associates, P.A., the law firm that represented Ferrano/Eagle Air Conditioning.

K. Respondent acknowledges that this matter began as a suit on a mechanic's lien bond, from which the fees would be paid (TT 58) and after filing suit and spending much time on the file it was learned that no bond existed and therefore no fees would be collected. (TT 90)

L. Respondent admits that he received three thousand two hundred fifty dollars ($3,250.00) as a settlement of the Ferrano collection matter, which he applied toward his legal fee and that Ferrano never received any proceeds from this settlement.

M. Ferrano was never given a copy of a closing statement which sets forth how his monies were disbursed. (TT 54)

The Referee found the Respondent has violated Rules 4-1.5(A) [An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee.], 4-1.5(F)(1) [Contingent fee agreements must be in writing.], and 4-1.5(F)(2)

[Upon recovery on contingent fee agreement a lawyer must execute and keep a distribution statement.] of the Rules of Professional Conduct. As a sanction for the foregoing rule violations, the Referee has recommended that the Respondent receive a public reprimand, administered by the Board of Governors of The Florida Bar and published in the Southern Reporter. The Referee also recommends that the Respondent remit to Ferrano the sum of two thousand one hundred sixty-seven dollars and seventy-five cents ($2,167.75), which sum represents two thirds of the monies recovered on Ferrano's behalf. Additionally, the Referee has taxed costs against the Respondent in the amount of one thousand five hundred seventeen dollars and nine cents ($1,517.09).

The Referee rendered her report on July 2, 1991 and the Respondent has petitioned for review her findings of guilt and recommendation on discipline.

SUMMARY OF ARGUMENT

The Respondent collected monies on behalf of his client, under a contingent fee agreement, and kept every red cent of the client's settlement, as a fee for services rendered. The Referee found this fee to be clearly excessive and the Bar agrees with her findings.

It is the Respondent's position that this matter is a minor fee dispute that is better left for resolution by a trial court and not by the Bar's disciplinary process. The Respondent's argument, while a correct statement of the law in most fee disputes, is not controlling when the fee collected is found to be clearly excessive, as it is in this case.

The Referee's recommendation of a public reprimand and a forfeiture of the excessive fee is warranted, as the Respondent kept all of the settlement funds as a fee in a contingent fee case.

There are also two trust account record keeping violations -- a failure to keep and maintain a signed written retainer agreement and a failure to have a signed distribution statement. The findings of guilt on both these matters are amply supported by the record and further support the Referee's recommendation of a public reprimand.

ARGUMENT

POINT I

THE RECORD CONTAINS SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT THE REFEREE'S RECOMMENDATION OF GUILT.

The Respondent has challenged the Referee's findings of fact, as well as the Referee's recommendation that Respondent receive a public reprimand. It is well settled that a referee's findings of fact are presumed to be correct and that the Supreme Court "cannot re-weigh the evidence or substitute its judgement for that of the trier of fact." The Florida Bar v. Scott, 566 So.2d 765, 767 (Fla. 1990), The Florida Bar v. Colclough, 561 So.2d 1147, 1150 (Fla. 1990). Furthermore, the Referee's findings of fact will be upheld unless found to be "clearly erroneous or lacking in evidentiary support." Id. The party seeking review has the burden to demonstrate that the Referee's Report is erroneous, unlawful or unjustified. Scott at 767. In the case at hand, the Respondent has failed to demonstrate that the Referee's findings were clearly erroneous or lacking in evidentiary support.

A) The excessive fee

In a case very similar to the one at hand, the Court publicly reprimanded an attorney for unethical conduct relating to a fee dispute and the attorney's self-help debt collection. The Florida Bar v. Bajoczky, 558 So.2d 1022, 1024 (Fla. 1990). In Bajoczky the attorney failed to secure a written agreement between himself and his client's

parents concerning a certain $4,000.00 award that came into the attorney's possession during the course of his representation of his client. Id at 1023. The aforementioned funds were specifically earmarked for payment to the Garys, the client's parents, pursuant to court order. Id. The Bajoczky court states that

> " . . . it appears that all those involved in this matter - Cox, the Garys, and Bajoczky alike - failed to be vigilant in specifying exactly what was to be done with the $4,000.00. However, because of Bajoczky's role and special skills as a lawyer, the referee placed the onus of this failure on Bajoczky.
>
> We must agree with that decision. A lawyer's special training creates an obligation to make sure that clients understand and clearly consent to fee agreements." Id at 1024.

The onus should also be placed on the Respondent in this action. The Respondent opines that his original contingent fee agreement with Ferrano was modified. His file note (TFB Exhibit 4) reads "modified fee 50 per hour against 1/3 recovery". However, Ferrano testified that he never agreed to this modification (TT 24) and this so called modification was never reduced to writing.[1]

The Respondent asserts that he was entitled to all of the monies he collected on Ferrano's behalf. His argument on this point is based solely on his belief that the aforesaid modification entitled him to $50

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[1] Perhaps if the Respondent reduced the so called modification to writing and had it signed by Ferrano, this matter may never have been brought to the Bar's attention. In fact, Rules 4-1.5(F)(1) and 4-1.5(F)(2), Rules Professional Conduct, requirement of a written fee contract for contingent fee cases is to obviate these types of disputes.

per hour plus a third of any recovery.[2] The Referee disagreed with this proposition and found that the only writing, albeit with Respondent's collection agency, indicates a 33 1/3 percent legal fee. (RR at 2)

The Respondent's protestations about the fee modification are not unlike Bajoczky's rhetorical question in his brief, wherein he questioned "where was the rest of the money to come from" if not from the $4,000.00. Id at 1024. The Bajoczky court replied that the foregoing was "a concern Bajoczky should have resolved long before" the Bar's intervention and further opined that "the fact that he must now ask (the question) only underscores the conclusion that Bajoczky has failed to meet his obligation." Id.

The Bajoczky opinion clearly places the burden on an attorney to produce unambiguous proof of just what the fee agreement was. The record, in the case sub judice, is devoid of such proof concerning the alleged fee modification. Accordingly, the Referee has found that the only writing is controlling and found that the fee agreement prescribed a 33 1/3 percent legal fee.

Once it has been concluded that the Respondent was only entitled to 33 1/3 percent of any settlement, all one must do is compare the fee agreement to what monies were recovered in this case and compute the fee that should have been earned and the fee actually collected. The

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[2]His cryptic note to his file (TFB Exh. 4) may also be read to mean $50 per hour but no more than a third of any recovery.

Respondent received three thousand two hundred fifty dollars ($3,250.00) on behalf of Ferrano (RR at 3) and therefore he was entitled to a legal fee of one thousand eighty-two dollars and twenty-five cents ($1,082.25). As the Respondent kept all of $3,250.00, he has collected a clearly excessive fee which is two thousand one hundred sixty-seven dollars and seventy-five cents ($2,167.75) more than he was entitled to under his agreement.

Rule 4-1.5(A)(1) of the Rules of Professional Responsibility prescribes in pertinent part that "a fee is clearly excessive when a . . . lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such degree as to constitute clear overreaching or an unconscionable demand by the attorney." Clearly this standard is met when an attorney who is only entitled to a third of the recovery keeps all of the recovery as a fee. In any event, Rule 4-1.5 goes further and states that one factor to consider, when determining if a fee is reasonable, is to consider the amount in controversy for the representation or the result obtained in comparison with the fee actually collected. Rule 4-1.5(B)(4), Rules Professional Conduct. Under this later criteria the Respondent's fee is also excessive, as the Respondent got every red cent of the money recovered on Ferrano's behalf.

The Respondent in his brief argues that this case is merely a fee dispute that is best left for resolution by the courts and directs this court's attention to The Florida Bar v. Winn, 208 So.2d 809 (Fla. 1968). The court in Winn did state that controversies over the reasonableness of an attorney's fee are "matters by which the very

nature of the controversy should be left to the civil courts." Id at 811. However, the Winn court went on to suspend Mr. Winn for six months for an "illegal and extortionate" fee. Id.

In a case decided several years after the Winn decision, the court recognized that fee disputes are not normally grounds for disciplinary proceedings unless the fee is clearly excessive. The Florida Bar v. Moribore, 314 So.2d 145, 148 (Fla. 1975). Also see Rule 5-1.1, Rules Regulating Trust Accounts [Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent.] (Emphasis added.)

The Referee found the Respondent's fee to be clearly excessive. (RR at 3). Therefore, the Respondent's argument, that this matter is a mere fee dispute to be resolved by a trial court, fails.

The Referee's finding of guilt on the excessive fee issue is clearly not erroneous and is supported by ample evidentiary support.

B) The lack of records

Rules 4-1.5(F)(1) and 4-1.5(F)(2), Rules Professional Conduct, mandate that an attorney who accepts a case on a contingent fee arrangement must reduce this agreement to writing and have the same signed by his client. Both Rule 4-1.5(F)(1) and Rule 4-1.5(F)(5), Rules Professional Conduct, require an attorney who recovers funds on behalf of a client, on a contingency fee case, to "prepare a closing statement reflecting an itemization of all costs and expenses together with the amount of the fee . . . " There is also a prescription in the aforesaid rules that the attorney must keep a copy of each of the

aforementioned records for six (6) years after the execution of the same.

The Respondent contends that he did not violate Rule 4-1.5(F)(1) and Rule 4-1.5(F)(5), Rules Professional Conduct, in regards to a distribution statement as the matter had not been concluded. He further contends that since his firm was still passively pursuing other avenues of relief that the matter was still pending and open, thus obviating his obligation to provide an accounting with a distribution statement. The Respondent's argument emasculates the clear reading and intent of the Rule. A reasonable and correct reading of the Rule is that a matter is "concluded" upon receipt and disbursement of settlement monies, whether they be a partial settlement or a full settlement. To hold that the Rule means anything else would allow attorneys to collect their fee and not disburse to their client if any tangential matter was still pending thereby denying the client the benefit of their settlement.

The Respondent also argues a certain July 6, 1989 letter that he wrote to Ferrano satisfies the requirement for a written distribution statement and Rule 4-1.5(F)(1). However, a distribution statement must also be signed by the client. See Rule 4-1.5(F)(5), Rules Professional Conduct. This July 6, 1989 letter was not signed by Ferrano and accordingly the Respondent's argument fails.

In regards to the lack of a written retainer agreement, the Respondent contends that he was not responsible for the lack of the same and that some unnamed employee of his was. He further argues that since the Bar did not charge him with negligent supervision, he

should be found not guilty of this charge. The Referee rejected this argument and so should this Court. The Respondent is the sole partner in Hollander and Associates and eventually became the attorney performing the bulk of the work on the Ferrano matter. Of interest is the Respondent's argument about the alleged modification of the fee agreement. This modification was still a partial contingent fee and should also have been reduced to writing.

At trial, the Respondent was unable to produce a written retainer agreement or an itemized settlement statement. Accordingly, the Referee properly found the Respondent guilty of the aforesaid rule violations.

POINT II

THE REFEREE'S RECOMMENDED SANCTION IS APPROPRIATE.

Respondent should receive a public reprimand for his charging of an excessive fee, his failure to reduce a contingency fee agreement to writing, and his failure to supply his client with a distribution statement indicating how his settlement monies were disbursed. In determining appropriate discipline, one must consider the three purposes of lawyer discipline as outlined by the Court in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1963). The Court in Lord stated that:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at

> the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Lord at 986. See also The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970); The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979).

On a prior occasion the Supreme Court of Florida has noted that: "[t]he single most important concern of this Court is defining and regulating the practice of law for the protection of the public from incompetent, unethical, and irresponsible representation." The Florida Bar v. Dancu, 490 So.2d 40, 41 (Fla. 1986). Thus, the Supreme Court of Florida has recognized the fact that, of the three purposes for lawyer discipline, the most important purpose is the protection of the public. Dancu at 41.

The Court in Dancu explains that:

> The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hand of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence.

Dancu at 41.

The Referee's recommendation of a public reprimand and forfeiture of the excessive fee is consistent with the precepts enunciated in The Florida Bar v. Lord. Lord at 986.

The excessive fee issue standing alone warrants a public reprimand. The Florida Bar v. Mirabole, 498 So.2d 428 (Fla. 1986);

The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986). In The Florida Bar v. Mirabole, the attorney billed his client $24,000.00 for services rendered in a $3,000.00 mechanics lien action. Mirabole at 429. The court found the foregoing fee to be excessive and ordered a public reprimand. Id at 429.

In The Florida Bar v. Fields, an attorney was publicly reprimanded for, among other things, failing to reach fee agreements with his clients prior to the initiation of representation and for failing to adequately communicate with his clients concerning his fees. Fields at 1355-1358.

Both the Mirabole and Fields opinions buttress the Referee's recommendation of public reprimand, in that the Respondent collected a clearly excessive fee and did not adequately communicate (in writing) with his client concerning his fee.

The Referee also recommended that the Respondent be directed to remit to Ferrano the sum of two thousand one hundred sixty-seven dollars and seventy-five cents ($2,167.75), which sum represents two thirds of the money recovered on Ferrano's behalf. The Respondent contends that he should not have been required to refund that portion of the monies in his possession which the Referee found to be excessive. The Respondent relies upon The Florida Bar v. Della-Donna, 14 F.L.W. S315 (Fla. 1989) Reh'g granted (costs only) 16 F.L.W. S419 (Fla. 1991).

The Respondent contends that Della-Donna stands for the proposition that "[d]isciplinary actions cannot be used as a substitute for what should be addressed in private civil actions against

attorneys." Id at 16 F.L.W. S421.

However, the Respondent's arrow misses the mark. The Court in Della-Donna specifically held that "[r]estitution of an excessive fee, therefore can be ordered as a condition of readmission or reinstatement . . . " Id. Also of note is the Supreme Court's recent change to Rule 3-5.1, Rules of Discipline, which reads in pertinent part:

> (i) Forfeiture of Fees. An order of the Supreme Court of Florida or a report of minor misconduct adjudicating a respondent guilty of entering into, charging or collecting a fee prohibited by the Rules Regulating The Florida Bar may order the respondent to forfeit the fee or any part thereof. In the case of a clearly excessive fee, the excessive amount of the fee may be ordered returned to the client, and a fee otherwise prohibited by the Rules Regulating The Florida Bar may be ordered forfeited to The Florida Bar Clients' Security Fund and disbursed in accordance with its rules and regulations.

The foregoing clearly indicates that the forfeiture of excessive fees, such as the forfeiture in this case, is proper and warranted in this instance, as is the Referee's recommended public reprimand.

CONCLUSION

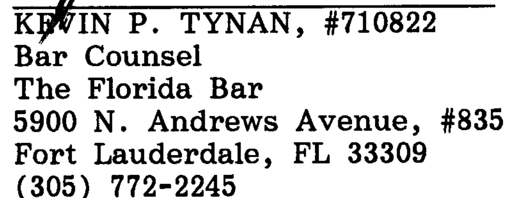
The issues before this Court are whether or not the Referee's findings of fact and recommendation of guilt in her Report are supported by the record and whether the Referee's recommended discipline is appropriate for Respondent's misconduct. The Referee's findings of fact in her Report are clearly supported by the record. In addition, the Referee's recommended discipline of a public reprimand,

and forfeiture of fee is supported by the record, and relevant case law.

As the trier of fact, the Referee had the opportunity to review all the evidence presented at trial. Accordingly, her findings of fact and recommendation as to discipline should be upheld unless it can be shown that they are clearly erroneous or lacking in evidentiary support.

WHEREFORE, The Florida Bar requests this Court to uphold the Referee's findings and approve the Referee's recommended discipline of a public reprimand, forfeiture of the excessive fee and the award of costs against the Respondent.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of The Florida Bar has been furnished to Bruce L. Hollander, Respondent, at 1940 Harrison Street, Hollywood, FL 33020, by regular mail on this 17th day of September, 1991.

KEVIN P. TYNAN