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SEP 23 1991

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: 76,862

THE FLORIDA BAR CASE NO.: 90-50,105(17H)

THE FLORIDA BAR,

Complainant,

v.

BRUCE L. HOLLANDER,

Respondent.

AMENDED
BRIEF OF RESPONDENT

Bruce L. Hollander
HOLLANDER & ASSOCIATES, P.A.
1940 Harrison Street
Hollywood, Florida 33020
(305) 921-8100 Broward
Fla. Bar No. 162665

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Reference to the transcript of the hearing shall be designated
(Pg. __, L. __), Pg. for page and L. for line.

Petitioner's Exhibits to the hearing shall be designated
(P. _____).

Respondent's Exhibits to the hearing shall be designated
(R. _____).

STATEMENT OF THE CASE AND FACTS

This is an appeal of the report of the referee in a Florida Bar Disciplinary Action involving a complaint by Frank Ferrano, President of Eagle Air Conditioning, Inc. against Bruce L. Hollander, attorney concerning a fee dispute. After a hearing on April 3, 1990, Grievance Committee "H" found probable cause that Rule 4-1.5 had been violated. The Florida Bar filed its complaint against the Respondent on October 30, 1990. On May 8, 1991, Judge Nancy Pollock, as referee, conducted a hearing on the matter. On July 2, 1991, the referee rendered her report with findings of fact holding that the Respondent was guilty of violating Rule 4-1.5(A), 4-1.5(F)(1) and 4-1.5(F)(2). The referee recommended a public reprimand and restitution of the fees found to be excessive.

The facts in this case are mostly without dispute. The facts as presented by the referee in her report, Paragraphs A-L, include all of the material facts in this case except one. That fact is that the Respondent testified and The Florida Bar and Mr. Ferrano concurred that the services provided by Hollander & Associates, P.A. were substantial (Pg.80 L.20-21) and proper (Pg.81 L.12-15) resulting in over \$6,300.00 in billable hours being recorded by the law firm (P.5). The finding of fact of the referee with respect to paragraph M is not supported by the evidence.

SUMMARY OF ARGUMENT

I

The Florida Bar should not prosecute cases involving fee disputes between an attorney and his client when the fee is not clearly excessive or violative of Rule 4-1.5. An honest misunderstanding between the attorney and the client should not result in a finding that the attorney breached the ethical rules of The Florida Bar.

II

The Florida Bar should not require an attorney to refund fees to a client when the attorney has not been disbarred. A fee dispute between an attorney and his client should be determined by a civil court suit.

III

Unless a matter has been concluded, a finding of a violation of Rule 4-1.5(F) should not be made. There is no formal requirement as to the contents, nor specific time within which the final statement and accounting should be made.

IV

A public reprimand is not an appropriate penalty for an attorney who did not initially open the file but did work in the file, nor for managing partner ultimately responsible for the conduct of the law office when no written contingent retainer agreement can be found for a particular file.

ARGUMENT

I

The Florida Bar should not pursue disciplinary action against an attorney in a case solely confined to a fee dispute between the attorney and his client when the fee charged is clearly not excessive.

Rule 4-1.5 Fees for Legal Services is clear.

"An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee. A fee is clearly excessive when: (1) after review of the facts, 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 a degree as to constitute clear overreaching or an unconscionable demand by the attorney; (2) the fee is sought by means of intentional misrepresentation or fraud upon the client...as to either entitlement to, or amount of, the fee."

In this case, The Florida Bar's main witness, Mr. Ferrano, was intelligent, well educated, and a businessman. (Pg.29 L.8-10). His company had performed air conditioning work on a warehouse project and was owed a balance of \$12,125.00. Mr. Ferrano made every effort to collect his money himself, including filing a mechanic's lien (R.4), filling a notice of dishonored checks (R.1) filing a complaint with the State Attorney's Office (R.2), sending certified letters to the contractor's attorney (R.3) and filing a complaint with the Department of Professional Regulation (R.5).

Mr. Ferrano hired Hollander & Associates, P.A. in January of 1988 to foreclose his mechanic's lien claim that appeared to have been transferred to bond by the contractor. The law firm's fees were contingent upon recovery and were to be paid from the bond.

When it was discovered that no bond existed, the fee arrangement with the law firm was changed to reflect a guaranteed minimum fee of \$50.00 per hour for the time billed but only to be paid out of proceeds recovered in the case. Mr. Ferrano admitted the conversation (Pg.24 L.16) but denied agreeing to the fee. Mr. Hollander's notes of the conversation were introduced into evidence (P.4).

The Florida Bar conceded that substantial and proper work had been done by the law firm (Pg.80 L.20,21 and Pg.81 L.12-15) resulting in more than \$6,300.00 of billable time (P.5). The case of The Florida Bar v. Winn, 208 So.2d 809 (Fla. 1968) is directly on point. There has been no allegations let alone any showing that the fee demanded by Mr. Hollander was extortionate or that the demand was fraudulent. See also The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975).

The question of the fees due the firm should have been addressed by Mr. Ferrano in small claims court not before The Florida Bar.

In applying the facts of this case to Rule 4-1.5(A)(1) and (2), it is clear that a misunderstanding existed as to what the fee should have been. It is equally clear that no ethical violation of the Rule occurred.

"The power to disbar or suspend a member of the legal profession is not an arbitrary one to be exercised lightly, or with either passion or prejudice. Such power should be exercised only in a clear case for weighty reasons and on clear proof". The Florida Bar v. Neale, 384 So.2d 1265 (Fla. 1980).

This court has recognized that.

II

An attorney should not be required to reimburse a client for fees found to be excessive when restitution is not a condition of reinstatement.

The sanction requested by The Florida Bar in this case was a public reprimand. The recommendation of the referee in her report was a public reprimand. Under those circumstances, it is clear that restitution to Mr. Ferrano of what was argued to be an excessive fee was improper. In The Florida Bar v. Della-Donna, 16 FLW S419 (Fla. 1991) this court concluded that "[d]isciplinary actions cannot be used as a substitute for what should be addressed in civil actions against attorneys". Restitution of an excessive fee can be ordered as a condition of readmission or reinstatement in cases that warrant it. It is obvious that this case falls below the level of all of the cases discussed in Della-Donna, supra. In The Florida Bar v. Winn, supra, this court clearly sets forth the conditions under which restitution to the client should be ordered.

The Florida Bar should not be viewed by the public as a forum to resolve fee disputes in cases that do not include elements of unethical behavior. Mr. Ferrano stated that the law firm put in a lot of work on his behalf (Pg.42 L.12-15). Mr. Ferrano also stated that Mr. Hollander was responsive to his calls and visits (Pg.42 L.16-20). Mr. Ferrano declined to meet with Mr. Hollander to review the file and to discuss the case both before and after the bar complaint was filed (Pg.41 L.11-19). Mr. Ferrano used The Florida Bar as the ultimate collection service (Pg.42 L.21-24).

Restitution in this case is not warranted.

III

The facts in this case are not sufficient to support a finding that Rule 4-1.5(F)(1) was violated by the Respondent.

Rule 4-1.5(F)(1) states that

Upon conclusion [emphasis added] of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

The evidence is clear that this case was not concluded at the time that the \$3,250.00 was received by Hollander & Associates, P.A. The monies were received sometime in October of 1988. On July 6, 1989, the firm wrote Mr. Ferrano a letter indicating that the firm was continuing its attempts to collect his monies for him (R.7). Thereafter, on August 25, 1989, the firm filed a Notice of Good Cause so that the case would not be dismissed. (R.10). All of these activities are consistent with the fact that the case was still open and continuing.

The letter written by the Respondent to Mr. Ferrano on July 6, 1989 clearly indicates that the \$3,250.00 had been "...applied against the legal fees due this office for this file". (R.7). Although this letter was prompted by a request from Mr. Ferrano for a statement to be used by his accountant "...to properly comply with [his] corporate income tax liabilities..." it should satisfy the requirements of the Rule. (R.6).

The facts of this case do not demonstrate a violation of Rule 4-1.5(F)(1) by the Respondent. See, The Florida Bar v. Wolding, 16 FLW Sec. 378 (Fla. 1991), The Florida Bar v. Bariton, 16 FLW Sec. 480 (Fla. 1991) and Neale, supra.

IV

The facts in this case are not sufficient to support a finding that Rule 4-1.5(F)(1) was violated by the Respondent.

The evidence is clear that the file was opened by an attorney other than Mr. Hollander. The evidence also showed that it was the policy of Hollander & Associates, P.A. that a contingent fee retainer be signed by all clients (R-9) (Pg.52 L.8-13) (Pg.75 L.12-17). The Respondent was not charged with the negligent supervision of his staff or employees. In cases where the Respondent did not commit the acts complained of, a finding of guilt should not be made. See, The Wolding, supra, Bariton, supra, and Neale, supra.

CONCLUSION

The Florida Bar should not be used as a collection service when a fee dispute arises between an attorney and a client. Rule 4-1.5(A)(1) and (2) sets forth specific matters to be reviewed in determining whether an excessive fee has been charged which may result in charges by The Florida Bar of unethical behavior. The facts in this case do not support a finding of any unethical behavior by the Respondent.

The Florida Bar should not order restitution of a disputed fee unless the restitution is tied to readmission or reinstatement of the attorney to practice within The Florida Bar. Disciplinary actions should not be used as a substitute for matters that may be addressed in civil actions against an attorney.

When the actions of an attorney are not in any way involved with a violation of these Rules charged by The Florida Bar, a finding of guilt should not be made. In those instances where the facts do not lend themselves to a conclusion that a breach of the Rules and unethical behavior has occurred, a finding of guilt is unwarranted.

Minor violations of the Rules should be dealt with by way of admonishment of the attorney. For actions that might constitute minor misconduct a public reprimand is not warranted.

The report of the referee should be rejected. The recommended discipline, the order of restitution and the assessment of costs against the Respondent should be rejected. The complaint against the Respondent should be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 20th day of September, 1991 to Kevin P. Tynan, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Ft. Lauderdale, FL 33309 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

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