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.

REPLY BRIEF OF RESPONDENT

Bruce L. Hollander
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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" or "Mr. Hollander".

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

ARGUMENT

The response by The Florida Bar in this case has consistently ignored the requirements of fairness and reasonableness that are contained in the Disciplinary Rules and as are set forth by this Court in The Florida Bar v. Neale, 384 So.2d 1265 (Fla. 1986).

In every case cited by The Florida Bar to support its position and the findings of the referee, the attorneys acted unreasonably and without any concern for the feelings and needs of their clients and without any regard for the Florida Disciplinary Rules governing the conduct of attorneys. The facts in this case do not support The Florida Bar's position and the finding of the referee.

In the case of The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990) the attorney attempted to steal three properties from the rightful heirs. The attorney argued that the testimony against him was biased and that his testimony should have been accepted. The Court correctly concluded the matter against the attorney because the referees finding was not clearly erroneous or lacking in evidentiary support. The Court did disapprove certain findings of guilt by the referee because the complaint did not allege, nor did the record provide any evidence to permit such a finding. The Scott case was a case involving moral turpitude. This case is clearly not such a case.

In the case of The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990) the respondent also contested the factual findings. The Court confirmed the rule that the referee's findings of fact "shall enjoy the same presumption of correctness as the judgment

of the trier of fact in civil proceeding". In the present case, the respondent challenges not the facts, but the recommended penalty and the application of the Disciplinary Rules to those facts. The findings of the referee are not supported by facts. The facts of the present case do support the Respondent's contention that no ethical or moral violation occurred.

In the Colclough case, supra, the respondent lied to the Court, prepared fraudulent documents and was clearly untruthful and untrustworthy in his conduct. Notwithstanding this factual finding, the Court did modify the punishment because the Court felt that it was too severe.

In the present case, a public reprimand is too severe a penalty.

The Florida Bar contends that The Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990) is "...very similar to the one at hand". It is not. In Bajoczky, the attorney took funds from someone other than his client to pay his attorneys fees. Mr. Bajoczky queried in his brief "[w]here was the rest of the money to come from?" The Court correctly commented that that matter should have been resolved long before the disciplinary proceeding.

In the present case, when it was first discovered that no bond money would be available and before additional work was done, Mr. Ferrano was contacted and a modified fee arrangement, acceptable to both parties, was agreed to. Then additional work was done. The conduct of Mr. Ferrano throughout this matter, and the facts before the referee support the contention that there was a minimum

fee agreement of $50.00 per hour. The evidence in the case is consistent only with the position of the Respondent. Mr. Ferrano's statement that he did not agree to the modified fee is the only testimony or evidence to support the referee's report. The Respondent's notes in the file, the total lack of complaints by, or even an inquiry, by Mr. Ferrano, Mr. Ferrano's letter of May 30, 1989 requesting a statement for his accountant, Respondent's letter of July 6, 1989 and the further failure to inquire or complain by Mr. Ferrano are totally consistent with Respondent's position. When all of the evidence is considered along with Mr. Ferrano's prior conduct in attempting to collect from the developer, it is clear that The Florida Bar Disciplinary Procedure and this Court is being used to collect a disputed fee.

The Florida Bar acknowledges the main holding in The Florida Bar v. Winn, 208 So.2d 809 (Fla. 1968) that controversies involving the amount of legal fees are not grounds for disciplinary proceedings. It is important to note that the six month suspension was upheld only because the attorney claimed fees that were too high when compared to the work done and the results obtained by the attorney. In Count I of the Complaint, the attorney charged $3,500.00 for services that were determined to be unproductive and ill considered. The attorney was found not guilty with respect to Count I because his conduct did not clearly violate the cannons of ethics. In Count II of the Complaint, the attorney claimed a $2,000.00 fee based on a contingent fee arrangement. The Court concluded that much of the value of the recovery was not based on

the attorney's efforts and therefore, the fee claimed was exorbitant or extortionate. Nevertheless, the order of restitution of that fee was overruled.

In the present case, the issue is definitely not the value of the attorney's services. Mr. Ferrano, The Florida Bar and the Respondent all agree that the value of the services performed by the Respondent exceeded the fees collected. (Pg.42, L.12-15 and Pg.80, L.18-21 & 22 and Pg.81, L.1-19)

> "Disciplinary proceedings are essentially a function of the Court instituted in the public interest and designed to preserve the purity of the Bar."..."Controversies, however, concerning the reasonableness of fees charged to and paid by clients are matters which by the very nature of the controversy should be left to the civil courts in proper proceedings for determination."

Winn, supra. The dissent best explained the reasons for findings of guilt in that case. The Respondent was "...grossly and blindly obtuse to applicable rules of professional ethics and public policy in his conduct concerning his clients." Id. 813. In this case, no such finding could possibly be made. Even after the Bar complaint was filed, the Respondent offered to meet with Mr. Ferrano to review the file and to discuss the fees. The offer was ignored, not refused.

The Florida Bar suggests that the holding in the case of The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975) is relevant. The Respondent agrees. In that case, an attorney entered into a contingent fee arrangement to collect assets in an estate. The amount of work to be done by the attorney to collect the assets was

far less than what the attorney was assured of collecting. The issue was not that the fees were merely excessive, but that they were so clearly excessive as to constitute a violation of the Disciplinary Rules. The Court acknowledged that the referee's initial recommendation of discipline only if the attorney failed to reimburse the client the difference between the excessive contingent fee and a reasonable fee was a lenient disciplinary measure. Only because the attorney ignored the findings of the referee and two additional recommendations of the referee was the attorney suspended from the practice of law.

The fees charged in the instant case are not clearly excessive after a review of the facts so that a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeded a reasonable fee for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney (Rule 4-1.5). The Florida Bar maintains that the agreed upon fee was one-third of any recovery. A recovery was made of $3,250.00 and therefore, only $1,083.33 should have been retained by the Respondent. The Florida Bar condents that retention of anything more than that was unethical, clearly excessive and in violation of Rule 4-1.5. It is obvious that the Respondent did not believe that the fee was based on one-third of any recovery. All of the Respondent's actions were consistent with that belief. All of Mr. Ferrano's actions were consistent with that belief up and until the Bar complaint was filed. Under the facts of this case, an ethical violation of the Rules should not

be found to have occurred. There does exist a factual dispute between the Respondent and his client, as to what the fee was to be. That dispute should be resolved directly by the parties (as was attempted by the Respondent) or by an action in civil court.

The Florida Bar has cited four cases in its brief, all standing for the proposition that discipline for unethical conduct must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983); The Florida Bar v. Dancu, 490 So.2d 40 (Fla. 1986); The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970); The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979). The Bar has argued that the most important purpose is the protection of the public. All four of these cases also stand for the proposition that the judgment must be fair to the attorney being sufficient to punish a breach of the ethics. In all four cases, the attorneys in question committed illegal and unethical acts that involved moral turpitude. In each case, the violations were obvious and known to the attorney. In two cases, the attorney committed repeat offenses. In the other two cases, the attorneys lied in an attempt to cover up their wrongdoing.

In the case of The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) the Court reduced the recommended punishment. In doing so, the Court quoted with approval from The Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954).

> "...the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charged against him."

The Florida Bar refers the Court to The Florida Bar v. Mirabole, 498 So.2d 428 (Fla. 1987) to support its position that a public reprimand is warranted. In that case, a $24,000.00 fee that was charged for a $3,000.00 mechanic's lien action was found to be clearly excessive. In the present case, the fees charged were warranted based on the services rendered and the results obtained. There is no evidence in the record to support a finding that the Respondent charged a clearly excessive fee based upon the criteria set forth in Rule 4-1.5. In fact, the Respondent actually avoided the assessment of attorneys fees against Mr. Ferrano for filing a fraudulent lien.

The Florida Bar has included in its brief the case of The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986). In that case, the Court upheld the findings of the referee recommending a public reprimand. The attorney was found guilty of charges involving two separate clients. In both cases, no written retainer agreement existed, and the attorney repeatedly failed to properly respond to the clients' requests concerning their bills. To aggravate matters, the attorney filed suits against these clients in an attempt to collect the fees, together with interest on the outstanding balances without any prior discussion with the clients concerning any penalty interest. The referee also found that the firm had filed many other suits to recover fees without following the Bar guidelines. The combined totality of the attorney's many breaches led the Court to conclude that a public reprimand was warranted. It should be noted that Justice Ehrlich in his dissent

reasoned that

> "...matters at issue reflect poor business judgment and inadequate supervision over the business aspect of respondent's practice. In my opinion, a private reprimand is the proper punishment."

Justice Boyd and Justice Adkins concurred. In the present case before the Court, the facts are far less damning and the acts of the Respondent are far less actionable.

If this matter had been brought in a civil court for resolution, the issues would have included the existence of a fee agreement and its terms. If no fee agreement were found to exist, the quantum merrit value of the attorney's services would have to be determined. It is submitted by the Respondent that there is no debate that $50.00 per hour is a reasonable fee to pay to pursue a $12,000.00 claim and to avoid the imposition of attorney's fees for filing a fraudulent lien.

CONCLUSION

The evidence and findings of fact do not support the conclusion of the referee that the Respondent charged a clearly excessive fee in violation of Rule 4-1.5. A public reprimand is not warranted under the facts of this case because of the failure of the Respondent to produce a signed retainer agreement nor a signed disbursement letter. The Florida Bar must guard against being used as a forum by citizens to collect monies from attorneys in matters involving a fee dispute.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 7th day of October, 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 and to John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300

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