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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

complainant,

v.

BBUCE L. HOLLANDER,

Respondent,

_____/

SUPREME COUBT CASE NO, 78,896

The Florida Bar Case
NO, 91-50,126(17H)

ANSWER BRIEF

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PRELIMINARY STATEMENT

For convenience to the reader the bar has adopted the same references as utilized by the Respondent in his brief. References to the transcript of the final hearing shall be designated as (P.__, L.__), P. stands for page and L. stands for line.

Respondent's exhibits shall be designated (R-___) and The Florida Bar's exhibits shall be designated as (B-___).

SUMMARY OF ARGUMENT

The Referee has found the Respondent guilty of violating the Rules of Professional Conduct and has recommended that he be publicly reprimanded and be placed on probation for a period of six (6) months. The bar is in complete agreement with the Referee.

The Respondent contends that bar counsel's proffer of the Respondent's prior disciplinary offence during the presentation of the bar's case requires the granting of a new hearing. The proffered Referee's Report found that the Respondent had violated rule 4-1.5(A). The Referee sustained the Respondent's objection to the introduction of his prior discipline over the bar counsel's argument that the prior discipline should be admitted as evidence of his intent to charge an excessive fee in the instant case. There is no evidence that the Referee then considered the proffered evidence on the issue of guilt or failed to disregard the order after refusing to admit the same.

The Respondent erroneously argues that the bar's expert witness was not qualified to provide expert testimony on contingency fee contracts in personal injury cases. The Referee's determination to permit the bar's expert witness to testify was consistent with the Florida Evidence Code and should not be disturbed in the absence of a clear showing of abuse of her discretion. The Respondent has failed to make such a showing.

The final points advanced by the Respondent essentially allege that the evidence presented at the hearing did not support the Referee's finding of guilt. The Respondent's fee agreement is clearly excessive

on its face thereby violating the bar's ethical rules. The Referee's finding of guilt is further supported by expert testimony. The weight given to the evidence and degree of credibility given to the witnesses by the Referee is presumed to be correct.

There is no basis far the Respondent's argument that the Referee abused her discretion in these proceedings or that she failed to objectively weigh the evidence presented. In that the Respondent has failed to meet his burden of establishing error by the Referee, this court should deny his request for a new hearing and approve the Report of Referee in its entirety.

STATEMENT OF THE CASE AND OF THE FACTS

On April 9, 1989, Lygia C. Tschirgi and the Respondent entered into a contingency fee agreement wherein the Respondent's firm, Hollander and Associates, P.A., (firm) undertook representation of her in a personal injury action. The contingency fee agreement includes a termination of services clause which provides, in part, that in the event the client discharges the firm,

> "the client must promptly pay the firm for all services rendered up through and including the date of termination along with any other fees, charges and/or other expenses incurred to that date.. .. In addition, the firm shall be entitled to a fee based on the fee schedule stated herein and computed on a prorata [sic] basis comparing the time expended by any new attorneys and the total recovery of the client."

The termination of services clause essentially provides far the payment of services at the time of the discharge of the Respondent's firm based on an hourly rate while entitling the firm to an additional percentage fee as set forth in the agreement should the client obtain a recovery after the firm is discharged.

In case of withdrawal by the firm, the withdrawal clause of the contingency fee agreement provides,

> "The client agrees that Hollander and Associates, P.A., shall continue to be entitled to a fee equal to the percentage of the amount received by the client as set forth in this agreement, unless and until a new mutually agreeable fee agreement is worked out between the client, this firm, and any new counsel taking over representation of the client."

The withdrawal clause allows the firm to obtain the same percentage of the recovery after withdrawal as it would have been entitled to if the firm had represented the client through recovery.

The Respondent determined that it would not be profitable for his firm to continue representing Mrs. Tschirgi. On February 12, 1990, the Respondent's associate, Scott Jontiff, mailed a letter to Mrs. Tschirgi requesting that she sign a Notice of Termination form that was enclosed therewith stating that she was discharging the firm. It was not Mrs. Tschirgi's intention to discharge the firm so she returned the notice of termination form to the firm unsigned. Some time thereafter the Respondent informed her that his firm would no longer continue representation. In October 1990, the Respondent made a motion to withdraw which was granted by the Court.

On July 23, 1991, Seventeenth Judicial Circuit Grievance Committee "H" conducted a hearing and found probable cause that Bruce L. Hollander, Respondent, violated Rules 4-1.5(D) and 4-1.16(d), Rules of Professional Conduct. On August 27, 1991, Grievance Committee 17 "H" conducted another hearing and found probable cause that the Respondent violated Rules 4-1.5(A) and 4-8.4(a) & (c). Both hearings were conducted pursuant to Rule 3-7.4(g), Rules of Discipline, and the Respondent was afforded all the rights to which he was entitled as set forth therein.

The Florida Bar filed a complaint against the Respondent and final hearing was held on March 6, 1992. On April 2, 1992, the Referee, the Honorable Melvia B. Green, issued her report of referee wherein she found the Respondent guilty of violating Rules 4-1.5(A) and 4-8.4(a) & (c), Rules of Professional Conduct. The Referee found the Respondent not guilty of violating Rule 4-1.16(d). The Florida Bar did not allege violation of 4-1.5(D) in its complaint.

After the Referee informed the Respondent and bar counsel of her findings as to guilt, memoranda of law regarding sanction was provided to her. The Referee recommended that the Respondent be publicly reprimanded and placed on probation for six (6) months. The terms of the recommended probation require that the Respondent cease and desist from the use and/or enforcement of the termination of services and withdrawal clauses in his firm's retainer agreements for contingency fee cases. The recommended probation further requires that the Respondent modify all of his firm's existing contingency fee agreements that contain the offending clauses and notify all clients who were effected by the modification and provide written certification to the Clerk of the Supreme Court of Florida that notice to the clients had been effected.

On April 13, 1992, the Respondent made a motion for re-hearing which the Referee denied April 16, 1992.

ARGUMENT

POINT I

THE RESPONDENT WAS NOT PREJUDICED BY BAR COUNSEL'S PROFFERING OF THE RESPONDENT'S PRIOR DISCIPLINE FOR VIOLATION OF RULE 4-1.5(A) WHICH THE REFEREE REFUSED TO ADMIT INTO EVIDENCE UPON OBJECTION BY THE BESPONDENT

Bar counsel's proffer of Respondent's prior disciplinary offense at final hearing during presentation of the bar's case which the Referee refused to admit or consider upon Respondent's objection, does not constitute a basis for a new hearing.

At the conclusion of the bar's presentation of testimony of its expert witness, bar counsel proffered this Court's order of March 5, 1992 approving the Referee's Report dated July 2, 1991, recommending that Respondent be found guilty of violating Rules 4-1.5(A), (F)(1) and (F)(2), Rules of Professional Conduct. (P. 51 L. 1-25). The Florida Bar v. Hollander, 594 So. 2d 307 (Fla. 1992). The Respondent immediately objected to the proffered order and after argument was made by Bar Counsel and the Respondent, the Referee refused to admit the order into evidence. (P. 54).

Even though the Referee in a bar grievance proceeding is not bound by the technical rules of evidence, bar counsel argued in good faith that the Respondent's prior offense of violating Rule 4-1.5(A) was evidence of his intent in the instant case. The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986).

Rule 3-7.6(k)(1)(4) does not prohibit the introduction of evidence which may be admissible pursuant to the Florida Evidence Code but merely indicates that which must be included in the Referee's Report.

Rule 90.404(2)(a) of the Florida Evidence Code states,

> "Similar fact evidence of other crimes, wrongs, or acts, is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." Section 90.404(2)(a), Fla.Stat. (1991).

The Referee sustained the Respondent's objection and did not admit the proffered case into evidence. (P. 54, L. 9 - 10). The Respondent argues that the Referee was prejudiced against his case merely by learning of the prior disciplinary case when bar counsel attempted to introduce this Court's order. In Trees By & Through Trees v. K-Mart, 467 So. 2d 401 at 403 (Fla. 4th DCA 1985), the court stated,

> "Where a trial court has weighed the probative value against the prejudicial impact before reaching a decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion."

The Referee's decision to exclude evidence of the Respondent's prior misconduct was clearly to the Respondent's advantage. There has been no evidence presented by the Respondent that the Referee considered the proffered evidence after having sustained his objection to its admission into evidence. The Respondent somehow believes that the Referee's finding of a selfish or dishonest motive as an aggravating factor in determining the appropriate recommended sanction was derived from considering his prior discipline before rendering her finding of guilt. No basis has been provided for such an assumption. The Respondent ignores the fact that the Referee was provided this Court's order pursuant to Rule 3-7.6(k)(1)(4), Rules of Discipline, after she

disciplinary offense as an aggravating factor when determining the appropriate sanction. Standard 9.22(a), Florida Standards for Imposing Lawyer Sanctions.

The Referee's decision is presumed correct and the Respondent has the burden of overcoming that presumption. In Re Guardianship of Read, 555 So. 2d 869 (Fla. 2nd DCA 1989). The Respondent has failed to meet his burden and the Referee's Report should be approved.

POINT II

THE BEFEBEE DID NOT EBB BY PERMITTING THE BAR'S EXPERT WITNESS TO TESTIFY AS *AN* EXPERT IN THE AREA OF CONTINGENCY FEE AGREEMENTS IN PERSONAL INJURY CASES

The Respondent argues that the Referee erroneously permitted Timothy P. Beavers, Esquire, to testify as an expert witness for the bar on the issue of contingency fee agreements involving personal injury cases in that it was not established that Mr. Beavers was an expert in such matters.

Rule 90.702, Florida Evidence Code, states,

> "If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience or training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial." Section 90.702, Fla.Stat. (1991).

Mr. Beavers testified that he had practiced law for approximately twelve years, almost exclusively in the plaintiff personal injury field of law, and represented all personal injury cases on a contingency fee basis. (P. 22, P. 23, L. 1 - 20). Based on Mr. Beaver's extensive experience in contingency personal injury cases the Referee properly permitted him to testify as an expert at the final hearing.

The Court in Guy v. Knight, 431 *So.* 2d 653 at 656 (Fla. 5th DCA 1983), ruled,

> "The trial court had the initial responsibility of determining the qualifications and range of subjects on which the expert witnesses were allowed to testify and its determination will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion."

The court further stated that the appellants were required to "point out clearly, definitely, and fully the prejudicial nature of the alleged error in admitting [the experts'] testimony." Id. at 656. The Respondent has failed to meet this burden. Therefore, the Referee's decision to consider the testimony of the bar's expert witness should be affirmed.

POINT III

THE REFEREE'S FINDING THAT THE RESPONDENT'S FEE AGREEMENT VIOLATED RULE 4-1.5(A) WAS SUPPORTED BY THE EVIDENCE PRESENTED AT FINAL HEARING

The Respondent argues that the termination and withdrawal clauses of his fee agreement were written for the purpose of clarity and for the client's benefit with no intent to violate ethical rules.

A review of the language of the subject clauses reveal that the provisions set forth therein were not only of no benefit to the client but overreaching and excessive, The termination of services clause provides,

> "..., should this claim be abandoned by the client or any other lawsuit filed pursuant hereto be dismissed at the client's insistence or request, then, and in that event, the client agrees to promptly pay the firm for all services rendered up through and including the date of termination along with any other fees, charges and/or expenses incurred to that date. The services rendered to that point shall be paid by client at the prevailing hourly rate for firm members at the time services were rendered."

The termination of services clause further provides:

> "In addition, the firm shall be entitled to a fee based on the fee schedule stated herein and computed on a prorata [sic] comparing the time expended by any new attorneys and the total recovery of the client."

The Respondent's claim that the above provisions are beneficial to the client is illusory. The clear import of the language is that if the client terminates the Respondent's services he or she must promptly pay the firm's prevailing hourly rate for services rendered. The Respondent's fee agreement overreaches, and thereby becomes clearly excessive, by entitling him to a prorated share of recovery based on the contingency percentages set forth in the agreement and comparing

this to the time spent by the client's subsequent attorney in addition to the hourly rate to which he is entitled. The Respondent's termination clause allows for him to be paid twice which has the effect of penalizing the client who discharges his firm.

The withdrawal clause of the Respondent's contingency fee agreement provides,

> "The client agrees that Hollander and Associates, P.A., shall continue to be entitled to a fee equal to the percentage of the amount received by the client as set forth in this agreement, unless and until a new and mutually agreeable fee agreement is worked out between the client, this firm, and any new counsel taking over representation of the client."

The withdrawal clause further provides that in the event of withdrawal by the Respondent:

> "... the client agrees to promptly pay the firm for all services rendered up through and including the date of withdrawal, and all other fees, charges and expenses incurred through the date of withdrawal."

Once again, the Respondent has created provisions in the agreement that entitle him to duel payment from the client even when it is the Respondent's decision to withdraw from the case. Should recovery be obtained by the client after the Respondent's withdrawal, the withdrawal clause allows the Respondent to collect a fee equal to the percentage of the recovery provided in the agreement which he would have been entitled to had he pursued the case to its conclusion. In addition to the fees that the Respondent would receive upon recovery by the client, the withdrawal provision requires that the client "promptly" pay the firm for all services rendered up through the date of withdrawal. The withdrawal and termination of services clauses effectively eliminate the contingency element set forth in the

Respondent's agreement as well as constituting a clearly excessive fee. As a result of such onerous terms, the Respondent, in effect, receives a bonus if he withdraws or is discharged prior to recovery, if any, by the client.

The Respondent's argument that Rule 4-1.5(A) does not specifically prohibit fee agreements such as his completely ignores the bar's ethical rules regarding fee agreements. Rule 4-1.5(A), Rules of Professional Conduct, states,

> "An attorney shall not enter into an agreement for, charge, or collect an illegal. prohibited, or clearly excessive fee ...,"

Rule 4-1.5(A)(1) states that a fee is clearly excessive if:

> "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 ...."

The testimony of the bar's expert witness, Mr. Beavers, and the language set forth in the termination of services and withdrawal clauses clearly establish an overreaching and excessive fee agreement which Rule 4-1.5(A) specifically prohibits.

Bar counsel does not argue that a lawyer should be precluded from recovering his or her fee under the doctrine of quantum meruit as the Respondent implies. As the Respondent correctly points out in his brief, this Court stated in Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982), that the attorney's cause of action for quantum meruit becomes ripe "upon successful occurrence of the contingency." Rosenberg involved an attorney who was discharged without cause and pursued his fee on the basis of quantum meruit after the client had obtained a substantial recovery in his cause of action. This Court

stated that a lawyer was entitled to a fee under the theory of quantum meruit but limited to the maximum fee set out in the fee agreement. Id. at 1017.

The Rosenberg decision does not validate the offensive and overreaching provisions of the Respondent's contingency fee agreement. None of the Court's language in Rosenberg suggests that the Respondent is entitled to the same percentage of recovery when discharged by the client as he would have been entitled to if he pursued the case to its conclusion and still be entitled to an additional fee calculated at an hourly rate for actual work performed. Furthermore, the Respondent's fee agreement provided for payment of his fee immediately upon termination without regard for whether recovery was ever realized by the client. Even more offensive is the provision for the immediate payment of the Respondent's fees even in those instances when the Respondent withdraws from the case without regard for whether there is recovery by the client.

It is suggested by the Respondent that when interpreting his agreement it is necessary to examine the conduct of the parties in addition to reviewing the entire document. The evidence before the Referee established that the Respondent's client, Mrs. Tschirgi, was directed by the Respondent's former associate to execute a form titled "Notice of Termination" that stated she was discharging the firm. After Mrs. Tschirgi's refused to sign the notice of termination, the Respondent indicated to her that he wished to withdraw from the case. The Respondent acknowledged in the Joint Pretrial Stipulation that Mrs. Tschirgi did not request that his firm cease representation. The fact that Mrs. Tschirgi executed the Respondent's contingency fee agreement

did not redeem what was an overreaching or excessive fee agreement. To hold otherwise would render an unconscionable agreement valid merely because the client made the mistake of signing such an agreement. In Foster v. Jones, 349 So. 2d 795 (Fla. 2nd DCA 1977), the Court stated,

> "Nevertheless, it is fundamentally accepted that competent parties have the utmost liberty of contracting and agreements voluntarily entered into will be enforced by the courts except where illegal, against public policy, or in contravention of statute." (emphasis added).

The Respondent acknowledges that his fee agreement contains language similar to the discharge clause which this Court found to be violative in The Florida Bar v. Doe, 550 So. 2d 1111 (Fla. 1989). Just as in Doe, the Respondent argues that it was not his intent to intimidate his client from exercising her right to discharge his firm. In Doe the Court found the respondent's contract violative of ethical rules on its face without regard for the intent of the respondent. Id. at 1112. The Court went on to state,

> "An attorney cannot exact a penalty for a right of discharge. To do so is contrary to our statement of policy in Rosenberg v. Levin, 409 So. 2d at 1021[.]"

Id. at 1113.

The Respondent's argument that he did not have the benefit of the Doe decision at time he entered into the fee agreement, and that he did not implement the offending clauses is not dispositive of the issue of whether his fee agreement is excessive. The Court's recognition that the Respondent reduced his lien and the referee's finding that he did not intend to violate ethical rules could be considered as mitigation, but did not negate "the effect of his onerous contract." Id. at 1113.

Obviously, the respondent in Doe did not have the benefit of the Court's opinion at the time he entered his fee agreement either. Therefore, the Referee's Report should be approved.

POINT IV

THE REFEREE'S FINDING THAT THE RESPONDENT VIOLATED RULES 4-8.4(a) & (c) WAS SUPPORTED BY THE EVIDENCE ADMITTED AT FINAL HEARING

The Respondent argues that the Referee's finding that he violated Rule 4-8.4(a) and *(c)* was not supported by the evidence presented at final hearing. The referee was uniquely situated to weigh all the evidence, observe the respondent's demeanor and determine his credibility. In Goldfarb v. Robertson, 82 So. 2d 504 at 506 (Fla. 1955), the court stated,

> "No authority needs *to* be cited for the proposition that this court is not entitled to substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."

The Referee in evaluating the testimony of the witnesses and the documentary evidence made a determination that the Respondent violated 4-8.4(a) and (c) when his associate mailed the letter to Mrs. Tschirgi requesting that she sign the notice of termination. As the supervisory lawyer and sole shareholder of Hollander and Associates, P.A., he bore some responsibility for the actions of his associate. Rule 4-5.1 states,

> "(c) A lawyer shall be responsible of another lawyer's violation of the Rules of Professional Conduct if: (2) The lawyer is a partner In the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

The Referee's recommendation that the Respondent was guilty of violating rule 4-8.4(c) is supported by the record and should not be disturbed. Rule 4-8.4(a) states that a lawyer shall not violate any of

the Rules of Professional Conduct and the Referee's finding with regard to that rule is established by the Respondent's misconduct in all counts of the bar's complaint. Therefore, the decision of the Referee should be approved.

CONCLUSION

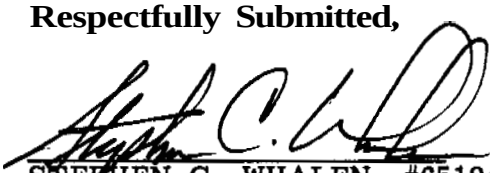
The Referee's finding that the Respondent violated the Rules of Professional Conduct is supported by the exhibits which were admitted into evidence at the final hearing as well as the expert testimony which further established his misconduct, The Respondent's prior misconduct was not admitted into evidence or considered by the Referee on the issue of guilt upon objection by the Respondent. Therefore, Respondent's claim of unfair prejudice is not supported by the evidence or precedent.

The bar's expert witness was qualified to testify in his capacity as an expert pursuant to evidentiary requirements. No showing has been made that the bar's expert witness was unqualified or that the Referee abused her discretion in allowing his tesimony.

The Respondent's fee agreement is violative on its face of ethical rules regarding fee agreements regardless of his intent and the weight given to the evidence by the Referee should not be disturbed. The absence of abuse of discretion by the Referee eliminates any basis for reversal of her findings and recommendations or re-hearing.

WHEREFORE, The Florida Bar requests this Court to uphold the Referee's findings and approve the Referee's recommended discipline of public reprimand and probation for six months and award the bar costs in these proceedings.

Respectfully Submitted,



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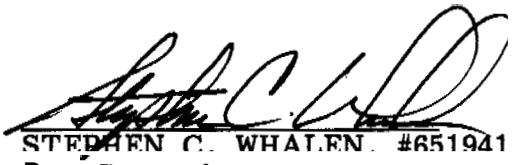
CERTIFICATE OF SERVICE

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, Esquire, at 1940 Harrison Street, Hollywood, FL 33020, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 by regular mail on this 14th day of July, 1992.



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