IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 29 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

SUPREME COURT CASE NO.: 78,896

THE FLORIDA BAR CASE NO.: 91-50,126(17C)

THE FLORIDA BAR,

Complainant,

v.

BRUCE LEE HOLLANDER,

Respondent.

BRIEF OF RESPONDENT

BRUCE L. HOLLANDER
HOLLANDER & ASSOCIATES, P.A.
1940 Harrison Street
Hollywood, FL 33020
(305) 921-8100 Broward
(305) 944-2822 Dade
FBN 162665

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INTRODUCTION

Reference to the transcript of the hearing shall be designated (P.___, L.___), P. stands for page followed by the page number and L. stands for line followed by the number of the line.

Respondent's Exhibits introduced into evidence at the hearing shall be designated (R-_____).

The Florida Bar's Exhibits introduced into evidence at the hearing shall be designated (B-____).

STATEMENT OF THE CASE AND FACTS

This is an appeal of the Report of Referee in a Florida Bar Disciplinary Action initiated by a complaint by Lygia C. Tschirgi against Bruce L. Hollander, Esquire concerning the law firm's contingent fee retainer agreement. After a hearing on July 23, 1991, at which the Respondent was not allowed to appear, the Seventeenth Judicial Circuit Grievance Committee "H" found probable cause for violation of Rule 4-1.5(D) and 4-1.16(d). At a further hearing on August 27, 1991, the Grievance Committee found probable cause for violation of Rules 4-1.5(A) and 4-8.4(a) and (c).

The Florida Bar filed a complaint against the Respondent on November 6, 1991 and an amended complaint on November 13, 1991. An Answer was filed by the Respondent on December 3, 1991. A Joint Pre-Trial Stipulation was filed by the parties prior to the hearing on March 16, 1992 before the Honorable Melvia B. Green.

The Referee notified The Florida Bar Counsel and the Respondent that she had found the Respondent guilty and requested a proposed Report of Referee from The Florida Bar Counsel and a Memorandum In Support Of Mitigation from the Respondent. A Memorandum In Opposition to The Florida Bar's proposed Report of Referee and the Memorandum In Support Of Mitigation was filed by Respondent on March 31, 1992.

On April 2, 1992, Referee Melvia B. Green rendered her report with findings of fact holding that the Respondent was guilty of violating Rule 4-1.5(A), not guilty of violating Rule 4-1.16(d) and guilty of violating Rules 4-8.4(a) and *(c)*. The Referee recommended a public reprimand and 6 months probation, partly

because the Referee found that the Respondent's conduct was "...more onerous than that of the attorney in The Florida Bar v. Doe, 550 So.2d 1111 (Fla. 1989) because "the Respondent's firm attempted to have the client discharge the firm against the client's will in order to exact benefits from the unconscionable termination clause of the retainer agreement."

A Motion for Rehearing was filed by the Respondent on April 13, 1992 supported by a Memorandum. The Motion was denied on April 16, 1992. A Petition for Review was filed on May 28, 1992.

Mrs. Lygia Tschirgi, a personal client of Gladys Coia, an associate of Hollander & Associates, P.A., hired the firm and signed the firm's contingent fee retainer agreement and the Statement of Clients Rights. (B-A). The retainer agreement was also signed by the Respondent. The form of the agreement had been previously approved by the Respondent.

Gladys Coia left the firm. The case was then assigned to Scott J. Jontiff, a new associate with the firm. A memo containing instructions was given to him by the Respondent. (R-4). The Respondent later determined that the firm no longer wished to handle the case and directed Mr. Jontiff to withdraw from the case. A bill dated February 2, 1990 was sent to Mrs. Tschirgi requesting reimbursement for costs and stating that "Legal Fees - unbilled legal fees will be charged upon the settlement of the case matter." (R-2). A Notice of Termination was sent to Mrs. Tschirgi by Mr. Jontiff. (B-B). Mrs. Tschirgi objected to the form of the notice, refused to sign it and returned it.

Mrs. Tschirgi sought substitute counsel, but was unable to do

so. Hollander & Associates, P.A. filed a Motion to Withdraw and a Notice of Lien. (R-3). The court entered an Order allowing the firm to withdraw.

SUMMARY OF ARGUMENT

I

Disclosure by The Florida Bar Counsel in contravention of Rule 3.7-6(k)(1)(4), Rules Regulating The Florida Bar (1987) so prejudiced the case that the Referee was unable to reach a fair and just decision. The Guide for Referees promulgated by The Florida Supreme Court, paragraph 4. subparagraph (e) also states the requirement that "Evidence of prior discipline is admissible against a Respondent after [emphasis added] a finding of guilt." The statement by The Florida Bar Counsel that the Respondent had just recently been reprimanded for a prior violation of Rule 4-1.5(A), thereby attempting to "...show his intent to charge an excessive fee and similar conduct" is not based on the facts of the prior disciplinary case and is so prejudicial that the Referee was unable to reach a fair and just decision. (P. 52, L. 4-5). A new hearing before a new Referee should be ordered.

II

The witness called by The Florida Bar Counsel was not sufficiently qualified to be an expert witness. Although the witness was an experienced personal injury lawyer, he had only worked for two Personal Injury firms utilizing two contingent fee retainer agreements and had only participated in the drafting of one of them. (P. 22, L. 20-23) and (P. 23, L. 17-20). The testimony of the witness should have been disallowed. The testimony of the witness was so prejudicial to Respondent's case that a new hearing before a new Referee should be ordered.

III

The retainer agreement as written and as intended to be interpreted by the Respondent does not provide for, nor permit the client to be charged a clearly excessive fee in contravention of Rule 4-1.5, Fees for Legal Services, Rules Regulating The Florida Bar (1987). None of the Respondent's supports the Referee's finding of a violation of Rule 4-1.5(A). None of the Respondent's independent acts support the Referee's findings of guilt. In fact, the Respondent's independent actions consisting partly of the bill dated February 2, 1990 (R-2), the memo (R-4), the Notice of Lien (R-3), the letter to Linda J. Amadon dated September 6, 1990 (B-C) together with the Pre-Trial Stipulations concerning Mr. Jontiff's testimony, all support the Respondent's contention that he should have been found not guilty. The decision of the Referee should be reversed.

IV

The total lack of evidence adduced at trial which would tend to support the Referee's finding that the Respondent violated Rule 4-8.4(a) and (c) requires reversal. There is no evidence that supports the Referee's finding that the Respondent intentionally attempted to have it appear that the client had discharged the firm in order to benefit from the retainer agreement's termination clause. The decision of the Referee should be reversed.

I. THE DISCLOSURE BY THE FLORIDA BAR COUNSEL THAT RESPONDENT HAD BEEN PREVIOUSLY REPRIMANDED FOR A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT BEFORE THE REFEREE HAD MADE A DETERMINATION IN THIS CASE TOGETHER WITH THE STATEMENT BY THE FLORIDA BAR COUNSEL THAT THE RESPONDENT HAD BEEN REPRIMANDED FOR VIOLATING THE IDENTICAL RULE REGULATING THE FLORIDA BAR REQUIRES THE GRANTING OF A NEW HEARING

The Florida Bar Counsel in contravention of Rule 3.7-6(k)(1)(4), Rules Regulating The Florid Bar and in contravention of The Guide for Referees in Disciplinary Casea established by This Court, and over the objections of Respondent disclosed to the Referee that the Respondent had just been disciplined by This Court. (P. 51, L . 4-25 and 52). The Rule clearly states that "...after [emphasis added] a finding of guilt, all evidence of prior disciplinary measures may be offered by Bas Counsel subject to appropriate objections or explanation by Respondent...". Rule 3.7-6(k)(1)(4) Rules Regulating The Florida Bar (1987).

The Florida Bar Counsel committed reversible error by further indicating to the Referee that the identical Rule alleged to have been violated in this case had been violated in the prior case. (P. 51, L. 16-24; P.52, L. 1-5; P.53, L. 1-9). The prior disciplinary action was based on the Respondent's failure to obtain a contingent fee agreement signed by the client. The comments of The Florida Bar Counsel were calculated to obtain an unfair advantage over the Respondent and to deprive the Respondent of a fair and impartial hearing. The prejudice to Respondent is patently evident, shown not only by the ultimate decision of the Referee, but shown specifically by virtue of the fact that with absolutely no supporting evidence and especially in light of the

Pre-Trial Stipulation between the parties involving Mr. Jontiff's testimony, that the Referee found a selfish and dishonest motive as set forth in the Aggravating Factors paragraph 2. of the Report of Referee. For the above *stated* reasons, *the* Report of Referee should be reversed and a new hearing should be granted to the Respondent.

II. THE WITNESS CALLED BY THE FLORIDA BAR SHOULD HAVE BEEN PROHIBITED FROM TESTIFYING AS AN EXPERT WITNESS BECAUSE THE WITNESS WAS NOT QUALIFIED AS AN EXPERT IN THE AREA IN WHICH HE TESTIFIED

The witness called by The Florida Bar as an expert should not have been allowed to testify. His qualifications were challenged by the Respondent and shown to be lacking. (P. 24, L. 1-24). The fact that the witness had been a practicing attorney in the area of personal injury litigation in no way made him an expert with respect to contingent fee retainer contracts. The witness testified that he only drafted one such contract (P. 23, L. 17-20). The witness also testified that his practice had been restricted to personal injury litigation for the past 12-13 years. (P. 22, L. 20-23). The witness had little or no experience in contract drafting or in contract construction.

It is apparent that the Referee adopted as fact the opinions of the "expert" witness. (Report of the Referee 11. J., L. and M.). This is true even through the witness did not have sufficient experience in the area of drafting or interpreting contingent fee retainer agreements to render an expert opinion.

Although it is the province of the Referee to determine whether or not the witness should be qualified as an expert, it is equally clear that if that decision is an abuse of discretion, it should be overturned. Guy v. Knight, 431 So.2d 653 (Fla. 5th DCA 1983).

Based on the foregoing argument, the decision of the Referee should be reversed and a new hearing ordered.

III. THE INTERPRETATION OF THE RETAINER AGREEMENT, CONSIDERING THE AGREEMENT AS A WHOLE AND EXAMINING THE INTENT OF THE RESPONDENT AS SHOWN BY THE RESPONDENT'S TESTIMONY, ACTIONS AND EVIDENCE REQUIRES A REVERSAL OF THE REFEREE'S DECISION

The Respondent is a Board Certified Real Estate Attorney whose practice consists mostly of transactional matters. The Respondent drafted a retainer agreement which included all of The Florida Bar mandated provisions and was intended to further comply with Rule 4-1.5, Rules of Professional Conduct, by including additional paragraphs to clarify what fees were expected by the firm in the event of certain specified contingencies. (B-A). The retainer agreement was intended to specify and clarify certain matters found to be lacking in other contingent fee retainer agreements. The added sections, were inserted for clarity, for the clients' benefit and to comply with The Florida Bar Rules.

Rule 4-1.5, Fees for Legal Services, The Rules Regulating The Florida Bar (1987), does not specifically prohibit a fee structure as set forth in the retainer agreement used by the Respondent, The Rules, however, do contain certain provisions that are specifically mandated to be in all contingent fee retainer agreements. All of these mandated provisions were contained in the firm's retainer agreement. The other sections were included in the agreement in an attempt to comply with the comments to the Rule which indicate the following:

> In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation.

and

> A written statement concerning the fee reduces the possibility of misunderstanding.

The testimony of the Respondent was that the agreement was intended to eliminate any confusion between the attorney and the client and not to exact an excessive or impermissible fee. (P. 66 L. 77).

The Rule does state that

> (A) 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 [emphasis added], 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.....
>
> (D) Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal...prohibited by this Rule, or clearly excessive as defined by this Rule.

Nothing in the Rule would lead an ethical attorney to the conclusion that a contingent fee agreement which provided for payment on an hourly basis for time spent by the firm up to the time of termination by the client would be perceived by The Florida Bar as an attempt to charge a clearly excessive fee. Recovery under the theory of Quantum Meruit takes into account, among other things, the time spent by the firm.

This Court, in the case of Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982), a non-disciplinary case, held that a Modified Quantum

Meruit Rule should be followed in Florida. This Rule determines the attorney's fees based on the value of his services but limits the attorney's recovery to the maximum amount of any attorney-client contract. The case further held that the cause of action for Quantum Meruit would arise only upon the successful occurrence of the contingency. This case also held that in computing the reasonable value of the discharged attorney's services, the trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client, including the attorney-client contract itself.

When interpreting the retainer agreement used by the Respondent, it is necessary to look at the entire document, as well as the conduct of the parties, as their conduct relates to that agreement.

The agreement as a whole was designed to conform to The Florida Bar Rules. The witness called by The Florida Bar conceded that except for the two offending sections, the agreement did comply with The Florida Bar Rules. (P. 35, L. 6-13).

Those two sections were never intended to allow the law firm to charge an excessive fee. It is clear from the testimony of the Respondent and the testimony of The Florida Bar's witness that the two questioned paragraphs are susceptible of different interpretations. In that event, it is appropriate to look at the entire contract and to look at the actions of the parties. Lalow v. Codomo, 101 So.2d 390 (Fla. 1958), Foster v. Jones, 349 So.2d 795 (Fla. 2nd DCA 1977), and Rod-Lyn Corporation v. DeBelay, 231 So.2d 233 (Fla. 3d DCA 1970).

Most recently the Third District Court of Appeals in the case of Oakwood Hills Company, et al. v. Horacio Toledo, Inc., 17 FLW 1275 (Fla. 3d DCA 1992) applied these same principals to a case involving the interpretation of a contract.

The TERMINATION OF SERVICES section of the agreement requires the client to "...promptly pay the firm for all services rendered...along with any other fees, charges and/or expenses incurred to that date." The section later contains a sentence that states: "All expenses of the firm shall be immediately [emphasis added] paid by the client." It is therefore logical to assume that the wording in the prior quoted sentence means what it says - that the fees shall be paid promptly, i.e., when permitted by The Florida Bar Rules and not "immediately" at the time of withdrawal, as is the obligation to pay the costs.

The sentence beginning with the words "In addition" was not intended to provide for legal fees over and above the hourly rate. The words "in addition'' were intended to mean that the fees that the firm would be entitled to would also take into account the time expended by the firm as compared to the time expended by the new firm on a prorata basis. The interpretation made by The Florida Bar's witness was that the fees claimed in that sentence were over and above the hourly fees. (P. 28, L. 18-23). If that were true, that sentence should logically have followed the sentence which states; "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 sentence beginning with "In addition..." was not placed there because it was intended to allow

the Court, in determining the Quantum Meruit value of the firm's services, to not be restricted by the hourly rate provisions found in the agreement if the Court were to determine that the value of the firm's services exceeded the hourly rate as required by the Rosenberg, case, supra.

The Florida Bar and the Referee relied heavily on the case of The Florida Bar v. Doe, 550 So.2d 1111 (Fla. 1989). That case involved a contingent fee retainer contract that contained an impermissible "discharge clause", and also did not contain The Florida Bar mandated clauses and Statement of Client Rights. The Referee ruled that The Florida Bar had submitted no testimony that John Doe's actions were in violation of The Florida Bar Rules. The Florida Supreme Court disagreed and ruled that the contingent fee retainer itself constituted a violation of the Rules because it contained an impermissible "discharge clause".

The retainer provided for a charge of $350.00 per hour if the client withdrew the case from the lawyer. The lawyer had earlier obtained an opinion from The Florida Bar that the "discharge clause" constituted an excessive fee. The lawyer prepared a new contract which reduced the hourly fee to $250.00 per hour but did not eliminate the clause. The lawyer obtained a second opinion from The Florida Bar which indicated that the contract did not contain the required Statement of Client Rights and that The Florida Bar's representative still had reservations concerning the "discharge clause". The lawyer prepared and sent another contract to the client, but received no response. Thereafter, the client discharged the lawyer.

The lawyer filed a Motion to Withdraw and sought fees based upon the rate of $350.00 per hour. That request was unilaterally reduced by the lawyer to $150.00 per hour. The Bar Complaint followed. Obviously, the lawyer did not heed the opinions received from The Florida Bar representative. This Court reasoned that a provision requesting $350.00 per hour, more than the attorney usually charged, was obviously intended to act as a deterrent to a client discharging him.

The retainer agreement in this case contains language similar to that which is prohibited by the Doe case, supra. It should be noted, however, that the retainer agreement was not intended to intimidate a client into not exercising their rights to discharge the law firm from representation nor was it intended to penalize any such exercise of that right. The retainer agreement was intended to set forth a clear understanding of what the client would probably have to pay the firm on a Quantum Meruit basis or otherwise. The retainer agreement had been used by the firm far many years without a single problem, client question, or Bar Complaint. The two objectionable sections have never been used by the firm.

The agreement was signed by Mrs. Tschirgi and the Respondent in April of 1989, five months before the Doe decision was reported. In drafting the agreement, the Respondent did not have the benefit of This Court's opinion in the Doe decision.

The WITHDRAWAL section of the agreement does not allow the law firm to charge an excessive fee. The first paragraph obligates the client to "...promptly pay the firm for all services rendered.. .and

other fees, charges and expenses incurred through the date of withdrawal." The second paragraph provides for a charging lien "...which shall be filed in the Court file for the payment of all sums due to the firm under the terms of this agreement;...". The paragraph also provides for attorneys fees and costs in the event it is necessary for the firm to institute suit to collect the monies it is due. That paragraph starts with the word "Additionally". This word is used in the same manner as "In addition" is used in the TERMINATION OF SERVICES paragraph. The clear, plain meaning of these words is that they are only an introduction to the sentence that follows. There would be no need to have a lien on the documents, property or money of the client if the client had paid the fees as set forth in the preceding paragraph. Therefore, the words "promptly pay" means that monies are due according to The Florida Bar Rules, when the contingency has been met and the monies are recovered on behalf of the client, otherwise, no lien would be necessary. The paragraph does not say "If you do not pay us right away we will file a lien." The interpretation of the paragraph as written supports the Respondent's position that the agreement does not provide for an excessive fee to be charged.

The next paragraph was included in the retainer agreement for the reasons set forth in the Respondent's testimony. (P. 73, L. 5 - P.74, L. 8).

The final paragraph in that section provides that the firm is entitled to a fee recovery based on a percentage of the amount offered in the event that an offer of settlement or award had been

made. This language is consistent with the Rules and Florida Case Law.

The retainer agreement, when considered as a whole, does not allow the law firm to charge a fee that could be considered clearly excessive. Accordingly, the Report of Referee should be reversed.

IV. THE *TOTAL* ABSENCE OF EVIDENCE PERTAINING TO THE ELEMENT OF RESPONDENT'S INTENT IN THIS CASE REQUIRES A REVERSAL OF THE REFEREE'S FINDING THAT RESPONDENT VIOLATED RULE 4-8.4(a) AND (c) OF THE RULES REGULATING THE FLORIDA BAR

The Referee is charged with the determination of the facts in the case. The Guide for Referees in Disciplinary Cases: Section 4. TRIAL BY REFEREE, Subparagraph (e) WEIGHT AND QUALITY OF EVIDENCE, Florida Supreme Court, requires that the evidence to sustain a disciplinary decision against the Respondent must be clear and convincing. This is something less than beyond a reasonable doubt as required in criminal cases and something more than a preponderance of the evidence required in civil cases. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978), and The Florida Bar v. Raman, 238 So.2d 594 (Fla. 1970).

In this case the facts overwhelmingly support the fact that the Respondent was in no way involved in the decision to send out the form "Notice of Termination" as opposed to any other form. The Notice of Termination was signed by Scott J. Jontiff, an Associate in the firm, assigned to handle the case after Gladys Coia, the associate originally responsible for the case, withdrew from the firm.

The Joint Pre-Trial Stipulation filed by The Florida Bar and the Respondent as to Count I, Paragraph 9. states that Mr. Jontiff, if he was called to testify, would state that:

(a) He does not recall his reason for utilizing the Notice of Termination that he sent to Mrs. Tschirgi;

(b) He did not recall any conversation with the Respondent regarding his decision to utilize

the Notice of Termination form that was provided to Mrs. Tschirgi;

(c) He believed that use of the Notice of Termination was the method to notify Mrs. Tschirgi that the Respondent's firm was terminating representation;

(d) He is unsure whether he understood what the Notice of Termination form meant on February 12, 1990."

The Respondent testified on direct examination by The Florida Bar's Counsel that "There was nothing specifically intended by the terminology of the form that was sent, whether it was a notice of withdrawal or termination of counsel form, there was no preconceived intention on the part of the firm when those were sent." (P. 16, L. 16-20). No demand was made on Mrs. Tschirgi to pay the firm a fee, either hourly or otherwise, until the case was concluded by substitute counsel. The Florida Bar elicited no other testimony in any way indicating that Respondent purposefully engaged in deceit for personal gain.

In Respondent's part of the case, Respondent introduced a memo from the Respondent to Mr. Jontiff dated November 20, 1989, which clearly indicates that there was no intent to do anything more than discontinue the firm's representation of Mrs. Tschirgi. (R-4) The memo does indicate a concern about the Statute of Limitations and the necessity of giving the appropriate notice to Mrs. Tschirgi. The memo is totally devoid of any reference to fees that may have been claimed by the firm or of any directions to attempt to exact a clearly illegal or excessive fee.

After Mrs. Tschirgi had been notified by Mr. Jontiff that the firm wished to withdraw, but before the notice was sent to her, a

bill was sent to her indicating that she owed the firm $35.00 in costs. (R-2). That bill clearly indicates what legal fees the firm claimed it was due.

> Legal Fees:
>
> Unbilled legal fees will be charged upon the settlement of the case matter. (R-2)

No mention is made of any fees being immediately due from Mrs. Tschirgi, calculated on an hourly basis or otherwise.

Mr. Jontiff, on behalf of the law firm, filed a lien in the case. (R-3) That lien clearly states that lien is for "...the value of...services rendered...prior to our Notice of Termination." The lien was filed on February 20, 1990.

The letter to Linda J. Amadon, Bar Counsel, dated September 6, 1990, after the complaint was filed, states Respondent's position that "...it would be up to the Judge to determine what fees the law firm would be entitled to." (B-C)

The case of The Florida Bar v. Nue, 17 FLW 226, (Fla. 1992) is directly on point. As in that case, here too The Florida Bar elicited no evidence and certainly no testimony establishing the necessary element of intent on the Respondent's part in order to support a finding that the Respondent had acted with dishonesty, fraud, deceit or misrepresentation. There is no connection between the sending of the Notice of Termination and the actions of the Respondent. Moreover, there is absolutely no evidence that there is any connection between the sending of the Notice of Termination and the Termination Clause in the retainer agreement.

Based on the foregoing argument, the decision of the Referee should be reversed.

CONCLUSION

The Respondent's law firm used a contingent fee retainer agreement that contained all of The Florida Bar mandated provisions including the Statement of Clients Rights. The agreement also contained other provisions intended to clarify what fees the firm expected under specified conditions in an attempt to further comply with The Florida Bar Rules requiring the client to have a clear understanding of the fees to be charged.

When the Respondent's law firm withdrew, a bill was sent to Mrs. Tschirgi indicating that only costs were then due. The bill also stated that legal fees would be charged upon the settlement of the case matter. (R.2). The firm also filed a lien to protect its fees. It was contemplated that the court would therefore be determining the amount of fees due the firm at the conclusion of the case. (R.3).

The Florida Bar presented a witness who should not have been qualified as an expert with respect to interpreting the contingent fee retainer agreement because of his lack of knowledge and experience in the areas of contract drafting and contract construction.

Respondent stated that the retainer agreement was not intended to allow the firm to charge a clearly excessive fee. The actions of the Respondent and the firm were consistent with that statement.

This case is distinguishable from the Doe, case, supra, for the following reasons:

The Respondent's retainer agreement contained all of The

Florida Bar required provisions and The Statement of Clients Rights. The Respondent did not receive any comments from a Florida Bar representative indicating that the retainer agreement was suspect as did John Doe. The Respondent indicated, by virtue of his firm's bill, his firm's lien for fees, as well as his letter to Linda J. Amadon, that the fees expected by the firm would be paid (1) at the conclusion of the case and (2) in an amount set by the court. (R-2, R-3, B-C). Both of these conditions are proper and do not constitute a violation of The Florida Bar Rules.

The sections in the retainer agreement that were questioned by The Florida Bar are perhaps not very clear and may have been ambiguous. Therefore, the entire agreement and the actions of the parties should have been considered by the court in order to determine the intent of these sections. The Respondent should not be found guilty of an ethical violation of The Florida Bar Rules based on unclear provisions in a retainer agreement that were not enforced nor followed.

The retainer agreement prepared and used by The Florida Bar witness and the agreements used by many Personal Injury Attorneys, only specifies that the fee due the firm is based on a percentage of the recovery. No where does that agreement specify that the fees would be reduced and then determined on a Quantum Meruit basis if the firm withdrew or was discharged. These agreements should not be viewed as allowing the firms to charge a clearly excessive fee because of that omission.

The Florida Bar Counsel disclosed to the Referee, prior to any

determination of Respondent's guilt or innocence, that the Respondent had just recently been reprimanded and that the violation was for the identical Rule 4-1.5(A) violation with which Respondent was being charged in this case. This disclosure, contraryto Rule 3.7-6(k)(1)(4), so prejudicedthe Referee that the Respondent was not able to obtain a fair and impartial hearing.

The previous case for which the Respondent was disciplined involved, among other things, the failure of the Respondent to obtain a signed contingent fee retainer agreement from a client. The Respondent claimed that the client had agreed to a fee increase. The client admitted that an increase had been discussed but denied agreeing to it. The fact of the increase was not reduced to writing, thereby creating an overcharge by the Respondent. This prior case in no way indicates an intent on the part of the Respondent to charge clearly excessive fees on an ongoing basis.

The decision of the Referee should be reversed and the Respondent should be found not guilty of a breach of the Rules Regulating The Florida Bar (1987) because (1) the retainer agreement when taken as a whole does not violate the Rules Regulating The Florida Bar (1987) and (2) because the Respondent's intent and actions implementing that agreement do not violate the Rules Regulating The Florida Bar (1987).

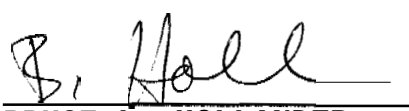
In the alternative, the decision of the Referee should be reversed and a new hearing should be granted because of (1) the prejudicial statements made by The Florida Bar Counsel and (2) the

testimony of The Florida Bar witness who was not qualified to be considered an expert.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 26th day of June, 1992 to Stephen C. Whalen, Bar Counsel, The Florida Bar, Cypress Financial Center, #835, 5900 N. Andrews Avenue, Ft. Lauderdale, FL 33309; 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.

HOLLANDER & ASSOCIATES, P.A.
1940 Harrison Street
Hollywood, FL 33020
(305) 921-8100 Broward
(305) 944-2822 Dade



BRUCE L. HOLLANDER