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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: 78,896

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

THE FLORIDA BAR,

Complainant,

v.

BRUCE L. HOLLANDER,

Respondent.

REPLY BRIEF OF RESPONDENT

Bruce L. Hollander
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The Florida Bar v. Doe, 550 So.2d 1111 (Fla. 1989) 1,4,7

RULES REGULATING THE FLORIDA BAR (1987):

Rule 4-1.5 Fees for Legal Services 2,3,7
Rule 4-1.5(A). 1
Rule 4-1.5(F)(4)(6). 3

INTRODUCTION

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 (P.__, L.__), P. for page and L. for 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-_____).

ARGUMENT

The Referee found in her report that the Respondent's conduct was "...more onerous than that of the attorney in The Fla 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."

This finding is not supported by any evidence or testimony adduced at the hearing. Their must be some evidence to support the Referee's finding. The Referee's finding should be reversed. This finding is the basis for Respondent's claim that the prejudicial and premature introduction of Respondent's prior disciplinary action by Bar Counsel greatly prejudiced the referee. During the hearing, Bar Counsel announced that "...he violated the same rule that is before you taday. And the Supreme Court as of yesterday handed down an order affirming...the referee's recommendation as being proper and he, in fact, was guilty of violating Rule 4-1.5 A". **(P.51 L.19-24).** The claim by Bar Counsel that the prior violation and the actions of Respondent in this case shows an intent on the part of the Respondent to violate the rules of professional conduct is unfounded and without merit when the facts of each case are examined. Bar Counsel's allegations constitute bad faith in prosecuting this case. Bar Counsel knew that Respondent would object. **(P.51,** L.1-2). The introduction of the prior violation was objected to by the Respondent. **(P.51, L.6-7, P.54, L. 13-14).**

The evidence introduced at the hearing which controverts the

Bar Counsel's contention includes the following: The joint pretrial stipulation, paragraphs (a) (b) (c) and (d) which indicated that Mr. Jontiff had not spoken to the Respondent about the Notice form and that Mr. Jontiff did not attach any significance to the form used. Direct testimony by the Respondent that there was no reason for the use of that particular form. (P.16, L.16-20). The memorandum dictated by the Respondent to Mr. Jontiff which contained nothing to indicate an intent to file a Termination of Counsel form as opposed to a Notice of Withdrawal form. There is not any evidence that Respondent was even aware of the form that was used until after Mrs. Tschirgi complained. The firm finally withdrew from the case with leave of court.

In addition to the evidence dealing directly with the type of form used, it should also be noted that the evidence adduced at trial concerning all of the actions taken by the Respondent and all of the actions taken by the law firm are consistent with Respondent's position that a clearly excessive fee was never contracted for, was never expected and was never claimed.

The main issue in this case involves the interpretation of Rule 4-1.5 Fees for Legal Services, Rules Regulating The Florida Bar and the language contained in the firm's retainer agreement.

The Rule states that a fee is clearly excessive when:

> (A)(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.

Paragraph (D) goes on to state that

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.

Paragraph (F) mandates that contingent fee contracts also contain a provision that states:

> 2. This contract may be cancelled by written notification to the attorney at any time within three (3) business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney(s) for the work performed during that time... .

It is reasonable to presume that if a contract is cancelled after the 3-day period that the client would be responsible to pay fees to the attorney. Those fees should be specified in the retainer agreement. Respondent attempted to comply with the Rules.

The provision of the Rules entitled Contingent Fee Resulation specifically allows contingent fees to be combined with non-contingent fees. Nothing in the Rules prohibits this type of fee arrangement. The only prohibition, is that the fees are not to exceed the schedule set forth in Rule 4-1.5(F)(4)(6).

It is equally clear that attorneys who are discharged by their client in contingent fee cases are entitled to a fee for the services rendered. This Court has already ruled that the fees are due only upon the occurrence of the contingency and apparently only for the quantum meruit value of those services.

There is nothing in the retainer agreement, after a review of the facts of this case, that would leave a lawyer of ordinary prudence with a definite and firm conviction that the fees claimed exceeded a reasonable fee for the services provided to such a

degree or to constitute clear and overreaching or an unconscionable demand by the Respondent.

This Court in The Florida Bar v. Doe, 550 So.2d 1111 (Fla. 1989), found Mr. Doe guilty because he "...filed a lien against his former client in an amount of the original contract after knowing it was suspect. Mr. Doe's contract provided for an exorbitant fee to dissuade clients from terminating his services. There is no exorbitant fee being charged in this case. Although it is impermissible to charge a client an hourly fee in a contingent fee case if the attorney is discharged prematurely, without the benefit of this Court's pronouncement in Doe, supra. The actions of the Respondent in this case should not be considered a breach of the ethical rules.

The bill sent to Mrs. Tschirgi made it clear that no legal fees were expected until "...settlement of the case matter." (R-2). The lien filed in the case was for "...the value...of services rendered...prior to our Notice of Termination." (R-3). It was left to the Court to establish the amount of the lien based on the time expended, what was accomplished and the value of the services rendered. The letter by the Respondent to Linda J. Amadon, Bar Counsel, made it clear that the Respondent understood that the Judge in the case would establish the fee due the firm. (B-C).

It was not the intent of the Respondent and The Bar Rules do not make it clear, that reverting to the firm's usual hourly fee in the event of a termination of a contingent fee contract by the client would violate those Rules. The hourly fee provision was disclosed to the client in the retainer agreement. The Respondent

did not have the benefit, as did Mr. Doe, of Bar Counsel's comments, nor the expressed concerns of any other attorney as to the propriety of the retainer agreement.

Bar Counsel has argued that the retainer agreement, specifically the Termination of Services, paragraph, provides for an excessive fee because it requests an hourly fee together with a prorata recovery of any contingent fee recovery by the new law firm. (B-A). Respondent has categorically denied that that paragraph was intended to provide for a fee based upon a prorata share of the recovery, in addition to the hourly fee. In fact, the bill rendered, the lien filed and the letter to The Florida Bar are consistent with Respondent's statements that be expectedto be paid if and when the contingency occurred and in an amount set by the Court. Without any evidence to the contrary, the Report of the Referee has no support and should be reversed.

The Withdrawal paragraph of the retainer agreement was intended to clarify the fact that the firm reserved the right to withdraw from representation for various reasons..."as permitted or required under the Florida Code of Professional Responsibility" and to provide for a lien for the services rendered to that point. The word "additionally" starts the paragraph dealing with the lien. Like the words in the Termination of Services paragraph "in addition", the word "additionally" is used as a modifier to clarify what was written earlier. The language and wording may have been inartfully drafted. There is no evidence to support The Bar's contention nor the Referee's Report that the Respondent intentionally attempted to charge an excessive fee.

The "expert" of The Florida Bar did not have any demonstrated expertise in the area of contract drafting nor in the area of contract interpretation. His testimony should have been excluded. If admitted, his opinion should not be the sole basis for a finding that the Respondent committed a violation of The Bar Rules.

Based on the foregoing argument, the Report of the Referee was not supported by any evidence and should be reversed.

CONCLUSION

The Respondent followed the Rules Regulating The Florida Bar and obtained a signed written contingent fee agreement from Mrs. Tschirgi which agreement contained all of the provisions mandated by Section 4-1.5 Fees for Legal Services including the Statement of Client Rights.

The Florida Bar prosecuted the Respondent claiming that the retainer agreement attempted to charge a clearly excessive fee citing the case of The Florida Bar v. Doe, 550 So.2d 1111 (Fla. 1989).

The Florida Bar presented no evidence to support its position that a clearly excessive fee was charged. The direct testimony of the Respondent and the evidence submitted proves just the opposite. The Respondent and the firm only expected to be paid at the conclusion of the case and in an amount established by the Court on a quantum meruit basis.

Unlike the attorney in Doe, supra, the Respondent did not file a lien for a prohibited amount. The Respondent did not have correspondence from Bar Counsel indicating that the agreement was questionable. The Respondent did not have to alter the amount of fees claimed in this case because no excessive fee was claimed.

The "expert" presented by The Florida Bar had no experience in contract drafting and contract interpretation. Although the "expert" was a personal injury lawyer of long standing, he had only been involved in drafting one contingent fee retainer agreement. His testimony should have been excluded by the Referee.

The Florida Bar Counsel announced during the hearing, over

objection, that the Supreme Court had just confirmed a finding of guilt of Respondent's for violating the same section of the Rules under review in this case. In that case, Respondent was found guilty of not having a signed contingent fee agreement. A review of the facts in each case clearly indicate that there was no similarity between that case and this. There could be no showing of a similar intent to charge a clearly excessive fee in this case as claimed by Bar Counsel. Introduction of the prior disciplinary action was intended to prejudice the Referee against the Respondent. It is apparent that this tactic was successful.

For the arguments contained in the briefs and the evidence adduced at trial, the Ruling of the Referee should be reversed and the Respondent found not guilty of entering into an agreement to charge a clearly excessive fee. In the alternative, the ruling of the Referee should be quashed and the Respondent given a new hearing before a new Referee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 24th day of July, 1992 to Stephen C. Whalen, Bar Counsel, The Florida Bar, Cypress Financial Center #835, 5900 N. Andrews Avenue, 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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