097

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JOSEPH SCOTT LANFORD,

Respondent.
_____/

Case No. 86,927
[TFB Case No. 95-31,311(18C)]

FILED 11-4
SID J. WHITE
OCT 28 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

RESPONDENT JOSEPH SCOTT LANFORD'S ANSWER BRIEF

R. KEITH WILLIAMS, P.A.
3125 West New Haven Avenue
West Melbourne, FL 32904
Tele: (407) 723-2300
Florida Bar No. 0502080
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES REGULATING THE FLORIDA BAR

SYMBOLS AND REFERENCES

In this answer brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar".

The Respondent J. Scott Lanford shall be referred to as Respondent or Lanford

The transcript of the final hearing held on April 25, 1996, shall be referred to as "T", followed by the cited page number.

The Report of Referee dated May 15, 1996, will be referred to as "ROR", followed by the referenced page number(s) of the Appendix, attached. (ROR-A-).

The bar's exhibits will be referred to as B-Ex._____, followed by the exhibit number.

The respondent's exhibits will be referred to as R-Ex._____, followed by the exhibit number.

The Florida Bar's initial brief will be referred to as CB-

_____, followed by the referenced page number.

STATEMENT OF THE CASE

Pursuant to a Complaint filed by The Florida Bar following established grievance committee proceedings, the Respondent J. Scott Lanford was charged with violation of a single rule regulating The Florida Bar, to wit: 4-8.4(c); conduct involving dishonesty, fraud, deceit, or misrepresentation. No other charges were levied against the Respondent. The final Hearing was held April 25, 1996, before a referee, the Honorable L. B. Vocelle, resulting in the report of the Referee dated May 15, 1996. The Referee concluded the Respondent had not violated Rule 4-8.4(c), to wit: no conduct involving dishonesty, fraud, deceit, or misrepresentation. This matter is properly before this Court upon Petition for Review initiated by The Florida Bar submitted August 2, 1996.

STATEMENT OF THE FACTS

The Respondent accepts the Statement of Facts as submitted in The Florida Bar's Initial Brief with brief addition.

Ms. Tartaglione charged Ms. Johnson's credit card account by mistake and Ms. Tartaglione admitted same (T-53). Prior to the incident of applying charges to Ms. Johnson's account, there existed an established office practice of submitting client bills on client charge accounts without signed authorizations on a pre-approved installment basis. (T-46-47). Ms. Tartaglione charged Ms. Johnson's Visa account without her specific transaction authority by mistake using a method established with other clients whom permitted charges without signatures (T-47).

SUMMARY OF ARGUMENT

The Florida Bar solely is responsible for the charges brought against the Respondent J. Scott Lanford and The Florida Bar chose to file a complaint charging Mr. Lanford with violation of Rule 4-8.4(c) alleging conduct involving dishonesty, fraud, deceit, or misrepresentation. The complaint arose out of the admitted mistake on the part of the Respondent in submitting charges on the credit card of Ms. Johnson without her prior signature. The Respondent first learned of both the mistake and Ms. Johnson's complaint of same only by Ms. Johnson filing a grievance with The Florida Bar. Ms. Johnson admitted she never contacted the Respondent regarding the bill, billing procedure, credit due on her credit card, or any other matter. Ms. Johnson availed herself to the credit protection afforded to her by her credit card issuer and was timely credited for the charges mistakenly applied by the Respondent's legal assistant. Respondent to date has not been paid by Ms. Johnson for services rendered.

The Florida Bar charged the Respondent with conduct constituting dishonesty, fraud, deceit, or misrepresentation. The burden of proof on The Florida Bar was to demonstrate clear and convincing evidence against the Respondent in order to prevail in it's complaint. A requisite element of dishonesty, fraud, deceit, or misrepresentation, is a demonstration of intent on the part of the accused. Notwithstanding any other label or categorization of the acts of the Respondent or his legal staff surrounding the transaction whereby Ms. Johnson's charges were mistakenly placed

on her credit card account without prior authorization, The Florida Bar failed completely to present at the Hearing before the Referee clear and convincing evidence of any intent on the part of the Respondent which would constitute dishonesty, fraud, deceit, or misrepresentation. As such, the Referee appropriately evaluated the facts and recommended dismissal of the allegations against the Respondent. The entirety of the facts, report of referee, recommendation for dismissal by the Referee, applicable case law, and the rules regulating The Florida Bar, support dismissal of these charges against the Respondent J. Scott Lanford. Inasmuch as the Florida Bar failed to prove by clear and convincing evidence any intent, or act(s) on the part of Lanford constituting dishonesty, fraud, deceit, or misrepresentation, and given that the Florida Bar chose to allege no other rule violations in their complaint, the issue and suggestion of discipline is unsupported and should be moot.

ARGUMENT
POINT I

WHETHER THE REFEREE'S FINDINGS THAT RESPONDENT WAS NOT GUILTY OF FRAUD, DECEIT, OR MISREPRESENTATION IS SUPPORTED BY THE EVIDENCE AND NOT CLEARLY ERRONEOUS.

The Florida Bar concedes the Referee's findings of fact (CB-4). The bar apparently is petitioning this Court to substitute it's judgment for that of the Referee's by suggesting improper or incorrect legal inferences and conclusions drawn from the uncontested facts. Respondent asserts that a Referee's findings enjoy the same presumption of correctness on issues of fact and law as would the judgment of a trier of fact in a civil proceeding. The Florida Bar vs. Hooper, 509 So.2d 289 (Fla. 1987). Further, this Court must sustain the Referee's findings if they are supported by competent and substantial evidence. i.d. at 291. See also The Florida Bar vs. Bajoczky, 558 So.2d 1022 (Fla. 1990). (A Referee's findings will be upheld unless they are without support in the evidence.)

This Court need look no further than the analysis applied by the Referee in the closing remarks at the end of the Hearing held April 25, 1996. Specifically, the Referee understood well the charges submitted by The Florida Bar, the burden of proof, and the elements of dishonesty, fraud, deceit, or misrepresentation. The following brief discourse so reveals.

> **MR. WILLIAMS**...the only issues were the transaction at the time it occurred was fraudulent, deceit, or misrepresentation.
>
> (T-73)
>
> **THE COURT:** Is the burden of proof clear and convincing?

MR. WILLIAMS: I believe so.

THE COURT: Do you agree Ms. DiGangi?

MS. DIGANGI: Yes it is Your Honor.

THE COURT: That the burden of proof is clear and convincing.

(T-73)

Moreover, the following discourse exhibits the Referee's understanding as well as Bar counsel's understanding of the necessary proof.

> **THE COURT:** Let me ask a question. Do you agree that on the basis of deceit, fraud, misrepresentation, dishonesty, there must be an intent?
>
> **MS. DIGANGI:** Yes Your Honor. (T-76).

The Court heard all of the Bar's proof or lack thereof and testimony of all necessary parties, reviewed the Bar's complaint and the recommended dismissal for the Respondent J. Scott Lanford and in so doing commented:

> **THE COURT:**...I think what has happened here is unfortunate, I don't think you (Ms. Johnson) had any obligation to call Mr. Lanford, but I think there has been a lack of communication, lack of understanding. And I can't see from clear and convincing evidence that there has been any fraud or any deceit or any dishonesty or misrepresentation. I think that there was a misconception of thought that the attorney had authority to do what he did...So, as far as I'm concerned, it's dismissed.
>
> (T-79)

There exists no confusion on the part of the Referee that in order to find an attorney has acted with dishonesty, misrepresentation, deceit, or fraud, the necessary element of

intent must be proven by clear and convincing evidence. The Florida Bar vs. Neu, 597 So.2d 266 (Fla. 1992). The Referee's application of existing case law to the facts presented, or lack of facts presented, is consistent with the evidence and law and contrary to the Bar's position, this Court is obligated to uphold the Referee's findings of fact and **conclusions** unless the Referee's findings are clearly erroneous and without support in the evidence. The Florida Bar vs. Johnson, 526 So.2d 53 (Fla. 1988). citing Florida Bar vs. Carter, 410 So.2d 920,922 (Fla. 1982).

The argument constructed by The Florida Bar in it's initial brief confuses the Respondent's mistaken belief expressed at the time of the initial Bar complaint initiated by Ms. Johnson (specifically Respondent's written response that Ms. Johnson had authorized the transaction to be placed on her charge card), with the issue of whether the Respondent intended any wrong to Ms. Johnson in January of 1995, at the time her account was charged. Specifically, the Respondent J. Scott Lanford's belief that Ms. Johnson would have by necessity authorized any change does not somehow suggest a retroactive intent to defraud or misrepresent anything to Ms. Johnson, but instead represents the established office practice of not placing clients' bills on charge cards without prior authorization with few exceptions.[1] The fact that Mr. Lanford was mistaken at the time of his reply to The Bar complaint, a mistake he readily admits at all levels of these proceedings, is

1. Respondent testified as did his legal assistant that in some cases clients had pre-approved monthly charges to their respective charge accounts without signed authorization for each transaction.

not transferable to establish intent by clear and convincing evidence of any thought or intention of misdeed at the time the charge was placed on Ms. Johnson's credit account many months before. Mr. Lanford's belief at the time was logical, to wit: how else could we have charged her account but for her authorization. Moreover, before concluding his own investigation there existed the possibility Ms. Johnson was not telling the truth.

The Florida Bar's reference to Respondent's state of mind as "no harm, no foul" (CB-6), is not to be found in the record of this proceeding, the transcript of the Hearing before the Referee, the findings of fact and conclusions of Referee in his report, and appears to be unfairly attributed to the Respondent. The Respondent never has suggested in any of these proceedings a desire to conduct self-help collection of his debt beyond a reasonable expectation of payment for services rendered.

The Florida Bar unfairly relies upon The Florida Bar vs. Cramer, 643 So.2d 1069 (Fla. 1994), for the proposition that self-help debt collection by attorneys is unethical conduct worthy of a punishment. Respondent does not quarrel with the Cramer decision or holding therein and respectfully asserts that the Cramer decision is not a self-help collection case with any application to these facts. The case of The Florida Bar vs. Stein, 545 So.2d 1364 (Fla. 1989), however, is in fact a disciplinary case related to self-help collection of debts collateralized by an attorney which resulted in ultimate suspension of the attorney involved.

In the Stein decision it is remarkable that the allegations of ethical violations did not involve accusations of fraud, dishonesty, deceit, or misrepresentation.

It is respectfully submitted that even if the conduct of Mr. Lanford in mistakenly placing a charge on a client's credit card account constitutes an ethical violation, The Florida Bar chose to file a one count complaint against the Respondent alleging dishonesty, fraud, deceit, or misrepresentation. As such, discipline cannot now be claimed for any new ethical violations for which the Respondent was not charged. The Florida Bar vs. Lancaster, 448 So.2d 1019 (Fla. 1984). In Lancaster this Court reversed a Referee's findings of guilt with respect to a specific count which the Bar had previously abandoned before the Hearing and upon which no proof was presented. In this petition for review The Florida Bar appears to seek substituted allegations of rule violations, substituted burdens of proof, and alternative findings of fact and conclusions, all as a result of the failure of the Bar at the Hearing before the Referee to establish any evidence of intent constituting clear and convincing evidence of guilt on the part of respondent as charged. Reliance by the Bar upon prior decisions of this Court in cases not involving dishonesty, fraud, deceit, or misrepresentation, as support for imposing guilt and discipline upon this Respondent is improper.

The Florida Bar relies extensively in it's argument for a finding of dishonesty, fraud, deceit, or misrepresentation, upon the discourse and discussions held with Respondent in the informal

grievance committee proceedings, and particularly Respondent's explanation of the protection afforded Ms. Johnson with her card company when she chose to contest the application of the charges to her account. (CB-8; B-EX.2,p.p.13-14). For the Bar to conclude that the Respondent's general discussion in the area of credit protection afforded to Ms. Johnson constitutes intent and disregard for Ms. Johnson's rights relating back to the time the charge was placed upon her account in January of 1994, is an impermissible pyramiding of inferences which cannot logically support a finding of dishonesty, fraud, deceit, or misrepresentation. A careful review of the comments by the head of the Grievance Committee within the transcript provided is indeed instructive. Mr. Torpy who was the investigating member of the Grievance Committee and acting chair, indicated as follows:

> **MR. TORPY:** I don't think you are trying to be deceitful with the client because, you know, obviously you let the client know what you were doing. (Referring to a simultaneous statement being sent indicating the charge event.)

The Florida Bar in it's argument makes several additional allegations which the Bar did not present at the Hearing before the Referee and constitutes mere conclusary remarks or opinions of Bar counsel in it's petition. Specifically, there is a suggestion that the Respondent "suspected that she might object to the charge" (CB-8) and that Respondent "blatantly" charged her credit card. (CB-8). A review of the cited provisions of the Grievance Committee transcript relied upon by The Florida Bar to deduce these arguments does not in any way support such inferences. (B-EX.2, pp 13-14).

The cited provisions instead reveal a lengthy and comprehensive discussion regarding general practices of using credit cards in the Respondent's practice as applied to Ms. Johnson and others.

Simply stated, Respondent's knowledge of how credit charges and protests occur does not in any way indict Respondent for the mistaken belief that Ms. Johnson authorized the charge on her credit card and for the lack of office procedures to avoid such mistakes.

While these inferences may exhibit an evidence of mistake and/or inadequate procedures, all of which Respondent readily admitted, none of these inferences or testimony relied upon by the Bar support evidence of wrongful intent or guilt on the part of the Respondent as charged. Given the clear presumption of correctness of the findings of fact and conclusions of law of the Referee and the nature of the charges against the Respondent and the proof deduced at the Hearing, none of which supported proof of intent of wrongful conduct and/or evidence of fraud, dishonesty, deceit, or misrepresentation, the Respondent does not herein address the issue of appropriate discipline in the event this Court deems it fit to reverse the findings of the Referee.

Given the Referee's finding of no unethical conduct on the part of the Respondent and his recommendation of dismissal of the Bar's complaint, there were no proceedings before the Referee with respect to discipline as prescribed by the rules regulating The Florida Bar. The Respondent acknowledges the authority and jurisdiction of this Court to impose and approve attorney

discipline with appropriate sanctions and the authority of this Court to remand issues of discipline to the Referee for further resolution.

The case decisions relied upon by The Florida Bar in support of their argument for appropriate discipline and guilt are each distinguishable and therefore inapplicable. As was stated earlier, the decision of The Florida Bar vs. Stein, 545 So.2d 1364 (Fla. 1989), a lawyer disciplined for self-help collection was not charged with fraud, dishonesty, deceit, or misrepresentation. Likewise, the Bars reliance upon the decision of The Florida Bar vs. Johnson, 511 So.2d 219 (Fla. 1987), and The Florida Bar vs. Swanson, 172 So.2d 827 (Fla. 1965), is misplaced. In reviewing these case decisions it is apparent that neither of these people were charged with dishonesty, fraud, deceit, or misrepresentation.

The Florida Bar's argument for the application of standard 4.63-lack of candor, from all appearances is an impermissible attempt to apply a different standard for different conduct compared to complaint allegations which The Florida Bar chose to charge the Respondent. Respondent has never been charged with "lack of candor" and was only charged with conduct constituting dishonesty, fraud, deceit, or misrepresentation.

CONCLUSION

At all times the Respondent has been receptive, responsive, appropriate, and complete in dealing with The Florida Bar, the Referee, and the appointed Grievance Committee. It remains uncontested that Mr. Lanford never has been paid by Ms. Johnson notwithstanding her acknowledgment that she owed Mr. Lanford the fees in question. There exists no evidence that Mr. Lanford ever inhibited or contested Ms. Johnson's remedies with her own charge card account or that he argued for the collection of his fee once the mistake was presented. There exists no basis in fact or law to support a finding of any ethical breach on the part of Respondent in this matter and certainly no basis for imposition of sanctions.

Wherefore, the Respondent prays that this Honorable Court will affirm the findings of fact and legal conclusions entered by the Referee in this cause after complete presentation of the facts and proof by both The Florida Bar and the Respondent. The Referee's report in it's entirety is supported by the facts and evidence, The Florida Bar having failed to demonstrate clear and convincing evidence of intent on the part of the Respondent to commit dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c).

Respectfully submitted,

R. Keith Williams, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the Respondent J. Scott Lanford's Answer Brief have been sent by regular U.S. mail to The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 32399-1927; and a copy to John F. Harkness, Jr., Executive Director The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300; John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300; and Rose Ann DiGangi-Schneider, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 20th day of October, 1996.

R. KEITH WILLIAMS, P.A.
3125 West New Haven Avenue
Suite 200
West Melbourne, FL 32904
Tele: (407) 723-2300
Florida Bar No. 0502080
Counsel for Respondent