IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOSEPH SCOTT LANFORD,

Respondent.
_____/

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

THE FLORIDA BAR'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

ROSE ANN DIGANGI-SCHNEIDER
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 745080

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SYMBOLS AND REFERENCES

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

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.

STATEMENT OF THE CASE

After a hearing attended by the respondent during which he gave testimony, the Eighteenth Judicial Circuit Grievance Committee "C" voted to find probable cause in this matter on July 31, 1995. The bar filed its complaint with this court on November 30, 1995. By order dated December 6, 1995, this court directed the chief judge of the Nineteenth Judicial Circuit to appoint a referee. The referee was appointed on December 13, 1995. The final hearing was held on April 25, 1996. The referee entered his report on May 15, 1996, recommending the respondent be found not guilty of violating the only rule charged by the bar, rule 4-8.4(c), for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

The board of governors considered the referee's report at its July, 1996, meeting and voted to seek a review of the referee's legal conclusion that the respondent is not guilty of violating the charged rule and instead seek a finding of guilt and a public reprimand as discipline. The bar served its petition for review on August 2, 1996.

STATEMENT OF THE FACTS

The respondent was retained by Dawnee Johnson on June 7, 1994, to handle a real estate closing (ROR-A p. 2). The respondent billed Ms. Johnson $60.00 which she paid by either check or cash (ROR-A p. 2). The respondent later submitted a second bill to her for services rendered in the amount of $120.00 on June 21, 1994 (ROR-A p.2). Ms Johnson paid this sum in full on June 24, 1994, with a credit card by executing a credit card sales slip (ROR-A p. 2). On July 21, 1994, the respondent sent a third bill to Ms. Johnson in the amount of $467.16 for fees and costs (ROR-A p. 2). Ms. Johnson did not pay this bill. Consequently, on January 20, 1995, the respondent directed his nonlawyer employee, Jane Tartaglione, to obtain payment of the $467.16 by charging it to Ms. Johnson's credit card (ROR-A p. 2). Ms. Tartaglione did as she was directed but the charge slip submitted for payment on Ms. Johnson's credit card for the amount of $467.16 was not signed by Ms. Johnson nor pre-authorized by her (ROR-A p. 2).

SUMMARY OF THE ARGUMENT

The bar submits that the respondent unethically attempted to collect a past due bill for legal fees and costs by debiting a client's credit card without her prior knowledge or consent. In his report, the referee clearly stated that the charge slip that the respondent submitted for payment did not have Ms. Johnson's signature or her pre-authorization. The respondent communicated the nonauthorized charge to his client only after he charged her credit card without her knowledge or consent. The bar submits the respondent feared Ms. Johnson would not pay the bill and that took the easiest avenue for recouping the debt, hoping that she would not contest the charge. This self-help debt collection has not been tolerated by this court in the past. Although the respondent's desire to be paid for services rendered is understandable, there are more appropriate avenues for seeking payment of a bill than using a client's credit card number without the client's prior authorization to do so. The applicable case law and standards support a public reprimand in this case.

ARGUMENT
POINT I

THE REFEREE'S LEGAL CONCLUSION THAT THE RESPONDENT DID NOT VIOLATE RULE 4-8.4(C) IS ERRONEOUS AND UNJUSTIFIED GIVEN THE EVIDENCE AND THE TESTIMONY.

The bar does not contest the referee's findings of fact. Those findings are presumed to be correct and will not be revisited by this court unless they are shown to be clearly erroneous or unsupported by the evidence. The Florida Bar v. Benchimol, 21 Fla. Law Weekly S226 (Fla. May 23, 1996). However, a referee's legal conclusions drawn from those facts are subject to broader review by this court. The Florida Bar re Grusmark, 662 So. 2d 1235 (Fla. 1995).

The bar submits that the facts, as reflected by the referee's findings articulated in nine paragraphs of the report, are very clear. The respondent was owed a fee by a client, Ms. Johnson, who did not pay (T. p.p. 24, 66). Ms. Johnson did not respond to the respondent's repeated bills (T. pp. 30, 51). The respondent had in his possession the client's credit card number because she had authorized a prior charge for a $120.00 bill (T.

p.p. 14, 64). Admittedly, the respondent had received no communication from this client for many months (T. p.p. 32, 35-36, 51). Therefore, it is incredible that the respondent would believe that he had her authorization to charge her credit card for a bill that had remained unpaid for some six months.

The respondent did not contact Ms. Johnson to determine whether she would authorize him to pay this bill by charging it to her credit card (T. p.p. 19, 26, 44, 45-46). Instead, the respondent directed his secretary, Jane Tartaglione, to "see about" having the bill charged to Ms. Johnson's Visa card (T. p.p. 46, 64). Although the respondent stated that he believed Ms. Johnson had authorized the respondent to charge this bill to her Visa card, the respondent admittedly did not (and still does not) understand how the charge card process works (T. p. 39), even though the respondent has accepted credit cards since 1992 (T. p. 46). The bar submits that the respondent charged the client's credit card without her authorization to do so, knowing that he could defend that if she disputed the charge, she would not be charged for same. In other words, the respondent stood to collect on a six month old bill if the client failed to recognize

the charge on her credit card bill. If, however, the client disputed the charge, she would not be charged the amount and thus, the respondent could defend as he has here, "no harm, no foul." The bar submits that intentionally charging a client's credit card without the client's authorization is an act involving fraud, dishonesty, deceit or misrepresentation. Self-help debt collection, although perhaps tempting to practitioners who are rightfully owed earned fees, is an unethical practice for an officer of the court. The Florida Bar v. Cramer, 643 So. 2d 1069 (Fla. 1994).

At the grievance committee hearing, the respondent testified that when he was reviewing the billing on the computer, Ms. Johnson's outstanding bill came up and the information on the computer screen showed that the method of payment had been MasterCard or Visa (B-Ex. 2 p. 11). He advised Ms. Tartaglione, by computer e-mail, to charge the bill to the client's Visa (B-Ex. 2 p. 12). The respondent did not review the client file before making this decision (B-Ex. 2 p. 12). Despite the respondent's testimony that he believed Ms. Johnson had give either verbal or written authorization for the charge (B-Ex. 2 p.

13), he later testified that he must have misunderstood the meaning of "prior authorization." The respondent believed that "prior authorization" meant that he could charge all subsequent bills to a client's credit card if the client had authorized the payment of one bill in this manner (B-Ex. 2 p.p. 42-43). The respondent then testified at the final hearing that at the time he responded to the bar asserting that he had obtained her prior authorization to debit the credit card, the respondent believed she had given a second authorization (T. p. 40). The respondent's later position was that he did not intend to lead the bar to believe that the prior authorization for the $120.00 payment was the authorization for the $467.00 payment (T. p. 40).

It is the bar's position that the respondent's letter, B-Ex. 4, speaks for itself. That response and the respondent's various explanations demonstrate that the respondent had hoped that the client would believe that because she had authorized him to debit her credit card for one fee payment that the respondent had the right to debit it for any further fee payments and would not, therefore, contest the matter. The tenor of B-Ex. 4 and B-Ex. 6 would convince a casual reader that the client had authorized the

respondent to debit her card for all the fees and costs she owed him, not just for the payment which the client had authorized by signing a credit slip. Under the respondent's Merchant Program Member Agreement, B-Ex. 11, regarding making a charge pursuant to a preauthorized order, the merchant must receive from the cardholder a written request for such preauthorization. Clearly this did not happen in Ms. Johnson's case. Therefore, even if Ms. Johnson had given verbal authorization for the respondent to debit her card for all fees and expenses incurred, he still would have failed to comply with his merchant agreement.

The respondent's testimony at the grievance committee hearing also indicated that at the time he made the decision to debit Ms. Johnson's credit card, he at least suspected that she might object to the charge. The respondent testified that he knew if she chose to dispute the charge, she would notify the credit card company and the charge would be removed (B-Ex. 2, p.p. 13-14). If the respondent suspected that the client might not approve the charge, then the respondent should have contacted the client to discuss the bill with her instead of blatantly charging her credit card without her authorization to do so.

What originally may have been termed a mere fee dispute brought on by poor communication may have been resolved if the respondent had contacted the client to discuss the bill and thus, the bar grievance may have never materialized. The respondent improperly chose to attempt to get paid the easy way rather than trying to contact and collect the bill from a nonresponsive client.

POINT II

THE APPROPRIATE LEVEL OF DISCIPLINE IS A PUBLIC REPRIMAND

The bar submits the case law and standards call for the imposition of a public reprimand when a lawyer resorts to self-help debt collection.

In The Florida Bar v. Stein, 545 So. 2d 1364 (Fla. 1989), a lawyer was suspended for three months after he sold collateral he was holding for a client to secure a fee. The fee agreement provided for a reasonable fee of $5,000.00, which was nonrefundable, plus costs. The agreement also provided that if the clients could not pay the fee in cash, they would transfer to Mr. Stein certain fireworks with a wholesale value of $10,000.00 to secure the payment. Mr. Stein and the clients agreed that the fireworks would be held in a storage facility and that Mr. Stein's agent would place a lock on the door to the warehouse along with the clients' own lock. Later, without prior warning to the clients, Mr. Stein opened the warehouse by forcibly removing the clients' lock and took possession of the fireworks. Mr. Stein sold some of the collateral without first taking any

formal action to obtain the right to possess it or to notify the clients. The referee found Mr. Stein had a duty to give the clients advance notice of his intent to seize the fireworks and he should have inventoried what he took. Later, some of the collateral could not be accounted for because of Mr. Stein's poor record keeping. Mr. Stein was ordered to make restitution to the clients for the missing fireworks.

In The Florida Bar v. Gold, 526 So. 2d 51 (Fla. 1988), an attorney was publicly reprimanded for his fee collection tactics. Mr. Gold was owed fees by a client whom he represented in a divorce. Consequently, Mr. Gold filed a small claims action against the client. Upon receiving the summons, the client called promptly called Mr. Gold's office and spoke to his secretary regarding settling the debt. The secretary, who was authorized by Mr. Gold to handle billing and collections, agreed to hold the small claims action in abeyance if the client would pay a portion of the debt. The client believed, based on that conversation and a subsequent letter, that Mr. Gold approved of the agreement. Mr. Gold proceeded with the hearing, wherein he failed to observe that the client had made a payment on the debt.

Mr. Gold obtained a judgment against the client for the full amount. Even after the client spoke to Mr. Gold and explained the agreement with the secretary, Mr. Gold took no action to have the judgment set aside. The referee found that Mr. Gold failed to exercise any control over his secretary's billings and collections and that the secretary's raises were contingent upon her success in collecting past due bills. However, the referee found that there was no actual misrepresentation by Mr. Gold because there was no clear and convincing evidence that Mr. Gold had actual knowledge of the client's agreement with the secretary.

A lawyer was publicly reprimanded in The Florida Bar v. Johnson, 511 So. 2d 295 (Fla. 1987), for entering into an improper business arrangement with a client and engaging in unprofessional fee collection tactics. Mr. Johnson was retained to provide legal advice concerning an existing joint venture. Mr. Johnson determined the client should form a limited partnership. In the documents he drafted, Mr. Johnson indicated he would contribute money as a limited partner but he failed to do so. Thereafter, the client transferred title to a ship to Mr.

Johnson, who asserted it was for the purpose of securing his fees. After the client found a buyer for the ship, Mr. Johnson returned the title to the client with the expectation of receiving all or part of the proceeds as payment for the fees he had earned. The client, however, failed to turn over any money to him. Mr. Johnson then wrote a series of letters to the client, in his capacity as an ordained minister, stating that the client would suffer great misfortune for his deeds. Although Mr. Johnson did not make any direct threats to the client, his fee collection attempts were deemed to be unprofessional.

In The Florida Bar v. Swanson, 172 So. 2d 827 (Fla. 1965), a lawyer was publicly reprimanded for his conduct in connection with a fee dispute. Mr. Swanson represented a client charged with driving while under the influence. The client paid Mr. Swanson $100.00 with the understanding this would cover the attorney's fees through trial. Subsequently, the client posted a bail bond in the amount of $200.00. After trial, the client was convicted and sentenced to serve a short sentence. The client decided to allow the previously posted bond to be estreated and therefore, he delivered $300.00 to Mr. Swanson to indemnify the

bondsman. According to Mr. Swanson, he kept $50.00 as payment for fees earned after the sentencing. The client did not consent to the $50.00 payment and had a different understanding as to how this money would be applied. Because the bondsman only required $200.00, Mr. Swanson was left holding $100.00 of his client's money. There was no agreement that Mr. Swanson could apply any of this money to the fees which the client owed. Although the referee found the lawyer had more than earned the $100.00 he was holding, Mr. Swanson's retention of those funds was improper because the client had not agreed to Mr. Swanson's payment of these funds to himself. Mr. Swanson was ordered to return the money to the client.

The Standards for Imposing Lawyer Sanctions also support the imposition of a public reprimand. Standard 4.63, Lack of Candor, calls for a public reprimand where a lawyer negligently fails to provide a client with accurate or complete information and causes injury or potential injury to the client. The respondent never attempted to contact his client to determine the reason for her failure to pay his bill. He never notified her of his intention to charge her credit card for the outstanding balance prior to

actually making the charge. Instead, he attempted to shift the burden to the client to contest the charge with the credit card company. Had she not reviewed her monthly credit card statement, the respondent's bill would have been paid through his unauthorized charge of her credit card.

In aggravation, under Standard 9.22(b), the respondent had a selfish motive in taking the action he did. He wanted to get paid. Standard 9.22(i) is also applicable as the respondent has substantial experience in the practice of law, having been admitted to practice in 1984. Finally, under Standard 9.22(f), the respondent's submission of false evidence to the grievance committee, e.g., that he had client authorization to charge her credit card, is another aggravating factor. In mitigation, under Standard 9.32(a), the respondent has no prior disciplinary history.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's legal conclusion and recommendation of not guilty and instead find the respondent guilty of violating R. Regulating Fla.Bar 4-8.4(c) and impose on the respondent a public reprimand and payment of the bar's costs now totaling $1,213.34.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

ROSE ANN DIGANGI-SCHNEIDER
Bar Counsel

The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 745080

By: Jan Wichrowski #381586

Jan Wichrowski
For Rose Ann DiGangi-Schneider
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to R. Keith Williams, Counsel for Respondent, 3125 West New Haven Avenue, Suite 200, Melbourne, Florida 32904-3533; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 11th day of September, 1996.

Respectfully submitted,

Jan Wichrowski
For Rose Ann DiGangi-Schneider
Bar Counsel

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APPENDIX TO COMPLAINANT'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

ROSE ANN DIGANGI-SCHNEIDER
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 745080

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