047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. 91,550

vs.

KEVIN KITPATRICK CARSON,

Respondent.
_____/

ON PETITION FOR REVIEW
FROM THE RECOMMENDATION OF A REFEREE

REPLY BRIEF OF RESPONDENT

KEVIN KITPATRICK CARSON
KEVIN "KIT" CARSON, P.A.
PO Box 1211
315 South Palmetto Avenue
Daytona Beach, FL 32115-1211
(904) 255-2273
Florida Bar No. 370711

COUNSEL FOR RESPONDENT

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SYMBOLS AND REFERENCES

In this brief, the respondent, Kit Carson, shall be referred to as "Mr. Carson".

The complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar". Staff Counsel for the bar shall be referred to as bar counsel.

The transcript of the referee hearing, held on February 20, 1998, shall be referred to as "TT" followed by the cited page number.

The transcript of the rehearing before the referee, held on September 30, 1998, shall be referred to as "RH" followed by the cited page number.

The bar's exhibits will be referred to as Bar Exhibit ____, followed by the exhibit number.

Mr. Carson's exhibits will be referred to as Respondent's Exhibit. ____, followed by the exhibit number.

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE BAR PROVED A DIVISION OF ATTORNEYS FEES BETWEEN LAWYERS IN DIFFERENT FIRMS BY CLEAR AND CONVINCING EVIDENCE.

The bar's answer to Mr. Carson's initial brief in this appeal is incomplete and misleading in its rendition of the statement of the case and the facts. Mr. Carson urges the court to refer to the argument and statement of the case and facts in his initial brief for a complete picture of the facts and events leading to this appeal. The bar's answer is unresponsive to Mr. Carson's brief.

While an appellate court ordinarily gives great deference to a trial judge's factual findings, the appellate court is not bound to accept a trial court's legal conclusions. Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So.2d 947, 950 (Fla. 4th DCA 1993). The referee's conclusions of law that Mr. Carson "had an oral agreement for referrals in contingent fee cases, has made referrals and has received money under this oral agreement, and has pursued entitlement to referral fees through the court" do not state a violation of bar rules. It is simply fair to say that most written agreements or contracts are preceded by oral discussions and agreements. Oral agreements do not violate bar rules. It is the division of fees in contingency fee cases without a written agreement that would violate the rules. There is a lack of clear and convincing evidence of any improper fee splitting in this case. The "clear and convincing evidence" evidence standard is described in Slomowitz v. Walker, 429 So.2d 797 (Fla. 4th DCA 1983).

Once again, Rule 4-1.5(g) provides as follows:

(g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of Subdivision (f)(4)(D). A division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is in proportion to the services performed by each lawyer; or

(2) by written agreement with the client:

(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

The critical element of this rule for contingency fee cases, a division of fees between lawyers who are not in the same firm, has not been proven in this case.

What bar counsel has done is to try to use "referral fee" as a term of art in order to stretch the rule and sashay around their burden of proof. During the cross-examination of the bar's own witness (Vasilaros), it became clear that there had actually been no division of the fee in the Fox case (TT 59-61; 157-158). This undisputed fact made it clear that Vasilaros' subsequent voluntary payment was a gift, an honorable resolution of an oversight, an incentive, a showing of good faith. This argument was later presented by Mr. Carson in the rehearing before the referee on September 30, 1998 (RH 82) and was not rebutted by bar counsel. Mr. Carson had denied wrongdoing and admitted his imperfection from the beginning.

The bar does not dispute the fact that there was no division of the fee in the Fox case.

The bar does not dispute the fact that in the Fox case the settlement statement would show that there was no division of the fee in that case.

The bar does not dispute the fact that there was no division of the fee in the Spears case.

The bar does not dispute the fact that there was no division of the fee in the Mobil Oil case.

The bar does not dispute the fact that it was on notice that its witness, Vasilaros, was untruthful in the 1996 hearing in the Mobil Oil case. Amazingly, the bar had alleged in its complaint that a contract did exist between Vasilaros and Mr. Carson. The bar took this position despite the 1996 ruling of the trial court that a meeting of the minds had not been shown as to the existence of a contract and the per curiam affirmance, without opinion, by the Fifth District Court of Appeal. A review of the transcript of the hearing (Bar Exhibit 2) and the hearing exhibits (Respondent's Exhibits 1, 2, 3) reveals that the minds did not just meet, they did the tango together. This would not be the first time that the Florida Supreme Court has disagreed with a per curiam affirmance by the Fifth District Court Of Appeal. See, Hall v. State, 614 So.2d 473, 476 (Fla. 1993)("If Ruffin's conviction for murdering the deputy had come to this Court, no doubt it, as well as Hall's, would have been reduced to second-degree murder").

The bar does not dispute the fact the attorney Chobee Ebbets' testimony at the referee hearing established that Vasilaros was untruthful during the 1996 hearing in the Mobil Oil case.

The bar does not dispute the fact that, when Mr. Carson became aware of Rule 4-1.5(g), he took steps that a professional would take under the circumstances, including, studying the rule and related case law, seeking the assistance of knowledgeable counsel, and seeking to comply with the rule.

The bar did not dispute the fact that, after Mr. Carson received materials from the bar initiating a complaint against him, Assistant Staff Counsel James Keeter told Mr. Carson's attorney that Keeter remembered Mr. Carson from a failed 1996 bar initiated grievance and that the Orlando office of staff counsel was going to teach Mr. Carson a lesson (TT 185-186).

The bar has not disputed the fact (found in Mr. Carson's Motion To Strike The Florida Bar's Response To Petition For Review/Motion For Rehearing) that when bar counsel reneged on her offer to settle this appeal, bar counsel told Mr. Carson's attorney, "What goes around, comes around", even though she could have done so in her response.

The bar does not dispute the testimony of attorney Charles Holloman (during the September 30, 1998, rehearing before the referee) that the referee had told bar counsel in March, 1998, that she might write an order that did not reflect well on The Florida Bar if she had to justify her report and recommendation. Bar counsel had been put under oath during the rehearing and had ample opportunity to rebut this--as did the referee.

The bar does not dispute that bar counsel withheld critical, exculpatory, information from the grievance committee (or "grand

jury"), and from Mr. Carson, when it failed to produce the settlement statement from the Fox case. Had bar counsel presented this information to the grievance committee, the committee might have ruled differently. Referring to indictments against judges obtainable by disgruntled or ambitious prosecutors in Clayton v. Willis, 489 So.2d 813 (Fla. 5th DCA 1986), the district court of appeal noted:

> "The indictment procured by the assistant state attorney in this case suggests, in the words of Chief Justice Burger:
>
> > [T]he dangers of a system of legal education that trains students in technique without instilling a sense of professional responsibility and ethics--a bit like giving a small boy a loaded pistol without instruction as to when and how it is to be used.
>
> See Clark v. Florida, --- U.S. ---, ---, 106 S.Ct. 1784, 1787, 90 L.Ed.2d 330 (1986).
>
> This case reveals the principal weakness of the grand jury system--the propensity of well-intentioned laymen in the hands of an irresponsible prosecutor to be led down any path."

Clayton, supra, at 819.

The undisputed facts show that there was no improper fee splitting by Mr. Carson. In her closing argument before the referee, bar counsel, Mrs. Savitz, admitted that there was no intention by Mr. Carson to circumvent any rule in this case (TT 246). Mr. Carson's attorney noted that if Mr. Carson was to be chased down like he was the fugitive, bar counsel had not pursued Vasilaros' law partner, who had signed the thank you letter in the Fox case (TT 244)(not his associate, as bar counsel represents).

In her answer brief, bar counsel mentions that no legal services were performed by Mr. Carson in the referred cases. Yet,

a reading of Rule 4-1.5(g)(2) reveals that there is no such requirement. Mr. Carson was available to consult and assumed joint responsibility. Mr. Vasilaros admitted to Chobee Ebbets that he owed Mr. Carson a fee (TT 114-120). In In The Matter Of The Florida Bar, 349 So.2d 630 (Fla. 1977), this Court made it clear that being available to consult and assuming joint responsibility "was more than pro forma because more often than not the referring attorney is the 'family lawyer' and can perform a meaningful function in this regard." Id., at 636. Mr. Carson calmed Mr. Franco's disappointment about the settlement in Mobil Oil.

The bar also seems to suggest that the fact that Vasilaros eventually entered into a consent judgment in Fox case is some sort of proof of guilt of Mr. Carson in this case. This suggestion is without merit. Vasilaros was charged with a serious offense relating to improper disbursement of disputed trust funds in Mobil Oil. Vasilaros essentially plea bargained and the trust fund matter was dropped. As a result of the plea bargain, Vasilaros avoided further scrutiny of his business dealings and trust account. He also avoided being ordered to make restitution of 25% of the fee in the Mobil Oil case, a fee that he had admitted that he owed to Mr. Carson. See, Rule of Professional Conduct 3-5.1(i).

Being referred to a diversion program is of no consequence as far as the newspaper media is concerned. In 1998, Mr. Carson sought election to the office of Volusia County judge and was defeated at the polls by a mere 430 votes. The newspaper still printed that Mr. Carson had been found to have been involved in

improperly sharing fees when it reported on the campaign. Mr. Carson mentioned this to the referee during the rehearing on September 30, 1998.

Bar counsel, without substantial and competent, clear and convincing, evidence accused Mr. Carson of improperly sharing fees with another lawyer. In a case where a county employee was accused of criminally obtaining money (fees) from the county, the Fifth District Court Of Appeal reversed the conviction and wrote:

> "We have no knowledge regarding why these charges were brought and why this county employee was taken down the track he was taken, but the train stops here."

See, Seiler v. State, 522 So.2d 113 (Fla. 5th DCA 1988).

The circumstances of Mr. Carson's case were not perfect. Under the circumstances, it would be unjust to jeopardize his professional standing or his reputation in his community. The Florida Bar v. Rubin, 210 So.2d 858 (Fla. 1968). The report and recommendation of the referee should be set aside and the proceedings dismissed.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED RESPONDENT TO PAY THE COSTS OF THIS MATTER.

Pursuant to the arguments presented in Mr. Carson's initial and reply briefs, it would be unjust and wrong to require Mr. Carson to pay the substantial costs in this case. The Florida Bar v. Rubin, 210 So. 2d 858 (Fla. 1968). But for bar counsel's questionable conduct, no complaint should ever have been filed and no costs would have been incurred.

The additional $619.98 in costs allegedly incurred by the bar for the rehearing on September 30, 1998, were unnecessary. As noted in Mr. Carson's Motion To Strike The Florida Bar's Response to Petition For Review/Motion For Rehearing, bar counsel falsely represented that the referee's first report was "clearly uncontested." This caused the need for the rehearing.

As noted in Mr. Carson's Notice Of Objection To Florida Bar's Final Affidavit Of Costs, the costs are excessive and not properly documented or authenticated. As a matter of professionalism toward a member of the bar and proper authentication, the bar should have included copies of its bills and expense reports along with its affidavit of costs. Failing to do so, it should bear all costs.

Bar counsel had a duty to report and to properly investigate Vasilaros' dishonesty in the Mobil Oil case and failed to do so. See, Rule 4-8.3(a), Rules Regulating The Florida Bar. Instead, bar counsel allowed Vasilaros to make a mockery of the oath. See, Footnote 1, at page 9 of this brief.

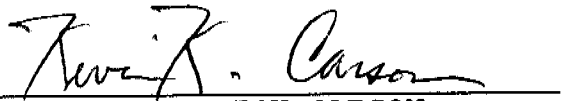
FLDRTAD
by JIM UNGER
RAISE YOUR RIGHT HAND.
REPEAT AFTER ME... I SWEAR TO TELL THE TRUTH...
I SWERVE TO SMELL DE SOUP...
..THE WHOLE TRUTH...
..DE TOLL-BOOTH...
.. AND NOTHING BUT THE TRUTH.
..AN NUTS SING ON DE ROOF.
NOW TELL US IN YOUR OWN WORDS EXACTLY WHAT HAPPENED.
-30-

FOOTNOTE 1:

CONCLUSION

Based upon the arguments presented herein, Mr. Carson respectfully prays that this honorable court set aside the recommendation of the referee and that the proceedings against him be dismissed.

Respectfully Submitted,



KEVIN KITPATRICK CARSON
KEVIN "KIT" CARSON, P.A.
PO Box 1211
315 South Palmetto Avenue
Daytona Beach, FL 32115-1211
(904) 255-2273
Florida Bar No. 370711

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Initial Brief of Respondent has been furnished by mail/~~delivery~~ to Patricia Savitz, Assistant Bar Staff Counsel, 1200 Edgewater Drive, Orlando, FL 32804, this 27 day of January, 1999.

KEVIN KITPATRICK CARSON
COUNSEL FOR RESPONDENT