

IN THE SUPREME COURT OF FLORIDA

047
FILED 12/27
DEBBIE GAUSSEAU
DEC 13 1999
CLERK, SUPREME COURT
BY _____

THE FLORIDA BAR;

Complainant

Supreme Court Case
No. 93,090; 93,091; 93,092

vs.

ALLAN M. ELSTER,

The Florida Bar Case
No. 97-50,721 (17D)
97-50,814 (17D)
97-51,095 (17D)

Respondent
_____ /

ALLAN M. ELSTER'S REPLY BRIEF
AND ANSWER BRIEF ON CROSS APPEAL

On Appeal from a
Report of Referee

Allan M. Elster, Attorney
3899 N.W. 7th Street
Suite 218
Miami, FL 33126
Florida Bar No. 0022562

TABLE OF CONTENTS

TABLE OF CITATIONS ii

CERTIFICATION AS TO FONT SIZE AND STYLE iii

ARGUMENT IN REPLY TO THE FLORIDA BAR'S
ANSWER BRIEF 1

 I. COUNT I, II, AND III OF THE ZAVALA COMPLAINT 1

 II. COUNT V OF THE ZAVALA COMPLAINT 4

 III. PARAGRAPH #35 OF THE REFEREE'S REPORT 5

 IV. COUNT I AND II OF THE VARGAS COMPLAINT 7

 V. COUNT III OF THE VARGAS COMPLAINT 8

 VI. COUNTS I THROUGH V OF THE DUVAL
 COMPLAINT 9

 VII. ANSWER AND ARGUMENT ON THE FLORIDA
 BAR'S CROSS APPEAL 10

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF CITATIONS

<u>Cases</u>	<u>Pages</u>
The Florida Bar v. Fetterman, 439 So.2d 835 (Fla. 1983)	1,2,3
The Florida Bar v. Fredericks, 731 So.2d 1249, 1251 (Fla. 1999)	6,10
The Florida Bar v. Garland, 651 So.2d 1182, 1184 (Fla. 1995)	7, 8
The Florida Bar v. Glick, 397 So.2d 1140 (Fla. 1981)	11
The Florida Bar v. Grant, 514 So.2d 1077 (Fla. 1987)	11
The Florida Bar v. Hayden, 583 So.2d 1016 (Fla. 1991)	8
The Florida Bar v. Littman, 612 So.2d 582 (Fla. 1993)	4
The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994)	4,5
The Florida Bar v. Pahules, 233So.2d 130 (Fla. 1970)	10
The Florida Bar v. Rayman, 238 So. 2d 594, 597 (Fla. 1970)	6,9,10
The Florida Bar v. Thomas, 582 So. 2d 1177 (Fla. 1991)	8
 Rules Regulating The Florida Bar	
Rule 4-1.4(a)	9
Rule 4-1.4(b)	9

CERTIFICATION AS TO FONT SIZE AND STYLE

Pursuant to this Court's Administrative Order In Re: Brief Filed in the Supreme Court of Florida, undersigned Respondent hereby certifies that this brief is produced in a font that is 14 point proportionately spaced Times New Roman type.

**ARGUMENT IN REPLY TO
FLORIDA BAR'S ANSWER BRIEF**

I. COUNT I, II AND III OF THE ZAVALA COMPLAINT

The only point that the Florida Bar and the Respondent agree to in reply to the Bar's Answer Brief is that the issue involving Respondent's business card is controlled by The Florida Bar v. Fetterman, 439 So. 2d 835 (Fla. 1983).

In fact, Bar counsel correctly states, on page 16 of her Brief, as argued in Respondent's Initial Brief, that a crucial issue in Fetterman is whether "the public was aware that Fetterman, [herein the Respondent], was accountable for the firm's actions."

Bar counsel, in her Answer Brief, fails to cite any record evidence that the public or Zavala was not aware that Respondent was accountable for his firm's actions.

Respondent, though, has supplied this record evidence to the Court. As set forth on page 23 of the Initial Brief, Zavala retained the Respondent, who she met at Krome, to represent her, not Immigration Verification

Associates (Tr. Vol. I, p. 112-114). The business card had Respondent's name on it (Tr. Vol. 10, 113), and so did the receipt for fees (Tr. Vol. 1, 120-124) (Exhibit 10), along with the pleadings filed in Zavala's case (Tr. Vol. 1, p. 124, 125) (Exhibit 11).

Rather than reference record testimony to support Bar counsel's argument that Respondent violated the principles contained in Fetterman, counsel makes inaccurate and untrue references to the record.

Thus, on page 17 of Bar counsel's Brief, she completely misquotes Respondent's testimony regarding the business card, without supplying any record references. The correct record reference on this issue is Tr. Vol. I, p. 116, where Respondent testified that the incorrect information on the business card was listing Santiago as president of Immigration Verification Associates because that trade name was never incorporated.

Since there was no evidence in the record that Zavala knew who Santiago was, how could that misinformation have mislead this client and thus violated the principles contained in Fetterman?

As stated in Fetterman, absent any evidence, "...that the public was actually deceived or misled...", the inquiry then shifts to whether the use of the trade name is "inherently misleading [which] will depend upon the particular facts and circumstances of each case..." Fetterman at 838.

Herein, Bar counsel can reference no record evidence that Zavala was misled by any information on the business card, whether that information be incorrect or otherwise.

Finally, on this issue, Bar counsel's argument then shifts to a sign on an office, completely unrelated to the issues in the Zavala Complaint or contained in the Referee's findings in his report (p. 18 of Bar counsel's Brief, Bar Exhibit 16).

Since the Referee made no specific findings in his report regarding this "sign" and "National Immigration Consultants", it was highly improper for Bar counsel to argue this issue, especially since she did not request review of the absence of any finding by the Referee as to Exhibit 16.

Further, there is no evidence in the record that Zavala had any knowledge of "National Immigration Consultants, Inc," neither is there any

evidence that Zavala found "the business card to be so offensive" as opined by Bar counsel at page 18 of her Brief.

Finally, Bar counsel devotes two paragraphs of her Brief objecting to the failure of the Referee to find unethical conduct by the Respondent with respect to Zavala. The Referee relied on The Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1973), in finding Respondent's legal work not to constitute unethical conduct. Florida Bar counsel offers no case citation or record reference in opposing this finding, other than a vague reference to her two expert witnesses. Surely, that is insufficient to overturn a Referee's finding of fact. The Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994).

II. COUNT V OF THE ZAVALA COMPLAINT

Florida Bar counsel argues that the Referee's finding of abandonment is "well supported by the record" (page 20 of Bar Brief).

In support of this argument, she references Krome Detention Center "call slips" which ended on June 6, 1996. Bar counsel asserts, "Thereafter, Respondent was able to produce no tangible evidence, of any kind, to support

his bare assertion that he continued to communicate with Zavala."

Bar counsel conveniently ignores Respondent's testimony on this issue, which is "evidence." As set forth in Respondent's Initial Brief, Respondent testified that he visited with Zavala after June 6, 1996 (Tr. Vol I, page 139, 140). Respondent specifically testified that he visited Zavala "on an intermittent basis" between the filing of the Appeal on April 16, 1996 and the Board of Immigration Appeals decision dated October 21, 1996 (Tr. Vol. I, p. 143). After the Appeal was denied, Respondent consulted with Zavala regarding going to Federal Court to stop the deportation (Tr. Vol. V, p. 40, 41).

This testimony went unchallenged by Bar counsel, and , therefore, is conclusive evidence that Respondent did not abandon Zavala. The Referee's finding of fact on this issue is erroneous. The Florida Bar v. Marable, supra.

III. PARAGRAPH #35 OF THE REFEREE'S REPORT

Florida Bar counsel support of the Referee's finding of fact #35 is based solely on the testimony of Modesto Vargas's sister. This testimony, other than

the expert witness, is the only evidence produced by the Florida Bar to prove not only the allegations of the Vargas Complaint, but to support the Referee's finding #35, rejecting Respondent's contention that he was retained to monitor changes in the immigration law.

In contrast is the sworn testimony of the Respondent, wherein he describes, at length, his agreement with Vargas (Tr. Vol. I, p. 38-54; Tr. Vol. II, p. 204-224).

This sworn testimony by the Respondent is direct evidence of his agreement with Vargas to "monitor the law", and thus, is a denial of any attorney misconduct alleged by the Florida Bar.

As held in The Florida Bar v. Rayman, 238 So. 2d 594, 597 (Fla. 1970) cited in the Florida Bar v. Fredericks, 731 So. 2d 1249, 1251 (Fla. 1999):

"...evidence sufficient to sustain a charge of attorney misconduct where the attorney has denied the act under oath `must be clear and convincing and that degree of evidence does not flow from the testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances..."

Ms. Vargas' testimony as set forth in Bar counsel Brief does not sustain or support Finding #35, nor a charge of attorney misconduct. It is further not corroborated by any other evidence, including the expert witness's testimony.

In fact, Ms. Vargas' testimony, as set forth in Respondent's Initial Brief, corroborates Respondent's testimony that he was retained to monitor the law to see if it changed (Tr. Vol. III, p. 55, 66, 69, 70).

The Referee's Finding of Fact #35 is, therefore, not supported by competent substantial evidence.

IV. COUNT I AND II OF THE VARGAS COMPLAINT

The issue of whether Respondent charged an excessive fee to Vargas is dealt with summarily by Bar counsel in her Brief, totally ignoring the criteria for such a finding set forth in The Florida Bar v. Garland, 651 So. 2d 1182, 1184 (Fla. 1995). Where is the evidence "that the fee is over-reaching or an unconscionable demand by an attorney" Garland at 1184.

Other than his opinion as to what other legal work could have been done, the expert witness could not testify from the documents in the file what fee was earned (Tr. Vol. IV, p. 28).

Respondent, in his testimony, describes the legal work performed (Tr. Vol. II, p. 224-226), and this evidence was not rebutted.

Bar counsel suggests in her Brief (page 29), that this testimony was found lacking in credibility by the Referee, yet there is no finding in his report on credibility as required by The Florida Bar v. Thomas, 582 So. 2d 1177 (Fla. 1991). Absent such a finding, and/or absent a finding that the criteria for establishing an excessive fee, as set forth in Garland has been met, the Referee's report on this issue should be rejected.

**V. COUNT III OF THE VARGAS COMPLAINT -
COMMUNICATIONS WITH CLIENT**

Florida Bar counsel devotes a little over a page in her Brief on this issue and argues that this issue turns on an adverse credibility finding by the Referee against the Respondent.

Again, there is absent in the report any credibility finding as required by the teachings of The Florida Bar v. Hayden, 583 So. 2d 1016 (where testimony conflicts the Referee is charged with assessing credibility based on

demeanor and other factors) Hayden at 1017.

Further, the teachings of The Florida Bar v. Raymon, supra, have not been established.

Finally, there is unrebutted evidence in the record (Respondent's testimony and Krome Detention call sheets) that Respondent communicated with Vargas on a constant basis (Tr. Vol. I, p. 15-59, 77-78; Tr. Vol. I, p. 197, 198) (Exhibit 7) until Vargas was transferred to the Manatee County jail in October.

As argued in the Initial Brief, the Complaint seems to center around a failure to return all of Ms. Vargas' calls. Bar counsel totally ignores Respondent's argument in the Initial Brief that his responsibility under R. Regulating Fla. Bar 4-1.4(a) and 4-1.4(b) is to the client, and not to his family. A finding of attorney misconduct where the attorney communicated with the client, but not always with a sister, cannot be sustained.

VI. COUNTS I THROUGH V OF THE DUVAL COMPLAINT

Consistent with her earlier arguments, Bar counsel suggests that all of

the Respondent's challenges to the Referee's findings as to the Duval Complaint should be rejected because the Referee discredited Respondent and his fact witness's (Etienne) testimony. Bar counsel neglects to point out or refer to any section of the Referee's report that contains an assessment of the credibility of the testimony of Respondent or Etienne.

As set forth in Bar counsel's own quote from The Florida Bar v. Fredericks, supra at 1251, a "referee is charged with the responsibility of assessing credibility based on demeanor and other factors."

No such assessment appears in the Referee's report. Thus, the Respondent was correct in his reliance on The Florida Bar v. Raymon, supra, in challenging the Referee's report on the Duval Complaint.

VII. ANSWER AND ARGUMENT ON THE FLORIDA BAR'S CROSS-APPEAL

On Cross-Appeal, Bar counsel suggests that Respondent be disbarred rather than suspended for 18 months, relying on The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970).

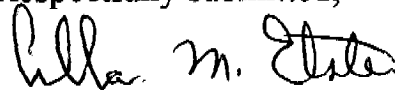
While the teachings of Pahules are correct depending on the facts and circumstances of each case as seen from the myriad of cases cited by Bar counsel in her Brief, she totally ignores another concept. That concept is that cumulative misconduct is dealt with more harshly than isolated misconduct. The Florida Bar v. Grant, 514 So. 2d 1077 (Fla. 1987) and The Florida Bar v. Glick, 397 So. 2d 1140 (Fla. 1981). Herein, there is no final order involving cumulative misconduct on the part of the Respondent except for a one-month suspension for non-client misconduct, and two earlier reprimands.

Of course, Respondent, as argued in his initial Brief and herein, suggests that there has been no attorney misconduct in these cases, and thus no attorney discipline is appropriate.

CONCLUSION

Respondent submits that based upon all of the arguments contained herein and in the initial brief, the Referee's Report should be overruled by this Court in its entirety. In addition, the Florida Bar's Cross-Appeal requesting an increased disciplinary penalty should be rejected.

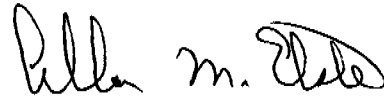
Respectfully submitted,



ALLAN M. ELSTER
3899 N.W. 7th Street, Suite 218
Miami, FL 33126
Florida Bar No.: 0022562

CERTIFICATE OF SERVICE

The undersigned HEREBY CERTIFY that on the 10 day of December, 1999, a true and correct copy of the foregoing was forwarded by First Class United States mail to: Lorraine Christine Hoffmann, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, FL 33309.



ALLAN M. ELSTER
3899 N.W. 7th Street
Suite 218
Miami, FL 33126
Florida Bar No.: 0022562