IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR

Complainant

vs.

ALLAN M. ELSTER

Respondent

Supreme Court Case

No. 92,968

The Florida Bar File

No. 97-50,830(17D)

BRIEF OF RESPONDENT

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RESPONDENT'S APPELLATE BRIEF ON REVIEW

STATEMENT OF THE CASE

Based upon a Complaint filed by the Florida Bar, this case was assigned to a Referee for hearing on May 26, 1998. A final hearing in this case was held on January 19, 1999 and was concluded on February 16, 1999.

The Referee's report was issued on March 17, 1999. Therein, the Referee made certain findings of fact and recommendations. The Referee concluded that the Respondent had engaged in certain items of misconduct and recommended that Respondent be suspended from the practice of law for a period of sixty days with automatic reinstatement at the end of the period of suspension, as provided in Rule 3-5.1(e), Rules of Discipline.

Pursuant to Rule 3-7.7 of the Rules of Discipline of the Florida Bar, a Petition for Review directed to this report of the Referee was timely filed with the Supreme Court of Florida. This brief is filed with this Court pursuant to Rule 3-7.7 and the applicable Rules of Appellate Procedure.

STATEMENT OF THE FACTS

The Respondent, Allan M. Elster, has been a member of the

Florida Bar, being admitted November 15, 1963.

On or about June 20, 1996, Antonio Sabatier retained Respondent to represent himself and his daughter, Joan Sabatier, regarding a pending hearing before the United States Immigration Court. The initial consultation meeting took place at the Sabatiers' home. Present at the meeting were the Sabatiers', the Respondent, his interpreter, and one or two other family members. The Sabatiers', at this June 20, 1996 meeting, agreed to pay the Respondent a total of $800.00 to represent Antonio Sabatier and his daughter in all proceedings pending before the United States Immigration Court and the Immigration Service.

The Respondent and at least one other family member present, testified that at least two to three hearings before the U. S. Immigration Court were necessary to resolve the Sabatiers' immigration problems.

At this June 20, 1996 meeting, Respondent gave the Sabatiers' a receipt for $800.00 believing, initially, that the total $800.00 was being paid at this meeting. When the Sabatiers' only paid the Respondent $400.00 at this meeting, Respondent testified that his agreement with the Sabatiers' was that the balance of $400.00 was to be paid prior to his attendance at any hearing before the Immigration Court. This agreement or understanding was interpreted to the Sabatiers' by the Respondent's interpreter, Enrique Santiago, since the Respondent could not communicate directly with

the Sabatiers' because of a language barrier.

After the initial meeting which lasted approximately two hours, and the Respondent anticipating a second meeting with the Sabatiers' to prepare for the Immigration Hearing, Respondent testified that he instructed his interpreter to contact the Sabatiers' by phone. The Respondent testified that his interpreter informed him that he had contacted the daughter, Joan Sabatier, by phone and that she had informed the interpreter that the Sabatiers' did not have the balance of the fee and would not pay the $400.00 prior to the hearing. The Respondent testified that he instructed his interpreter to advise the Sabatiers' that he would not make an appearance in Immigration Court without the balance of the fee being paid. The Respondent testified that his interpreter, Enrique Santiago, advised him that he had conveyed this message to the Sabatiers'.

The Sabatiers' testified that they did not intend to pay the Respondent the balance of the fee until all legal work and all hearings had been concluded. The Sabatiers' further testified that they attended the initial hearing in United States Immigration Court on August 6, 1996, but did not bring the $400.00 balance with them to that hearing.

Finally, the Respondent testified that he performed over four to five hours worth of legal services for the Sabatiers' which included the two hours at an initial consultation meeting and two

hours in the law library in preparation time, plus travel time.

The Respondent testified, without contradiction, that he had advised the Sabatiers' at their initial meeting that as Cubans, they could claim and file an application for asylum in this country which would require two or three hearings before the Immigration Court, and also a second meeting to prepare for that asylum application. The alternative was to accept a deportation order and apply under the Cuban Adjustment Act for residency status after one year from their time of entry into this country. The Respondent testified, without contradiction, that the Sabatiers' did not want a deportation order entered against them and were interested in applying for asylum.

Another witness called by the Florida Bar, Christina Diaz Gonzalez, testified that she was retained to represent the Sabatiers' after the August 6, 1996 hearing which was continued. Gonzalez testified that she represented the Sabatiers' at one Immigration Hearing where she agreed to a deportation order against the Sabatiers'. Gonzalez further testified that she did not assist the Sabatiers' in adjusting their status to that of a permanent resident, which was done by someone else.

An expert witness called by the Florida Bar, a Bar certified immigration attorney, testified that he would have been reluctant to agree to a deportation order as did attorney Gonzalez, and would have sought to get the case continued until the year was up for the

Sabatiers' to adjust their status to permanent resident under the Cuban Adjustment Act.

Enrique Santiago, although subpoenaed by the Florida Bar and the Respondent, did not appear and testify.

SUMMARY OF THE ARGUMENT

The Respondent contends that the proof adduced by the Florida Bar in support of the findings of fact and recommendations of guilt and discipline "failed to sustain the Bar's burden of proving impropriety by clear and convincing evidence," The Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1970) and The Florida Bar v. Schonbrun, 257 So. 2d 6 (Fla. 1971).

This standard of proof is required, rather than the mere "preponderance of the evidence" sufficient for a civil action because:

> "... disciplinary actions, while not fully criminal in character, are penal proceeding the results of which may permanently cripple an attorney's reputation and standing in the community..."

The Florida Bar v. Quick, 279 So. 2d 4, 8 (Fla. 1973).

The Respondent and the Sabatiers', as found by the Referee, entered into a retainer agreement, wherein the Sabatiers' agreed to pay the Respondent $800 to represent them before the Immigration Court. A down payment of $800 was made at the initial meeting and the evidence established a dispute between the Sabatiers' and the Respondent as to when, if at all, the agreed upon total fee of

$800.00, less the $400.00 initially given, was to be paid.

The Respondent contends that the proof adduced by the Bar in this case "failed to sustain the Bar's burden of proving impropriety by the Respondent in this contractual or fee dispute by clear and convincing evidence."

On one side of the coin, so to speak, we have the Respondent entering into a fee contract with the Sabatiers' for $800.00 to represent these Cuban nationals in all Immigration Hearings and proceedings including adjusting their status to permanent residents. Through an interpreter, Respondent requested the payment of $800.00 at the initial consultation meeting, wrote out a receipt for that amount, and then when informed by his interpreter that the Sabatiers' were only going to pay half of that amount, made it clear that the entire balance had to be paid prior to attendance at any Immigration Hearing.

The Respondent, unrebutted by the testimony of the other two attorney witnesses, both immigration attorneys, testified that the entire fee had to be paid prior to filing a Notice of Representation with the Immigration Court because once doing so, the attorney is virtually locked into representing that client even if he is not paid his entire fee.

In this regard and as will be argued in the main part of this Brief, Respondent submits that the Referee erred in rejecting Respondent's testimony or defense that he instructed his

interpreter, Santiago, to tell the Sabatiers' that he would not appear in Immigration Court if the entire fee was not paid (page 3 of Referee's Report). In disciplinary proceedings, the Referee is not bound by technical rules of evidence State v. Dawson, 111 So. 2d 427 (Fla. 1969). Thus, this Referee should have accepted Respondent's testimony, even if hearsay, based on the refusal of Santiago to obey two subpoenas, one from the Florida Bar to appear as a witness.

On the other side of the coin, we have the Sabatiers' testimony that they had no intention of paying the balance owed of $400.00 until all Immigration Hearings and other proceedings were concluded.

Clearly, the "clear and convincing evidence" in this case is on the side of the Respondent. That is there was a contractual or fee dispute between the parties to the fee agreement, undoubtedly caused by the language barrier, as to when the $400.00 was to be paid.

Such a contractual fee dispute between an attorney and his client is not sufficient to warrant disciplinary action under the circumstances of this case. Florida Bar v. Quick, supra.

ARGUMENT

I. WHETHER THE REFEREE ERRED IN MAKING THE FINDINGS OF FACT AS TO COUNT I OF THE COMPLAINT.

This Court, in Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973)

has held that a contractual or fee dispute between an attorney and his client is an inappropriate one for disciplinary action. The uncontradicted testimony is that (1) Respondent and his attorney had their initial meeting with the Sabatiers' on June 20, 1996 at the Sabatiers' home, which meeting lasted approximately two (2) hours; (2) that at this meeting, the Sabatiers' agreed to pay the Respondent a total of $800.00 for representation of the Sabatiers' before the Immigration Court and other immigration proceedings; (3) a family member, who attended this meeting, testified that the parties to this meeting discussed the possibility that there could be two to three hearings which Respondent and the Sabatiers' would have to attend before the Immigration Court; (4) that the Respondent gave the Sabatiers' a receipt for $800.00 based on a misunderstanding on Respondent's part that only $400.00 was to be paid at this meeting; (5) that there exists a language barrier between Respondent and the Sabatiers' in that the Respondent does not speak or understand Spanish and the same is true with respect to the Sabatiers' and the English language.

What is in dispute between the parties is when the balance owed of $400.00 was to be paid. The Respondent contends that he instructed his interpreter to inform the Sabatiers' that the $400.00 had to be paid prior to his attending any hearing. The Sabatiers', on the other hand, testified that they did not intend to pay the balance owed until after all Immigration Hearings and

proceedings were concluded.

The issue, therefore, before the Referee was whether the Respondent was required to file a "Notice of Appearance" with the Clerk of the United States Immigration Court on their behalf, based on his understanding, through his interpreter, as to when the balance of $400.00 was to be paid (Finding of Fact #5).

Respondent contends that the Sabatiers' violated their fee agreement and thus, he was justified in not making an appearance in Immigration Court until the entire fee was paid. The Referee's finding that this failure to file an appearance in Immigration Court and not attending the August hearing warrants disciplinary action is not supported by "clear and convincing evidence" which, as argued, is the standard of proof in these disciplinary cases; The Florida Bar v. Rayman, supra.

The Respondent clearly had a retainer agreement with the Sabatiers' for the payment of a total fee of $800 for all immigration services. According to the Respondent, and at lest one impartial witness to the original transaction, those immigration services required attendance at two or three Immigration Hearings.

The Respondent testified, without contradiction, from the Bar's expert witness, that once a Notice of Appearance is filed in Immigration Court, an attorney is virtually locked to represent that client in all Immigration Hearings.

The sole issue before this Court is whether an attorney is

required to make an appearance in court, and represent a client in all court proceedings to their conclusion, notwithstanding the failure of the client to pay the fee contracted for.

Now, it is true that there are sub-issues involved. If the fee is excessive or unreasonable, under Bar standards, the fee can be challenged. In order to show impropriety with respect to the amount of attorney's fees charged, the Bar must prove by clear and convincing evidence that the amount demanded from a client is extortionate or that the demand is fraudulent. The Florida Bar v. Quick, supra.

Clearly a fee of $800.00 for the amount of immigration services contemplated by the parties, i.e. two or three Immigration Hearings, is not extortionate or the demand not fraudulent.

A second sub-issue is whether the parties to this fee agreement mutually agreed when the balance of the fee owed was to be paid, or was there a dispute as to this issue.

This, of course, is the crux of the case before this Court. If there was clear and convincing evidence before the Referee that there was a meeting of the minds, thus an agreement between the parties, that the Respondent had agreed to attend all Immigration Hearings and handle all immigration matters for the Sabatiers', and not be paid until the conclusion of all proceedings, then the Referee was correct in his findings.

That, of course, is not the case by any stretch of the

evidence. Surely there is no clear and convincing evidence that such an agreement was entered into by the Respondent.

The sole evidence before the Referee as to what Respondent agreed to was (1) that he accepted a payment of $400.00 at the initial meeting after giving a receipt for the entire $800.00 to the Sabatiers', initially believing that amount was to be paid then, with the understanding, through his Spanish interpreter, that the balance was to be paid prior to any hearings being attended, and (2) that he instructed his Spanish interpreter to inform the Sabatiers' that he would not appear in court unless the entire amount was paid.

As to the latter, Respondent submits that the Referee erred in rejecting Respondent's testimony or defense on this crucial issue (Finding of Fact #9). Unless the Referee did not find Respondent's testimony credible on this issue, which is not specifically stated in his Report, then this testimony should have been accepted. In disciplinary proceedings, the Referee is not bound by technical rules of evidence, State v. Dawson, supra. Thus, hearsay testimony is admissible in these proceedings. This hearsay evidence, i.e., that Santiago, the Respondent's interpreter, told him that he had so informed the Sabatiers', should have been accepted, even though hearsay. This testimony was crucial to Respondent's defense, and absent the testimony of Santiago, who ignored two subpoenas to testify, one from the Florida Bar, Respondent's testimony as to

what he believed should have been accepted. After all, it is Respondent's state of mind as to why he did not attend the August 6, 1996 hearing, which should be crucial. If Respondent honestly believed that the Sabatiers' had been informed by his interpreter that he would not attend the August 6, 1996 hearing unless he was paid the balance of $400.00 owed, and the Sabatiers' had refused this request or demand, he should not be subject to disciplinary action.

Respondent, therefore, submits that he credibly testified that he was informed by his Spanish interpreter that the Sabatiers' refused to abide by their agreement to pay him the balance of the money owed prior to attending any Immigration Hearing. This testimony is, to some degree, corroborated by the testimony of both Sabatiers' that they did not bring the $400.00 balance owed to the August 6 hearing and had no intention of paying same until all proceedings were concluded.

What we do not know, because of the absence of Santiago's testimony, is whether this intent by the Sabatiers' not to pay until the end of the case, was formulated at the initial meeting or thereafter. Surely, if Respondent is to be found credible, and there was no finding to the contrary by the Referee, such an intent was not communicated to the Respondent at the initial meeting, either by his interpreter or by the Sabatiers', because of the language barrier.

Therefore, if Respondent justifiably did not file a Notice of Appearance with the Immigration Court's Clerk, contrary to Finding of Fact #6, then the other findings of fact, as to Count I of the Complaint, must fall.

As to "Finding of Fact #6", Respondent credibly testified that he did research in anticipation of his next meeting with the Sabatiers' to prepare for presentation of an asylum claim in Immigration Court. Yet the Referee rejected this legal preparation along with the Respondent's initial meeting with the Sabatiers' as being non-meaningful "work on their behalf." Surely, the time spent by the Respondent in giving legal advice at their initial meeting and research in preparation for the court hearing, did not justify this finding by the Referee.

Also not justified was the Referee's "Finding of Fact #7" that ".... Respondent effectively abandoned them and their cause of action." If this court finds that Respondent was justified in not attending the August 6, 1996 hearing, then there is no clear and convincing evidence that he abandoned the Sabatiers'.

As to "Findings of Fact #8 and 9", they already have been addressed herein.

II. WHETHER THE REFEREE ERRED IN MAKING THE FINDINGS OF FACT AS TO COUNT II OF THE COMPLAINT.

Findings of Fact #10 through 16, as to Count II of the

Complaint, deal with the legal conclusion reached by the Referee that the Respondent violated Rules Regulating Florida Bar 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.)

The sole evidence in support of Findings of Fact #10 through 13 is the Sabatiers' testimony that Respondent failed to return their telephone calls and beeper pages. The Sabatiers' in their testimony did not specify whether they were calling the Respondent or his interpreter. Nevertheless, because of the language barrier, Respondent was incapable of communicating with the Sabatiers' except through an interpreter. Thus, Respondent could not have effectively returned any telephone calls or beeper pages and been understood by the Sabatiers'.

The only avenue of communication open to the Respondent with these Cuban Nationals, who do not speak English, is through his interpreter.

The Respondent credibly testified that he instructed his interpreter to contact the Sabatiers' about payment of the balance of the money owed. The Respondent was informed by his interpreter that the Sabatiers' were not going to pay the balance until the end

of the case, and advised his interpreter to inform the Sabatiers' that he was not going to attend any court hearings without being paid the balance because that was his agreement with the Sabatiers'. The rejection of this evidence by the Referee has been argued in Part I of this brief.

The above is the extent of Respondent's knowledge of any communication with the Sabatiers'. Surely, as testified by the Respondent, if the Sabatiers' had called the interpreter, prepared to comply with their agreement and pay the $400.00 before the August 6, 1996 hearing, Respondent would have attended that hearing; had his interpreter advised him of this communication. No such call obviously was made by the Sabatiers', because they never intended to pay the Respondent until the end of the case.

Since Santiago refused to testify, we will never know if telephone calls or beeper pages were or were not returned by him.

Nevertheless, there is no "clear and convincing evidence" that Respondent violated Rules Regulating Florida Bar 4-1.1(a) by failing to "... keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

To rule otherwise would be to justify a violation of 4-1.4(a)

every time any attorney does not communicate with a client either because of the failure of a non-lawyer associate or staff member to keep an attorney informed of calls or because of a language barrier, or both.

As to "Findings of Fact #14 through 16", they deal with the retention of attorney Gonzalez, and her testimony that one or two occasions she attempted to place calls to the Respondent. Clearly, the failure of an attorney to communicate with another attorney does not justify a violation of 4-1.4(c).

III. WHETHER THE REFEREE ERRED IN MAKING THE FINDINGS OF FACT AS TO COUNT III OF THE COMPLAINT.

The findings made by the Referee as to Findings of Fact #17 and 18 have been previously covered in this brief. Clearly, the $400.00 collected from the Sabatiers' was not an excessive fee as previously argued herein.

The conclusion in Finding of Fact #18 that "Respondent did not do the legal work for which he was retained" is not supported by "clear and convincing" evidence. As argued, the Respondent provided legal consultation and research on behalf of the Sabatiers', clearly justifying a four hundred ($400.00) fee. It was the Sabatiers' who violated their fee agreement with the Respondent that prevented the completion of the legal work

contracted for, i.e., attendance at the Immigration Hearing.

IV. RECOMMENDATION AS TO GUILT

As argued, there is no clear and convincing evidence in the record to support the Referee's findings of fact, and therefore his recommendation as to guilt.

Recommendation A, i.e., R. Regulating Fla. Bar 3-4.2 is a catch all rule, as is 4-8.4(a). As to the latter, there is no evidence that Respondent knowingly assisted or induced another to violate any rules of the Florida Bar.

Recommendation "B" involves R. Regulating Fla. Br 4-1.1 (competent representation to a client) and 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client). This recommendation is based on the Referee's finding that Respondent failed to accomplish any meaningful work on the Sabatiers' behalf and failed to represent them at the August 6, 1996 hearing.

Respondent has previously argued herein and will adopt that argument as to this recommendation of guilt, as to the meaningful work performed and the justifiable reason for not attending the August 6, 1996 hearing.

Recommendation "C" and "D" involve the communication to the Sabatiers' through his interpreter that Respondent would not attend the August 6, 1996 hearing without receiving the balance of the

monies owed. As argued, the Referee erred in rejecting the testimony of the Respondent that he instructed his interpreter to so advise the Sabatiers' of this fact.

As to Recommendation "E," the $400.00 fee collected did not violate R. Regulating Fla. Bar 4-1.5(a). The Respondent spent four to five hours in consultation and research on the Sabatiers' behalf prior to their violating the retainer agreement with the Respondent by refusing to pay the remainder of the fee owed until after all legal work was accomplished. Respondent's request, through his interpreter, that this payment be made before any hearings were attended, was clearly reasonable. Therefore, any fee that was earned prior to the violation of this retainer agreement cannot be considered excessive in violation of Fla. Bar Rule 4-1.5(a).

V. RECOMMENDATION AS TO DISCIPLINARY MEASURES

The Referee recommended that Respondent be suspended from the practice of law for a period of sixty (60) days.

Based on the arguments contained herein and the lack of "clear and convincing evidence" that the Respondent engaged in any misconduct in violation of any Florida Bar Rule, the disciplinary measure imposed is inappropriate.

CONCLUSION

Respondent submits that based upon all of the arguments

herein, the Referee's Report shall be overruled by this Court.

Respectfully submitted,

Allan M. Elster, Attorney
Florida Bar No.: 002562

CERTIFICATION OF SERVICE

The undersigned HEREBY CERTIFY that on the _____day of June, 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; Mark Perlman, Esq., 1820 East Hallandale Beach Boulevard, Hallandale, Florida 33009-4717; Kenneth A. Marra, Referee, c/o Circuit Court, 205 N. Dixie Hwy, West Palm Beach, Florida.

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