IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee and Cross-Appellant

v.

ALLAN M. ELSTER,

Respondent/Appellant and Cross-Appellee

_____/

Supreme Court No. 92,968

The Florida Bar File No. 97-50, 830(17D)

RESPONDENT'S REPLY BRIEF AND ANSWER BRIEF ON CROSS-APPEAL

On Appeal from A Report of Referee

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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 of the Complaint.

The Florida Bar, in their Answer Brief, misconstrues Respondent's argument as to the Referee's findings as to Count I of the Complaint.

First of all, there is basically no factual dispute as to the events that transpired at the Sabatier's place of residence at the initial meeting on June 20, 1996.

As set forth in both parties' Statement of the Facts, the Respondent agreed to represent the Sabatiers in their immigration case for a total fee of $800.00, of which $400.00 was paid at that initial meeting.

What is in dispute is when that $400.00 balance was to be paid and whether Respondent was required to make a formal appearance in Immigration Court until that

balance was paid.

Respondent testified, and this testimony is not disputed (page 9 of Florida Bar Brief), that he was of the understanding that the balance of the fee was to be paid prior to any appearance being made in Immigration Court.

The Florida Bar's counsel counters this assertion in her Brief by the argument that this testimony was unsupported by corroborating testimony or documentary evidence. Is the Florida Bar's counsel suggesting that if this testimony or defense had been corroborated by testimony or documentary evidence, it would have been a sufficient defense to the Bar's charges?

As to testimonial evidence, Respondent and the Florida Bar subpoenaed Respondent's interpreter, a witness to those events, but he ignored these subpoenas.

The documentary evidence is the receipt for the full fee. As conceded by Bar counsel, the receipt is marked paid in full and contains the sum of $800.00 (Bar Brief pg. 10). Counsel for the Florida Bar further comments on this receipt in footnote two (2) of her Brief (pg. 10):

> The Sabatiers testified that this receipt was in error. It is noteworthy that their position in this matter would have been significantly enhanced had they chosen not to volunteer this fact. Accordingly, this assertion against interest speaks volumes for the Sabatiers' veracity.

A strange comment by an attorney for the Florida Bar, to say the least. First of all, if the receipt was in error, why did the Sabatiers accept it from Respondent. The proper procedure would have been for a corrected receipt to have been requested reflecting the $400.00 actually paid at the June 20, 1996 meeting, which was not done. This receipt,

(marked paid in full for the $800.00) corroborated Respondent's testimony that he expected the entire fee of $800.00 was to be paid at that meeting when he wrote the receipt. When Respondent found out he was mistaken, after he had written the receipt, presented it to the Sabatiers who accepted it, was the request or demand made through his interpreter that the entire amount be paid prior to any appearance in Immigration Court.

Also strange for a Florida Bar attorney, is her suggestion in footnote two that the Sabatiers could have not volunteered the receipt, i.e., thus, hidden or destroyed it. Bar counsel further admits that this receipt was an "assertion against interest", an acknowledgment that this receipt somewhat damaged their case against the Respondent.

As to the rejection of this defense or testimony by the Referee (Finding of Fact #9), if it was just a rejection of a defense, the Referee did not specify why he did so. On the other hand, if it was a rejection of Respondent's testimony on this critical issue, then a specific credibility finding should have been made, which the Referee did not choose to do.

Florida Bar's counsel further argues on this very point that even if the Referee had found Respondent's testimony to be credible, his argument would fail, citing The Florida Bar v. King, 664 So. 2d 925 (Fla. 1995).

It is true, as set forth in King, that a fee is not necessary to form an attorney-client relationship, for an attorney could never perform work pro bono for a client. The decision in King by this Court also stands for another proposition, not referenced by Bar counsel, that:

> "...once an attorney has appeared in pending litigation to represent a party, that attorney cannot withdraw from the case...without leave of court....." King at 927.

That is the crux of this case, for once Respondent had made an appearance in Immigration Court without being paid his full fee, he could not have withdrawn that appearance, without leave of court and compliance with Rule 4-1.16(d), Rule Reg. Fla. Bar.

As argued in the initial Brief, two or three hearings were contemplated by the parties in Immigration Court and once an appearance had been made, Respondent, as set forth in King, would have been obligated to continue to represent the Sabatiers in these court appearances, without getting paid his entire fee. This is the very reason why Respondent was justified in not making a formal appearance in Immigration Court until his full fee was paid. It must be emphasized here that the Sabatiers admitted that they brought no portion of the monies owed to Respondent to the initial court appearance and did not intend to pay the balance of the fee until the end of the case.

Next, the Florida Bar's counsel relies heavily on The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999), in an effort to counter the "rules of evidence" set forth by this Court in Florida Bar v. Rayman, 238 So. 2d 594, 597 (Fla. 1970) and in Florida Bar v. Junkin, 89 So. 2d 481 (Fla. 1956).

In an obvious attempt to avoid the heavy burden required by Rayman and Junkin, as to the requisite findings that are required to be made by a referee to sustain a charge of attorney misconduct, Bar counsel extracts one quote or portion of the Fredericks decision, on credibility of witnesses in a Bar hearing. In point of fact, this Referee made

no credibility findings, contrary to the assertions by Bar counsel, that he did. The Referee merely rejected Respondent's defense (Findings of Fact #9). Unlike the referee in Fredericks, no specific credibility findings were made as to the credibility of the Sabatiers' testimony over that of Respondent's as to the testimony on the critical issue of whether he had instructed his Spanish interpreter to inform the Sabatiers that he would not appear in court unless the entire amount was paid (Finding of Fact #9).

Therefore, for the reasons and arguments stated in Respondent's initial Brief and herein, the Referee's findings as to Count I must be overruled.

II. Count II of the Complaint.

For purposes of countering Respondent's arguments as to the Referee's findings directed to Count II of the Complaint, Florida Bar counsel makes this amazing assertion.

As to the failure of Respondent to return any of the "numerous," but unsuccessful telephone communications to Respondent, as Bar counsel suggests each witness but the expert testified to, she states:

> Where those telephone numbers rang, and who or what (if anyone or anything) answered those lines is inconsequential to these proceedings (pg. 16 of Bar counsel's Brief).

Other than Ms. Gonzalez, there is a language barrier between the Sabatiers and the Respondent.

Therefore, it would seem to be the Florida Bar's position that the Respondent is guilty of attorney misconduct for not answering or returning the Sabatiers' telephone calls, wherever these calls were made to and who or what answered these calls.

An attorney is, therefore, guilty of misconduct, according to the Florida Bar, if he fails to return phone calls that he has no knowledge of or could not have knowledge of, if the calls were not made to his telephone.

If, as Bar counsel suggests, this was the evidence relied upon by the Referee in making his findings as to Count II of the Complaint, they should be overturned under the teachings by this Court in The Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994).

This is so for that very statement by Bar counsel in her Brief, is an admission that the Sabatiers, in their testimony, did not identify where those numerous telephone calls were made to and who or what answered the calls.

Based on this admission by Bar counsel, and the arguments contained in the initial Brief and herein, the Referee's findings as to Count Ii of the Complaint should be overturned.

III. Count III of the Complaint.

The issue as to Count III of the Complaint and the Referee's findings directed to that Count, is whether the Respondent charged a clearly excessive fee to the Sabatiers, which constitutes attorney misconduct.

The Florida Bar, on this issue, relies solely on the testimony of their expert witness. His testimony was based on his review of the Respondent's file, the legal research contained therein, and his conclusion that the work performed was incompetent.

This witness was not privy to the initial consultation that Respondent had with the Sabatiers, nor was he present when Respondent engaged in legal research in preparation for further meetings with the Sabatiers and the immigration hearing. The expert's testimony, as to this legal research, was that some of the cases found in the file were "not relevant to the issue at hand" (Tr. Vol. 2, pg. 43, 1.14-15).

Based on this finding, the expert testified that "even taking into account what he's done, Respondent's admittedly small fee....was excessive" (Tr. Vol. 2, pg 57, 1.5-7).

The Florida Bar also relies on the testimony of Joani Sabatier that the Respondent gave no legal advice at the consultation meeting.

This testimony is countered by Respondent's testimony that he provided "legal consultation and research on behalf of the Sabatiers" (Fla. Bar Brief, pg. 19).

As set forth by this Court in The Florida Bar v. Garland, 651 So. 2d 1182, 1184, in order for an attorney to be found guilty of charging a clearly excessive fee under Rule 4-1.5(a)(1):

> "...after review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear over-reaching or an unconscionable demand by the attorney..."

The Garland court concluded:

> "Therefore, under the circumstances, we do not believe that one could be left with a `definite and firm conviction' that the fee charged here exceeds a reasonable fee to such a degree as to be considered `clear over-reaching or a unconscionable demand'.."

Respondent submits that the $400.00 fee collected herein under an agreement that the balance of $400.00 would be paid prior to any court hearings, cannot be considered "clear over-reaching or an unconscionable demand".

The Florida Bar does not dispute the time spent by the Respondent in legal consultation and research, just the results.

While the Florida Bar and their expert witness do not agree or approve of the results of the legal effort expended by Respondent, surely, "the admittedly small fee" charged to the Sabatiers is not clearly excessive under Rule 4-1.5(a)(1), as ruled on by the Garland court.

The finding by the Referee as to Count III of the Complaint should be overruled.

IV. Argument in Answer to The Florida Bar's Cross-Appeal.

The Florida Bar, in their Cross Appeal, contests the Referee's recommended sanction of a sixty (60) day suspension. The standard of review of this imposed sanction by a referee, is according to the Florida Bar contained in this Court's decision in The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999). Therein, this Court opened:

> "...a referee's recommendation is presumed correct and will be followed if reasonably supported by existing case law and not `clearly off the mark'." Id. at 1254.

The Florida Bar contends that a 60 day suspension is "off the mark," referencing numerous court cases, with clearly different types of attorney misconduct, in support of their claim that the recommended suspension is not supported by existing case law.

As to the cases cited by Bar counsel, as stated, each one can be distinguished.

1. The Florida Bar v. Patterson, 530 So. 2d 285 (Fla. 1988). Therein, this Court approved a one (1) year suspension where neither party sought review.

2. The Florida Bar v. Morrison, 669 So. 2d 1040 (Fla. 1996). Herein, the Respondent did not contest the case before the Referee.

3. The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993). One year suspension where attorney did not pursue lawsuit or appear in court after lawsuit had been filed.

4. The Florida Bar v. Schilling, 436 So. 2d 551 (Fla. 1986). Six month suspension where Respondent did not contest Referee's report.

5. The Florida Bar v. Brakefield, 679 S. 2d 766 (Fla. 1996). Six month suspension based on numerous incidents of neglect of clients' lawsuits.

6. The Florida Bar v. MacPherson, 534 So. 2d 1156 (Fla. 1988). Six month suspension where attorney abandoned his practice and failed to return files and money to clients.

7. The Florida Bar v. Daniel, 641 So. 2d 1331 (Fla. 1994). Ninety-one day suspension approved where Daniel did not contest case.

8. The Florida Bar v. Collier, 385 So. 2d 95 (Fla. 1980). Sixty day suspension approved where no petition for review filed.

9. The Florida Bar v. Witt, 626 So. 2d 1358 (Fla. 1993). Ninety-one day suspension for failure to file briefs in appellate cases.

10. The Florida Bar v. Wilder, 543 So. 2d 222 (Fla. 1989). Six month suspension for allowing lawsuit to be dismissed with prejudice.

11. The Florida Bar v. Netzer, 462 So. 2d 1103 (Fla. 1988). One year suspension where attorney lied to client that lawsuit was being handled, where he allowed lawsuit to be dismissed.

12. The Florida Bar v. Orman, 409 So. 2d 1023 (Fla. 1982). Eighteen month suspension where attorney failed to take action on cases, kept settlement monies and lied to this Court.

In addition to the above cases where severe attorney misconduct was involved, or the respondents did not contest the bar charges, the Florida Bar cites two other cases that deserve comment. In The Florida Bar v. Grant, 514 So. 2d 1077 (Fla. 1987), this Court opened:

> "We generally deal with cumulative misconduct more harshly than isolated misconduct..."

This Court made the same comment on cumulative misconduct in The Florida Bar v. Glick, 397 So. 2d 1140 (Fla. 1981). This Referee was not presented with any cumulative misconduct involving clients when he decided the appropriate sanction in this case. An earlier one month suspension was for non-client misconduct, and so were two earlier reprimands.

In addition, there are other cases, not referenced by Bar counsel, where less discipline was handed out and approved by this Court. An example of such a case is The Florida Bar v. Doltie, 606 So. 2d 1158 (Fla. 1992). Therein, an attorney was suspended for one month and placed on probation for charging excessive fees and failing to appear at a hearing on behalf of a client.

In conclusion on this issue, the increased sanction urged by the Florida Bar should be rejected.

CONCLUSION

Respondent submits that based upon all of the requirements 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,

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CERTIFICATE OF SERVICE

The undersigned HEREBY CERTIFY that on the _____ day of August, 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.

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