IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	**)**	
	)	**Case No. SC95539**
Complainant-Appellee	**)**	
	)	
v.	**)**	**TFB Case No.**
	)	**1999-50,838(17H)**
JOHN T. CARLON, JR.,	**)**	
	)	
Respondent-Appellant.	**)**	
_____)		

THE FLORIDA BAR'S ANSWER BRIEF

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CERTIFICATION OF TYPE, SIZE, STYLE AND ANTI-VIRUS SCAN

Undersigned counsel hereby certifies that the brief of The Florida Bar is submitted in 14 point, proportionately spaced, Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

COUNTER STATEMENT OF STATEMENT OF THE CASE AND FACTS

The bar respectfully submits the following COUNTER STATEMENT of the case and facts in that it does not regard respondent's statement as complete.

Case

The bar charged respondent with charging a clearly excessive fee in violation of Rules Regulating The Florida Bar 4-1.5(a).

The bar's complaint was filed on May 14, 1999. The final hearing was held on February 25, 2000. The referee, finding that respondent had charged a clearly excessive fee in violation of Rule 4-1.5(a), recommended that respondent receive a 91-day suspension, that he make restitution to his client and that he pay the bar's costs.

The referee's report was considered by the bar's board of governors at the meeting which ended April 7, 2000. The board determined not to petition for review.

Facts

1. Respondent, John T. Carlon, Jr., is and at all times hereinafter mentioned was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. Heretofore, on or about December 16, 1997, one Darlean Woodburn contacted respondent by telephone and then related to respondent that she needed to secure an amended divorce decree from Phoenix, Arizona [Final hearing transcript, page 11][1].

[1] All further references to the final hearing transcript will appear as "page(s)" followed by a number or numbers.

3. Rather than simply informing Ms. Woodburn that she should consult an Arizona legal directory and select an attorney, respondent, instead, informed her that he would need to meet with her [page 11].

4. Respondent arranged to meet with Ms. Woodburn at her office where Ms. Woodburn again explained to respondent what she needed, with respondent stating that an amended divorce decree would have to be filed in Arizona. [page 14]. Ms. Woodburn then had the following conversation with respondent:

> And I said, "Well, I thought we could do it here?"
>
> And he said, "No. It has to be filed where the original was secured."
>
> And I said, "Well, then what I need is an attorney in Arizona, and I don't need an attorney from Florida since it has to be filed there."
> And he said, "Oh no. You have to have an attorney in Florida, too."
>
> And I said, "Well, why?" I didn't understand.
>
> And he said, "Because you are a resident of the State of Florida. You have to conform to Florida law."
>
> And I said, "Okay." [pages 14, 15].

5. Respondent then and there presented to Ms. Woodburn a written fee agreement which provided for a retainer in the sum of $4,000 and which provided, inter alia, for an hourly rate of $250 and an "administrative fee of $500 for opening

your file." Ms. Woodburn advanced the $4,000 retainer at the meeting [page 15; bar's exhibit 1 in evidence].

6. Thereafter, between December 18, 1997, and March 27, 1998, respondent drafted two (2) letters, one, seeking an Arizona attorney to represent Woodburn in securing the asset she sought to recover, a copy of which letter [four (4) of which, dated January 2, 1998, were identical and eight (8) of which, dated February 17, 1998, contained an inconsequential change] was directed to twelve (12) Arizona attorneys, and the other, seeking an Arizona attorney to represent Woodburn in connection with a malpractice claim against her Arizona matrimonial attorney, an exact copy of which was directed to two (2) Arizona attorneys [See bar's exhibits 2 and 9 in evidence].

6. On or about February 23, 1998, respondent forwarded his first billing to Ms. Woodburn in the total amount of $2,885. The bill included what respondent described as "out of pocket expenses" in the sum of $510, $500 of which was the "administrative fee per agreement" [bar's exhibit 7 in evidence]. That bill included 5.1 hours for "research," "review of research," drafting the letters above referenced and proofing, mailing and signing such letters.

7. The "research" that respondent billed for consisted of his going to the Broward County Law Library and selecting names, addresses and telephone numbers of Arizona attorneys from Martindale Hubbell [page 43; bar's exhibit 8 in evidence].

8. Not having heard from respondent, Woodburn, upon her own initiative, secured representation from an Arizona attorney who undertook her representation to secure the amended divorce decree in question. She informed respondent of that fact in a May 1, 1998, letter to respondent in which she stated:

> I wish to advise you that I have retained an attorney in Arizona since you are not able to put me in touch with one. My xhusband, by written letter, has agreed to release my retirement for his value in the pension plan at the time of divorce. The money will be divided equally between my three children.
>
> My attorney has prepared the modified divorce decree. Mr. Danrangi is charging me $75.00 per hour for his time and $13.00 per hour for typing. He states there will be no problem in getting the decree signed by the judge.
>
> After discussing the case with the Attorney in Arizona, I am having a problem with your accounting statement. It does not seem to be reasonable that twelve (12) form letters should cost me $2,885.00 and for this $2,885.00 I have received nothing. Please advise me of the adjustment you feel would be appropriate [bar's exhibit 3 in evidence].

While the bar's exhibit 3 is undated, it bore a May 1, 1998, postmark and Ms. Woodburn fixed the May 1, 1998, date in her testimony [pages 19; bar's exhibit 4 in evidence].

9. Respondent, by letter to Ms. Woodburn dated May 7, 1998, failed to address Ms. Woodburn's concerns regarding his $2,885 bill and request for an adjustment other than stating:

> The other matters raised in your letter are best addressed at the time your file is ready for closing.
>
> Please keep me advised of the status. Until I hear further from you, I am suspending further action on your file [bar's exhibit 4 in evidence].

10. By letter to respondent dated July 16, 1998, Ms. Woodburn forwarded a copy of the amended divorce decree her Arizona counsel had secured for her, informed respondent of the $366.58 charged by Arizona counsel, furnished respondent with a copy of the billing underlying such $366.58 charge and repeated:

> Due to the above information I have shared with you, I feel my case is ready to close. Therefore, I am sure you understand my problem with your accounting statement. It does not seem to be reasonable nor realistic that I was charged $2,885.00 for twelve (12) form letters [bar's exhibit 5 in evidence].

11. By letter and billing statement to Ms. Woodburn both dated August 6, 1998, respondent increased his prior billing of $2,885 to $3,340.10 and refunded the balance of Ms. Woodburn's $4,000 retainer payment [bar's exhibit 6 in evidence].

12. As evidenced by the two (2) bills rendered by respondent to Woodburn, [bar exhibits 6 and 7 in evidence] the only services claimed to have been rendered by

respondent to Woodburn consisted of an initial consultation, securing names from Martindale-Hubbell, drafting and mailing the two (2) above referenced form letters, and receiving and responding to his client's two (2) correspondences regarding respondent's fees.

13. According to the bar's expert and as found by the referee, respondent's task in securing names from Martindale-Hubbell for purposes of obtaining Arizona counsel for Woodburn did not present respondent with a novel, complex or difficult question requiring any skill other than the ability to extract names from a directory [page 58; report of referee, page 3, item I].

14. In undertaking representation of Woodburn there was no likelihood that the acceptance of such employment would preclude other client employment of respondent [pages 57, 58; report of referee, page 4, item J].

15. When queried regarding whether or not there was any skill, expertise, or efficiency of effort reflected in those items that respondent testified that he provided in connection with his representation the bar's expert testified:

> That there was no proficiency, skill, or particular talent required or provided by any of the subjected efforts by Mr. Carlon [pages 58, 59].

16. Respondent obtained no results for Woodburn [See item 7 in respondent's answer to the bar's interrogatories page 50 where the interrogatories were filed with the referee who took judicial notice thereof].

17. Woodburn imposed no time limitations upon respondent nor did any circumstances arise during the course of his representation of Woodburn which imposed any such time limitations [see item 8 in respondent's answers to the bar's interrogatories].

18. There was no prior attorney/client relationship between the respondent and Woodburn nor any unusual nature or length of the professional relationship [see item 9 in respondent's answers to the bar's interrogatories].

19. Upon a review of the facts surrounding respondent's representation of Woodburn, a lawyer of ordinary prudence would be left with a definite and firm conviction that the $3,340.10 fee (including a $500 administrative fee for opening Woodburn's file) exceeds a reasonable fee for services provided to such a degree as to constitute clear overreaching and/or an unconscionable demand by respondent [page 57].

20. The bar's expert opined:

> Q. What, if any, legal services did you find that Mr. Carlon rendered to Ms. Woodburn in this matter?

> A. I candidly do not believe there was any legal service that was provided, nor that was needed to be provided by Mr. Carlon [page 59].

21. The bar's expert further opined that the entire $3,340.10 retained by respondent constituted a clearly excessive fee [page 59].

SUMMARY OF ARGUMENT

RESPONDENT'S GUILT

In bar counsel's view, the referee summed up this issue so succinctly as not to be capable of improvement. The referee stated:

> Respondent's misconduct cannot be characterized as negligent. His actions in representing to Ms. Woodburn that she would need to conform to the laws of Florida as well as the laws of Arizona constituted the hook whereby respondent secured Ms. Woodburn as a client. Additionally, respondent's gross over-billing for the rendition of what charitably can be labeled as minor ministerial acts was not negligent, but knowing and intentional [report of referee, page 6].

CHARGES OF ETHICS VIOLATIONS BY BAR COUNSEL AND REFEREE

The communication by the referee's judicial assistant to bar counsel seeking help in responding to this court's request [to the referee] for a submission of an application for an extension of time within which to file the report of referee and bar

counsel's filing of a request for such extension was communicated to respondent by the bar's January 31, 2000, letter to the court. It constituted a ministerial action for an administrative purpose and did not constitute an ethics breach nor a prohibited ex parte communication.

RESPONDENT'S REQUEST FOR A PRE-TRIAL CONFERENCE

The referee's lack of scheduling the pre-trial conference does not constitute fundamental error which would require a new trial. Respondent did nothing to follow up on his request, made no additional pre-trial motions and did not make any attempt to seek whatever relief he believed himself entitled to through a motion in limine, a proffer or a request to explain the relevancy of his questions which were objected to and sustained.

REFEREE'S RULINGS ON RELEVANCE OBJECTIONS

Respondent posed questions to a bar witness regarding subject matter not related to any subject raised by the bar on direct and having no apparent relevance to the issues. The bar's objections were sustained. Respondent made no proffer of the direction he was attempting to take, made no application to address his concern at a sidebar and made no effort to secure the information by posing any other question. Under the circumstances, the referee's rulings were correct, or, if incorrect, did not constitute fundamental error.

ARGUMENT

POINT I - THE REFEREE'S FINDINGS OF FACT, RECOMMENDATIONS REGARDING GUILT AND SANCTION RECOMMENDATION ARE PREDICATED UPON CLEAR AND CONVINCING EVIDENCE AND THE PROPER APPLICATION OF BOTH PRECEDENT AND THE STANDARDS FOR IMPOSING LAWYER SANCTIONS

A party contesting a referee's findings of fact and conclusions of guilt "carries the burden of demonstrating that . . . the record evidence clearly contradicts the conclusions." Florida Bar v. Spahn, 682 So.2d 1070, 1073 (Fla. 1996). It is respectfully submitted that the evidence presented in the case at bar establishes an ipso facto violation by respondent of R. Regulating Fla. Bar 4-1.5(a) which rule proscribes an attorney's charging and collecting of a clearly excessive fee. In the bar's view, the finding of guilt and sanction would not have changed even had the bar not secured the testimony of the board certified lawyer who testified: "I candidly do not believe there was any legal service that was provided, nor that was needed to be provided by Mr. Carlon" [page 59]. That a lawyer would charge anything in the circumstances surrounding Ms. Woodburn's problem, would, at the very least, constitute an unprofessional act. That he would charge $3, 340.10 to "research" a lawyer's directory for purposes of writing two (2) letters, is incomprehensible and by any standards would leave not only a lawyer of ordinary prudence but anyone with a sense of propriety to conclude that such a fee is so excessive as to constitute clear

overreaching or an unconscionable demand by an attorney. When Ms. Woodburn had the temerity to question respondent regarding his bill, he reacted by charging her for the time he devoted, first to writing her a totally unresponsive letter [see Ms. Woodburn's May 1, 1998, letter to respondent, bar's exhibit 3 and respondent's May 7, 1998, unresponsive letter, bar's exhibit 4] and then for writing the August 6, 1998, letter [see bar's exhibit 6].

Perhaps most telling regarding the nature, extent and scope of the so-called legal services respondent claims to have rendered to support his $3,340.10 charge is respondent's testimony given in response to questions posed to him by bar counsel requesting that respondent define each and every legal service claimed to have been rendered. When asked what legal services he rendered to his client, respondent proceeded to discuss making an appointment to meet with his client, then having Ms. Woodburn execute a retainer and taking a history and receiving some documents. Pressed, respondent agreed that none of those items involved the delivery of legal services [pages 39 through 42]. He stated that Ms. Woodburn discussed tactics with him and that he advised her that the choice of tactics was up to her [page 42]. The balance of respondent's replies concerning what legal services he claims to have rendered consisted of his "research" using Martindale Hubbell and the drafting of the two (2) letters to Arizona lawyers [pages 42 through 49].

Respondent questions the referee's reliance on The Florida Bar v. Richardson, 574 So.2d 60 (Fla. 1990). It is not without some considerable irony that respondent views as a distinguishing factor in Richarson, that the respondent in such case imposed a monthly cover charge. Apparently respondent views his $500 "administrative fee for opening [your] file" as somehow different [See bar's exhibits 1, the retainer agreement where such administrative fee is set out and the bar's exhibit 7, respondent's bill where such $500 administrative fee is listed as an "out of pocket" expense].

The referee explained why she considered Richarson to be so persuasive stating:

> The Richardson case is noteworthy for its similarity to the case at bar. In Richardson, the respondent had charged his clients $10,550.99 for representation in a simple estate involving a single asset valued at $22,000.00. Like the respondent in the instant case who charged Ms. Woodburn a $500.00 "administrative fee" for opening a file, the respondent in Richardson, had made a "monthly cover charge." Unlike the case at bar, however, the respondent in Richardson "was a young, hard-working attorney who had never been disciplined previously. . ."[62] whereas the respondent in this proceeding has a bar discipline history and, admitted since 1955, is hardly an inexperienced attorney [Report of Referee, page 6].

The referee also noted the court's reference, in Richardson, to Baruch v. Giblin, 164 So. 831(1935), where the court observed:

> Lawyers are officers of the court. The court is an instrument of society for the administration of justice.

> Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys its power to perform adequately the function of its creation [833].

The bar thoroughly agrees with respondent's observation at page 17 of his brief where he states: "It is significant that no evidence was even attempted to be advanced that the legitimacy of Respondent's charges as itemized in his billing/accountings to WOODBURN were open to question." There is a simple explanation for that. There exists no such evidence.

The referee meticulously followed the Standards For Imposing Lawyer Sanctions in arriving at her sanction recommendation explaining every step of her analysis.

It is respectfully submitted that the referee's findings of fact are overwhelmingly supported by the evidence, her recommendation as to guilt is mandated by the facts adduced and her sanction recommendation is predicated upon a careful and reasoned application of precedent and standards.

POINT II - THE CIRCUMSTANCES SURROUNDING BAR COUNSEL'S FILING OF AN APPLICATION SEEKING AN EXTENSION OF TIME WITHIN WHICH TO PERMIT THE REFEREE TO FILE HER REPORT

WARRANT NO FINDING OF IMPROPRIETY AND FORM NO BASIS FOR RELIEVING RESPONDENT OF HIS CONVICTION

On January 28, 2000, the court directed a letter [with copies to bar counsel and to respondent] to the referee reminding her that her report of referee was not filed and stating:

> It would be helpful if you would submit a request for an extension of time to file your report, immediately.

Bar counsel was contacted by the referee's judicial assistant on January 31, 2000, seeking help in filing the extension application. Bar counsel that date wrote to the court stating:

> I have been asked to request an extension of time for the referee to file her report in this matter. A final hearing, for all purposes, has been scheduled for February 25, 2000. Request is hereby made for an extension through March 3, 2000.

That letter was copied to respondent. Respondent then filed a February 3, 2000, response to the request for extension, objecting thereto on the basis that he was not afforded an explanation by the referee as to why she was seeking the extension. Thereafter, this court issued its order dated February 14, 2000, granting the extension request.

Respondent then moved for an order disqualifying the referee [a motion which respondent has renewed upon the filing of his initial brief] complaining, as he does in

his brief and as he did in his initial motion for disqualification, that bar counsel and the referee joined in some unholy alliance where bar counsel became the referee's lawyer for securing an extension within which to file her report of referee. Bar counsel filed a pleading opposing the granting of such relief. The referee, who was served with a copy of the original motion, apparently construing it to be a recusal application, entered an order on February 3, 2000, denying such application. That was followed by this court's February 4, 2000, order, unanimously denying respondent's motion, without prejudice.

It is respectfully submitted that a communication by this court directed to a referee alerting the referee of the time limitation for filing a report and soliciting the filing of a motion for extension is an administrative procedure employed over the years as a matter of course. The court suggests, the referee requests and the extension is granted. It is not uncommon for successive extension requests to be made and is commonplace that such extension requests are granted. The processing of both the reminder by the court to the referee that an extension should be filed and the orders granting the pro forma extensions are issued by the court clerk as in the case at bar. The entire procedure seems to fall foursquare under Canon 3B (7)(a), Code of Judicial Conduct, which permits a judge to call upon an attorney for administrative purposes.

POINT III - THE REFEREE'S FAILURE TO SCHEDULE A PRE-TRIAL CONFERENCE DOES NOT CONSTITUTE FUNDAMENTAL ERROR REQUIRING A NEW TRIAL

With the final hearing scheduled for February 25, 2000, respondent, by pleading dated January 13, 2000, moved the referee for a pre-trial conference. No such conference was scheduled. The prejudice that respondent claims as a result of not having such conference, is that his cross examination of the complainant to the bar was thereby thwarted. He suggests that "the pre-trial conference could have crystallized other issues rendering appellate review less likely" [page 13 of respondent's brief]. He fails to state, in any respect, what "other issues" he claims are involved. It is respectfully submitted that the failure to schedule a pre-trial conference does not constitute fundamental error and in no way prejudiced respondent.

Respondent made no effort to secure a hearing date for his motion. He did not correspond with the referee to request that she act thereupon. He did not bring the subject up at the commencement of the final hearing when such conference could have taken place and if an issue or issue were raised thereat a continuance could have been sought. He did not, by a motion in limine, attempt to address any scope or limitations issues regarding his anticipated cross examination of any witness. He did not depose any of the bar's witnesses. He did not, upon the sustaining of objections to questions propounded by him, seek to make a proffer or even request an opportunity to be

heard. He did not lose his right to have any issue raised on appeal as a result of the conference not being held. He has made no demonstration to establish that the failure to hold the status conference so impacted him as to be incapable of being cured.

POINT IV - THE REFEREE'S RULINGS SUSTAINING BAR OBJECTIONS WERE CORRECT

Respondent questioned Ms. Woodburn regarding her present employment and duties [pages 36, 37]. He then asked her regarding her prior employment whereupon the bar objected on the basis of relevancy, which objection was sustained [page 37]. He then asked Ms. Woodburn how many times she was married and whether or not she had been a party to a dissolution of marriage proceeding other than the matter leading to her relationship with respondent. The bar objected to both lines of inquiry on the basis of relevance, which objections were sustained [pages 37, 38]. Respondent then ceased his cross examination. He made no attempt to explain the purposes of his questions, no proffer and no request for a sidebar. He made no attempt to ask the witness what, if any, experience she had in entering into retainer agreements with lawyers. The bar respectfully submits that respondent's questions were not so pregnant with the purpose thereof as to be obvious either to bar counsel or the referee. Standing alone, such questions simply appeared to have nothing to do

with the issues raised by the disciplinary proceeding. The referee was correct in sustaining the bar's objections.

Even if the referee had overruled the bar's objections and respondent had established that Ms. Woodburn had extensive interchange with lawyers, such evidence has nothing whatever to do with the fact that respondent charged $3,340.10 for selecting fourteen (14) lawyers from Martindale Hubbell and drafting two (2) letters addressed to such lawyers.

CONCLUSION

Deference should be afforded to the referee's findings of fact and sanction recommendation. Nothing transpired during the proceedings which should form the basis for dismissal or new trial.

All of which is respectfully submitted.

_____

David M. Barnovitz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that A true and correct copy of the foregoing brief has been furnished by regular U.S. Mail to John T. Carlon, Jr., respondent, at 2737 Oakland Park Boulevard, Suite 202, Post Office Drawer 9237, Fort Lauderdale, Florida 33310-9237, this 30th of June, 2000.

David M. Barnovitz