IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

KENNETH J. KAVANAUGH,

Respondent-Appellant.

______________________________________/

Case No. SC03-1899

The Florida Bar File
No.2001-51,685(17C)

RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar.” Kenneth J. Kavanaugh, Appellant, will be referred to as "respondent.” The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter and “ST” will be used to designate the transcript from the sanction hearing. Lastly, the symbol “TFB” or “Resp.” followed by a letter and number will designate the trial exhibits of the respective parties.

SUMMARY OF ARGUMENT

At issue in this appeal is whether The Florida Bar has met its burden of proof to find a lawyer guilty of having collected a clearly excessive fee when the Bar has failed to present expert testimony to establish this point and when a Respondent presented compelling evidence that the written fee agreement was modified by a subsequent agreement between the lawyer and the client and the lawyer acted in reliance upon same.

It is important to stress that the Referee found that the Respondent secured an "exceptional result" for his client, in that the client received $9,000.00 more than his actual damages. Yet the Referee ignored the evidence presented by the Respondent concerning this subsequent agreement and found him guilty of having violated his earlier fee agreement. The Respondent believes that the evidence presented at trial fails to support the Referee's findings of guilt and that he should be found not guilty.

In its Cross appeal the Bar surprisingly seeks to exceed the Referee's sanction recommendation by requesting a thirty day suspension without any real argument to support this position. At most, if this Court upholds the finding of guilt, this Court should Admonish the Respondent, as was recommended by the Grievance Committee.

ARGUMENT

I. THE RESPONDENT SHOULD BE FOUND NOT GUILTY OF HAVING COLLECTED A CLEARLY EXCESSIVE FEE.

The Respondent has sought review of a Referee's finding that he collected a clearly excessive fee and set forth in his Initial Brief a very concise explanation of why the Referee's findings of guilt are "clearly erroneous and lacking in evidentiary support." The Florida Bar v. Canto, 668 So. 2d 583 (Fla. 1996). This explanation included precise reference to the testimony and evidence adduced at trial, inclusive of the fact that the Bar failed to produce any expert testimony that the fee was unreasonable or excessive and a demonstration that there was a novation of the original fee agreement. The Florida Bar v. Barley, 831 So. 2d 163 (Fla. 2002); The Florida Bar v. Hollander, 594 So. 2d 307 (Fla. 1992). Rather than attempt to refute this position the Bar makes no reference to trial testimony and instead directs the Court to conclussorry remarks made by the Referee prior to hearing any evidence (Answer Brief p.10-11) and other remarks made by the referee during the trial.

A. The Novation.

The Florida Bar argues that the terms of the initial fee agreement should be followed at all costs and that since the fee ultimately collected was not in accordance

with the terms of the initial fee agreement then the Respondent should be found guilty of collecting an excessive fee. Perhaps had there been no novation of the fee agreement then the Bar's argument may have had some merit. However, there was a modification of the fee agreement that changed the terms of the original fee contract.

Both parties to this appeal agree that the Respondent and Harry Pollak entered into a written fee agreement on January 11, 1999. This agreement called for the greater of forty percent of the amount recovered or the fees awarded by the court as there was a statutory fee entitlement under the Florida Unfair and Deceptive Trade Practices Act. While there was some discussion about what this phrase meant, inclusive of a mistaken belief that there was a necessity of court approval for any fee that was in excess of the forty percent contingency fee,[1] this discussion is irrelevant because the parties to the fee contract agreed to change the terms of their original agreement. The evidence adduced at trial clearly established that Pollak agreed to the precise fee collected by the Respondent. This evidence included the Respondent's correspondence (all copied or directed to the client) and Pollak's signature on the final distribution

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[1] It seems that the Referee may have misapplied R. Regulating Fla. Bar 4-1.15(4)(B)(i) which requires court approval of fees in personal injury cases under certain circumstances. This is not a personal injury case and the rule has no application. Also see Comments to rule under the heading "Contingent fee regulation".

statement wherein the exact fee, the costs and Pollak's distribution[2] were all set forth with specificity. Further evidence on this point was the Respondent's testimony regarding his various conversations with his client on this point and the contemporaneous telephone notes that were introduced at trial.

The Bar, in its brief, presents no argument concerning the change in the terms of the fee agreement. At trial the Bar contended that since there was no court order the parties were bound by their prior agreement. However, this type of argument flies in the face of logic and common settlement practice where there are statutory fee entitlements. If one was to adopt the Bar's position all cases with statutory fees must be presented to the Court for approval, rather than the parties being able to resolve the matter without the waste of judicial resources. In fact the Bar's position in this case, would make settlement close to impossible and cases would be forced to trial and verdict. This would be void against public policy as the courts always encourage and attempt to facilitate settlement. In fact had the bar's position been followed in this case, the matter would have been tried, Mr. Pollak could have received $250.00 and the Respondent in excess of $80,000.00 in statutory fees. Instead the case settled and Mr. Pollak received in excess of $23,000.00. In essence, applying the Bar's position

[2] The Initial Brief, at page three, demonstrates that Pollak's actual damages were $14,199.00 and that he received an additional $9,228.78 over and above that sum.

to the case at hand would have put less money in Mr. Pollak's hands and a higher fee award for the Respondent.

A comment must also be made concerning the Referee's contention that the Respondent had arbitrarily decided upon the percentage of fees he would receive. However, the evidence adduced at trial, inclusive of the Respondent's time records and the Respondent's testimony and that of opposing counsel, indicated that the fee was not computed as a percentage rather the fee was computed by multiplying the hours put in to the case by a reasonable hourly rate and then compromising on a final figure. Please remember that opposing counsel testified that he believed that the statutory fee exposure could have exceeded $80,000.00.

B. Lack of expert testimony.

The Respondent, in his Initial Brief, pointed out the similarities between this case and The Florida Bar v. Barley, 831 So. 2d 163 (Fla. 2002), wherein the attorney was found not guilty of charging and collecting an excessive fee. Id., at 170. The Court's comment on the facts of that case were that:

> . . . the Bar presented no expert testimony or any evidence other than Mr. Emo's testimony, challenging the legality or the reasonableness of the fees Barley charged. Moreover, the record shows that Barley consistently provided Mr. Emo with billing statements which detailed the work Barley did and the hourly rate he was charging. As Barley argued, Mr. Emo consistently paid these statements

> without challenging the reasonableness of the fees. Although we find Mr. Emo's testimony reliable, in and of itself, his testimony does not constitute competent, substantial evidence that Barley's fees were clearly excessive. Thus we reject the referee's recommendation that Barley be found guilty of violating rule 4-1.5(a). Id.

While the Referee in this case may have found Pollak's "testimony reliable" there was no expert testimony presented by the Bar. Nor did the Bar in its Answer Brief attempt to explain away the impact of not having introduced expert testimony and in effect has conceded this point.

In conclusion on the question of guilt or innocence, it is clear that the Bar's Answer Brief fails to refute that an expert was necessary to present clear and convincing evidence of an excessive fee and has further failed to present any reference to the record that disproves that Pollak and the Respondent modified their fee agreement and that Pollak simply changed his mind forty four days later when he sought to renegotiate his previous agreement on fees.

II. THE REFEREE'S PROPOSED SANCTION OF A PUBLIC REPRIMAND, RESTITUTION AND REVOCATION OF A BOARD CERTIFICATION IS UNWARRANTED UNDER THE FACTS OF THIS CASE.

If the Court believes that the Respondent should be found guilty of collecting an excessive fee then the Court must determine if the Referee's recommendation of a public reprimand with restitution and revocation of a Board Certification is warranted

under the circumstances of this case. The Bar has filed a cross appeal seeking a thirty day suspension plus the restitution and revocation of the Board Certification. The Respondent in his Initial Brief discussed the case law raised by the Bar in its cross appeal[3] and it would be redundant to do so here. However, it is important to stress that the Bar at page 14 of its Brief only cites to The Florida Bar v. Richardson, 574 So. 2d 60 (Fla. 1990) [two counts of excessive fee including billing for pro bono case];[4] The Florida Bar v. McAtee, 601 So. 2d 1199 (Fla. 1992) [trust account issues plus an excessive fee]; and The Florida Bar v. Forrester, 656 So. 2d 1273 (Fla. 1995) [trust accounting violations and excessive fee]. In fact the Bar fails to explain how these ninety and ninety one day suspension cases are even remotely similar to the case at Bar.

Thus the Bar's argument on sanction appears to hinge on its reference to the Florida Standards for Imposing Lawyer Sanctions and in particular Standard 7.2 which requires that the lawyer knowingly violate the rules. At worst in this case you have a lawyer who believed he could renegotiate the fee with his client, renegotiated that fee

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[3] See pages 18 and 19 of the Initial Brief.

[4] Note that the Bar presented expert testimony in this case also. Richardson at 61.

to the client's satisfaction only to find out forty days later that the client had changed his mind.

The Bar, while it does discuss the revocation of the Board certification, fails to refute that under the facts of The Florida Bar v. Hollander, 638 So. 2d 516 (Fla. 1994) that the attorney in that case had two distinct public reprimands and not the one recommended by the Referee.

The Respondent's Initial Brief sets forth several mitigating factors that were present in the case, but ignored by the Referee in her Report. The Bar makes no statement in this regards and as such appears to have conceded this point also.

The Bar closes its sanction argument by attempting to minimize its own grievance committee finding of minor misconduct. The Bar's contention misses the mark. The Respondent has pointed out that the Bar's grievance committee that reviewed this case characterized this case as minor and recommended an admonishment plus restitution. To now ask for a thirty day suspension, plus restitution and revocation of a board certification appears extremely inconsistent and aimed to punish a lawyer who verily believes that he was not guilty and took a principled decision in defending himself against the claim of an excessive fee.

CONCLUSION

For all of the reasons set forth above, the Referee's findings of guilt are clearly erroneous and lacking in evidentiary support. Thus, this Court should find that the Respondent did not charge and collect a clearly excessive fee in violation of R. Regulating Fla. Bar 4-1.5(a).

WHEREFORE, the Respondent, Kenneth J. Kavanaugh, respectfully requests this Court to find him not guilty of the Bar's complaint and if the Court affirms the Referee's finding of guilt then to impose an admonishment for minor misconduct coupled with a fee refund of $4,307.83 as a sanction therefore.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished served via U.S. Mail on this ____ day of November, 2004 to Lillian Archbold, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL

33309 and to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the foregoing Brief 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 McAfee.

____
KEVIN P. TYNAN