IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Appellee/Cross Appellant

Supreme Court No. SC03-1899

v.

TFB Case No. 2001-51,684(17C)

KENNETH J. KAVANAUGH,

Appellant/Cross Appellee

_____/

THE FLORIDA BAR'S CROSS REPLY BRIEF

LILLIAN ARCHBOLD, #163996
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, Suite 900
Fort Lauderdale, FL 33309
(954) 772-2245

JOHN A. BOGGS, #253847
Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR., #123390
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600

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PRELIMINARY STATEMENT

Throughout this Cross Reply Brief, The Florida Bar will refer to specific parts of the record as follows: The Amended Report of Referee will be designated as ARR ____ (indicating the referenced page number). The transcript of the Final Hearing held on April 16, 2004, will be designated as TT "1" ____, (indicating the referenced page number). The transcript of the Sanctions Hearing held on April 21, 2004, will be designated as TT "2" ____, (indicating the referenced page number).

SUMMARY OF THE ARGUMENT

The Florida Bar has met its burden of proof to sustain the Referee's finding of guilt as to the Respondent's charging and collecting an excessive fee. The Referee was not persuaded by the Respondent's argument that he and Pollak agreed to a modification of the original terms of the contingent fee agreement.

At the conclusion of its case, the Bar presented case law, the Florida Standards For Imposing Lawyer Sanctions, and argument for consideration by the Referee in support of its position that imposition of a suspension was warranted under these circumstances. This Court should review the sanction imposed and should enhance the Referee's recommendation of a public reprimand to that of a suspension of at least thirty (30) days.

ARGUMENT

I. THE REFEREE'S FINDINGS OF GUILT ARE CLEARLY SUPPORTED BY THE RECORD AND SHOULD BE UPHELD

A Referee's findings of fact regarding guilt carry a presumption of correctness and they should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Dubbeld, 748 So.2d 936 (Fla. 1999). It is the Respondent's burden in this case to prove that there is no record evidence to support the Referee's findings, or that such evidence contradicts the Referee's conclusions.

In his Reply Brief, the Respondent alleges that "Rather than attempt to refute this position the Bar makes no reference to trial testimony and instead directs the Court to conclussory remarks made by the Referee prior to hearing any evidence (Reply Brief, p. 3). The Respondent is mistaken. At the conclusion of the presentation of evidence, the Court found as follows:

> "Based on the evidence that I heard today, as I started from the outset after hearing your opening arguments, I made clear that the underlying facts of the case of how this case shook out or how many hours Mr. Kavanaugh spent really wasn't relevant because the contract for representation was entered into. ...
>
> I mean, from hearing all of the facts, I think you're dealing with an elderly gentleman and whether it's forgetfulness or just age of he is deceitful doesn't really matter…
>
> But the facts are simply this: You entered into a contract for representation which is an alternative theory of collection whereby it's either a contingency rate or a greater amount awarded by the Court. There's been absolutely no

evidence whatsoever.

> The fee collected was clearly in excess of the contingency fee and that as the Referee I was going to determine whether or not there was a Court awarded amount in excess of 40%. There absolutely wasn't. It's not even close.
>
> Is the Settlement Agreement the equivalent of a verdict or a final judgment? Yeah, but even the case law that's given to me by Mr. Kavanaugh says and as such it means that you can then go to the Court for a determination of what the appropriate attorney's fees are. Even the settlement agreement isn't signed by the Court and had it been, there's nothing that delineates what percentage or what amount shall be construed as attorney's fees.
>
> To make an argument otherwise – I find that the Bar's argument that you arbitrarily decided what percentage of the net assets would be collected as attorney's fees, was just arbitrarily decided by Mr. Kavanaugh. He decided he was going to reduce what he thought he should have gotten on an hourly rate to a figure and it was 53% of the net proceeds and there is just nothing that would support your ability to do that.
>
> You did not enter into a contract for an hourly rate and there is no award signed off on by a Court saying that you were entitled to 53%. I can't even fathom how you could still be arguing to me--- ...
>
> No sir, I really don't need any more argument and I just think it's abundantly clear and I am convinced by clear and convincing evidence that you illegally collected attorney's fees from Mr. Pollak in this case and that there was not any way that it could be substantiated under the contract for representation." (TT 1, 141-144)

The Respondent's suggestion that Pollak agreed to the novation of the fee agreement and knowingly accepted the 53% recovery is misplaced. The record is devoid of any determination by the Referee that a novation occurred.

> "I find that there was absolutely not a scintilla of evidence that would support your [Respondent's] position that a $53,000 [sic] fee was Court

> approved. I find that you simply – there was an elderly gentleman. You put on an awful lot of evidence to convince me that he was a liar or that he was difficult or crotchety.
>
> And all that be as it may, I saw from his demeanor that he was elderly, that he had difficulty hearing and understanding ..." (TT 2, 21 -22).

Because of these specific findings of fact, the Bar did not feel it necessary to restate that which was obviously found by the Referee and contained in the record transcript.

The Respondent cites to the Bar's "failure" to address the issue of expert testimony in its Answer Brief (Reply Brief, pg. 6-7), and places significant reliance on The Florida Bar v. Barley, 831 So. 2d 163 (Fla. 2003). Barley involved an hourly fee contract in a commercial litigation dispute. The complainant in Barley, expressly consented to the hourly rate of $225.00 per hour, which was the rate Barley consistently billed and the Complainant paid. The court declined to find that Barley's fees were excessive due in part to the complainants' consistent payment of fees without challenging the reasonableness of the fee.

In the instant case involving a contingency fee contract, the Respondent did not provide Pollak, an elderly gentleman, with regular billing statements. It was only post-settlement that the Respondent provided Pollak with a complete breakdown of hours and costs expended. While Pollak admits that the final closing statement bears his signature, he testified that he presented himself at the Respondent's office and didn't have his

reading glasses with him at the time. (TT 1, 46). It was only after showing the documents to his son, Neil Pollak, that Pollak became aware that Respondent took 53% of the settlement proceeds instead of the 40% agreed upon under the terms of the contract for representation. (TT 1, 48). Pollak testified that he notified the Respondent immediately upon discovering the excess fee collected, challenged the excess fee, and requested a refund. (TT 1, 48). The Respondent declined to refund the excess monies collected to Pollak. (TT 1, 49). Pollak's own credible testimony established that he did not knowingly consent to a change in the terms of the fees charged for the representation.

ARGUMENT

II. THIS COURT SHOULD REJECT THE REFEREE'S SANCTION RECOMMENDATION AND SHOULD INSTEAD IMPOSE A SUSPENSION OF AT LEAST THIRTY (30) DAYS

This Court has broad discretion in reviewing a Referee's recommended discipline. The Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992). The Bar has filed a Cross Appeal seeking a suspension of at least thirty (30) days, plus restitution and revocation of the Respondent's Florida Bar Board Certification in Civil Trial. The Bar has at all times relevant sought a suspension. The Bar has already discussed the cases cited in its cross appeal. Because the findings of guilt are limited to the collection of an excessive fee and do not contain other substantive rule violations, the Bar is seeking a thirty (30) day suspension.

Moreover, suspension is warranted in conformity with Standard 7.2 of the Florida Standard for Imposing Lawyer Sanctions. The Referee found that the Respondent's conduct was not negligent (ARR 6). The Respondent's attempt to characterize his conduct as inadvertent or the result of a mistaken belief that he could renegotiate the fee with the client is simply incorrect.

Lastly, the Respondent's briefs are devoid of any discussion as to Rule 6-3.8(b) of the Rules Regulating The Florida Bar [Revocation of Certification Due to Disciplinary Action]. The Rule as written does not require any prior disciplinary history as a condition precedent to revocation.

CONCLUSION

The Respondent has failed to meet his burden that the Referee's findings are clearly erroneous or without support in the record. Therefore, the findings should not be disturbed.

The Respondent's knowing misconduct warrants the imposition of a suspension from the practice of law for at least thirty (30) days, revocation of his Board Certification in Civil Trial, and restitution in the amount of $4,307.83 plus interest at the statutory rate from April 3, 2001 (the date of the final closing statement) to the present, and payment of the Bar's costs.

Respectfully submitted,

LILLIAN ARCHBOLD, #163996
Bar Counsel
The Florida Bar
Cypress Financial Center
5900 N. Andrews Avenue, Ste. 900
Fort Lauderdale, Florida 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Florida Bar's Cross Reply Brief have been furnished by regular U.S. mail to Kenneth J. Kavanaugh, c/o Kevin P. Tynan, Esq., Attorney for Appellant/Cross Appellee, 8142 N. University Drive, Tamarac, Florida 33321, and to Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 on this _____ day of December, 2004.

_____
LILLIAN ARCHBOLD

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

Undersigned counsel hereby certifies that the Cross Reply Brief of The Florida Bar is submitted in 14 point, proportionately spaced, Times New Roman font, and that the electronic filing of this brief has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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LILLIAN ARCHBOLD