IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

COSTELL WALTON, JR.,

Respondent.
_____/

Supreme Court Case
No. SC 05-774

The Florida Bar File
No. 2004-51,708(17A)

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." Costell Walton, Jr., 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. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

SUMMARY OF THE ARGUMENT

The Respondent in this case enforced his client's rights to receive full and complete satisfaction of a judgment held by the clients. The Respondent's Initial Brief documented that the statutory provisions relied upon by the Bar and the Referee in seeking to discipline the Respondent placed certain obligations upon the judgment holder and not the judgment holder's counsel. Rather than advance a legal or factual argument to defend the finding of guilt and recommended sanction, the Bar tries an emotional appeal by contending that the Respondent engaged in sharp practice in not satisfying a judgment that was short twenty three cents. This was not the Respondent's twenty three cents to give away and heretofore there was never an obligation for the legal counsel to a judgment owner, to make up the deficiency in an attempted payoff of a judgment.

Not only are the Referee and the Bar wrong on the facts of this case, they are wrong on the sanction that is recommended and the underlying analysis to reach the sanction recommendation set forth in the Report of Referee. The primary violations found by the Referee sound in failure to provide competent and diligent representation to a client. Firstly, the complainant herein is not the Respondent's client and secondly these types of cases are routinely resolved at the public reprimand level. While the Respondent understands that his prior disciplinary

record, even though he has not been disciplined for almost thirteen years, warrants some enhancement that enhancement should not be to a ninety-one day suspension.

ARGUMENT

I. WHETHER A LAWYER VIOLATES THE RULES OF PROFESSIONAL RESPONSIBILITY BY NOT PROVIDING A SATISFACTION OF JUDGMENT UNTIL FULL AND TOTAL PAYMENT IS TENDERED.

In this case The Florida Bar seeks to suspend a lawyer for not providing a satisfaction of judgment to an individual who, both parties to this appeal agree, had not made a full and complete tender of funds to fully satisfy that judgment. The Respondent, at trial and in his initial brief, demonstrated (1) that a full tender had not been made and that a satisfaction was not necessary until full payment had been made and (2) that the statutory obligation to provide a satisfaction of judgment upon full payment is placed upon the judgment holder and that the Respondent was not the judgment holder. Rather than address these factual and legal arguments, the Bar has resorted to an emotional appeal by claiming that the failure to provide a satisfaction was really an example, as the Bar phrases it, of "gotcha" law.

Normally, this phrase denotes a lawyer who consistently lays in wait to trap an unwary foe into making a procedural mistake or who consistently engages in sharp practices by only revealing documents or information when that lawyer is no longer able to keep that information from being shared. This is not one of

those cases.[1] Instead, this case is about a person who attempted to pay a judgment but did not seek estoppel information prior to making his payment, failed to tender a complete payment to the judgment holder's counsel and asks this Court, through The Florida Bar, to punish the lawyer who did not have the judgment holder provide a satisfaction of judgment for coming close to making full payment.

The Referee in this case took judicial notice of the applicable statutory provisions regarding satisfaction of judgments and at the Bar's urging has entered a finding that the "Respondent failed and refused to prepare and/or record a satisfaction of judgment, in contravention of Florida law." RR at 3. Putting aside the fact that all parties agree that full and complete payment was not tendered until mid November 2004 when the debtors counsel forwarded additional funds to the Respondent, the statutory authority is clear that the burden of providing a satisfaction is placed upon a judgment holder and not the judgment holder's legal counsel. See Fla. Stat. §701.04(1) and Fla. Stat. §701.05. Yet a third statutory provision places the burden of the recordation of the satisfaction upon the Clerk of Court. Fla. Stat. §55.141. The Bar's brief is silent on an explanation of how or why these statutory provisions create a legal

[1] If this was an example of sharp practice, the Respondent would have insisted on payment of more interest for the time frame in which only partial payment had been tendered.

obligation for a judgment holder's counsel. The reason for this silence is that the Bar cannot justify the Referee's incorrect finding that the Respondent failed in ***his*** legal obligations to the debtor. The Bar does argue at page 12 of the Answer brief that the Respondent's reliance on the "technical requirements and strict interpretation of the law on satisfaction of judgments . . . violated the spirit of the law." If this was true, there would be no case law to support the proposition that a judgment holder could refuse to provide a satisfaction if the tendered amount did not include the correct interest amount. The Bar's brief fails to provide any reference to case or statute that supports its position that a judgment holder must provide a satisfaction on less than a full tender of payment. The reason for this is that the statutes and case law both require full payment prior to the execution of a satisfaction of judgment. *Dade County v. American Reinsurance Company,* 467 So. 2d 414 (Fla. 3rd DCA 1985).

While no legal obligation existed, the Bar still tries to contend that the Respondent's actions in this case were guided by his personal animus for the debtor[2] created by acrimonious litigation. While the record is clear that the parties had a great distrust and dislike of each other (TT45 and TT158), the

[2] Even if there was distaste for the debtor due to what he did in causing the need for litigation between the debtor and the judgment holder, there still was no obligation to provide a satisfaction until full and complete payment was tendered. Without a legal obligation, whether the parties liked each other or not is totally irrelevant to the decision that must be made in this case.

record is likewise clear that the relationship between the lawyers remained cordial and professional. TT103-104;159.

The Bar likewise tries to discredit the testimony and evidence introduced at trial about the proceedings held before the Honorable Martin Dishowitz, the trial judge in the escrow dispute as Judge Dishowitz agreed that the judgment had not been satisfied at the time claimed by the Bar as the tender of monies were insufficient to fully satisfy the judgment. Despite this fact, the Bar and the Referee refuse to give this ruling any deference whatsoever because it does not fit into the desired result. It is respectfully contended that if Judge Dishowitz had felt the motion before him was frivolous or made for an improper purpose he would not have made the ruling on the fact that the judgment was not satisfied on May 11, 2004.

Interestingly, the Bar's Answer Brief also states, as some form of aggravating factor, that the Respondent refused to accept phone calls from the debtor. While it is true that the Respondent refused to accept the debtor's phone calls, he did so because he knew the debtor was represented by counsel and that to do otherwise would be a violation of R. Regulating Fla. Bar 4-4.2 [communication with represented parties].

The Bar concludes its argument on guilt by returning to its "gotcha" argument and tries to state that the Respondent has no remorse because when he

was questioned by the Bar about whether or nor he would have refused to provide a satisfaction if the tender was short by one cent his reply was that he would not have provided a satisfaction because that was his obligation to his clients. TT177. The money being paid to him was not his money. It was his clients. Lawyers do not have the absolute right to take less money on a settlement or the payoff of a judgment or other debt. See R. Regulating Fla. Bar 4-1.2. In fact, the Respondent's client would have a valid complaint against the Respondent had he accepted less than full payment on their behalf without their consent.

The Respondent in this case did nothing more than follow the law on the satisfaction of judgments to make sure his clients received the full value of the judgment that belonged to them. The chilling effect of a ruling to the contrary would be extraordinary.

II. WHETHER A NINETY ONE DAY SUSPENSION FROM THE PRACTICE OF LAW IS AN APPROPRIATE SANCTION FOR PROVIDING AN UNTIMELY SATISFACTION OF JUDGMENT.

A rehabilitative sanction is a serious sanction. This type of disciplinary sanction should be predicated upon serious misconduct to the extent that a lawyer must prove that he or she is rehabilitated from such misconduct. The bar advances no argument why this case should be considered as one warranting a rehabilitative suspension. The only real comment made by the Bar is in its closing remarks

wherein the Bar contended that the Respondent's prior disciplinary record should be taken into account. The Respondent has not argued that the Court should not examine this prior record. However, it is important to discuss that these disciplinary sanctions arise from disciplinary actions initiated 1991, 1990 and 1988 and that the Respondent fully rehabilitated himself from his prior actions in that he has not had his ethics challenged in this Court for more than 15 years. The Respondent noted in his Initial Brief that the "Court considers the respondent's previous history and increases the discipline ***where appropriate***." Florida Bar v. Morrison, 669 So.2d 1040, 1042 (Fla.1996) (emphasis added). Further, the Respondent indicated that there were several examples of "older" disciplinary sanctions carrying less weight in the balancing of a proper sanction. The Bar takes no issue with this analysis.

The Bar attempts to support the Referee's finding of a dishonest or selfish motive because as the Bar puts it – the Respondent had an "intense dislike for Mr. Asbate and his lawyer" (Answer Brief at 22) and also claimed that the Respondent "derived personal satisfaction" (Answer Brief at 22) in not providing a satisfaction of judgment on less than a full tender. However, the Bar takes great license with the actual findings by the Referee which were that the Respondent had "negative feelings" (RR 6) and "personal feelings of dislike" (RR7) towards Mr. Asbate and not the intense hatred argued by the Bar. Despite the Bar's argument to the

contrary there is no comment in the Report of Referee that the Respondent had any negative feelings towards opposing counsel.

The Respondent advanced his argument on the appropriate level of sanction in his Initial Brief and will not reiterate this argument herein. However, comment needs to be made on the Bar's misplaced reliance on *The Florida Bar v. Nowacki*, 697 So. 2d 828 (Fla. 1977) and *The Florida Bar v. Jones*, 403 So. 2d 1340 (Fla. 1981). The Referee did not rely upon these cases and the Bar's new argument disregards the cases cited by the Referee in her Report, which cases were shown, in the Initial Brief, to be inapposite to the case at hand.[3] These new cases advanced by the Bar are likewise not relevant to the case at hand.

The lawyer in *Nowacki* was charged with five counts of misconduct and was found guilty of:

1. Count I – Neglect and lack of communication in a dissolution of marriage case;
2. Count II – Engaging in dishonesty, fraud and deceit by not paying wages to an employee when there was a legal obligation to do so;

[3] The Respondent would agree with the Bar that there does not appear to be any Florida disciplinary action clearly on point with the facts of this case. The Respondent believes that reason for such is that heretofore no lawyer has been found guilty and sanctioned for failing to perform an act that should have been performed by his client.

3. Count III – Neglect and lack of communication of a bankruptcy case as well as failing to supervise a new associate;

4. Count IV – Neglect and lack of communication of a second bankruptcy case;

5. Count V – Neglect and lack of communication of a personal injury action.

The Referee in *Nowacki* found that the attorney had a "serious client relations problem." *Id.,* at 832. In fact the Court found that this particular case involved a "persistent pattern of client neglect and mismanagement by the Respondent." *Id.,* at 833. The Court went on to show that this pattern was a continuation of prior similar misconduct by the lawyer, who had received a 1992 public reprimand for the same type of conduct, as well as a 1993 public reprimand with probation for the same exact conduct. As the Court's *Nowacki* ruling was handed down in 1997, all three of her disciplinary sanctions came within a five year period of time and were for the same exact misconduct. *Nowacki* makes the perfect contrast to the case at hand in that the conduct at issue in this case is totally unrelated to the prior conduct and there is a 15 year gap in time between the instant action and the Respondent's prior sanctions.

The *Jones* case relied upon by the Bar in its brief adds nothing to the discussion. The only issue on appeal in *Jones* was the manner in which costs were

going to be assessed upon reinstatement and the facts of the case were not even mentioned except to the extent that a lawyer had been found guilty of conduct prejudicial to the administration of justice. The lawyer in *Jones* was suspended for six months but we have no information to understand why this was an appropriate sanction, making this case irrelevant to the discussion at hand.

The Respondent took issue with the Referee's recommendation of the payment of "restitution" to Asbate for the "costs and legal fees" he may have incurred in seeking a satisfaction of judgment. The Respondent, in his Initial Brief, pointed out that this "restitution" looks very similar to "a substitute for what should be addressed in private civil actions against attorneys" and which this Court has held was an impermissible sanction recommendation. The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989). The Bar took no issue with this argument and has presumably conceded that this "restitution" is vague and ambiguous and that if Asbate has a remedy for any damages he has incurred it is in a civil action against the judgment holder.

The Supreme Court in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. They are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as deterrent to others who might be

tempted to engage in similar misconduct. The sanction proposed by the Referee does not meet these standards.

CONCLUSION

The Respondent in this case refused to secure a satisfaction of judgment from his clients, the judgment holders, when full and complete payment was not tendered. The Bar contends that following the law and protecting his client's interest is "gotcha law." Most respectfully, this argument must fail when the law was followed and no legal obligation existed to satisfy the judgment until full tender was made. If the Court disagrees and finds that some form of sanction should be imposed, it should be no more than the ten day suspensions ordered in the two cases relied upon by the Referee.

WHEREFORE the Respondent, Costell Walton, Jr., respectfully requests that the Court reverse the Referee's findings of guilt and sanction and grant any other relief that this Court deems reasonable and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this ____ day of May, 2006 to Lorraine C. Hoffmann, 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 this 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.

By: _____
KEVIN P. TYNAN, ESQ.