

5-11

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,  
Complainant,  
v.  
ROGER R. MAAS,  
Respondent.

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CASE NO. 67,854



THE FLORIDA BAR'S ANSWER BRIEF

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STATEMENT OF THE CASE

This disciplinary proceeding is before this Court upon Petitioner's Petition for Review of the Report of the Referee finding Petitioner in violation of the Florida Bar Code of Professional Responsibility Disciplinary Rule 6-101(A)(1) (handling a legal matter an attorney knows or should know he is incompetent to handle) and Disciplinary Rule 6-101(A)(3) (neglect of a legal matter). Petitioner further seeks review of the referee's findings and recommendation that respondent be disciplined by a suspension of four (4) months and thereafter until he proves rehabilitation, pays the costs of the Bar proceedings and restitution to the client in the amount of \$11,300.00.

The Petitioner in this Petition for Review is Roger R. Maas and the Respondent is The Florida Bar. In this Answer Brief, each party will be referred to as they appeared before the referee. Record references in this Answer Brief are to portions of two-volume transcript with exhibits and to pleading as they appear in the record. The transcripts will be referenced as follows:

Final Hearing - July 9, 1987 = TR I

Continuation of Final Hearing - October 2, 1987 = TR II

STATEMENT OF THE FACTS

In order to maintain the integrity of the record in this proceeding, complainant points out to the Court that respondent's Statement of Facts and Argument incorporate, in large part, references to letters, memoranda, transcripts and respondent's own interpretations, which were not a part of the record below.

The following are facts, taken only from the record, as distinguished from respondent's statements.

In June, 1981, when Mrs. Ruth H. Leto died, she left a Will providing that her assets be equally divided among her three children: Ruth Lyons, Frank Leto and Marvin Leto. [TR I 41; Bar Exhibit 1, Last Will and Testament]. At the time of her death, Mrs. Leto's estate totalled approximately \$296,00.00. [TR I 41, 60; Bar Exhibit 1, Inventory]. A substantial portion of the estate consisted of a pre-existing marital trust handled by the United States Trust Company in the amount of \$158,000.00, proceeds of which were distributed by the trust company to the three beneficiaries in January, 1982 as takers in default upon the death of their mother, Ruth H. Leto. [TR I 24, 41, 60]. The remainder of the estate consisted of the following: Certificates of Deposit in the amount of \$110,000.00 deposited with Barnett Bank of Florida, a joint savings account held by Mrs. Leto in the

amount of \$6,000.00 at Clearwater Federal, and three securities, Dayco (\$5,234.62), Internorth, Inc. (\$14,121.50), and Security Pacific (\$5,262.50). [Bar Exhibit 1, Inventory; TR I 24, 25, 42, 43, 60]. The joint savings account of Clearwater Federal was transferred to Mrs. Lyons without respondent's assistance. [TR I 42].

Following her mother's death, Mrs. Lyons contacted respondent, who had originally drafted Mrs. Leto's Will, regarding the distribution of the assets in her mother's estate. [TR I 24, 25]. At that time, respondent asked Mrs. Lyons to meet him at the law offices of Baskin & Bennison, located in Clearwater, stating that as Mrs. Lyons lived in Palm Harbor, the location would be more convenient. [TR I 25, 88]. At the time, respondent maintained an office in St. Petersburg and did not have an office at Baskin and Bennison. [TR I 88]. Due to illness, a difficult divorce and lack of a probate secretary, respondent asked assistance from H. H. Baskin's wife and secretary. [TR I 111]. Respondent entered into an agreement with Joyce Baskin, an experienced probate secretary, wherein she would provide secretarial service on the estate, in exchange for respondent's payment of the \$9,000.00 in estate fees to H. H. Baskin to discharge a debt for Baskin's representation in respondent's divorce. [TR I 88].

In July, 1981, Mrs. Lyons met with respondent and Joyce Baskin at the Baskin & Bennison office. At that time, Mrs. Lyons delivered to respondent and Joyce Baskin the securities

certificates for Dayco, Internorth and Security Pacific, as well as information regarding the Certificates of Deposit [TR I 25]. On August 24, 1986, Mrs. Lyons, who was appointed by her brothers as Personal Representative, gave respondent a check to open the estate and signed the Petition for Administration and Oath of Personal Representative, on which respondent was listed as attorney for the Petitioner with the address of his law office in St. Petersburg. [Bar Exhibit 1, Petition for Administration, Oath of Personal Representative; TR I 26]. At no time were either Ms. Lyons, or her brother Frank Leto (who later met with Joyce Baskin in the Clearwater office), aware of H. H. Baskin or informed that he would be handling the file in any manner, as respondent contends. [TR I 26, 35, 44].

On October 9, 1981 respondent filed the Petition of Administration, signed by Mrs. Lyons in August, 1981. [Bar Exhibit 1, Petition for Administration]. On October 8, 1981, respondent corresponded with the three beneficiaries on his St. Petersburg law office letterhead, informing them of the status of the estate and advising them to direct all inquiries to his secretary at his "Clearwater office". [Bar Exhibit #2]. On January 20, 1982, Mrs. Lyons signed the Estate Inventory, prepared by respondent, as Attorney for the Personal Representative. [Bar Exhibit #1, Inventory]. The Inventory listed as probate assets the jointly held savings account in the amount of \$6,000.00 and the marital trust, both of which were

automatically distributed following Mrs. Leto's death. [Bar Exhibit 1, Inventory; TR I 24, 41, 60].

On January 26, 1982, at respondent's request, Mrs. Lyons issued a check to respondent in the amount of \$5,000.00 as attorney fees for handling the estate, which respondent endorsed over to H. H. Baskin as per his agreement with Joyce Baskin. [TR I 29; Bar Exhibit 3]. Mrs. Lyons was not informed that any estate attorney fees would be turned over to H. H. Baskin. [TR I 29].

On February 9, 1982, Mrs. Lyons received a Show Cause Citation for failure to file the Estate Inventory, which she signed on January 26, 1982 and delivered to respondent. [Bar Exhibit 1, Citation Requiring Showing of Cause as to Why Contempt Order Should not be Entered]. On February 11, 1982, respondent filed the Inventory and the Show Cause Citation was discharged. [Bar Exhibit 1, Inventory, Order dated February 17, 1987].

On March 16, 1982, respondent received a second check for attorney fees in the amount of \$4,000.00. [Bar Exhibit 3]. As with the first check, this amount as well was submitted to H. H. Baskin to discharge the debt respondent owed him for his representation of respondent in his divorce. [TR I 89]. Following the opening of the Estate, over a period of several months, respondent and Joyce Baskin received numerous requests from Mrs. Lyons and Mr. Leto regarding the status of the transfer of the securities and several missing dividend checks. On several



occasions, Mrs. Baskin informed Mrs. Lyons and Mr. Leto that the securities were at the transfer agent. [TR 32, 44]. During that time, Mrs. Lyons was requested to sign transfer papers regarding the three securities on two separate occasions. [TR I 28, 32, 44; Bar Exhibit 4]. Each time, she delivered them to Joyce Baskin. [TR 31]. Both Mr. Leto and Mrs. Lyons attempted to get information by writing to the transfer agents personally, however, they were informed that the agents did not have the securities in their possession. [TR 33, 50].

In March 1983, when the securities were not transferred, Mrs. Lyons contacted Ronald Skipper, an attorney in Sarasota, where she was then residing, who contacted respondent regarding the delay. [Bar Exhibit 6]. When respondent did not answer Mr. Skipper's letter, Mr. Leto wrote to Joyce Baskin requesting action on the transfer of the securities. [Bar Exhibit 8]. Again no response was received and Mr. Leto filed a grievance with the Bar. [TR I 45, 46].

The Certificates of Deposit were distributed on May 12, 1983 to the three beneficiaries. [Bar Exhibit 1, Continuation of Accounting].

On March 22, 1984, the probate court issued a Show Cause Citation for failure to Discharge the Estate. On April 19, 1984, respondent filed a Petition to Extend Time for filing Final Discharge which was granted by the Court on April 19, 1984. On

May 22, 1984, although the securities were not yet transferred, respondent filed a Motion to Withdraw, which Motion was denied upon Objection raised by attorney Robert Winnick, hired by Mr. Leto on May 25, 1984, as beneficiary to the estate. [Bar Exhibit 1, Motion to Withdraw, Notice of Appearance, Order on Motion to Withdraw]. On October 22, 1984, Robert Winnick filed a Petition to Surcharge respondent for misconduct in his handling of the Leto estate. [Bar Exhibit 1, Petition to Surcharge]. On October 31, 1986 attorney Mark Shames was appointed by the probate court as co-counsel with respondent as attorney for the estate. [Bar Exhibit 1, Order dated November 1, 1984]. A hearing on the Petition for Surcharge was set August 21, 1985. On August 20, 1985, respondent filed a Chapter 11 Bankruptcy proceeding. [Bar Exhibit 1, Notice of Hearing dated August 12, 1985; Suggestion of Pendency of Bankruptcy Proceeding under Chapter 11].

After continued inaction by respondent, the attorney for Frank Leto, Robert Winnick, began transfer of the securities in August or September, 1984. As the securities were now defined as "lost securities", the beneficiaries were forced to post bond premiums in the total amount of approximately \$800.00. [TR I 51, 69]. Mr. Winnick received the Dayco and Internorth securities within four (4) to six (6) weeks after his request. [TR I 70]. He received the Security Pacific stock in June or July, 1985, due to confusion by the transfer agent concerning Winnick's status

in the estate. [TR I 71]. At no time was Mr. Winnick familiar with H. H. Baskin or consider him to be in anyway responsible for the estate. [TR I 78].

From the inception of the opening of the estate, the following expenses have been incurred regarding the transfer of the Certificate of Deposit and the three securities:

Respondent:	\$9,000.00 attorney fee
Mark Shames:	\$1,500.00 fee as co-counsel, appointed by probate judge
Robert Winnick:	\$6,000.00 fee for tracing and transferring lost securities and handling Petition for Surcharge
Bond Premium:	\$800.00

As of the date of the final hearing, the assets of the Leto estate were fully distributed; however, the estate remained open pending a determination of the Petition for Surcharge. [TR I 82].

## SUMMARY

Respondent presents several arguments in his Petition for Review, three of which pertain to respondent's allegations of procedural impropriety occurring during the course of this disciplinary proceeding.

First, respondent charges that he was deprived of due process rights, arguing that the grievance committee found violations for certain Disciplinary Rules of which he was not noticed prior to the hearing. The Bar answers that respondent was informed of the general nature of the misconduct charged, which was sufficient under Integration Rule 11.04(3).

Second, respondent states that he was not properly served with a grievance committee report pursuant to Integration Rule 11.04(6)(c)(i). The Bar responds that this rule pertains to recommendations of Minor Misconduct, which was not the recommendation of the grievance committee. Respondent was properly served with a Complaint following a finding of Probable Cause by the committee.

Third, respondent argues that his due process rights were denied as the Bar failed to present exculpatory cases and cases involving Private Reprimands. The Bar responds that the facts in this case do not warrant a Private Reprimand. Further, if the Bar thought that "not guilty" cases applied, this disciplinary proceeding would not have been before the referee presenting these charges.

Respondent also argues that the referee erred by finding

that respondent was incompetent to handle the Leto Estate. Respondent, by his own admission, stated that illness, divorce and the lack of a probate secretary greatly diminished his ability to handle the Leto Estate. Respondent further stated that he did not neglect the estate. The Bar answers that (1) he was attorney of record and (2) the serious neglect of the estate is apparent from the record. The damage incurred to the clients totalled over \$11,000.00.

Respondent further argues that a recommendation of restitution is inappropriate. The Bar responds that, due to respondent's bankruptcy, filed one day before the civil hearing on a Petition for Surcharge against respondent for his misconduct in the handling of the Leto Estate, is the only way to ensure that the clients can be made whole.

Finally, respondent argues that the referee's recommendation of discipline is erroneous. The Bar answers that the egregious neglect of the simple transactions involved in the Leto Estate and the subsequent expenses and fees incurred by the client to remedy respondent's misconduct, certainly warrant the recommendation by the referee, which is well supported by prior case law.

"A Referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support." The Florida Bar v. Stalnaker, 485 So. 2d 815, 816 (Fla. 1986). The Florida Bar v. McCain, 361 So. 2d 700,

706 (Fla. 1978); The Florida Bar v. Wagner, 212 So. 2d 770, 772 (Fla. 1968). Therefore, the Bar asks this Court to uphold the referee's findings of fact and recommendations which are abundantly supported by the record.



ISSUE I

THE GRIEVANCE COMMITTEE PROCEEDED PROPERLY  
UNDER INTEGRATION RULE 11.04.

On May 8, 1984, Grievance Committee C for the Sixth Judicial Circuit held a hearing in the instant case, for which respondent was properly noticed but failed to attend. On October 31, 1984 respondent was served with a Notice of Hearing for December 11, 1984 by Investigating Member Gilbert MacPherson, which Notice advised respondent, pursuant to Integration Rule, article XI, Rule 11.04(3), of the general nature of his misconduct.

Prior to the taking of testimony and full disclosure of the facts, the Investigating Member expressed to the committee the areas of the Code that concerned him during his investigation, DR 2-102, DR 2-107(A)(1), DR 2-107(A)(2) and DR 9-102(A)(4). However, after a full hearing on the merits, the grievance committee found Probable Cause for the violation of DR 1-102(A)(4), DR 2-107(A)(1), DR 6-101(A)(1) and DR 6-101(A)(3).

The referee found respondent guilty of DR 6-101(A)(1) and DR 6-101(A)(3) and not guilty of DR 2-107(A)(1). (DR 1-102(A)(4) was inadvertently omitted from the Bar's Complaint.)

Respondent argues that the committee's failure to advise him of each disciplinary rule that it ultimately found as a probable cause violation is in an infringement of his due process rights. To this, the Bar responds that nowhere does the Integration Rule provide that the accused be advised, other than in general terms,

regarding the nature of the conduct being investigated. Integration Rule, article XI, Rule 11.04(3). It is apparent on the face of the Notice of Hearing that the nature of the misconduct is the subject of Frank Leto's complaint, with which respondent was copied when it was received by the Bar.

Additionally, the function of the grievance committee is to serve as an investigatory body, which is nonadversarial in nature. Respondent was well aware of the nature of the misconduct charged by the Bar at the time of the grievance committee hearing and, as such, was not deprived of procedural due process rights.



ISSUE II

THE REFEREE'S FINDING THAT RESPONDENT  
VIOLATED DR 6-101(A) (1) AND DR 6-101(A) (3)  
IS SUPPORTED BY THE RECORD AND SHOULD BE  
UPHELD.

First, respondent argues that the referee's finding that he violated DR 6-101(A) (1) is in his handling of the Leto estate is in error, stating that he was competent to handle the estate due to his prior experience in probate.

The referee, however, found respondent incompetent to handle the matter due to the personal and professional problems respondent experienced at the time. Disciplinary Rule 6-107(A) (1) is not limited to academic competence when read in conjunction with the Ethical Considerations which insist on lawyer competence for the protection of the client.

Respondent stated to the referee; in addition to a pending, difficult divorce the following:

Respondent...Also, I think at the time Mrs. Leto died I had been hospitalized twice in that less six months, and immediately after within that year I was hospitalized four times.

I am not sure where the timing of it all runs. I didn't have a probate secretary although I had a lot of probate experience, this appeared to me to be a relatively easy estate, but I didn't have a secretary. I had been quite ill, having difficulty keeping up with my practice anyway.  
[TR I 111].

Despite these several problems and the fact that H. H. Baskin had substantial probate experience, respondent failed to refer the case to H. H. Baskin or any other attorney. Instead, respondent collected \$9,000.00 in fees and remained attorney of record in order to pay his debit to Baskin although at the time respondent was certainly incompetent to handle the estate. [TR II 30].

Respondent's second argument is that he is not guilty of DR 6-101(A) (3) (neglect of a legal matter.). Throughout these proceedings respondent has used several conflicting defenses in attempt to deny his responsibility for the file.

His basic assertion is that H. H. Baskin had primary responsibility for the file. Both H. H. Baskin and Joyce Baskin, concede that Baskin was responsible in a supervisory capacity for all of Joyce Baskin's work, and that he was aware that she was working on the Leto estate for respondent. [TR I 90, 100]. He also stated that although he assisted respondent on the estate in an advisory capacity [TR I 90, 100], he had never met either Mrs. Lyons or Mr. Leto [TR I 99], did not receive attorney fees from the estate [TR I 104; TR II 31] and at no time considered himself to be handling the administration of the estate. [TR I 101; TR II 34]. Joyce Baskin stated that she was unaware of how H. H. Baskin's name appeared with respondent's on the Notice of Publication and noted that the publication listed respondent's law office in St. Petersburg.

Following the filing of the grievance in the instant case, H. H. Baskin stated that, in an effort to assist respondent with what he perceived to be difficulty with the transfer agents, he drafted a Complaint for respondent's signature. [TR I 100, 120; TR II 35].

Respondent argues in his Opening Brief, that he had no responsibility for the Leto Estate as he turned the file to H. H. Baskin from the beginning [Respondent's Opening Brief, p. 20], although the record shows that he received the \$9,000.00 in fees which he turned over to Baskin to pay legal fees owed for his divorce [TR I 89] and that he was Attorney of Record until May 22, 1984, when he filed a Motion to Withdraw. [Bar Exhibit 1, Motion to Withdraw]. Despite his contentions respondent stated:

I said I don't know what to do. I had filed a motion to withdraw immediately upon getting the grievance, copy of the grievance. I didn't think I should appropriately try to represent them if they filed a grievance against me, although I didn't -- I told Judge Miller I don't think I'm the lawyer, but they apparently do, so I'm going to get off the case and let Ham finish it.  
[TR I 123].

Additionally, On December 15, 1983 in his response to the Leto complaint, respondent stated "the undersigned represents Mrs. Judy Lyons as Personal Representative in the estate of Mrs. Leto, deceased". [TR I 128].

The following is clear from the record:

1) Respondent received three security certificates from Mrs. Lyon in July or August, 1981.

2) He was the attorney of record on the Ruth Leto estate.

3) The securities were not transferred at the time respondent filed his Motion to Withdraw on May 22, 1984, almost three (3) years later.

4) The estate incurred additional fees and expenses to perform the transfers respondent had been paid to do.

5) Respondent's dilatory handling of the Leto estate constituted neglect and a violation of the DR 6-101(A) (3).

ISSUE III

RESPONDENT WAS PROPERLY NOTICED PURSUANT TO  
INTEGRATION RULE 11.04.

On December 11, 1984, the grievance committee found probable cause that respondent violated certain provisions of the Code of Professional Responsibility in his handling of the Ruth Leto Estate. Pursuant to Integration Rule 11.04(6)(b), a formal Complaint, signed by the Grievance Committee Chairman, Staff Counsel and the undersigned, was served on respondent. Respondent did not receive a Minor Misconduct recommendation from the committee, therefore Rule 11.04(6)(c) does not apply.

While the committee made a recommendation as to discipline, such recommendations are not binding and are subject only to approval by the Board of Governors. After a full hearing on the merits which were aggravated by circumstances occurring after the grievance committee hearing, the referee issued his recommendation which was approved by the Board.

In these proceedings, the referee is generally not presented with the grievance committee transcript. Therefore, the transcript was introduced into evidence in the instant case. Although respondent includes portions of the transcript in his Petition for Review. It is important to note that following the Grievance Committee hearing, the respondent could have easily obtained a copy of transcript at any time by requesting a copy from the court reporters or from the Bar office.

ISSUE IV

THE RESPONDENT WAS NOT DENIED DUE PROCESS  
BY THE BAR'S FAILURE TO PRODUCE UNPUBLISHED  
CASES.

Respondent charges the Bar with misconduct for failing to produce cases which will exculpate him from the Bar's charges. The Bar presented to the referee pertinent cases involving discipline of relating to the facts of the instant case.

Fortunately for our disciplinary system, there simply are no cases similar to respondent's resulting in a not guilty or a Private Reprimand. Additionally, the referee receives a list of Private Reprimands or "The Red Book" when he is assigned to the case. Had the Bar thought a Private Reprimand was appropriate, such cases, if they exist, would have been cited to the referee.

In sum, respondent's egregious neglect of the Leto estate, which respondent conceded was a simple administration [TR I 126]. That resulted in over \$17,000.00 in fees and costs to the client client to transfer three securities, is not a case when a Private Reprimand is warranted. The referee's recommendation is more than appropriate and, as such, should be upheld.

ISSUE V

ALL PROCEDURAL RULES WERE CORRECTLY  
FOLLOWED AND, THEREFORE, THE REFEREE'S  
RECOMMENDATION PUNISHMENT SHOULD BE  
UPHELD.

Respondent was properly noticed under Integration Rule  
11.04(6)(b) and, therefore, the referee's recommendation is  
proper.

ISSUE VI

THE REFEREE DID NOT ERR IN RECOMMENDING  
RESTITUTION.

Respondent's argument in this issue is antithetical to his position that he was not the attorney on the Leto estate. Here, he defends his right to attorney fees and argues that Robert Winnick's fees were excessive fee for the transfer of the three securities, for which respondent charged \$9,000.00 but failed to perform.

Restitution is often awarded in disciplinary cases in order to make the client whole for the damages created by the attorney. The beneficiaries in the instant case incurred substantial damage as a result of respondent's misconduct. Due to his pending Bankruptcy, restitution to the client prior to reinstatement to practice may be the only way to ensure them a remedy.



ISSUE VII

THE REFEREE'S ASSESSMENT OF COSTS AND  
RECOMMENDATION OF A SUSPENSION IS NOT  
ERRONEOUS AND SHOULD BE UPHELD.

The referee's recommendation that respondent pay the costs of this proceeding is supported by Integration Rule 11.06(9)(a). His recommendation of discipline is supported both by the egregious nature of respondent's misconduct and by prior case law. The Florida Bar v. Zyne, 248 So. 3d 1 (Fla. 1971); The Florida Bar v. Windham, 380 So. 2d 1294 (Fla. 1980); The Florida Bar v. Shannon, 376 So. 2d 858 (Fla. 1979). Therefore, his recommendation should be upheld.

In The Florida Bar v. Zyne, 248 So. 2d 1 (Fla. 1971) Respondent Zyne was employed in the later part of 1965 to represent the executrix in the administration of a decedent's estate. After accepting the employment, Zyne was grossly dilatory in performing the administration and failed to communicate with his client. Ultimately, Zyne made misleading statements to his client concerning the services performed. Zyne was suspended from practice for six (6) months.

In The Florida Bar v. Windham, 380 So. 2d 1294 (Fla. 1980) respondent Windham was suspended for six (6) months for his unexcused failure to proceed with the administration of an estate for which the client paid an attorney fee of \$250.00.

Finally, in The Florida Bar v. Shannon, 376 So. 2d 858 (Fla.

1979) this Court suspended Respondent Shannon for ninety one (91) days and, thereafter, until he proved rehabilitation for failing to properly handle an estate over a thirteen (13) year period. It can be distinguished from the instant case in that the beneficiaries failed to inquire about the estate for almost an eleven (11) year period.

It is clear that the referee's recommendation of a four (4) month suspension is consistent with prior case law.

CONCLUSION

Respondent agreed to handle an estate. He received a fee of \$9,000.00 to promptly distribute the assets. The assets to be distributed consisted of \$100,000.00 in Certificates of Deposit and three securities. The Certificate of Deposit was transferred almost two years later. Respondent never transferred the securities. The estate incurred an additional \$8,000.00 in fees and costs to complete the tasks respondent failed to do.

Respondent contends that the estate was not his responsibility. He argues he is the victim in this entire proceeding resulting from misconduct on the part of H. H. Baskin, Joyce Baskin, the Grievance Committee Investigating Member, Bar Counsel and the referee. To respondent's contentions, the Bar responds that it is not the above individuals who have victimized respondent, but that it is respondent who has victimized his client, Mrs. Lyons and her two brothers. Therefore, The Bar asks the Court to approve the referee's finding and recommendations in this proceeding.

Respectfully submitted,

By:   
DIANE V. KUENZEL

CERTIFICATE OF SERVICE

I HERE BY CERTIFY that a true and correct copy of the foregoing has been furnished to ROGER R. MAAS, respondent, by regular U. S. Mail at 2901 First Avenue North, St. Petersburg, FL 33713 and to John T. Berry, Staff Counsel, The Florida Bar, 600 Appalachee Way, Tallahassee, FL 32301, this 16th day of April, 1987.

  
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DIANE V. KUENZEL