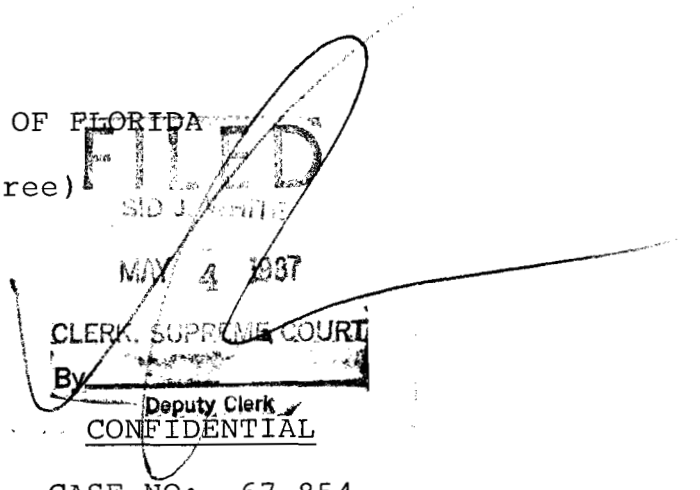
IN THE SUPREME COURT OF FLORIDA

(Before a Referee)



THE FLORIDA BAR,

Complainant,

-vs-

ROGER R. MAAS,

Respondent.

CONFIDENTIAL

CASE NO: 67,854

RESPONDENT'S REPLY BRIEF

IN SUPPORT OF PETITION FOR REVIEW

ROGER R. MAAS
2901 First Avenue North
St. Petersburg, Florida 33713
Respondent

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ISSUE I

WAS THE RESPONDENT DEPRIVED OF PROCEDURAL DUE PROCESS OF LAW WHEN CHARGES OF VIOLATING DR 6-101(A)(1) and DR 6-101 (A)(3) WERE ADDED TO THE ORIGINAL CHARGES BASED UPON, AND AS A RESULT OF, TESTIMONY PRESENTED AT DISCIPLINARY HEARINGS.

The Answer Brief of The Florida Bar completely ignores all the United States Supreme Court cases cited by the Respondent in his initial brief which unequivically require due process of law in Bar Disciplinary procedures, by stating 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."

The Florida Bar Counsel also fails to understand that this Court, in adopting the Rules regulating The Florida Bar, effective January 1, 1987, recognized the due process rights of accused attorneys by amending the Integration Rule language to state:

> ...the respondent shall be advised of the conduct which is being investigated and the rules which may have been violated..."

The Respondent would suggest that this Court intended the new, more restrictive language be used to ensure the accused attorney be given due process of law and to eliminate trial by ambush, as in the case at bar.

Respondent was found not guilty of the only alleged violation of the Disciplinary Rule with which he was originally charged.

Also, in further disregard of the Respondent's 14th Amendment right to due process, Bar Counsel, in Issue II, raised an entirely new Disciplinary Rule to justify the Referee's recommendation.

It is apparent that Bar Counsel is continuing her effort to prejudice the Respondent by stating:

> "(DR 1-102(A)(4) was inadvertently omitted from the Bar's Complaint.)"

This statement was intentionally included in the Answer Brief to mislead this Court into believing the Respondent may have violated a Disciplinary Rule which is not based upon any allegation or testimony. If the Respondent had made such a misleading and inappropriate comment to this Court the Bar would, in all probability, charge him with a violation of:

> DR 6-101 Failing to Act Competently
> (A) A lawyer shall not:
> (2) Handle a legal matter without preparation adequate in the circumstances, and (3) neglect a legal matter entrusted to him.
>
> DR 7-102 Representing a client within the bounds of the Law.
> (A) ..., a lawyer shall not:
> (1) ...assert a position, ... or take other action on behalf of his client when he knows or when it is obvious that such action would serve to merely harass or maliciously injure another.
>
> DR 7-106 Trial Conduct
> (A) A lawyer shall not...
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or will not be supported by admissible evidence.

The Respondent was not only denied due process of law throughout the earlier proceedings, but the Bar's defamatory, unprofessional and unethical insinuation that it could have included an additional charge is an attempt to further deny Respondent due process of law.

ISSUE II

WHETHER THE REFEREE ERRED FINDING THE RESPONDENT GUILTY OF DR 6-101(A)(1), HANDLING A LEGAL MATTER AN ATTORNEY KNOWS OR SHOULD KNOW HE IS INCOMPETENT TO HANDLE: OR DR 101(A)(3), NEGLECT.

The Florida Bar, in its Answer Brief, takes the position that the Referee recommended Respondent be found guilty of DR 6-107(A)(1) because of his alleged personal and professional problems. Bar counsel presumes to enter the mind of the Referee by stating his ruling was due to the fact that Respondent did not have an experienced probate secretary at that time and that he had been hospitalized on numerous occasions during that period.

Until the filing of the Bar's Answer Brief, Respondent was not aware of any alleged health, personal or professional problems being an issue in this action. The purported health or professional problems were not mentioned in the Complaint filed by the heir to the estate; were not made a part of the evidence or findings at the Grievance Committee level; nor were these purported "problems" alleged in the Complaint filed by The Florida Bar.

If, in fact, the Referee's decision is based upon

purported health and professional problems of the Respondent; then the Respondent has been denied due process of law under the 14th Amendment of The United States Constitution. The Respondent was never charged with a violation of DR 2-110(B)(3) which specifically deals with mental or physical incapacity of an attorney.

To find or to recommend guilt of a Disciplinary Rule that was not alleged in any part of the grievance procedure, without notice to the Respondent, is clearly a violation of due process of law. In The Matter of John Ruffalo, Jr., 390 US 544, 20 L Ed 2d 117, 88 S Ct 1222, ren den 391 US 961, 20 L Ed 874, 88 S Ct 1833 (1968).

Further, assuming arguendo, that Respondent is not entitled to notice that his alleged health problems were an issue, and that he was not entitled to notice that he was alleged to be in violation of DR 2-110, and that he was not entitled to notice that the Referee had the authority to amend instanter, the Disciplinary Rule allegedly violated; they still did not show by clear and convincing evidence that the alleged health and professional problems resulted in the Respondent being incompetent.

For further purposes of argument, if all procedural and substantive due process requirements had been met, and it had been shown that the Respondent was incompetent because of his health or professional problems, The Bar failed to prove by clear and convincing evidence that the

Respondent's alleged incompetence in any way affected the administration of the estate in question.

The Bar concedes that the Respondent is experienced and competent in probate law as they have shown no argument to the contrary. Further, The Bar concedes Attorney H. H. Baskin is experienced and competent in probate law, but, The Bar contends Attorney Baskin was merely acting in an advisory capacity. The Statements of Attorney H. H. Baskin cited by the Bar were taken out of context and incomplete. In fact, Attorney H. H. Baskin stated as follows:

> A I did definitely instruct Joyce, and she worked under my supervision, and for that I am responsible. (R-100, 14-15)
>
> Q Did Mr. Maas talk to you about working with him on this Leto Estate?
> A Yes, Sir. (C-145, 17-19)
>
> A My name is clearly up on the door, and his is not. And that was to Mrs. Lyons, I believe.
> Q Lyons?
> A Who was the PR. And I was not in the office when that occurred. I wasn't dodging Mrs. Lyons. I must have had something to do over at the law library.
> Q Did you assist your wife during the course of this estate preparing some of the papers and everything? It's our understanding that she pretty much carried the ball on this thing.
> A I oversee everything that I have anything to do with in my office. (C-148, 3-14)
>
> Q Did you oversee this work that was being done on this Leto Estate?
> A Everything was done under my supervision. Now, as to how detailed that

is, every case is different. (C-148, 20-23).

A This is not the first time that I have had appearances before august bodies of this type in grievance matters having to do with a delayed closing on an estate. (C-150, 19-21).

Q Have you reviewed the background of this with your wife?
A Yes, sir. We've had a couple of problems with this thing. The complaint about one was the delay in handling the transfer of the three stocks, I believe, and another was processing some dividends. (C-151, 14-20)

Q Let me --
A I wrote these people -- (C-153, 3-4)

A And I dictated a complaint... (C-153, 13)

A I had written, I think, almost a dozen - either written or called almost a dozen times trying to break this thing loose. (C-154, 17-19)

Q But what I'm trying to find out, Ham, is, I'm trying to get a sense of this. Were you supervising her; was Roger supervising her, or were both of you supervising her, or was nobody supervising her?
A I would say that I was directly involved to see that the work was pursued properly. After all, I'm the lawyer, and I can't shove things over on Joyce. (C-154, 17-25 throug C-155, 1-8)

A I don't deny the responsibility is what I'm saying. (C-156, 15-16)

Q You're saying that there were three transfer agents' there was three separage transfer agents involved in these stocks but each of them refused to transfer the certificates?
A Well, after writing them, you know,

four or five times, and then you write this one, say, if you don't answer this letter, I'm going to charge you with embezzlement and conversion or, you know, talk real mean to them, and you don't even get a reply. (C-158, 19-25 through C-159, 1-2)

A Well, you know, I had to surrender all of my file, Mr. Chairman, and Mr. Maas associated co-counsel. I would be prepared today if I had had any of my files. (C-160, 3-6)

Q ...I'm asking in view of your testimony, whether you drafted that letter.
A (Reviewing) Well, it appears to be my language. (C-164, 3-5)
A This is my language, not Joyce's. (C-164, 1-11)

A ...I think I did what was required and necessary, and if it wasn't enough and we didn't send enough copies to clients that may be a very good reason why I'm in trouble or Mr. Maas is in trouble. (C-167, 6-10)

A Joyce is quite knowledgeable in probate affairs and matters. I never have laid eyes upon Mrs. Lyons. She doesn't claim that I'm her lawyer. This maybe was a bad type of arrangement, but I don't think that -- I know of no prohibition of a lawyer who's not handling probate work associating another one to supervise work as long as it gets done.
Q It was your impression that this was an association?
A I would -- well, I guess you'd have to say that although it's awfully easy for one lawyer to say the other one stole his client. (C-169, 12-19)

Q -- in handling the estate if they saw your endorsement on the back of that check.
A Well, I did have responsibility. I'm not denying that I had responsibility. (C-171, 6-9)

Q Would you tell the committee what

your responsibility was?
A Basic supervision of this file as well as any other file in my office which is under my practice for preparation... (C-171, 10-14)

Further, the wife and secretary to Attorney H. H. Baskin, Jr. (Joyce Baskin) stated, among other things:

Q Do I understand correctly that the sense of your testimony earlier was that this project was between you and Roger and that Ham (Attorney Baskin) had nothing to do with it?
A I don't think I said that. (C-174, 21-24)

Q Were those letters reviewed by Mr. Baskin before going out?
A Everything is reviewed by him unless it's a transmittal letter sending a check that Mrs. Lyons or another client has requested out of an estate. (R-96, 11-15)

Q (By The Court) But all the materials in the file as to this probate were maintained with you?
A Yes, sir.

Q All right. Now, were you his (Mr. Maas') secretary at that time?
A I was not employed by Mr. Maas.
Q Were you subsequently employed by him?
A No, sir. (C-102, 9-13)

Q They were kept, then, as ordinary fees for your husband?
A Yes.
Q Were there any -- was there any compensation paid to you directly by Mr. Maas for the administrative or secretarial assistance which you rendered --
A No, sir.
Q --for working on this estate? (C-109, 5-12)

The Bar further intentionally omitted the unrebutt-

statements of Joyce Baskin that the stock certificates were lost in the mail and that the Personal Representative had moved and "more trouble ensued because they did not change the addresses properly." (C-132, 24-25) Also, when the Personal Representative moved she did not supply a forwarding address as is evidenced by the Court's file (A-9).

The Answer Brief of The Bar does not address, in any fashion, the issue of collateral estoppel.

The identical facts The Bar contends would constitute neglect, were considered by the Probate Court Judge who dismissed its Order To Show Cause on his own Motion February 17, 1982. The Bar is now collaterally estopped from attempting to resurrect the issue over five years later. James Talcott, Inc. v. Allahabad Bank Ltd., 44 F. 2d 451, 459 (5th Cir. 1971).

ISSUE III

WAS RESPONDENT DENIED DUE PROCESS OF LAW WHEN THE FLORIDA BAR MISREPRESENTED AND WITHHELD THE RECOMMENDATIONS OF THE GRIEVANCE COMMITTEE FROM RESPONDENT AND BY NOT SERVING SAID RECOMMENDATIONS ON RESPONDENT AS REQUIRED BY THE 1984 FLORIDA BAR INTEGRATION RULE 11.04(6)(c)(i).

The Florida Bar, in its Answer Brief, states, "Respondent did not receive a minor misconduct recommendation from the committee, therefore Rule 11.04(6)(c) does not apply." The Bar does not cite any part of the record to substantiate this statement.

In fact, the Grievance Committee transcript, page 180, lines 18-23, state that it was the unanimous recommendation of the committee that the Respondent receive a private reprimand.

The Bar did not attach any document showing compliance with Rule 11.04(6)(c). The Respondent was never served with the report, and, because of a lack of any documentation to the contrary, we must assume the disciplinary review committee did not object. Further, there is nothing to indicate The Board of Governors or the Referee were ever made aware of The Bar's own select committee's recommendation of a private reprimand.

It appears, therefore, that Bar counsel took it upon herself to continue with prosecution of this case without affording the Respondent the protections of the Discipline Review Committee or The Board of Governor's Review; to ignore the unanimous professional opinion of the five Grievance Committee members; and to refuse Respondent the opportunity to accept a private reprimand.

Bar counsel states, "After a full hearing on the merits which were aggravated by circumstances occurring after the grievance committee hearing,..." Counsel cites no aggravating facts that were presented, and Respondent is, therefore unable to properly rebut this unsubstantiated statement which, to his knowledge, is merely another figment of her imagination, if not another intentional misrep-

resentation.

Bar Counsel is, again, as she has repeatedly done in her Answer Brief and in the proceedings below, attempting to mislead and distort facts, issues and evidence by insinuation and innuendo. Bar Counsel does not even attempt to defend or address the fact that she lied to the Respondent in the proceedings below wherein she stated the Grievance Committee recommended a public reprimand, among other things, when, in fact, it was unanimously agreed by the five member Grievance Committee that a private reprimand was appropriate. Bar Counsel therefore concedes this misrepresentation.

ISSUE IV

WAS THE RESPONDENT DENIED DUE PROCESS OF LAW WHEN THE FLORIDA BAR STAFF COUNSEL WITHHELD ALL UNPUBLISHED CASES THAT INVOLVED LESSER PENALTIES, FROM THE RESPONDENT AND THE REFEREE.

Bar Counsel contends that the Referee was supplied with the "Red Book", or the compilation of Private Reprimands. The "Red Book" is not "sanitized"; that is, the names of the accused lawyers are printed without initials or any attempt to maintain confidentiality. This being true, Bar Counsel has violated the confidential status of every lawyer whose name is contained within their infamous "Red Book". The Referee is not authorized to obtain this information.

Notwithstanding the blatant violation of confidentiality, the Referee's hearing takes on the aspects of a "Star Chamber Proceeding", when only the Referee and Bar

Counsel are privy to the precedent. This would be akin to giving access to The Southern Reporters to only the State Attorney and the Judge in criminal actions, and not to defense attorneys, thereby giving the State Attorney sole discretion to arbitrarily pick and choose "appropriate" cases by which a Defendant is restricted in his defense.

The Respondent is, of course, unable to assist this Court with citations of authority, but, simple logic would dictate that <u>if</u> The Bar's allegation that "there simply are no cases similar to respondent's resulting in a not guilty or a private reprimand" is true; then only one of the following conclusions can be drawn:

(1) In the entire history of The Florida Bar, no lawyer has ever filed a petition for probate approximately 90 days beyond the statutory deadline; and, except for the cases cited by The Bar, only cases where a petition was filed 7 years late, and an estate which remained open for 13 years, would be considered misconduct, or

(2) Those cases where the filing of the petition for probate was less than 7 years past the statutory deadline; and the estate remained open for less than 13 years, were not considered even minor misconduct.

Since neither of the above conclusions can reasonably be true, we must, therefore, conclude that cases similar to the Respondent's do exist, and continue to be withheld from the Referee and the Respondent.

Further, since The Florida Bar routinely supplies

all Referee's with all prior cases, even though in violation of confidentiality, it is only proper that this Court also receive copies of the "Red Book" so that the Referee's decision can be properly reviewed.

ISSUE V

> WHETHER THE REFEREE ERRED IN HIS RECOMMENDED PUNISHMENT WHEN NONE OF THE CONDITIONS OF INTEGRATION RULE 11.04(6)(c)(iii) WERE PRESENT.

Respondent's issue as stated above was apparently misunderstood or intentionally avoided in The Florida Bar's Answer Brief. The Bar's Answer Brief responded to this issue as follows:

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

The issue is, of course, did the Referee err when none of the conditions of Integration Rule 11.04(6)(c)(iii) were present.

Notice is not a consideration in this issue. It is assumed, therefore, that The Florida Bar concedes this point, and the alleged misconduct, if any, is minor.

It should also be noted, and heavily weighed, that the Grievance Committee unanimously recommended a private reprimand.

ISSUE VI

> WHETHER THE REFEREE ERRED IN RECOMMENDING RESTITUTION PURSUANT TO RULE 11.10(4), FLORIDA BAR INTEGRATION RULE.

Bar Counsel failed to comprehend Respondent's issue. The Referee cited Rule 11.10(4) as authority to order restitution. Rule 11.10(4) does not deal with, nor authorize restitution. The Respondent is entitled to know the authority upon which the Referee relies, or he is denied due process of law.

The Respondent should not have to speculate what, if any, authority the Referee has.

Bar Counsel further ignores Florida Statutes 733. 106(3)(4), which provides that the award of attorney's fees is solely the province of the probate court.

The Bar Counsel has further misrepresented to this Court and defamed the Respondent by stating this grievance may be the only way the client may be made whole because of Respondent's pending bankruptcy.

The Respondent had filed a Chapter 11 Reorganization (United States Bankruptcy Court, Middle District of Florida, Tampa Division, Case Number 84-1421) and all valid creditors have been paid. Bar Counsel is further misstating the facts as there is currently pending, in probate court, a Petition to Surcharge the Respondent which was filed without objection by the Respondent and by leave of Court. Accordingly, if the Probate Court awards fees, they too shall be paid.

Further, Bar Counsel has also ignored the case law which deliniates under what circumstances attorney's fees may be awarded, so Respondent assumes The Bar concedes

fees were improperly awarded.

ISSUE VII

DID THE REFEREE ERR IN RECOMMENDING ALL COSTS BE PAID BY RESPONDENT, AND THAT HE BE PUBLICLY REPRIMANDED AND SUSPENDED IN LIGHT OF THE TOTALITY OF THE FACTS.

Respondent concedes that usually costs are awarded in disciplinary actions when sanctions are imposed. However, Bar Counsel has failed to address the issues and cases cited by the Respondent.

The Bar was unable to cite even one case where not closing an estate within fifteen months, (the date from the filing of the Petition for Administration to date of filing of grievance) constituted neglect or incompetence. The Probate Court has reviewed this matter and dismissed its Citation To Show Cause.

The Responent would further note that the Complainant and his counsel have kept this estate open an additional 42 months for the purpose of surcharging Respondent. This has not even been set for hearing. If Complainant prevails in this grievance matter or on the Petition to Surcharge, the net effect they wish to accomplish is to receive a free probate.

The Bar is also unable to explain its own inordinate delay in the prosecution of their Complaint. The Respondent must, therefore, assume that The Bar admits being dilatory and the alleged misconduct is, at most, minor in nature, that the Referee's recommendations should be rejected and the charges dismissed considering the totality of the facts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been served by regular U. S. Mail upon DIANE VICTOR KUENZEL, ESQUIRE, Bar Counsel, The Florida Bar, Suite C-49, Tampa Marriott Hotel, Tampa, Florida 33607; and to JOHN T. BERRY, ESQUIRE, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, this 4th day of May 1987.

Roger R. Maas

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