IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

EUGENE COLLIER,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.
_____/

Case No. 71,343
[TFB No. 88-20,417(ORE)]

RESPONDENT'S ANSWER BRIEF AND BRIEF IN SUPPORT OF CROSS-PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

In this brief, the respondent, The Florida Bar, will be referred to as the Bar.

The referee report shall be referred to as R.

The transcript for the reinstatement hearing held January 28, 1988, will be referred to as T.

Bar exhibits in the appendix will be referred to as B-Ex.

STATEMENT OF THE CASE

Petitioner was suspended from the practice of law by order of this court dated March 19, 1987, for a period of six months. The Florida Bar v. Collier, 506 So.2d 389 (Fla. 1987). He was found to have improperly acquired the signature of his father-in-law, Elton Crisman, Sr., in 1983 on a waiver and relinquishment of his interests in a trust in favor of the respondent's wife who was both the trustee and potential residual beneficiary of the corpus of the trust upon the extinguishment of Mr. Crisman's interest. The referee found and this court approved the determinations the petitioner obtained this assignment knowing that Mr. Crisman, Sr. was not competent to terminate his interest in the trust.

E. M. Crisman, Jr. was appointed as guardian for his father shortly after the petitioner obtained the waiver. He thereafter brought suit to seek an accounting and other relief for the ward whose regular payments from the trust were terminated once Mr. Crisman, Jr. was appointed.

The petitioner was found by the referee to have made a misrepresentation to the court. His reliance on the 1952 waiver was fraudulent as was his reliance of the 1983 waiver. He also misrepresented to the court in a motion for continuance that it was necessary to delay a hearing as he had a schedule conflict

and could not appear. He made this representation knowing it was untrue.

The petitioner intentionally delayed the trial court proceedings because of his own personal interests in the matter. He was a real party in interest as it was alleged that he had come into possession of some of Mr. Crisman, Sr.'s personal property. The petitioner had an obvious conflict of interest, yet continued his representation of the trustee, his wife.

The petition for reinstatement was filed on October 21, 1987. A hearing was held on November 16, 1987, before the same referee who heard the disciplinary action. The petitioner presented numerous witnesses who testified as to his character and rehabilitation. After considering all the evidence, the referee recommended he be reinstated conditioned upon his payment to Mr. Crisman, Jr. the sum of $13,795 for out-of-pocket expenses he incurred in meeting obligations that should have been paid by the trust, namely the legal and other expenses he incurred as guardian during the prolonged litigation. (R pp.3-4)

The petitioner filed his petition for review on March 16, 1988, and his brief in support of his petition for review on April 6, 1988. The Bar filed its provisional cross petition for review on April 1, 1988. The Bar supports the referee's report

but suggests petitioner be allowed to make the payment to the guardian within a year of his reinstatement.

STATEMENT OF THE FACTS

A testamentary trust was created in the 1930's designating Elton Crisman, Sr. as beneficiary of a life estate with his daughter, the respondent's wife, designated to receive the corpus of the trust if she survived her father. There were provisions for a contingent remainder to other relatives if she predeceased her father. In 1952 Mrs. Collier petitioned the court to terminate the trust in her favor but was denied due to the contingent remainder. She was, however, named trustee. Just prior to these proceedings Mr. Crisman, Sr. apparently signed over his interests in the trust to his daughter. At that time the court apparently found the waiver had not been effectively made. Mr. Crisman, Sr. continued to receive money from the trust on a regular basis until Mr. Crisman, Jr. was appointed guardian in 1983 in favor of and over objections of the petitioner.

On June 29, 1983, Mr. Crisman, Sr. again executed a waiver of his interest in the trust in favor of Mrs. Collier. The petitioner prepared the document. This was done shortly after Mr. Crisman, Sr. returned from a visit with his son in Georgia. On the flight back it was necessary for Mr. Crisman, Jr. to make arrangements with the airlines to tag and monitor his father as if he were a small child. In July, 1983, he was found to be incompetent. The court appointed Mr. Crisman, Jr. as guardian

rather than the petitioner. Afterwards Mr. Crisman, Sr. received no further disbursements from the trust. Mr. Crisman, Jr. thereafter filed suit alleging the petitioner and his wife had engaged in improper conduct in their handling of the estate.

The main case in Brevard County was heavily litigated until Mr. Crisman, Sr. passed away and it was dismissed (T p. 49-50) The guardianship was terminated as Mr. Crisman, Jr. no longer had standing to continue the suit. (T p. 82) He then brought suit against Mr. Crisman Sr.'s estate in Marion County, Florida, to recover the money he had expended in legal fees as guardian. (T pp. 74,82) He ultimately was forced to abandon the suit as the estate had very few assets. (T pp. 75,89) The matter was allowed to be dismissed for lack of prosecution. (T pp. 49,75)

Petitioner was suspended for six months by this court in its order dated March 19, 1987, in the case of The Florida Bar v. Collier, 506 So.2d 389 (Fla. 1987). Many of the above mentioned facts were contained in the referee's report which this court adopted in its written opinion. The referee found the petitioner knew Mr. Crisman, Sr. was incompetent when he signed the 1983 waiver and that he misrepresented to the trial court in the main case that the 1952 waiver was a valid assignment. It was further found that the petitioner intentionally delayed the litigation and had a conflict of interest in representing his wife. Collier,

supra. As a result, Mr. Crisman, Jr. incurred considerable expenses estimated by him to be approximately $25,313.84. (B-Ex 2) The petitioner received legal fees totalling $7,595 for his services from 1980 through 1983. The previous attorney for the trust had received a total of $811.20 from 1968 through 1979. In addition, Mrs. Collier received a total of $6,200 for her services as trustee from 1980 through 1983, while from 1968 through 1979 she received a total of $1,200. Collier, supra.

The petitioner petitioned for reinstatement in October, 1987. The hearing, held on November 16, 1987, was before the same referee who had heard the disciplinary matter. He found the petitioner met the qualifications for reinstatement, which will not be further elaborated on, but conditioned it upon his repayment of $13,795 to Mr. Crisman, Jr. for the expenses he incurred as guardian that should have been paid from the trust had the petitioner not caused the funds to be unavailable from the trust and found by the referee to be improperly diverted while petitioner was the attorney. (R pp.3-4) The amount appears to be the payments from the trust to both petitioner and his wife from 1980 through 1983 which the referee found to be grossly disproportionate and thus clearly excessive. (T p.99) In his report, dated March 9, 1988, the referee stated that no evidence was ever presented at any hearing on this matter to justify either the petitioner's fees or those of his wife which

were substantially higher during the last four years of the trust than they were during the preceding eleven years. (R p.3) In essence, the referee found that as a result funds were not available from the trust to pay the guardian for the costs and legal fees he incurred in attempting to protect the ward's interests.

SUMMARY OF THE ARGUMENT

The Bar does not contest the reinstatement aspect of this case and differs from the referee's recommendation only in that the petitioner should be permitted a one year period of time after his reinstatement in which to repay the funds to Mr. Crisman, Jr.

As guardian of the person and estate of E. M. Crisman, Sr., Mr. Crisman, Jr. had an obligation to protect his father's interests when Mrs. Collier, the trustee, ceased making disbursements from the trust upon Mr. Crisman, Jr.'s appointment as guardian over petitioner's objection. The petitioner was aware of the situation as he represented her as counsel. Unfortunately Mr. Crisman, Sr.'s death brought a premature end to the action. Mr. Crisman, Jr. was unable to receive repayment for his legal expenses from his father's estate as it contained insufficient assets.

A guardian is entitled to be compensated for legal fees and expenses when asserting the ward's good interests even where not successful. Webster & Moorefield, P.A. v. City National Bank of Miami, 453 So.2d 441 (3d DCA 1984). It is true Mr. Crisman, Jr. has not sought to pursue the matter any further in civil proceedings, primarily because he now lacks the funds to do so

and the estate had little or no assets. (T pp.75,85,89) The Bar maintains that he should not be required to do so as a prerequisite to this court's upholding of the referee's recommendation.

Petitioner also apparently believes this court should afford him a second review/trial of his disciplinary case. Such a proceeding is not provided for in the rules and his request that this court in effect reverse itself with respect to its findings in Collier, supra, is unreasonable. Respondent previously failed to convince the referee and this court that he engaged in no wrongdoing. He filed a lengthy petition for rehearing and failed again. The Bar is confident the outcome would be the same if the matter were retried.

Finally, if this court is troubled by the source and amount of funds the referee has recommended the petitioner repay to Mr. Crisman, Jr., then the Bar submits it would be appropriate to remand this question either to the present referee or another to hear testimony as to the amount of expenses incurred by the guardian subject to reimbursement due to the unnecessary litigation and delay which is the subject of the discipline case.

In summary, the Bar submits it would be appropriate to reinstate the petitioner and to uphold the referee's recommended

payment of $13,795 to Mr. Crisman, Jr. However, the petitioner should be allowed a period of one year from his reinstatement to pay the money rather than conditioning his reinstatement on prior payment.

ARGUMENT

POINT I

THE REFEREE PROPERLY RECOMMENDED THE PETITIONER REIMBURSE $13,795 TO THE GUARDIAN.

In his report dated March 9, 1988, the referee found the petitioner met the qualifications for reinstatement. However, he conditioned this upon the petitioner's payment to E. M. Crisman, Jr. the sum of $13,795. (R p.3) The Bar does not oppose the reinstatement although it proposes he be permitted to repay the funds within one year after his reinstatement.

The petitioner argues the referee's recommendation that he pay money to Mr. Crisman, Jr. is erroneous, unjustified, and unsupported by the evidence. The Bar maintains the referee's recommendation is supported by the evidence and that it is fair and equitable. Rule 3-7.9(k) of the Rules Regulating The Florida Bar permits a referee to condition his recommendation for reinstatement upon the petitioner's making either a partial or complete restitution to parties harmed by his misconduct which led to his suspension from the practice of law.

It appears the referee arrived at the sum of $13,795 because he felt that had the petitioner and his wife not drawn such large fees out of the trust from 1980 to 1983 the money would have been available to reimburse the guardian for the expenses he incurred

in protecting Mr. Crisman, Sr.'s interests in the trust. (R pp.3-4) A guardian's attorney is entitled to attorney fees and costs for the good faith legal efforts made for the benefit of the ward. 744.424(2) Fla. Stat. (1987). See also Lucome v. Atlantic National Bank of West Palm Beach, 97 So.2d 478 (Fla. 1957). This is true even if the guardian unsuccessfully defends against a removal petition. Webster & Moorefield, P.A. v. City National Bank of Miami, 453 So.2d 441 (3d DCA 1984). The amount of compensation to which he is entitled is up to the discretion of the court. Gamse v. Touby, 382 So.2d 115 (3d DCA 1980).

Mr. Crisman, Jr. had the right with court approval to attempt to protect his father's interest in the trust after the trustee ceased remitting payments to him. 744.441(11) Fla. Stat. (1987). For reimbursement, it is necessary now to look to the trust funds that have passed to Mrs. Collier as the guardianship and Mr. Crisman, Sr.'s estate contain few if any significant assets. Therefore, to require him to file an action against the estate would be a meaningless act.

In Stabinski v. Meyer, Weiss, Rose, Arkin, Shampanier, Ziegler and Barash, P.A., 439 So.2d 330 (3d DCA 1983), the court held that a guardian was not personally responsible for attorney's fees incurred in defending against a petition filed by a trustee of the ward's trust alleging mismanagement of

guardianship assets. The fees were found to have been properly charged against the trust assets. Therefore, it appears it would be permissible for Mr. Crisman, Jr., to look to the trust assets for reimbursement which apparently now belong outright to the respondent's wife.

Petitioner contends it would be unfair to require him to reimburse any money to Mr. Crisman, Jr. and that no evidence was presented to support Mr. Crisman's claims. Would it be fair to require Mr. Crisman, Jr. to pursue yet another civil action as a prerequisite of this court's upholding of the referee's finding and recommendation for repayment? The Bar feels this should be answered in the negative. Furthermore, Mr. Crisman provided the referee at the reinstatement hearing with a summary of his out-of-pocket expenses and testified to their make up. (B Ex-2); (T pp.76-78)

The petitioner is correct in noting that Mr. Crisman filed four actions against the petitioner and his wife. The initial action filed in Brevard County was filed only after Mrs. Collier ceased remitting regular payments due her father under the terms of the trust agreement. The petitioner asserted before the court that Mr. Crisman, Sr. was not entitled to receive any money from the trust as he had waived his interest in 1952 and again in 1983. However, this was a misrepresentation by the petitioner as neither assignment was valid. Collier, supra. Mr. Crisman, Sr.

had been receiving regular payments from the trust for over twenty-five years and as soon as his son was appointed guardian rather than the petitioner and his wife the payments ceased. Mrs. Collier then, with petitioner's assistance as counsel, assumed an adversarial position. The Bar maintains the ensuing litigation could best be characterized as family litigation that got out of hand. The petitioner was found by the referee to have engaged in prolonged dilatory action in an attempt to delay the suit rather than provide the accounting requested by the guardian. Collier, supra. At one point he requested a continuance for a hearing by misrepresenting to the court that he had a schedule conflict. Collier, supra, at 391.

In his brief, the petitioner again displays the use of tactics that serve only to mislead. For example, he indicates George Ritchie testified at the reinstatement hearing that he became familiar with the facts of the disciplinary case while serving on the grievance committee and the committee found nothing improper in the petitioner's action. What he fails to mention, however, is Mr. Ritchie's testimony at the same hearing that he was no longer serving on the grievance committee when probable cause was found. (T pp. 24,28)

Petitioner also relies upon excerpts from transcripts of the prior disciplinary hearings. In his statement of the case he

offers as a fact that Mr. Crisman, Jr.'s attorney, and complainant in the disciplinary matter, David W. Dyer, attempted to blackmail the petitioner and his wife into conceding the case. He includes an excerpt from the testimony of Barbara J. Carroll, his former secretary. This comes from the referee hearing held April 10, 1986. However, he fails to include Mr. Dyer's testimony to the contrary. (B-Ex 5) In addition, the referee failed to make any such finding in his report dated June 26, 1986. There is no substantiation in the record for the petitioner's allegation of "blackmail."

Petitioner states he had no contact with the trust until Mr. Crisman, Jr. filed his lawsuit in 1984. He cites to Ms. Carroll's testimony again in the transcript of the April 10, 1986, referee hearing. He neglects to address his own testimony at that same hearing in which he admitted he received loans from the trust as evidenced by three promissory notes that were later applied toward his attorney's fees. (B-Ex 6) Mr. Crisman, Jr. testified earlier at the March 20, 1986, referee hearing that the notes were applied to legal fees earned by the petitioner based upon testimony given either by Mrs. Collier or the petitioner in the civil matter. (B-Ex 7) The notes were dated January 31, 1980, September 24, 1981, and January 31, 1983, in the amounts of $2,000, $2,500, and $2,500 respectively (B-Ex 8). Petitioner's

statement that he had no contact with the trust until 1984 is therefore misleading.

Point II

PETITIONER SHOULD NOT BE PERMITTED A TRIAL DE NOVO IN THE DISCIPLINARY MATTER.

The petitioner appears to be concerned that a referee in a Bar disciplinary system is not bound by the technical rules of evidence. It is a well settled issue that the technical rules of evidence do not apply to Bar disciplinary proceedings as they are quasijudicial administrative proceedings. See Rule 3-7.5(e)(11) of the Rules of Discipline and its predecessor, Florida Bar Integration Rule, Article XI, Rule 11.06(3)(a); The Florida Bar v. Dawson, 111 So.2d 427, 431 (Fla. 1959). The petitioner was afforded ample opportunity to present evidence and witnesses in both the disciplinary and reinstatement proceedings. It is the referee's duty to consider and weigh all the evidence put before him and his findings and recommendations should be upheld unless they are clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986).

The referee was in a unique position to have heard both the disciplinary matter and the reinstatement petition. As the transcript of the proceeding shows, he was well acquainted with the facts surrounding the disciplinary case. (T p. 98).

Petitioner appears to believe that not only is the referee's recommendation he repay the guardian for expenses unsupported by

the evidence, but the referee's recommendation as to discipline in the original discipline proceedings was unsupported by the evidence as well. His request for a trial de novo is simply not provided for by the rules. Petitioner was afforded ample opportunity to present witnesses and evidence to the referee in two hearing held on March 20, 1986, and April 10, 1986. He then appealed the referee's findings and recommendations to this court. Yet he failed to convince either the referee or this court that his actions were proper or that they did not warrant a suspension. Obviously, this court adopted the referee's findings and recommendations in Collier, supra. The case is closed and what is properly on review now are the terms of the petitioner's reinstatement.

If this court is troubled by the referee's computation of the sum he recommended Mr. Crisman, Jr. receive, the Bar requests this issue be remanded either to the same or another referee to take additional testimony as to the amount of the expenses the guardian incurred.

Just as the referee's finding's of fact are given great weight under the rule and case law, so too should be his recommendations. They are fair to all concerned in this case. They should be adopted with the provision the petitioner be given a year from the date of reinstatement to complete the repayment of the $13,795 to Mr. Crisman, Jr.

CONCLUSION

WHEREFORE, The Florida Bar requests this Honorable Court to affirm the referee's recommendation for reinstatement and either permit the petitioner one year from the date of his reinstatement in which to reimburse the guardian $13,795 or remand the matter to a referee to determine the amount to be reimbursed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the original and seven (7) copies of the foregoing Brief and accompanying appendix by U.S. Mail to the Clerk of the Supreme Court, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing by certified mail, return receipt requested no. P 788 056 868, on petitioner, Eugene Collier, Post Office Box 1778, Merritt Island, Florida, 32952; and a copy to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 27th day of April, 1988.

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