1-9-89

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant

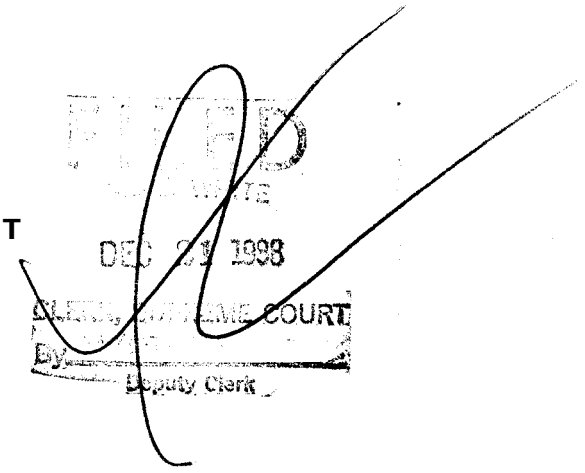
v.

STANLEY RISKIN,

Respondent.

Case no. 71,846

ANSWER BRIEF OF RESPONDENT



DAVID L. KAHN, P.A.
633 S. ANDREWS AVE
FORT LAUDERDALE,FL 33301
(305)462-6290
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES CONT.

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Respondent adopts the Statement of the Case and Facts set forth by the Florida Bar.

It is also important to note that the complaining party, Evelyn Fox was noted by the Referee to have made a number of inconsistent statements throughout her testimony before the Referee. In addition, Evelyn Fox never sustained any loss or injury as a result of the conduct of Stanley L. Riskin. She did not desire to have a workers compensation claim at any time in the first right and was seeking only to be returned to flight status with Eastern Airlines. She had no civil cause of action because her injury arose in the course and scope of her employment thereby barring civil action against Eastern Airlines because of workers compensation immunity. Therefore, what Evelyn Fox wanted, she could not have because of workers compensation immunity. What Evelyn Fox had (a right to bring a workers compensation claim) she neither wanted nor asked for in as much as her medical bills were covered under the group health insurance plan afforded by Eastern Airlines and her loss of earnings was reimbursed through sick pay programs at Eastern Airlines, and was in any event, not long enough to entitle her to disability benefits under the workers compensation act.

SUMMARY OF ARGUMENT

The Florida Bar's position is untenable although it claims that a private reprimand is erroneous because of the fact that the Code of Professional Responsibility was abandoned and the Rules Regulating the Florida Bar were substituted as of January 1, 1987, the Bar nevertheless prosecuted the Respondent under the Code of Professional Responsibility.

The Florida Bar has taken the position that what they do is irrelevant and it is what they say that must be considered by the Court. What the Bar did, besides prosecuting the Respondent under the Disciplinary Rules of the Code of Professional Responsibility, included losing one the two counts against the Respondent.

The Referee's recommended punishment (private reprimand) was consistent with the Code of Professional Responsibility and the Integration Rule of the Florida Bar.

Bar discipline is punishment and penal in nature and thereby substantive. A respondent member of the Bar cannot be held accountable ex post fact for a newly imposed penalty in connection with a previous transaction.

The Referee acted correctly in refusing to assess the costs of a deposition copy against the Respondent Stanley Riskin. The Referee has reasonable discretion to deny the Bar's request to tax the cost of their copy of Leland Stansell's deposition.

POINT I.

A PRIVATE REPRIMAND WAS ALLOWABLE AND APPROPRIATE UNDER THE CIRCUMSTANCES AND THE REFEREE'S RECOMMENDATION SHOULD BE ACCEPTED BY THIS COURT

The position taken by the Florida Bar is patently inconsistent. The Bar argues that the Referee had no authority to recommend a private reprimand as punishment for Stanley Riskin. The Bar supports it's contention by arguing that the Rules Regulating the Florida Bar, 494 So.2d 977 (Fla. 1986) became effective as of January 1, 1987, and therefore were solely applicable to the prosecution of Stanley Riskin. Those Rules contained both the Regulations to which all members of the Florida Bar are required to adhere plus the procedures for carrying out the work of the Florida Bar. They are a consolidation of what previously included the Code of Professional Responsibility, the Integration Rule and its by-laws, and the Rules governing admission to the Florida Bar.

All the while that the Bar has maintained, both before the Referee and before this Court, that the former collection of codes, rules and by-laws were made obsolete and inapplicable, the Bar neglected to advise this Court and acknowledge to the Referee that it chose to prosecute Stanley Riskin for violations of the Code of Professional Responsibility, Canon 6 and the Disciplinary Rules DR 6-101 (A)(2), (3).

This inconsistency is particulary glaring since, if the

argument of the Florida Bar should be accepted that the Code of Professional Responsibility ceased to exist as of January 1, 1987, then the entire complaint and proceedings, both before the Greivance Committee and the Referee were unauthorized. Conversely, if the Bar acted appropriately, then Stanley Riskin is required to answer to violations of the Code of Professional Responsibility and the penalties/disciplinary measures in existance, simultaneously with the Code of Professional Responsibility and found in the Integration Rule, Article XI, Rule 11.10. Specifically therein it is provided that:

> **"(2) Private reprimand. A private reprimand may be adjudged by the Supreme Court in any case even though the proceeding may not be confidential..."**

The Referee below, adhering to his responsibility required by the Integration Rule Article XI weighing the facts before him, believed that the Respondent was satisfactorily punished with a private reprimand. The Bar has the burden to show that the Referee's recommendation was erroneous, unjustified and illegal. They can hardly do so after having prosecuted Stanley Riskin under disciplinary regulations that existed prior to January 1, 1987.

The Referee was correct in determining that the imposition of punishment or discipline is substantive and not procedural. Professional regulatory disciplinary statutes have been held to be penal in character and effect. **Fleishman v. Department of Professional Regulation,** 441 So.2d 1121 (Fla. 3rd DCA 1983) A statute is considered penal if it imposes punishment for an offense against the State including all statutes which command or prohibit acts and establish penalties. **Dotty** v.

State, 197 So2d 315, 318 (Fla. 4th DCA 1967). This Court has recognized that it's job in disciplinary matters, is to "punish" a breach of ethics so to encourage reformation of professional conduct and to deter others from violations. See the **Florida Bar** v. **Larkin,** 370 So2d 371, 372 (Fla. 1979). In so doing, this Court stressed that the punishment must be fair to the attorney.

The Florida Bar has urged this Court to enforce what is in effect, an ex post facto law that increases the enormity of the crime and requires the Respondent to suffer the infliction of more punishment than is proscribed by law at the time that he committed the alleged offense. Such laws are prohibited by the Florida Constitution. Art. I, §10, **Fla. Const.** (1968).

The Bar, in an effort to justify it's position, argues that punishment of a lawyer is not penal but rather procedural or at least remedial. **DeBock** v. **State,** 512 So.2d 164 (Fla. 1987) is relied upon to make this argument. While this Court was of the opinion in July of 1987 that Bar disciplinary proceedings are remedial, the punishment still must be considered penal. Again, this Court is reminded of it's acknowledgment in **Larkin** that the disciplinary rules of the Florida Bar result in punishment for breaches of ethical considerations. While the procedures for review of the facts and circumstances surrounding a complaint may well in fact be remedial, the discipline cannot fairely be anything other than penal. Likewise it would seem that the Court's opinion

in **The Florida Bar v. Massfeller,** 170 So2d 834, 839 (Fla.1964) which is an adaptation of statements made by Justice Cardozo that disbarment is not punishment seem to collide headlong with the later acknowledgment by this Court that breaches of ethics must result in the punishment of the offending attorney. **Larkin,** supra.

Another fallacy of the Florida Bar's position is that the penalty aspect of proceedings to review ethical violations is something other than substantive. Substantive matter is the product while procedure is simply the machinery of the judicial process. Substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their person and their property. In re: Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972) [Concurring opinion of Justice Adkins]

As such, substantive law is only prospectively applied. **Young** v. **Altenhaus,** 472 So2d 1152 (Fla. 1985). A substantive penal law or statute that provides punishment is subject to the well settled rule requiring strict construction. **State ex rel Cooper v. Coleman,** 138 Fla. 520, 189 So. 691 (1939)

A new obligation imposed in connection with a previous transaction, [such as has occured effective January 1, 1987 with the development of the Rules Regulating the Florida Bar,] prevents retroactive applications. **McCord** v. **Smith,** 43 So2d 704, 708 (Fla.1949) and **St. Johns Village I v. Department of State,** 497 So.2d 990 (Fla. 5th DCA 1986) In the latter case , the Court pointedly noted that a newly imposed penalty

for a former transgression has no relationship to enforcing a right or addressing an injury and therefore cannot be considered remedial. The Florida Bar's position, if accepted by this Court, would allow them to delay the filing of their complaint against the Respondent Stanley Riskin in order to obtain ex post facto, a greater penalty or more severe discipline.

Certainly the procedural aspects of the new rule regulating Florida lawyers should be applied to pending cases. In fact, that is all that the Rules Regulating the Florida Bar provide for:

> **"these rules will become effective at 12:01 a.m. on January 1, 1987. Thereafter, the Rules Regulating the Florida Bar shall govern the conduct of all member of the Florida Bar. All disciplinary cases pending as of 12:01 a.m. January 1, 1987 shall thereafter be processed in accordance with the procedures set forth in the Rules Regulating Florida Bar..."**

It is clear that only the procedures used to process cases pending under the former Integration Rule By-laws and Code of Professional Responsibility would be applied to such cases. The substantive measures were not specifically made retroactive to prior breaches of discipline. To do otherwise would have violated the basic rule of construction requiring prospective application of substantive measures.

The Florida Bar has cited a recent decision by the Court, **The Florida Bar v Greenberg,** 13 F.L.W. **625** (Oct. 20, 1988) to support its argument that the punishments created after January 1, 1987 should be applied to conduct or transactions prior to January 1, 1987. The case doesn't hold for that.

Rather, it deals with the procedural format for reapplication, by a disbarred attorney, for admission to the Florida Bar. The issue was not whether disbarment was a punishment available to the Referee or the Florida Bar. But rather for a disbarred attorney, what were the procedures that would apply in the future to his Petition for Admission, including the waiting period before application. The issue was never whether Greenberg could or could not be disbarred. The issue involving the Respondent herein is whether he could or could not receive a private reprimand.

A private reprimand would have been proper for a member of the Florida Bar had he not failed to adhere to the Referee's stipulation that he provide certain restitution to his client. **The Florida Bar v. Porter,** 458 So2d 768 (Fla. 1984)

The Florida Bar has sought to make an issue of the fact that Stanley Riskin received a private reprimand in August of 1974, arising from an incident that occured shortly after his admission to the Bar and approximately 14 years prior from the Florida Bar filing the within complaint against him. The very case cited by the Bar, **The Florida Bar v Bern,** 425 So2d 526 (Fla. 1982) deals with the more serious violations of more numerous provisions of the Code of Professional Responsibility and the Integration Rule. In addition, Mr. Bern had three prior reprimands, one of which was a public reprimand. There is no factual relationship between the **Bern** case and the instant case. Moreso, this Court in **Bern** indicated that discipline should only be increased where

appropriate. Obviously, the Referee below did not feel that anything more than a private reprimand was appropriate and there has been no showing in the Bar's papers to the contrary. The prior private reprimand of Stanley Riskin was extremely minor and obviously the result of inexperience and naivete. Furthermore, the very Rules of Procedure that the Bar argues apply to this case, specify that prior disciplinary proceedings or judgments of misconduct occuring more than five years in the past are not considered significant enough to disqualify a member of the Bar from having his conduct characterized as minor misconduct. See **Rules Regulating the Florida Bar,** Rule 3-5.1 (b)(l)(d), 494 So2d 977, 999 (Fla.1986).

The Bar has cited no authority that would show that a private reprimand of the type received by Stanley Riskin 14 years ago constitutes cummulitive misconduct.

Finally, the opinions relied upon by the Bar; **The Florida Bar v. Leopold,** 320 So2d 819 (Fla.1975), **The Florida Bar v. Welty,** 382 So2d 1220 (1980) and **The Florida Bar v. Larkin,** supra. are factually dissimilar to the instant case. In **Leopold** the Respondent was found guilty of three disciplinary rules and and Integration Rule and received a public reprimand. In **Welty,** the Respondent took trust account money, a far more serious breach of ethics than is found in the instant case. In fact the Court pointed out that there are few breaches of ethics as serious as the use of a client's fund by a lawyer. In **Larkin,** the Respondent was found guilty of the violation of three disciplinary rules and there was evidence that his

client had lost a year's worth of income. Unlike Larkin, Stanley Riskin was never found by the Referee to have been guilty of prejudicing or damaging his client, [DR 7-101 (A)(3)] during the course of his professional relationship with her. This is a critical and distinguishable fact that certainly justified the private reprimand.

While the Florida Bar Board of Governors established in November of 1986, standards for imposing lawyer sanctions, this Court is not bound by them. The Referee was in a position to weigh and evaluate the complainant Evelyn Fox and the Respondent Stanley Riskin. His conclusion regarding punhishment of Stanley Riskin should not be disturbed.

POINT II.

THE COST OF A COPY OF LELAND STANSELL'S DEPOSITION PURCHASED BY THE FLORIDA BAR SHOULD NOT HAVE BEEN TAXED AGAINST THE RESPONDENT AND THE REFEREE WAS CORRECT IN REFUSING TO DO SO

The acquisition by Bar counsel of a copy of Leland Stansell's deposition, was not compulsory. Stansell was hired by the Florida Bar to act as an expert witness. His deposition was not read into evidence, nor was it used during the proceedings before the Referee.

This Court has promulgated the "STATE WIDE UNIFORM GUIDELINES FOR TAXATION OF COSTS IN CIVIL ACTIONS'' 7 F.L.W. 517 (Fla. 1981) and 432 So.2d 1346, 1349 (Fla. 4th DCA 1983). It specifically provides that copies of depositions should only be taxed if used in whole or in part at the trial or to defeat a motion for summary judgment. (Rule 1. F.) The record reveals that that was not the case before the Referee and the Referee was correct in refusing to tax a deposition copy obtained solely for the convenience of Bar counsel.

The taxation of costs is called for by Article XI, Rule 11.06(9)(a) of the Integration Rule of the Florida Bar. [adopted in Rule 3-7.5(k)(1) of the Rules Regulating the Florida Bar] 494 So.2d 977, 1010(Fla. 1986) While the Rule specifies that Court Reporter fees and copy costs are identified as costs that can be taxed, there is no definition of what the "copy" costs relate to and the Bar did not pay a fee for the appearance of the Court Reporter at Leland Stansell's deposition. The Respondent paid the Court Reporter's attendance fee as it was the Respondent who

noticed Mr. Stansell for deposition.

The Referee was correct in applying the uniform guidelines for taxation of costs. The cases cited by the Bar, **Florida Bar v. White,** 284 So. 2d 690 (Fla. 1973) and **The Florida Bar v. Lehrman,** 485 So.2d 1276 (Fla. 1986) do not address the issue raised by the Bar.

There is precedent for not imposing all costs of proceedings upon the Respondent. See **The Florida Bar v. McCain,** 361 So2d 700, 707 (Fla. 1978) and **The Florida Bar v. Davis,** 419 So2d 325 (Fla. 1982). In the latter opinion, this Court recommended that a "discretionary approach" should be used in disciplinary actions when it is time to assess costs. In that particular case the Referee recommended that only one third of the total costs incurred by the Bar be assessed since Mr. Davis was found not guilty on two of the three charges against him. In the instant case Stanley Riskin was found not guilty on one of the two counts brought against him.

For all of the above reasons, the Referee's recommendation as to taxation of costs should be affirmed and approved by this Court.

CONCLUSION

The Florida Bar's position is inappropriate. They chose to pursue the Respondent based upon disciplinary regulations that they now claim to be superceded. The punishment recommended by the Referee was appropriate as a matter of law and the reasons given by the Referee in denying the Bar's post hearing challenge to that punishment were correct. The succcess of the disciplinary system is dependant upon the energy and intuition of an unbiased Referee. In the instant case, a Circuit Court Judge, from a different County than that where the Respondent maintains his office impartially heard and considered the facts. His judgment should be allowed to stand, both as to the punishment for the Respondent and the taxation of costs.

Respectfully submitted,

DAVID L.KAHN, P.A.
Attorney for Respondent
633 S. Andrews Avenue
Fort Lauderdale, Fl 33301
(305)462-6290

David L. Kahn, Esq.
#159992

I HEREBY CERTIFY that a copy of the aforegoing was mailed this 16th day of December, 1988 to Jacquelyn Needelman, 5900 N. Andrews Ave., Fort Lauderdale, Fl and to John Berry, Esq., 650 Apalachee Parkway, Tallahassee, Fl 32399-2300.

David L. Kahn, Esq.