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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
Complainant,	)	
vs.	)	CASE NO. 73,041
ROBERT T. MILLER,	)	[TFB NO. 88-30,913 (10A)]
Respondent.	)	

ANSWER BRIEF AND **BRIEF IN SUPPORT OF COUNTER-PETITION FOR REVIEW OF RESPONDENT, ROBERT T. MILLER**

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SYMBOLS AND REFERENCES

In this Brief, the Complainant will be referred to as "**The Florida Bar**", and the respondent, Robert T. Miller, will be referred to as "**Respondent**".

The following **symbols** will be used:

T For the transcript of the Referee hearing on April 13, 1989

RR Fur the Report of Referee

O For the Referee's Order on Mo ion f r Rehearing and/or Clarification

EX For exhibit

STATEMENT OF THE CASE AND OF THE FACTS

Respondent adds to the Statement of the Case set forth by THE FLORIDA BAR that the Respondent filed a cross-petition for review on June 8, 1989.

Respondent adopts the Statement of Facts set forth in the report of Referee (RR 1).

SUMMARY OF ARGUMENT

The determination of the extent of discipline to be imposed in a disciplinary proceeding is exclusively the jurisdiction of the Supreme Court.

Under the facts and exceptional circumstances of this particular case, the misconduct of the Respondent was minor misconduct and the imposition of a private reprimand alone will accomplish the purposes for which disciplinary proceedings are intended.

ARGUMENT

POINT ONE

THE RULES OF DISCIPLINE PROHIBIT PRIVATE DISCIPLINE IN A PUBLIC PROBABLE CAUSE CASE

Discipline imposed upon an attorney for misconduct should be commensurate with such misconduct, regardless of whether the disciplinary proceedings are confidential or have become public information.

The duties of a grievance committee, in disciplinary proceedings, are primarily investigative and administrative. Rule 3-7.3(e). The finding of probable cause by a grievance committee is not a determination of guilt but is merely, as set forth in Rule 3-2.1(h):

> "A finding by an authorized agency that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action."

The provision in Rule 3-7.5(k)(1) prohibiting a referee, after a trial and regardless of the facts and conclusions determined by the referee, from recommending a private reprimand solely because of the type of complaint filed by the grievance committee is somewhat anomalous.

Neither the finding of probable cause by a grievance committee, Rule 3-7.3(j), nor the proceedings becoming public information, Rule 3-7.1(a)(2), is dispositive of the extent of discipline to be imposed in a disciplinary proceeding, such determination being exclusively the jurisdiction of this Court. Art. V, §15, Fla. Const.; The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).

ARGUMENT

POINT TWO

A PUBLIC REPRIMAND, PROBATION, AND THE PAYMENT OF COSTS IS THE MORE APPROPRIATE DISCIPLINE GIVEN THE NATURE OF THE MISCONDUCT

The referee has recommended that the Respondent be found guilty of violating Disciplinary Rules DR 1-102(A)(6) and DR 5-101(A), Code of Professional Responsibility (RR 3).

It is the position of the Respondent that the actions of the Respondent in this cause do not amount to a violation of the Disciplinary Rules, as recommended by the Referee, but amount to only minor misconduct. The Respondent does not advocate a lawyer preparing a will for a client in which the lawyer is a contingent beneficiary, but only that the facts and circumstances of this particular case show that the Respondent is guilty of no more than minor misconduct.

On March 27, 1986, the attorneys of the State of Florida were subject to the Code of Professional Responsibility. Under the Code of Professional Responsibility, Disciplinary Rule DR 5-101(A) did not explicitly prohibit the preparation of a will for a client wherein the lawyer would be a contingent beneficiary. This, however, was discouraged in Ethical Consideration EC 5-5.

On January 1, 1987, the Code of Professional Responsibility was replaced by the Rules Regulating The Florida Bar. The Florida Bar Re Rules Regulating The Florida Bar, 494 So.2d 977 (Fla. 1986). Under the Rules Regulating The

Florida Bar, Rule 4-1.8(c), a lawyer is prohibited from preparing an instrument giving the lawyer or certain family members of the lawyer a substantial gift, unless the client is related to the donee.

As pointed out by The Florida Bar, there is a scarcity of cases in Florida with similar facts to the case in issue. The Florida Bar has cited a number of cases from other jurisdictions which may be similar, however, such cases may not be applicable. For example, under the Florida Code of Professional Responsibility, the Ethical Considerations were aspirational in character (Preamble to Code of Professional Responsibility), unlike the Disciplinary Rules which were mandatory in character, whereas in Iowa, the ethical canons were not aspirational but were mandatory. Matter of Randall, 640 F.2d 898, (8th Cir. 1981).

The facts as set forth by the Referee (RR 1 and 2) are not at issue. This Court held, in The Florida Bar v. Abramson, 199 So.2d 457, 460 (Fla. 1967):

> "The Referee had the material advantage of having the witness before him in evaluating the evidence in this cause. Neither this Court nor the Board of Governors is in the same position to judge the truthfulness, the candor or the lack of candor, manner of replying to questions or the many other intangible things that occur in the arena of such a trial. Evidentiary findings and conclusions of the trier of facts where supported by legally sufficient evidence should not lightly be set aside by those possessing the power of review."

Rule 3-5.1(b)(1), Rules Regulating The Florida Bar, sets forth the following:

> (1) Criteria. In the absence of unusual circumstances misconduct shall not be regarded as minor if any of the following conditions exist:
>
> a. The misconduct involves misappropriation of a client's funds or property.
>
> b. The misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights or valuable property rights) to a client or other person.
>
> c. The respondent has been publicly disciplined in the past three (3) years.
>
> d. The misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past five (5) years.
>
> e. The misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent.
>
> f. The misconduct constitutes the commission of a felony under applicable law.

Since misconduct, under the rule, could be regarded as minor misconduct even if any of the foregoing criteria existed under unusual circumstances, the rule would suggest that if none of the criteria are present then the misconduct might be considered minor misconduct. Respondent suggests that none of these criteria are present in the present case.

The Respondent has readily admitted that he did not refer the client to another attorney in regard to the will (T 27), however, the client did receive the exercise of the professional judgment on behalf of the client from the Respondent by the Respondent advising the client that his testamentary plan, as set forth in the handwritten memorandum, made no provision for the client's spouse. The Respondent advised the client that the spouse had a right to an elective share, upon which the client directed "Give it all to her" (T 14, 15). The will was prepared devising all of the client's estate to his spouse, if she survived him.

The Respondent was not present at the time that the will was delivered to the client (T 54); at the time the will was read by the client (T 54); at the time the client acknowledged that he understood the document to be his last will (T 54); at the time the client was asked if he had any questions to which he replied "no" (T 54); at the time the client was asked if he was ready to sign the will to which he replied "yes" (T 54); or at the time the client executed the will in the presence of the witnesses (T 54) and in the presence of his wife, Mrs. Schmidt (T 57, 58). Mrs. Schmidt, the sole beneficiary under the will if she survived Mr. Schmidt, died in October, 1986 (T 18), approximately seven months after the execution of the will by Mr. Schmidt. Mr. Schmidt died in May, 1987 (T 43), approximately one year and two months after his execution of the will, and seven months

after the death of his wife. It is not unreasonable to assume that Mr. Schmidt, at least mentally, reviewed his will following the death of his wife to determine whether he desired to alter his testamentary plan. He certainly had sufficient time and opportunity to alter the contents of his will, should he have desired to do so.

The relationship between Mr. Schmidt and the Respondent, spanning approximately 30 years (T 7), was much more than a client-attorney relationship (T 8, 20, 21, 25, 39, 40, 49). It was a close personal relationship. The Referee concluded that:

> "... the Respondent was as close or closer personally to the testator than were any of the other heirs named in the will." (O 1)

The Respondent did not suggest to Mr. Schmidt that he be named as a beneficiary under Mr. Schmidt's will (T 40), such inclusion being the desire of Mr. Schmidt as evidenced by his handwritten memorandum (EX 37). Although Mr. Schmidt was elderly (T 19), he was adjudged by the Circuit Court to have possessed testamentary capacity (EX 72).

Although not a disciplinary proceeding, the facts in In Re: Underhill's Estate, 42 Fla. Supp. 197 (Fla. 18th Cir. Ct. 1974); affirmed 312 So.2d 525 (Fla. 4th DCA 1975), are similar to this case under review. That case involved a petition for revocation of probate, on the grounds of undue influence, of a will prepared by an attorney under which the

attorney received a substantial gift as a beneficiary under the will. The Court, in that case, found exceptional circumstances not requiring compliance with the provisions of Ethical Consideration EC 5-5 of the Code of Professional Responsibility. The Court found that the client possessed testamentary capacity, that after execution there was sufficient time and opportunity to alter the contents of the will, and that the relationship between the client and the attorney was more than that of mere attorney and client. All of these factors are present in this case.

The Florida Bar has argued and the Referee has observed (RR 1) that the Respondent did not discuss with Mr. Schmidt, after the death of Mrs. Schmidt, any conflict which the Respondent had as a beneficiary under the will. It is submitted that even had the Respondent done so, it would not have affected these proceedings. If the Respondent was guilty of violation of Disciplinary Rule DR 5-101(A), then that occurred on March 27, 1986 upon the conference with the client and the preparation of the will. At that time, the die was cast and the Respondent had crossed his Rubicon.

The Referee has recommended, as punishment for the misconduct of the Respondent, that the Respondent be privately reprimanded and that the Respondent be placed on probation for a period of one year: the terms of probation being that the Respondent complete an appropriate ethics course and prepare a paper on legal ethics specifically

related to a lawyer's responsibility to his client when the lawyer's interest poses a potential conflict with those of the client (RR 3).

Respondent submits that a private reprimand is sufficient punishment.

As stated by this Court in The Florida Bar v. Scott, 197 So.2d 518, *520* (Fla. 1967):

> "... the degree of punishment in each case where violations of Canons of Professional Ethics are involved depends entirely upon the factual situation presented by the record in that particular case. Over the years this Court has not found any areas of black and white as to the degree of punishment to be imposed in all cases. Rehabilitation as well as punishment is involved in every case. Such factors call upon the total experience of the Justices of this Court in determining the appropriate judgment in each instance."

This Court has set forth the purposes of discipline as: protection of the public, The Florida Bar v. Rubin, supra, and the cases cited therein; fairness to society, The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983); punishment and rehabilitation of an attorney, The Florida Bar v. Lord, id; The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984); fairness to the attorney, The Florida Bar v. Rubin, supra, The Florida Bar v. Lord, supra; deterrence to other members of The Bar, The Florida Bar v. Lord, supra, The Florida Bar v. Larkin, supra: the creation and protection of a favorable image of the profession, The Florida Bar v. Larkin, supra.

However, see also DeBock v. State, 512 So.2d 164 (Fla. 1987) wherein the Court held that the vast weight of judicial authority recognizes that bar discipline exists to protect the public, not to "punish" the lawyer.

The Florida Bar argues that a private reprimand as recommended by the Referee (RR 3) is inappropriate and that a public reprimand is applicable. The position of The Florida Bar that a financial or business transaction between an attorney and the client, illustrated by the cases cited, as being somewhat analogous to the facts and circumstances in this case is untenable. In the case at bar, it was the client, not the attorney, who requested that the will be prepared. It was the client, not the attorney, who dictated the testamentary plan. It was the client, not the attorney, who selected the beneficiaries who were to be the objects of his bounty. It was the client, not the attorney, who determined what portion of his estate would be bestowed upon each beneficiary. Subject only to legislative limitations, a client has a right to dispose of his or her assets by testamentary disposition to whom, in what portions, and in what manner as he or she may choose. A client may certainly expect to have a will drawn in conformance with the client's desire, as was done in this case. If the testamentary plan of the client is flawed, then the client should be so advised, as was done in this case. It should

not be the prerogative of any attorney to recommend beneficiaries contrary to the desires of the client.

The facts in this case show that there was no undue influence exerted upon the client in the preparation of the will: there was no overreaching or taking advantage of the client. The will, as pointed out by the Referee (O 1), incorporated the testator's intent.

The Florida Bar suggests that the defending of litigation instituted by the heirs of Mr. Schmidt for revocation of probate of Mr. Schmidt's will and the retention of part of the assets of the estate as a beneficiary evidences a refusal on the part of the Respondent to acknowledge the wrongful nature of his misconduct and justifies increasing the recommended discipline to be imposed to a public reprimand. The Respondent as the personal representative of the estate of Frederick Schmidt (T 30) had a fiduciary duty to defend and uphold the will of Mr. Schmidt. A settlement reached by litigants carries no connotation of wrongdoing but is merely a resolution of the issues between the parties.

The Florida Bar also refers to the Florida Standards for Imposing Lawyer Sanctions as a basis for the imposition of a public reprimand. These Standards, although approved by the Board of Governors of The Florida Bar, have not been adopted by this Court. This Court has exclusive jurisdiction for the determination of the extent of discipline to be

imposed in a disciplinary proceeding. Art. V, §15, Fla. Const.; The Florida Bar v. Rubin, supra.

Respondent submits that a private reprimand alone would suffice to accomplish the purposes of discipline in this particular case. The misconduct of the Respondent is an isolated incident unique to the circumstances under which it occurred. Probation and the terms of probation recommended by the Referee (RR *3)* are unnecessary for rehabilitation of the Respondent, these disciplinary proceedings alone being sufficient to reach that end (T **43).**

Considering, as the Referee considered, the age of the Respondent, his 40 years of unblemished service as an attorney, and the other exceptional circumstances (RR *3)*, a private reprimand alone is sufficient punishment for the misconduct of the Respondent.

CONCLUSION

In attorney disciplinary proceedings, the Supreme Court alone makes the final determination as to whether an attorney has engaged in misconduct and, if so, the extent of punishment to be imposed. Such determinations are reached after consideration of the facts and circumstances of the case under review. Respondent submits that, under the facts and exceptional circumstances of this case, a determination of minor misconduct by the Respondent and the imposition of a private reprimand are appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing have been furnished to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399; and a true and correct copy of the foregoing has been furnished to Alana C. Brenner, Suite 200, 880 North Orange Avenue, Orlando, Florida 32801, Attorney for Complainant; John F. Harkness, Jr., The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399; and, John T. Berry, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399; by U.S. Mail, this 18th day of July, 1989.

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