IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GENE M. KICKLITER,

Respondent.

CASE NO. 74,025
TFB NO. 88-11,185 (06D)

APPELLANT'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Appellant, the Complainant, will be referred to as the "The Florida Bar". The appellee, Gene M. Kickliter, will be referred to as the "respondent". "TR" will denote the transcript of the Final Hearing held on July 10, 1989. "RR" will denote the Report of Referee.

STATEMENT OF THE FACTS AND OF THE CASE

In December 1987, Frank Bruno Macenas retained respondent to prepare his Last Will and Testament. On or about December 15, 1987, Mr. Macenas furnished the respondent with the information necessary to draft said Will. (TR p.11, 1. 18-21). Mr. Macenas told respondent that he did not want his sons, who were heirs-at-law, to receive anything under the Will and he wanted his estate to go to his grandchildren, one of whom was Nancy Meyer. (TR p. 12, 1. 16-20). On December 15, 1987, respondent prepared the Will of the decedent, bequeathing Nancy Meyer the bulk of Mr. Macenas' estate. Mr. Macenas died on the evening of December 15, 1987, or in the early morning of December 16, 1987, without executing the Will. (TR p. 14, 1. 20-21).

On or about December 16, 1987, respondent forged the signature of Frank B. Macenas to the document which respondent had prepared as Mr. Macenas' Last Will and Testament. (TR p.16, 1. 7-14). Respondent directed or caused two of his employees to witness the purported Last Will and Testament containing the forged signature, and he then personally notarized the self-authenticating clause of the purported Last Will and Testament of Mr. Macenas. (TR p. 17, 1. 6-9). The forged Will was then admitted to probate. (TR p. 18, 1. 3-4). On or about March 16, 1988, Nancy Meyer met with the respondent to discuss the forged execution of Mr. Macenas' Will.

Specifically, Ms. Meyer sought respondent's advice regarding the likelihood of Mr. Macenas' forged signature being revealed in the course of a Will contest. Ms. Meyer, at the meeting, was wired with a surveillance tape, and recorded, without the knowledge of the respondent, the entire conversation. The tapes revealed that the respondent informed Ms. Meyer that the only way the forgery would be revealed was disclosure by one of the participants in the forgery. Respondent advised her that if she didn't say anything, he wouldn't say anything either. (TR p. 27, 1. 12).

On or about March 18, 1988, an Information was filed in the Circuit Court for the Sixth Judicial Circuit, Pinellas County, Florida, in The State of Florida v. Gene M. Kickliter, Case Number 88-0400500 CFANO-A, charging respondent with Forgery, Uttering a Forged Instrument, and Taking a False Acknowledgment, all of which are Third Degree Felonies. (TR p. 19-20, 1. 23-25, 1-5). On or about June 20, 1988, respondent entered a plea of guilty to the three aforementioned charges. (TR p. 10, 1. 20). On or about August 22, 1988, adjudication of guilt was withheld as to the aforementioned charges. The respondent was placed on three (3) years probation, with the special conditions that he perform 200 hours of community service, complete a law school ethics course, not hold status as a Notary Public, and pay court costs and assessments. (TR p. 20, 1. 11-12).

On or about August 25, 1988, The Florida Bar filed a Notice of Determination or Judgment of Guilt, seeking respondent's

suspension from the practice of law. On or about October 10, 1988, respondent was suspended from the practice of law pursuant to Rule 3-7.2(e), Rules of Discipline. (RR p. 2).

On or about April 14, 1989, The Florida Bar filed a Complaint, in a disciplinary proceeding separate from the above-mentioned felony suspension. A Final Hearing was held on July 10, 1989. Following the hearing, the Referee recommended that the respondent be suspended for a minimum period of two (2) years, beginning on October 10, 1988 (the date of his suspension by The Supreme Court of Florida), provided, however, if he has not completed his period of probation ordered by the Circuit Court of Pinellas County, Florida in the case of State of Florida v. Gene M. Kickliter, Case Number CRC 88-04050 CFANO-A, by said time, he shall be suspended until he completes said period of probation and further, until he proves his rehabilitation for a maximum suspension period of three (3) years. (RR p. 3).

The Board of Governors of The Florida Bar considered the Report and Recommendation of the Referee at their meeting which ended September 22, 1989, and voted to file a Petition for Review in the instant case.

SUMMARY OF THE ARGUMENT

The respondent, who has substantial experience as an attorney, forged a signature on a Will, directed his employees to witness the forged execution, notarized the self-authenticating clause, and submitted the Will with the forged signature to probate. Such continuing course of misconduct perpetrated a fraud on the court and should be disciplined by the harshest sanction -- disbarment.

The Referee recommended a suspension in the instant case. However, a suspension is not in keeping with the gravity of this conduct. The respondent has engaged in a pattern of fraud, and an attempt to conceal the fraud. It would be contrary to the public interest to allow the defendant to continue as a member of the Bar.

Disbarment is appropriate when a lawyer, with intent to deceive the court, knowingly submits a false document, and it is also appropriate when a lawyer engages in serious criminal conduct. Here, the respondent has pled guilty to three (3) Third Degree Felonies. He submitted a forged Will to probate with the intent to deceive the court into believing that the decedent had executed the Will. Such conduct is prejudicial to the administration of justice, and should be justly disciplined. By reason of the foregoing, the respondent should be disbarred from the practice of law.

ARGUMENT

WHETHER DISBARMENT, RATHER THAN SUSPENSION, IS THE APPROPRIATE DISCIPLINE FOR AN ATTORNEY WHO FORGED THE SIGNATURE OF A CLIENT ON THE CLIENT'S LAST WILL AND TESTAMENT AFTER SUCH CLIENT WAS DECEASED, CAUSED TWO OF HIS EMPLOYEES TO SIGN THE WILL AS WITNESSES, AND NOTARIZED THE SELF-AUTHENTICATING CLAUSE OF SUCH WILL.

No course of conduct can be more unprofessional than attempts to deceive the court by artifice or false statement of fact. Dodd v. The Florida Bar, 118 So.2d 17, 20 (Fla. 1960) (quoting J. Terrell, concurring).

In December, 1987, Frank Bruno Macenas retained respondent to prepare his Last Will and Testament. Mr. Macenas died without signing such Will. On or about December 16, 1987, respondent forged the signature of Mr. Macenas on a document purporting to be the Last Will and Testament of Mr. Macenas. In addition, the respondent directed two of his employees to sign the purported Will as witnesses, and the respondent notarized the self-authenticating clause. Mr. Macenas' granddaughter, Nancy Meyer, who was aware of the forgery, sought respondent's advice regarding the likelihood of the forged signature being revealed. Ms. Meyer was equipped with a surveillance tape which recorded the entire conversation, without the respondent's knowledge. The respondent advised Ms. Meyer that the only way the forgery would be revealed was by disclosure by one of the participants of the forgery.

The respondent pled guilty to Forgery, Uttering a Forged Instrument, and Taking a False Acknowledgment, all of which are Third Degree Felonies. Subsequently, the Referee recommended that the respondent be suspended for a minimum period of two (2) years, from October 10, 1988 (the date of his suspension by The Supreme Court of Florida), provided however, if he has not completed his period of probation ordered by the Circuit Court of Pinellas County, Florida in the case of State of Florida v. Gene M. Kickliter, Case Number CRC 88-04050 CFANO-A, by said time, he shall be suspended until he completes said period of probation and further, until he proves his rehabilitation for a maximum suspension period of three (3) years. (RR p. 3). However a suspension is not in keeping with the gravity of this conduct.

This Court has held that disbarment should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. Dodd, 118 So.2d at 19. There has been such a demonstration of persistence in unprofessional conduct in this case and it would be contrary to the public interest to allow the defendant to continue as a member of the Bar.

In The Florida Bar v. Rubin, 257 So.2d 5 (Fla. 1972), Rubin was charged with attempting to redeem U.S. Savings Bonds, registered to the name of Mrs. Buttice, by falsely making and forging Mrs. Buttice's endorsement. The referee found Rubin guilty of the aforementioned charges and recommended disbarment. This Court ordered disbarment even though Rubin did not profit

personally from the misconduct except by his future receipt of his legal fee. In the instant case the respondent has pled guilty to forging the Will. The respondent also received no benefit by forging the Will, but was entitled to receive his fee for the drafting of such Will. Like Rubin, he should be disbarred.

In The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981), Agar was retained to represent the husband in an uncontested divorce. Despite knowing the witness to be his client's wife, Agar called her to testify to the husband's residency, which she did, giving a false name, concealing the fact of marriage, and stating that she knew the husband because she did bookkeeping for him. Id. The referee recommended that Agar be suspended from the practice of law for four months and thereafter until he shall prove his rehabilitation and that he be assessed the costs of the proceedings. This Court stated that it had not changed its attitude since Dodd v. The Florida Bar, 118 So.2d 17 (Fla. 1960), in which it stated:

> "No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty." Id. at 19.

The discipline in Dodd was disbarment, as it was in Agar.

While in Dodd and Agar disbarment was for use of "false testimony," the same discipline is clearly warranted for fraud on the court.

The Florida Bar is aware of The Florida Bar v. Betts, 530 So.2d 928 (Fla. 1988), which appears to be of a similar factual basis. In Betts, the respondent caused a codicil to be executed by his comatose client by an X that Betts marked on the document with a pen he placed and guided in the testator's hand. This Court imposed a public reprimand on Betts.

Also in the similar case of The Florida Bar v. Story, 529 So.2d 1114 (Fla. 1988), Story obtained the signatures of the witnesses purporting to the testators execution prior to when the client executed the will. In Story, this Court imposed a thirty (30) day suspension from the practice of law.

As this Court stated in Agar, the extent to which similar cases with lighter sanctions do not substantially differ from the instant case in degree of participation by the attorney or some other significant factor, they represent the exception to the general rule of strict discipline against deliberate, knowing elicitation or concealment of a falsehood. Agar, 394 So.2d at 406.

Betts and Story can be distinguished from the instant case by the continued pattern of misconduct by the respondent herein. In the instant case the respondent first, conspired with Ms. Meyer to forge the testator's name to the Will. Second, the respondent forged the testator's name to the Will. Third, the

respondent then directed his employees to witness the forged signature. Fourth, the respondent notarized the self-authenticating clause of the Will. Fifth, the respondent submitted the purported Will to probate and thus perpetrated a fraud on the court. And Last, when confronted by Ms. Meyer as to the possibility of the forgery being discovered, respondent advised her that if she did not say anything that neither would he. This pattern of criminal misconduct was revealed due to Ms. Meyer's cooperation with law enforcement in an effort by her to end a felonious enterprise. Only when Ms. Meyer disclosed such forgery did the respondent admit his misconduct. The respondent has been a member of the Bar for several years, and has substantial experience as a lawyer, and such course of misconduct is inexcusable.

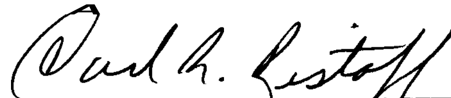
Moreover, The Standards for Imposing Lawyer Sanctions, Rule 5.11(a) states disbarment is appropriate when a lawyer is convicted of a felony or (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, extortion, misappropriation, or fraud. Further, Rule 6.11 states: Disbarment is appropriate when a lawyer (a) with intent to deceive the court, knowingly....submits a false document. Here, the respondent has pled guilty to three Third Degree Felonies, and submitted such forged Will to probate with intent to deceive the court into believing that the decedent had executed the Will.

A lawyer's professional duty requires him to be honest with the court and to conform his conduct to the recognized legal ethics in protecting the interests of his client. The respondent, who has substantial experience as an attorney, forged a Will, directed his employees to witness such forged execution, notarized the self-authenticating clause, and submitted such forgery to probate. Such conduct is prejudicial to the administration of justice, and should be justly discipline. As Justice Terrell formerly stated, "One practices law by grace and not by right, the practice of law is affected with a public interest and the privilege to practice may be withdrawn from one when wilful disregard of the honor of the profession is shown." Dodd, 118 So.2d at 20 (quoting J. Terrell concurring). By reason of the foregoing, the respondent should be disbarred from the practice of law.

CONCLUSION

The respondent has demonstrated a persistence in unprofessional conduct by the forgery of a Will and subsequent submission of such Will to probate. Such attitude and conduct is wholly inconsistent with approved professional standards.

Accordingly, it is requested that the respondent be disbarred.



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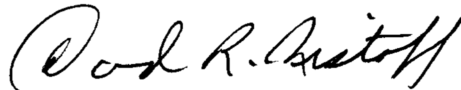
<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief has been furnished by Regular U.S. Mail, to Counsel for Respondent, Richard T. Earle, Jr., 150-2nd Avenue North, Suite 1220, St. Petersburq, Florida 33701; and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by Regular U.S. Mail; on this 1st day of Nov., 1989.



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